

National Oceanic and Atmospheric Administration

(301) 628-5658 (O)

(b)(6) (C)

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On Thu, Sep 14, 2017 at 3:40 PM, Karen Robin - NOAA Federal <karen.robins@noaa.gov> wrote:

Hi Mark,

Further on this request, please review/repair my plan, which is in this order:

(b)(5) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Thanks,
Karen

—

Karen Robin

FOIA Liaison

NOAA's Workforce Management Office

Silver Spring, MD • [\(301\) 713-6361](tel:3017136361)

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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Workforce Management Office
1305 East West Highway, 12th floor
Silver Spring, MD 20910

(Date)

(b) (5)

Sincerely,

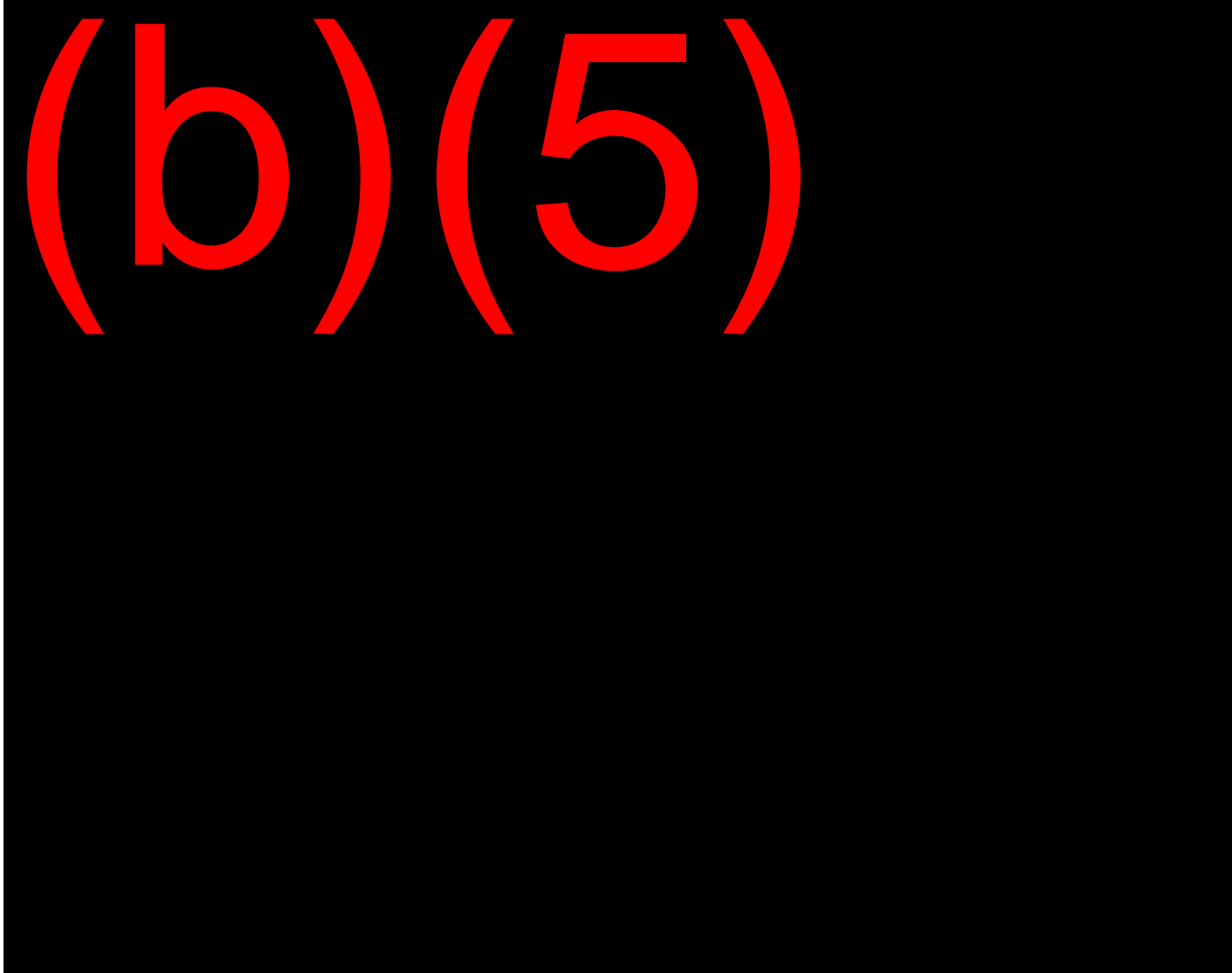
(Insert Preparer's Name)

cc: **(Agency/FOIA Officer)**



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Workforce Management Office
1305 East West Highway, 12th floor
Silver Spring, MD 20910

via FOIAonline and USPS



Sincerely,

Karen Robin
FOIA Liaison, Workforce Management

From: Seeley, Sue (US - Parsippany) <sseeley@deloitte.com>
Sent: Monday, March 13, 2017 11:17 AM
To: Mark Graff - NOAA Federal; Stewart, Korrina (US - Arlington)
Cc: Knox, Christopher S (US - Austin); Devine, Eamon (US - Arlington)
Subject: RE: Meeting recap

Mark,

It was a pleasure speaking with you again the other week. As we discussed, Deloitte is providing follow-ups to our conversation in two areas – (1) sample descriptions of direct gap support and diagnostic services we have provided to other agencies and (2) information regarding potential vehicles with Deloitte.

Immediate Gap Support

Faced with increasing internal and external requests to identify and disclose information, NOAA may need immediate support to prevent delays in responding from occurring or growing. Deloitte can provide professionals with experience in assisting agencies in identifying, collecting, and reviewing requested information. As described below, this direct support will provide valuable insight for any diagnostic services as well.

Sample Diagnostic Services

In seeking to improve and streamline information disclosure procedures, whether from agency or Congressional request, pursuant to the Freedom of Information Act (FOIA), or litigation discovery requirements, an agency should first perform a diagnosis of their current program to identify current efficiencies, potential gaps, and better define requirements for improvement. This diagnostic should include three (3) steps:

Step 1: Define and Map Existing Process.

Combining direct support for the agency's data request process (using Deloitte staff to perform all steps in the current workflow) with interviews of key stakeholders in the existing process, Deloitte will identify all elements of the current approach. In addition, Deloitte will evaluate all workflow and technologies used throughout the lifecycle of responding to a data request.

Step 2: Gap Analysis – evaluation of existing people, process, and technology.

Based on the direct support and interviews conducted in Step 1, Deloitte will identify:

- People: how best to leverage current agency staff and subject matter expertise as well as needs for staff growth and augmentation (e.g. contractor support).
- Process: the impact of gaps in process and workflow. For example, the impact of gaps between data response and business teams that may lead to under- or over-collection of potentially responsive material.
- Technology: how best to leverage current technologies in use at the agency and identification of additional technology options available in the marketplace, including how best to utilize technology within an optimized workflow.

Step 3: Prepare Report and Recommendations.

Based on Steps 1 and 2, Deloitte will prepare a summary report of existing process, gap analysis, and recommendations, including a range of workflow optimization, staffing recommendations, and technology options.

Potential Contract Vehicles:

We are in on-going conversations with our colleagues to determine if there are any active contract vehicles between both NOAA and Commerce that would be applicable for you in this situation. I will follow-up with you again later this week with more information.

In addition, Deloitte has GSA schedule that matches the scope of the diagnostic services described above – GSA Schedule 36, 51-508. This schedule has the advantage of a select population of contractors allowing for a shorter timeline for procurement.

Perhaps it might make sense to chat again once I have additional information on contract vehicles later this week?

Best Regards,

Sue.

Sue Seeley

Deloitte Transactions and Business Analytics

Tel/Mobile: +1 (b)(6)

www.deloitte.com

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]

Sent: Wednesday, March 1, 2017 1:29 PM

To: Stewart, Korrina (US - Arlington) <kostewart@deloitte.com>

Cc: Knox, Christopher S (US - Austin) <csknox@deloitte.com>; Seeley, Sue (US - Parsippany) <sseeley@deloitte.com>;

Devine, Eamon (US - Arlington) <eadevine@DELOITTE.com>

Subject: Re: Meeting recap

Outstanding--thank you Korrina. I appreciate the follow up. I'll also circle back after I have a chance to speak with the Director of our Cyber Security Division (Robert Hembrook) to get a read on the extent of their burden with data calls. Thanks again,

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

(301) 628-5658 (O)

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On Wed, Mar 1, 2017 at 1:12 PM, Stewart, Korrina (US - Arlington) <kostewart@deloitte.com> wrote:

Hey Mark,

Thanks again for coordinating today. Very nice to meet Rob and Dennis!

So as our team shared, we have seen similar problems facing other agencies and have worked with them on solutions, but while we understand you need more robust workflow management and reporting from your

solution, the collaborative and real-time nature of your current solution is far ahead of others facing similar challenges.

As discussed, we have found that the most effective way to identify sources for efficiency, innovation, and improvement is a combination of “boots-on-the-ground” support and diagnostic interviews to elicit stakeholder perspectives. In instances where we haven’t been able to place an individual with an agency to learn “on the job,” we have used limited shadowing instead, but we agree with you that hands on experience is the best approach. That being said...

By next Friday, March 10th, our team will get back to you with the following:

- (1) Sample scopes/statements of work for where we have done this in the past
- (2) Information about potential vehicles for working with Deloitte

Copied on the email are Chris, Sue and Eamon so that you have all of our email addresses and can pass them on.

In the meantime, please feel free to reach out if any questions come up.

Talk to you soon,

Korrina

This message (including any attachments) contains confidential information intended for a specific individual and purpose, and is protected by law. If you are not the intended recipient, you should delete this message and any disclosure, copying, or distribution of this message, or the taking of any action based on it, by you is strictly prohibited.

v.E.1

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Thursday, March 23, 2017 9:17 AM
To: Stephen Lipps - NOAA Federal; John Almeida - NOAA Federal; Holmes, Colin; Robert Moller - NOAA Federal; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal
Cc: Tom Taylor; Kimberly Katzenbarger - NOAA FEDERAL; Charles; Dennis Morgan - NOAA Federal; Stacey Nathanson - NOAA Federal; Robert Swisher - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lola Stith - NOAA Affiliate; Zachary Goldstein - NOAA Federal; Douglas Perry - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Jeri Dockett - NOAA Affiliate; Cc: OCIO/OPPA; Troy Wilds - NOAA Federal; Lawrence Charters - NOAA Federal; Allison Soussi-Tanani - NOAA Federal
Subject: Weekly FOIA Incoming and High Visibility Requests
Attachments: Weekly FOIA Incoming and High Visibility Requests Report 03152017 - 03222017.xls; 2nd Declaration Final Signed.pdf

Good Morning,

Attached is the weekly report. Please take note of the two Environmental Defense Fund (EDF) requests. One of those requests seeks records documenting changes to NOAA websites regarding climate change following the inauguration, as well as correspondence with political appointees regarding such changes. (DOC-NOAA-000844). EDF's other request seeks records on public communication directives about scientific research, attendance at public events, and all FOIA-related correspondence with political appointees and transition-team members. (DOC-NOAA-2017-000843).

One request was received from PETA regarding a SeaWorld orca permit. (DOC-NOAA-2017-000851). Also, a request was received from Environmental Advocates seeking records regarding endangered fish in the Yuba River, and Daguerre Point Dam fish ladders. (DOC-NOAA-2017-000811).

In litigation, NOAA filed its second Declaration in Support of our Motion for Summary Judgment in the Judicial Watch case (attached). The original request sought records related to the October 13, 2015 Rep. Lamar Smith subpoena and global temperature data sets.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

| | | |
|---------------------------------|---|--------------------------------|
| |) | |
| JUDICIAL WATCH, INC., |) | |
| 425 Third Street, SW, Suite 800 |) | |
| Washington, D.C. 20024 |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. 15-2088 (CRC) |
| |) | |
| U.S. DEPARTMENT OF |) | |
| COMMERCE, |) | |
| 1401 Constitution Avenue, NW |) | |
| Washington, D.C. 20230 |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

SECOND DECLARATION OF MARK H. GRAFF

Pursuant to 28 U.S.C. § 1746, I, Mark H. Graff, declare and state as follows:

1. I am currently the Freedom of Information Act (FOIA) Officer for the National Oceanic and Atmospheric Administration (NOAA), which is a part of the United States Department of Commerce (DOC). I have occupied this position since September 6, 2015. My primary duties include management of requests submitted to NOAA for records made under both the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a (PA). In that capacity, I oversee NOAA's receipt and log-in of in-coming FOIA requests, the tasking and coordination of searches for responsive records, and review of out-going responses.

2. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, upon conclusions and determinations reached and made in accordance therewith, and upon my personal examination of

the withheld and redacted documents. I am personally familiar with Plaintiff Judicial Watch's FOIA request, which is at issue in this civil action. I submit this declaration in support of a motion for summary judgment filed by DOC in the above-captioned lawsuit and in opposition to the cross-motion for summary judgment filed by Plaintiff Judicial Watch.

3. This is my second declaration in this case. It incorporates by reference my first declaration, *see* ECF No. 16-1, Declaration of Mark Graff ("1st Graff Decl."), and is being submitted in further support of DOC's motion for summary judgment. I submit this declaration to correct an inadvertent truncation of a description in the *Vaughn* index that was attached to the 1st Graff Declaration as Exhibit 1. I also submit this declaration to further address NOAA's segregability review for the documents identified as responsive to Plaintiff's FOIA request.

4. During the final stages of preparing the *Vaughn* index, when that index was converted from an Excel spreadsheet to a .pdf file, it was not recognized that the cell on page 58 containing the description for Category A was too small to include the entire text of the description, and thus portions of the entire description of that category were inadvertently left out. A complete description of Category A on the *Vaughn* index Part 2 is as follows:

Draft of paper "Possible artifacts of data biases in the recent global surface warming hiatus" by Thomas Karl, et al. as well as the drafts of the "supplementary materials" that accompanied the paper and were made available for download by Science upon publication of the paper. Non-final, pre-decisional draft contains opinions and recommendations of one or more NOAA authors; draft language, data, and data interpretation for consideration by other NOAA authors; comments on previous drafts of the paper; and/or responses to other NOAA authors' or reviewers' comments on earlier drafts of the paper.

5. My first declaration and the accompanying *Vaughn* index, including the correction noted above, contain a complete explanation of the exemptions applied for each document and why each document was denied in full or denied in part.

6. By the time of my first declaration, NOAA personnel had conducted a review of all known agency records containing information responsive to Plaintiff's request to determine whether there was any reasonably segregable non-exempt information that could be released. As a result of NOAA's review, NOAA did not locate any such releasable information beyond that produced to Plaintiff in full or in part.

7. NOAA carefully reviewed each redacted or withheld record individually to identify non-exempt information that could be reasonably segregated from exempt information for release and has implemented segregation where possible. All segregable information has been released to Plaintiff.

8. Following that review, NOAA determined that the records listed as "Partially Redacted" or "Released in part" in the *Vaughn* Index could be released in part with redactions per the identified FOIA exemptions. These records comprise a mixture of material that could reasonably be segregated for release, material that was withheld because release would trigger foreseeable harm to one or more interests protected by Exemption 5 or Exemption 6, and material that was inextricably intertwined with protected material and therefore could not reasonably be segregated for release.

9. Also following that review, NOAA determined that the records identified as "Fully Withheld" on the first part of the *Vaughn* Index and all documents not marked "Released

in part” on the second part were required to be withheld in their entirety. NOAA determined either that all information in these records was fully covered by the deliberative process privilege or that any non-exempt information in these records was so intertwined with exempt material that no information could be reasonably segregated for release. Any further segregation of this intertwined material would employ finite resources only to produce disjointed words, phrases, or sentences, that taken separately or together, would have minimal or no informational content.

10. In sum, the non-released information has been properly withheld pursuant to FOIA Exemptions 5 and 6. NOAA has thoroughly reviewed the records it found for reasonably segregable information. NOAA has determined that there is no further reasonably segregable information to be released.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 15 day of March, 2017, Silver Spring, Maryland.

A handwritten signature in blue ink, appearing to read 'M. Graff', is written over a horizontal line.

Mark H. Graff

| Tracking Number | Type | Requester |
|------------------------|-------------|---------------------|
| DOC-NOAA-2017-000851 | Request | Jared S. Goodman |
| DOC-NOAA-2017-000844 | Request | Benjamin Levitan |
| DOC-NOAA-2017-000843 | Request | Benjamin Levitan |
| DOC-NOAA-2017-000834 | Request | Shannon M. Cremeans |
| DOC-NOAA-2017-000845 | Request | Elizabeth N. Moran |
| DOC-NOAA-2017-000846 | Request | Elizabeth N. Moran |
| DOC-NOAA-2017-000811 | Request | Christopher Hudak |

| Requester Organization | Submitted | Received | Assigned To |
|---|------------------|-----------------|--------------------|
| PETA Foundation | 03/21/2017 | 03/21/2017 | NOAA |
| Environmental Defense Fund | 03/20/2017 | 03/20/2017 | NOAA |
| Environmental Defense Fund | 03/20/2017 | 03/20/2017 | NOAA |
| | 03/19/2017 | 03/20/2017 | NOAA |
| The Law Offices of Gary M. Gilbert & Associates, P.C. | 03/16/2017 | 03/16/2017 | OCAO |
| The Law Offices of Gary M. Gilbert & Associates, P.C. | 03/16/2017 | 03/16/2017 | OCAO |
| Environmental Advocates | 03/15/2017 | 03/16/2017 | NOAA |

Custom Report - 03/23/2017 08:29:08

| Case File Assigned To | Perfected? | Due | Closed Date | Status | Dispositions |
|------------------------------|-------------------|------------|--------------------|--------------------------|---------------------|
| NOAA | No | TBD | TBD | Submitted | |
| NOAA | No | TBD | TBD | Submitted | |
| NOAA | No | TBD | TBD | Submitted | |
| NOAA | No | TBD | TBD | Initial Evaluation | |
| OCAO | Yes | 04/13/2017 | TBD | Assignment Determination | |
| OCAO | Yes | 04/18/2017 | TBD | Assignment Determination | |
| NOAA | No | TBD | TBD | Initial Evaluation | |

Detail

On behalf of People for the Ethical Treatment of Animals (PETA), and pursuant to the Freedom of Information Act, Please find our FOIA request attached.

Please find our FOIA request attached.

I am writing to request copies of the application for import of (2) killer whales by Six Flags in 2001 Ref: Marine Man Copies of the Reports of Investigation for any and all informal or formal EEO complaints filed by, or on behalf of, TI Copies of any and all records, documents, and communications, including but not limited to emails, regarding any : Please see attached FOIA request letter, and accompanying fee waiver request.

I request copies of all records regarding Permit No. 774, issued to SeaWorld on October 7, 1992, to im

nmals; File Application No. 1004-1656 & Permit No. 1004- 1656-00 I am requesting copies of all c
thomas Smith, including, but not limited to, Agency Nos. 54-2012-01801, 54-2011-02074, 54-2011-0026;
and all actions taken by any Agency employee, including but not limited to Mark Paese and Tahara Daw

port the orca Tilikum pursuant to the Marine Mammal Protection Act (MMPA), excepting correspondenc

documentation, inventories, necropsy reports, correspondence, etc. associated with the Application and
7, 11-54-00066, 10-54- 00811, 10-54-00339, and 08-54-00092. Copies of any and all communications a
kins, to address, respond, and/or comply with the successful finding of discrimination in the EEO compli

re between the agency and PETA, the Animal Welfare Institute, and their representatives. This request is

Issued Permit. I am requesting both a copy of the Application for permit and the Issued permit, with all associated documentation, drafted, sent, received, and/or maintained by the EEO Counselor(s) for any and all EEO complaints filed by Thomas Smith (EEO Appeal No. 0120130553, Agency No. 54-2009-00092).

ncludes, but is not limited to, memoranda, reports, notes, letters, emails, and other correspondence.

associated documentation for both.

EO complaints filed by, or on behalf of, Thomas Smith, against the Agency, including, but not limited to,

Agency Nos. 54-2015-00137, 54-2014-00137, 54-2013-00264, 54-2012-01971, 54-2012-01801, 54- 20

!1-02074, 54-2011-00267, 11-54-00066, 10-54-00811, 10-54-00339, and 08-54- 00092. This request inc

cludes any and all communications, including but not limited to emails, between the EEO Counselor(s) fi

or the aforementioned EEO complaints and any responsible management official named in that informal

| EEO complaint.

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Thursday, March 23, 2017 9:32 AM
To: Lola Stith - NOAA Affiliate
Cc: Robert Swisher - NOAA Federal
Subject: Fwd: Weekly FOIA Incoming and High Visibility Requests
Attachments: Weekly FOIA Incoming and High Visibility Requests Report 03152017 - 03222017.xls;
2nd Declaration Final Signed.pdf

So looking at the -000843 request I described below (b)(5)

?

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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----- Forwarded message -----

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Date: Thu, Mar 23, 2017 at 9:16 AM
Subject: Weekly FOIA Incoming and High Visibility Requests
To: Stephen Lipps - NOAA Federal <stephen.lipps@noaa.gov>, John Almeida - NOAA Federal <john.almeida@noaa.gov>, "Holmes, Colin" <cholmes@doc.gov>, Robert Moller - NOAA Federal <robert.moller@noaa.gov>, Scott Smullen - NOAA Federal <scott.smullen@noaa.gov>, Jeff Dillen - NOAA Federal <jeff.dillen@noaa.gov>, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>
Cc: Tom Taylor <tom.taylor@noaa.gov>, Kimberly Katzenbarger - NOAA FEDERAL <kimberly.katzenbarger@noaa.gov>, Charles <charles.green@noaa.gov>, Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov>, Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov>, Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Zachary Goldstein - NOAA Federal <Zachary.Goldstein@noaa.gov>, Douglas Perry - NOAA Federal <Douglas.A.Perry@noaa.gov>, Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov>, Jeri Dockett - NOAA Affiliate <jeri.dockett@noaa.gov>, "Cc: OCIO/OPPA" <ocio.ppa@noaa.gov>, Troy Wilds - NOAA Federal <troy.wilds@noaa.gov>, Lawrence Charters - NOAA Federal <lawrence.charters@noaa.gov>, Allison Soussi-Tanani - NOAA Federal <Allison.Soussi-Tanani@noaa.gov>

Good Morning,

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Mark H. Graff
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National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

| | | |
|---------------------------------|---|--------------------------------|
| |) | |
| JUDICIAL WATCH, INC., |) | |
| 425 Third Street, SW, Suite 800 |) | |
| Washington, D.C. 20024 |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. 15-2088 (CRC) |
| |) | |
| U.S. DEPARTMENT OF |) | |
| COMMERCE, |) | |
| 1401 Constitution Avenue, NW |) | |
| Washington, D.C. 20230 |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

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the withheld and redacted documents. I am personally familiar with Plaintiff Judicial Watch's FOIA request, which is at issue in this civil action. I submit this declaration in support of a motion for summary judgment filed by DOC in the above-captioned lawsuit and in opposition to the cross-motion for summary judgment filed by Plaintiff Judicial Watch.

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5. My first declaration and the accompanying *Vaughn* index, including the correction noted above, contain a complete explanation of the exemptions applied for each document and why each document was denied in full or denied in part.

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8. Following that review, NOAA determined that the records listed as "Partially Redacted" or "Released in part" in the *Vaughn* Index could be released in part with redactions per the identified FOIA exemptions. These records comprise a mixture of material that could reasonably be segregated for release, material that was withheld because release would trigger foreseeable harm to one or more interests protected by Exemption 5 or Exemption 6, and material that was inextricably intertwined with protected material and therefore could not reasonably be segregated for release.

9. Also following that review, NOAA determined that the records identified as "Fully Withheld" on the first part of the *Vaughn* Index and all documents not marked "Released

in part” on the second part were required to be withheld in their entirety. NOAA determined either that all information in these records was fully covered by the deliberative process privilege or that any non-exempt information in these records was so intertwined with exempt material that no information could be reasonably segregated for release. Any further segregation of this intertwined material would employ finite resources only to produce disjointed words, phrases, or sentences, that taken separately or together, would have minimal or no informational content.

10. In sum, the non-released information has been properly withheld pursuant to FOIA Exemptions 5 and 6. NOAA has thoroughly reviewed the records it found for reasonably segregable information. NOAA has determined that there is no further reasonably segregable information to be released.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 15 day of March, 2017, Silver Spring, Maryland.

A handwritten signature in blue ink, appearing to read 'M. Graff', is written over a horizontal line.

Mark H. Graff

| Tracking Number | Type | Requester |
|------------------------|-------------|---------------------|
| DOC-NOAA-2017-000851 | Request | Jared S. Goodman |
| DOC-NOAA-2017-000844 | Request | Benjamin Levitan |
| DOC-NOAA-2017-000843 | Request | Benjamin Levitan |
| DOC-NOAA-2017-000834 | Request | Shannon M. Cremeans |
| DOC-NOAA-2017-000845 | Request | Elizabeth N. Moran |
| DOC-NOAA-2017-000846 | Request | Elizabeth N. Moran |
| DOC-NOAA-2017-000811 | Request | Christopher Hudak |

| Requester Organization | Submitted | Received | Assigned To |
|---|------------------|-----------------|--------------------|
| PETA Foundation | 03/21/2017 | 03/21/2017 | NOAA |
| Environmental Defense Fund | 03/20/2017 | 03/20/2017 | NOAA |
| Environmental Defense Fund | 03/20/2017 | 03/20/2017 | NOAA |
| | 03/19/2017 | 03/20/2017 | NOAA |
| The Law Offices of Gary M. Gilbert & Associates, P.C. | 03/16/2017 | 03/16/2017 | OCAO |
| The Law Offices of Gary M. Gilbert & Associates, P.C. | 03/16/2017 | 03/16/2017 | OCAO |
| Environmental Advocates | 03/15/2017 | 03/16/2017 | NOAA |

Custom Report - 03/23/2017 08:29:08

| Case File | Assigned To | Perfected? | Due | Closed Date | Status | Dispositions |
|------------------|--------------------|-------------------|------------|--------------------|--------------------------|---------------------|
| NOAA | | No | TBD | TBD | Submitted | |
| NOAA | | No | TBD | TBD | Submitted | |
| NOAA | | No | TBD | TBD | Submitted | |
| NOAA | | No | TBD | TBD | Initial Evaluation | |
| OCAO | | Yes | 04/13/2017 | TBD | Assignment Determination | |
| OCAO | | Yes | 04/18/2017 | TBD | Assignment Determination | |
| NOAA | | No | TBD | TBD | Initial Evaluation | |

Detail

On behalf of People for the Ethical Treatment of Animals (PETA), and pursuant to the Freedom of Information Act, Please find our FOIA request attached.

Please find our FOIA request attached.

I am writing to request copies of the application for import of (2) killer whales by Six Flags in 2001 Ref: Marine Man Copies of the Reports of Investigation for any and all informal or formal EEO complaints filed by, or on behalf of, TI Copies of any and all records, documents, and communications, including but not limited to emails, regarding any : Please see attached FOIA request letter, and accompanying fee waiver request.

I request copies of all records regarding Permit No. 774, issued to SeaWorld on October 7, 1992, to im

nmals; File Application No. 1004-1656 & Permit No. 1004- 1656-00 I am requesting copies of all c
thomas Smith, including, but not limited to, Agency Nos. 54-2012-01801, 54-2011-02074, 54-2011-0026;
and all actions taken by any Agency employee, including but not limited to Mark Paese and Tahara Daw

port the orca Tilikum pursuant to the Marine Mammal Protection Act (MMPA), excepting correspondenc

documentation, inventories, necropsy reports, correspondence, etc. associated with the Application and 7, 11-54-00066, 10-54- 00811, 10-54-00339, and 08-54-00092. Copies of any and all communications a kins, to address, respond, and/or comply with the successful finding of discrimination in the EEO compli

re between the agency and PETA, the Animal Welfare Institute, and their representatives. This request is

Issued Permit. I am requesting both a copy of the Application for permit and the Issued permit, with all associated documentation, drafted, sent, received, and/or maintained by the EEO Counselor(s) for any and all EEO complaints filed by Thomas Smith (EEO Appeal No. 0120130553, Agency No. 54-2009-00092).

ncludes, but is not limited to, memoranda, reports, notes, letters, emails, and other correspondence.

associated documentation for both.

EO complaints filed by, or on behalf of, Thomas Smith, against the Agency, including, but not limited to,

Agency Nos. 54-2015-00137, 54-2014-00137, 54-2013-00264, 54-2012-01971, 54-2012-01801, 54- 20

!1-02074, 54-2011-00267, 11-54-00066, 10-54-00811, 10-54-00339, and 08-54- 00092. This request inc

cludes any and all communications, including but not limited to emails, between the EEO Counselor(s) fi

or the aforementioned EEO complaints and any responsible management official named in that informal

| EEO complaint.

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Tuesday, March 28, 2017 8:15 AM
To: rachael.leonard@ostp.eop.gov
Cc: Lola Stith - NOAA Affiliate; Robert Swisher - NOAA Federal; ostpfoia@ostp.eop.gov
Subject: NOAA Consultation 1st Interim Release (DOC-NOAA-2017-000580)
Attachments: 1st Interim Release Combined.pdf; New Judicial Watch Request.pdf

Good Morning Rachael,

As you and I had discussed several weeks ago (b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Thank you for your time as we advance this request.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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Judicial Watch®

*Because no one
is above the law!*

February 6, 2017

VIA CERTIFIED MAIL

National Oceanographic and
Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Judicial Watch, Inc. (“Judicial Watch”) hereby requests that the National Oceanographic and Atmospheric Administration (“NOAA”) produce the following records pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”):

Any and all records of communication between NOAA scientist Thomas Karl and Director of the Office of Science and Technology Policy John Holdren.

The time frame for the requested records is January 20, 2009 through January 20, 2017.

Please determine whether to comply with this request within the time period required by FOIA and notify us immediately of your determination, the reasons therefor, and the right to appeal any adverse determination to the head of the agency or his or her designee. 5 U.S.C. § 552(a)(6)(i). Please also produce all responsive records in an electronic format (“pdf” is preferred), if convenient. We also are willing to accept a “rolling production” of responsive records if it will facilitate a more timely production.

Judicial Watch also hereby requests a waiver of both search and duplication fees. We are entitled to a waiver of search fees because we are a “representative of the news media.” *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also Cause of Action v. Federal Trade Comm.*, 799 F.3d 1108 (D.C. Cir. 2015); *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381 (D.C. Cir. 1989). For more than twenty years, Judicial Watch has used FOIA and other investigative tools to gather information about the operations and activities of government, a subject of undisputed public interest. We submit over 400 FOIA requests annually. Our personnel, which includes experienced journalists and professional writers on staff and under contract, use their editorial skills to turn this raw information into

distinct works that are disseminated to the public via our monthly newsletter, which has a circulation of over 300,000, weekly email update, which has over 600,000 subscribers, investigative bulletins, special reports, www.judicialwatch.org website, *Corruption Chronicles* blog, and social media, including Facebook and Twitter, among other distribution channels. We have authored several books, including *Corruption Chronicles* by Tom Fitton (Threshold Editions, July 24, 2012), and another book, *Clean House* by Tom Fitton (Threshold Editions, Aug. 30, 2016), is forthcoming. In 2012, we produced a documentary film, "District of Corruption," directed by Stephen K. Bannon. Our "news media" status has been confirmed in court rulings. See, e.g., *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000). As a tax exempt, 501(c)(3) non-profit corporation, we have no commercial interests and do not seek the requested records for any commercial use. Rather, we intend to use the requested records as part of our on-going investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

Judicial Watch also is entitled to a waiver of both search fees and duplication fees because "disclosure of the information is in the public interest." 5 U.S.C. § 552(a)(4)(A)(iii). Disclosure of the requested records undoubtedly will shed light on "the operations or activities of the government." *Cause of Action*, 799 F.3d at 1115 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Disclosure also is "likely to contribute significantly to the public understanding" of those operations or activities because, among other reasons, Judicial Watch intends to disseminate both the records and its findings to "a reasonably broad audience of persons interested in the subject" via its newsletter, email updates, investigative bulletins, website, blog, and its other, regular distribution channels. *Cause of Action*, 799 F.3d at 1116 (quoting *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994)). Again, Judicial Watch does not seek the requested records for any commercial benefit or for its own "primary" benefit, but instead seeks them as part of its ongoing investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

In the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch agrees to pay up to \$300.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5172 or bmarshall@judicialwatch.org.

Thank you for your cooperation.

NOAA FOIA Request
February 6, 2017
Page 3 of 3

Very respectfully,

A handwritten signature in black ink, appearing to read "William F. Marshall". The signature is written in a cursive style with a large initial "W".

William F. Marshall
Judicial Watch, Inc.

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Tuesday, March 28, 2017 9:28 AM
To: James LeDuc - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Julie MacGowan - NOAA Federal
Subject: Re: FOIA Assignment for Request Detail Task for Request DOC-OS-2017-000552

I don't thin (b)(5)

Thanks for checking, Jim--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Mon, Mar 27, 2017 at 12:28 PM, James LeDuc - NOAA Federal <james.leduc@noaa.gov> wrote:

I have a new FOIA as follows:

Under the provisions of the Freedom of Information Act, I request records from the following electronic search: "all emails from the domain EOP.gov to the Secretary, Assistant Secretaries, Deputy Secretaries and Under Secretaries. encompassed within the required agency system for retaining emails of senior officials. Frequently this records management policy/system is described by the name Capstone. <https://www.archives.gov/records-mgmt/grs/grs06-1-fags.html> If the agency has not yet established NARA-compliant email retention procedures, then I instead request an electronic search of the mailboxes of agency senior managers for all emails that include the EOP.gov phrase in the FROM address. I limit this request to the time period January 20, 2017 to the present."

Should (b)(5)

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

From: Maria Williams - NOAA Federal <maria.williams@noaa.gov>
Sent: Tuesday, March 28, 2017 10:44 AM
To: Mark Graff - NOAA Federal
Subject: Re: Judicial Watch files suit on Feb. 6 FOIA
Attachments: Unusual Circumstance 10 Day Extension.pdf; Fee Notification_0613 and 10 day extension.pdf

Mark,

(b)(5)
[Redacted]
[Redacted]
[Redacted] See attached.

Respectfully,

Maria S. Williams

Property \NESDIS FOIA Liaison \Admin Officer\FAC-COR II
National Oceanic and Atmospheric Administration
Satellite and Information Service
Office of the Assistant Chief Information Officer
Phone: 202-308-4959

Follow NOAA Satellites on Social Media: [Facebook](#), [Twitter](#), [YouTube](#)

"Talent wins games, but teamwork and intelligence wins championship"

On Tue, Mar 28, 2017 at 10:37 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
Maria--

(b)(5) [Redacted] ?

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) [Redacted] (C)

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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL ENVIRONMENTAL SATELLITE, DATA,
AND INFORMATION SERVICE

February 24, 2017

Mr. Dan Vergano
1630 Connecticut Ave.
7th Floor
Washington, DC 20009

Re: Request No. DOC-NOAA-2017-000613

Dear Mr. Vergano

This letter is in reference to your Freedom of Information Act (FOIA) request entered into FOIA online on February 9, 2017 for records pertaining to “copies of any agency communications to, or from, Dr. John Bates regarding the 2015 Karl et al study in Science magazine”).” NOAA has granted a *discretionary waiver of fees* for your FOIA request.

Also, 15 C.F.R. 4.6(d) (2) allows an agency to extend the FOIA response deadline by ten business days for unusual circumstances. Due to the following *reasons: (i) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are the subject of a single request; and (ii) The need for consultation, which shall be conducted with all practicable speed, with another component or Federal agency having a substantial interest in the determination of the request* we are choosing to invoke this 10 day extension and anticipate completing your request by **[March 24, 2017]**.

Please be aware that not all responsive documents are necessarily releasable under the FOIA. If you have any questions about your request or NOAA’s FOIA regulations or procedures, please contact Maria Williams, 301-713-7103 or maria.williams@noaa.gov.

Sincerely,

WILLIAMS.M
ARIA.STELLA.
1042493429

Digitally signed by
WILLIAMS.MARIA.STELLA.10424
93429
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ou=DoD, ou=PKI, ou=OTHER,
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Date: 2017.02.24 12:33:08
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Maria S. Williams
FOIA Liaison
National Environmental Satellite Data,
and Information Services





UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL ENVIRONMENTAL SATELLITE, DATA,
AND INFORMATION SERVICE

March 2, 2017

Mr. Dan Vergano
1630 Connecticut Ave.
7th Floor
Washington, DC 20009

Re: Request No. DOC-NOAA-2017-000613

Dear Mr. Vergano:

This letter is in response to your Freedom of Information Act (*FOIA*) request entered into FOIAonline on **February 14, 2017**. You requested “access to and copies of any agency communications to, or from, Dr. John Bates regarding the 2015 Karl et al study in Science magazine from July 30, 2014 to February 4, 2017.”

Also, 15 C.F.R. 4.6(d) (2) allows an agency to extend the FOIA response deadline by ten business days for unusual circumstances. Due to the following *reasons: (i) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are the subject of a single request; and (ii) The need for consultation, which shall be conducted with all practicable speed, with another component or Federal agency having a substantial interest in the determination of the request* we are choosing to invoke this 10 day extension and anticipate completing your request by **March 29, 2017**.

If you have additional information clarifying your request, please contact me at maria.williams@noaa.gov or by phone at **202-308-4959**.

Sincerely,

Digitally signed by WILLIAMS.MARIA.STELLA.1042493429
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI,
ou=OTHER, cn=WILLIAMS.MARIA.STELLA.1042493429
Date: 2017.03.02 08:23:32 -05'00'

Maria S. Williams
FOIA Liaison

National Environmental Satellite, Data,
and Information Service



From: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>
Sent: Wednesday, March 29, 2017 11:11 AM
To: Allison Soussi-Tanani - NOAA Federal
Cc: Mark Graff - NOAA Federal
Subject: Re: Weekly FOIA Incoming and High Visibility Requests
Attachments: NOAA Scientific Integrity FOIA (1).pdf

Hello Allison - Please find a copy of the EDF FOIA request attached.

R/
Lola

On Wed, Mar 29, 2017 at 10:24 AM, Allison Soussi-Tanani - NOAA Federal <allison.soussi-tanani@noaa.gov> wrote:

Hi Mark,

Just checking in on this request (b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED].

Thanks in advance for your help.
Allison

--
Allison Soussi-Tanani
Digital Strategy Lead
NOAA Office of the CIO
Service Delivery Division

- (b)(6) [REDACTED] (m)
-- allison.soussi-tanani@noaa.gov

On Thu, Mar 23, 2017 at 1:40 PM, Allison Soussi-Tanani - NOAA Federal <allison.soussi-tanani@noaa.gov> wrote:

Hi Mark,

(b)(5) [REDACTED]
[REDACTED]
[REDACTED].

Thanks!
Allison

--

Allison Soussi-Tanani
Digital Strategy Lead
NOAA Office of the CIO
Service Delivery Division

- (b)(6) (m)
-- allison.soussi-tanani@noaa.gov

On Thu, Mar 23, 2017 at 9:16 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
Good Morning,

Attached is the weekly report. Please take note of the two Environmental Defense Fund (EDF) requests. One of those requests seeks records documenting changes to NOAA websites regarding climate change following the inauguration, as well as correspondence with political appointees regarding such changes. (DOC-NOAA-000844). EDF's other request seeks records on public communication directives about scientific research, attendance at public events, and all FOIA-related correspondence with political appointees and transition-team members. (DOC-NOAA-2017-000843).

One request was received from PETA regarding a SeaWorld orca permit. (DOC-NOAA-2017-000851). Also, a request was received from Environmental Advocates seeking records regarding endangered fish in the Yuba River, and Daguerre Point Dam fish ladders. (DOC-NOAA-2017-000811).

In litigation, NOAA filed its second Declaration in Support of our Motion for Summary Judgment in the Judicial Watch case (attached). The original request sought records related to the October 13, 2015 Rep. Lamar Smith subpoena and global temperature data sets.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) (C)

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--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov



March 20, 2017

**SUBMITTED ELECTRONICALLY
HARD COPY TO FOLLOW BY U.S. MAIL**

National Freedom of Information Officer
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910

Re: Freedom of Information Act Request for Records Related to Scientific Research and Communication

Dear National Freedom of Information Officer:

Environmental Defense Fund (“EDF”) respectfully requests records, as that term is defined at 5 U.S.C. § 552(f)(2) of the Freedom of Information Act (“FOIA”), of the National Oceanic and Atmospheric Administration (the “Agency”). Specifically, EDF requests:

- 1) all directives and guidance to Agency scientific staff that relate to public communication about scientific research or findings;
- 2) all questionnaires or other solicitations of information sent to Agency scientific staff that relate to (i) past, current, or prospective public communication of scientific research or findings, and (ii) attendance at or participation in past, current, or prospective public events; and
- 3) all correspondence relating to FOIA that was sent or received by anyone who, since November 8, 2016, has served as a political appointee or member of the beachhead team or transition team.

For all elements of this request, EDF respectfully seeks records produced, modified, or transmitted since November 8, 2016 that exist as of the date of this request and on a rolling basis going forward. “Correspondence” includes, but is not limited to, hard copy correspondence and electronic correspondence such as emails, text messages, and correspondence transmitted through any other electronic platform. “Communication” includes, but is not limited to, any means by which information is made available to the public, media, or other outside entities, and specifically includes journal publications and presentations at conferences.

If any of the information sought in this request is deemed by the Agency to be properly withheld under a FOIA exemption, 5 U.S.C. § 552(b), please provide EDF with an explanation, for each such record or portion thereof, sufficient to identify the record and the particular exemption(s) claimed.

Request for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 15 C.F.R. § 4.6(f)(1)(iii) and (iv), EDF respectfully seeks expedited processing because this request involved “[a] matter of widespread and exceptional media interest involving questions about the Government’s integrity which affect public confidence” and “[a]n urgency to inform the public about an actual or alleged Federal Government activity, if made by a person primarily engaged in disseminating information.” In support of this request, I certify that the following statement is true and correct to the best of my knowledge and belief:

1. EDF engages in extensive, daily efforts to inform the public about matters affecting environmental policy. For example, EDF has multiple channels for distributing information to the public, including through direct communication with its more than 2 million members, press releases, blog posts, active engagement on social media, and frequent appearances by staff in major media outlets. *See, e.g.*, Martha Roberts, *Less Science, More Cost: Why the Misguided “Secret Science” Bill Is Bad Policy*, EDF Climate 411 Blog (Feb. 7, 2017), <http://blogs.edf.org/climate411/2017/02/07/less-science-more-cost-why-the-misguided-secret-science-bill-is-bad-policy/>; Scott Weaver, *We Lose More than You Think if NASA’s Climate Science Is Cut*, EDF Voices Blog (Nov. 23, 2016), <https://www.edf.org/blog/2016/11/23/we-lose-more-you-think-if-nasas-climate-science-cut>. With respect to another FOIA request, the U.S. Environmental Protection Agency recently recognized EDF’s eligibility for expedited processing under its analogous FOIA provisions.
2. Since November 8, 2016, scientific integrity and scientific communication in federal agencies has been a matter of significant public concern. *See, e.g.*, Steven Mufson and Juliet Eilperin, *Trump Transition Team for Energy Department Seeks Names of Employees Involved in Climate Meetings*, Wash. Post (Dec. 9, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/12/09/trump-transition-team-for-energy-department-seeks-names-of-employees-involved-in-climate-meetings>; Rebecca Leber, *The EPA Used to Tweet About the Environment. Now It Just Tweets About Scott Pruitt*, Mother Jones (Mar. 14, 2017), <http://www.motherjones.com/environment/2017/03/scott-pruitts-epa-his-own-pr-firm>.
3. Media reports give rise to a serious concern that scientific integrity and scientific communication are being deemphasized or undermined at federal agencies. *See, e.g.*, David Malakoff, *Trump’s 2018 Budget Will Squeeze Civilian Science Agencies*, Science (Feb. 27, 2017), <http://www.sciencemag.org/news/2017/02/trump-s-2018-budget-will-squeeze-civilian-science-agencies>; Debra Kahn, *State Officials to Federal Scientists: “Come West”*, E&E News (Mar. 14, 2017), <http://www.eenews.net/climatewire/2017/03/14/stories/1060051408>. This concern is compounded by threatened cuts to funding for climate science at the Agency. *See, e.g.*,

Scott Waldman, *Trump Administration Seeks Big Budget Cuts for Climate Research*, Sci. Am. (Mar. 7, 2017), <https://www.scientificamerican.com/article/trump-administration-seeks-big-budget-cuts-for-climate-research/>.

4. Threats to scientific integrity and scientific communication at the Agency could have imminent consequences for the American people. Such threats could jeopardize the dissemination of scientific information impacting public health and the environment and negatively impact the morale and work product of the federal scientific workforce. If such threats persist undisclosed, the harm suffered by the American people will increase, and the conditions creating that harm may become increasingly intractable and irreversible. If the public learns of those conditions only after scientific research, policies, and communication have already been impacted for a significant duration, the ability of concerned citizens to influence and engage with their government would be severely prejudiced.

Request for Fee Waiver

As a non-partisan, non-profit organization that provides information that is in the public interest, EDF respectfully requests a waiver of fees associated with this request. We are not seeking information for any commercial purpose and the records received will contribute to a greater public understanding of issues of considerable public interest: scientific research and communication about topics that include grave threats to the American people. 5 U.S.C. § 552(a)(4)(A)(iii). EDF is well positioned to disseminate the records to the public, as we routinely issue press releases, action alerts, reports, analyses, and other public outreach materials. Accordingly, we respectfully request that the documents be furnished without charge.

For ease of administration and to conserve resources, we will accept documents produced in a readily accessible electronic format. In the event EDF's request for a fee waiver is denied or if you have any questions about this request, please contact me immediately by telephone at (202) 572-3318 or by email at blevitan@edf.org.

Respectfully submitted,

Benjamin Levitan
Environmental Defense Fund
1875 Connecticut Avenue, NW
Suite 600
Washington, DC 20009

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Wednesday, March 29, 2017 12:18 PM
To: Allison Soussi-Tanani - NOAA Federal
Cc: Lola Stith - NOAA Affiliate
Subject: Re: Weekly FOIA Incoming and High Visibility Requests
Attachments: Incoming Request -000843.pdf; Incoming FOIA -000844.pdf

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]

Attached are both requests.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) [Redacted] (C)

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On Wed, Mar 29, 2017 at 10:24 AM, Allison Soussi-Tanani - NOAA Federal <allison.soussi-tanani@noaa.gov> wrote:

Hi Mark,

Just checking in on this request (b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

[Redacted]
[Redacted]

Thanks in advance for your help.
Allison

--
Allison Soussi-Tanani

Digital Strategy Lead
NOAA Office of the CIO
Service Delivery Division

- (b)(6) (m)
-- allison.soussi-tanani@noaa.gov

On Thu, Mar 23, 2017 at 1:40 PM, Allison Soussi-Tanani - NOAA Federal <allison.soussi-tanani@noaa.gov> wrote:

Hi Mark,

(b)(5)

Thanks!
Allison

--
Allison Soussi-Tanani
Digital Strategy Lead
NOAA Office of the CIO
Service Delivery Division

- (b)(6) (m)
-- allison.soussi-tanani@noaa.gov

On Thu, Mar 23, 2017 at 9:16 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
Good Morning,

Attached is the weekly report. Please take note of the two Environmental Defense Fund (EDF) requests. One of those requests seeks records documenting changes to NOAA websites regarding climate change following the inauguration, as well as correspondence with political appointees regarding such changes. (DOC-NOAA-000844). EDF's other request seeks records on public communication directives about scientific research, attendance at public events, and all FOIA-related correspondence with political appointees and transition-team members. (DOC-NOAA-2017-000843).

One request was received from PETA regarding a SeaWorld orca permit. (DOC-NOAA-2017-000851). Also, a request was received from Environmental Advocates seeking records regarding endangered fish in the Yuba River, and Daguerre Point Dam fish ladders. (DOC-NOAA-2017-000811).

In litigation, NOAA filed its second Declaration in Support of our Motion for Summary Judgment in the Judicial Watch case (attached). The original request sought records related to the October 13, 2015 Rep. Lamar Smith subpoena and global temperature data sets.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:(301)628-5658) (O)

(b)(6) (C)

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March 20, 2017

**SUBMITTED ELECTRONICALLY
HARD COPY TO FOLLOW BY U.S. MAIL**

National Freedom of Information Officer
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, MD 20910

Re: Freedom of Information Act Request for Records Related to National Oceanic and Atmospheric Administration Websites

Dear National Freedom of Information Officer:

Environmental Defense Fund (“EDF”) respectfully requests records, as that term is defined at 5 U.S.C. § 552(f)(2) of the Freedom of Information Act (“FOIA”), of the National Oceanic and Atmospheric Administration (the “Agency”). Specifically, EDF requests:

- 1) a copy of all Agency records related to climate change, including any information that pertains to monitoring or addressing climate change, that appeared on the Agency’s websites on January 19, 2017 but no longer appear, or were modified, as of January 20, 2017 or any date thereafter. This request encompasses, but is not limited to, web pages, databases, and any records accessible through the Agency’s websites via hyperlink or other means, including web pages linking to climate and air quality information on White House or other federal agency websites; and
- 2) correspondence related to the content of the Agency’s websites, including prospective future changes to such content, sent or received by any political appointee or member of the beachhead or transition team.

This request specifically excludes changes to font style, where the text remains unchanged; the addition of new press releases, blog posts, or social media posts; changes to names, biographies, or contact information of Agency staff; and updates to databases to the extent such updates were made pursuant to policies that were effective as of January 19, 2017.

For both elements of this request, EDF respectfully seeks records produced, modified, or transmitted since November 8, 2016 that exist as of the date of this request and on a rolling basis

going forward. “Correspondence” includes, but is not limited to, hard copy correspondence and electronic correspondence such as emails, text messages, and correspondence transmitted through any other electronic platform.

Request for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 15 C.F.R. § 4.6(f)(1)(iii) and (iv), EDF respectfully seeks expedited processing because this request involved “[a] matter of widespread and exceptional media interest involving questions about the Government’s integrity which affect public confidence” and “[a]n urgency to inform the public about an actual or alleged Federal Government activity, if made by a person primarily engaged in disseminating information.” In support of this request, I certify that the following statement is true and correct to the best of my knowledge and belief:

1. EDF engages in extensive, daily efforts to inform the public about matters affecting environmental policy. For example, EDF has multiple channels for distributing information to the public, including through direct communication with more than 2 million members, press releases, blog posts, active engagement on social media, and frequent appearances by staff in major media outlets. *See* Peter Zalzal, *In Early Action, EPA Administrator Pruitt Moves to Block Communities’ Right to Know about Oil and Gas Pollution*, EDF Climate 411 Blog (Mar. 7, 2017), <http://blogs.edf.org/climate411/2017/03/07/in-early-action-epa-administrator-pruitt-moves-to-block-communities-right-to-know-about-oil-and-gas-pollution/>; Scott Weaver, *Scott Pruitt’s Misleading Senate Testimony – Will Alternative Science Replace Real Science at EPA?*, EDF Climate 411 Blog (Feb. 8, 2017), <http://blogs.edf.org/climate411/2017/02/08/scott-pruitts-misleading-senate-testimony-will-alternative-science-replace-real-science-at-epa/>. With respect to another FOIA request, the U.S. Environmental Protection Agency recently recognized EDF’s eligibility for expedited processing under an analogous FOIA provision.
2. Since January 20, 2017, changes to websites of federal agencies—especially scientific agencies—have been a matter of significant public concern. *See, e.g.*, Emily Atkin, *The EPA’s Science Office Removed “Science” from Its Mission Statement*, New Republic (Mar. 7, 2017), <https://newrepublic.com/article/141174/epas-science-office-removed-science-mission-statement>. Changes that have been effected and anticipated have resulted in rapid, tangible public responses. *See, e.g.*, Amy Harmon, *Activists Rush to Save Government Science Data – If They Can Find It*, N.Y. Times (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/science/donald-trump-data-rescue-science.html>.
3. Due to the deep, demonstrated concern by the public about changes to the federal agencies’ websites, it is imperative that the public understand the process for making those changes. It is particularly salient whether politically appointed officials or transition/beachhead team members were involved. The requested records could immediately influence how concerned members of the public select priorities and allocate resources as they seek to identify website changes and preserve current or recent information available through Agency websites. Without expedited processing, information of considerable public value may be irretrievably lost, or policies regarding

such information may be deeply entrenched, before the public has the knowledge or opportunity to engage.

Request for Fee Waiver

As a non-partisan, non-profit organization that provides information that is in the public interest, EDF respectfully requests a waiver of fees associated with this request. We are not seeking information for any commercial purpose and the records received will contribute to a greater public understanding of issues of considerable public interest: the public availability of information provided on the website of a major federal agency. 5 U.S.C. § 552(a)(4)(A)(iii). EDF is well positioned to disseminate the records to the public, as we routinely issue press releases, action alerts, reports, analyses, and other public outreach materials. We fully intend to disseminate newsworthy information received in response to this request. Accordingly, we respectfully request that the documents be furnished without charge.

For ease of administration and to conserve resources, we will accept documents produced in a readily accessible electronic format. In the event EDF's request for a fee waiver is denied or if you have any questions about this request, please contact me immediately by telephone at (202) 572-3318 or by email at blevitan@edf.org.

Respectfully submitted,

Benjamin Levitan
Environmental Defense Fund
1875 Connecticut Avenue, NW
Suite 600
Washington, DC 20009



March 20, 2017

**SUBMITTED ELECTRONICALLY
HARD COPY TO FOLLOW BY U.S. MAIL**

National Freedom of Information Officer
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910

Re: Freedom of Information Act Request for Records Related to Scientific Research and Communication

Dear National Freedom of Information Officer:

Environmental Defense Fund (“EDF”) respectfully requests records, as that term is defined at 5 U.S.C. § 552(f)(2) of the Freedom of Information Act (“FOIA”), of the National Oceanic and Atmospheric Administration (the “Agency”). Specifically, EDF requests:

- 1) all directives and guidance to Agency scientific staff that relate to public communication about scientific research or findings;
- 2) all questionnaires or other solicitations of information sent to Agency scientific staff that relate to (i) past, current, or prospective public communication of scientific research or findings, and (ii) attendance at or participation in past, current, or prospective public events; and
- 3) all correspondence relating to FOIA that was sent or received by anyone who, since November 8, 2016, has served as a political appointee or member of the beachhead team or transition team.

For all elements of this request, EDF respectfully seeks records produced, modified, or transmitted since November 8, 2016 that exist as of the date of this request and on a rolling basis going forward. “Correspondence” includes, but is not limited to, hard copy correspondence and electronic correspondence such as emails, text messages, and correspondence transmitted through any other electronic platform. “Communication” includes, but is not limited to, any means by which information is made available to the public, media, or other outside entities, and specifically includes journal publications and presentations at conferences.

If any of the information sought in this request is deemed by the Agency to be properly withheld under a FOIA exemption, 5 U.S.C. § 552(b), please provide EDF with an explanation, for each such record or portion thereof, sufficient to identify the record and the particular exemption(s) claimed.

Request for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 15 C.F.R. § 4.6(f)(1)(iii) and (iv), EDF respectfully seeks expedited processing because this request involved “[a] matter of widespread and exceptional media interest involving questions about the Government’s integrity which affect public confidence” and “[a]n urgency to inform the public about an actual or alleged Federal Government activity, if made by a person primarily engaged in disseminating information.” In support of this request, I certify that the following statement is true and correct to the best of my knowledge and belief:

1. EDF engages in extensive, daily efforts to inform the public about matters affecting environmental policy. For example, EDF has multiple channels for distributing information to the public, including through direct communication with its more than 2 million members, press releases, blog posts, active engagement on social media, and frequent appearances by staff in major media outlets. *See, e.g.*, Martha Roberts, *Less Science, More Cost: Why the Misguided “Secret Science” Bill Is Bad Policy*, EDF Climate 411 Blog (Feb. 7, 2017), <http://blogs.edf.org/climate411/2017/02/07/less-science-more-cost-why-the-misguided-secret-science-bill-is-bad-policy/>; Scott Weaver, *We Lose More than You Think if NASA’s Climate Science Is Cut*, EDF Voices Blog (Nov. 23, 2016), <https://www.edf.org/blog/2016/11/23/we-lose-more-you-think-if-nasas-climate-science-cut>. With respect to another FOIA request, the U.S. Environmental Protection Agency recently recognized EDF’s eligibility for expedited processing under its analogous FOIA provisions.
2. Since November 8, 2016, scientific integrity and scientific communication in federal agencies has been a matter of significant public concern. *See, e.g.*, Steven Mufson and Juliet Eilperin, *Trump Transition Team for Energy Department Seeks Names of Employees Involved in Climate Meetings*, Wash. Post (Dec. 9, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/12/09/trump-transition-team-for-energy-department-seeks-names-of-employees-involved-in-climate-meetings>; Rebecca Leber, *The EPA Used to Tweet About the Environment. Now It Just Tweets About Scott Pruitt*, Mother Jones (Mar. 14, 2017), <http://www.motherjones.com/environment/2017/03/scott-pruitts-epa-his-own-pr-firm>.
3. Media reports give rise to a serious concern that scientific integrity and scientific communication are being deemphasized or undermined at federal agencies. *See, e.g.*, David Malakoff, *Trump’s 2018 Budget Will Squeeze Civilian Science Agencies*, Science (Feb. 27, 2017), <http://www.sciencemag.org/news/2017/02/trump-s-2018-budget-will-squeeze-civilian-science-agencies>; Debra Kahn, *State Officials to Federal Scientists: “Come West”*, E&E News (Mar. 14, 2017), <http://www.eenews.net/climatewire/2017/03/14/stories/1060051408>. This concern is compounded by threatened cuts to funding for climate science at the Agency. *See, e.g.*,

Scott Waldman, *Trump Administration Seeks Big Budget Cuts for Climate Research*, Sci. Am. (Mar. 7, 2017), <https://www.scientificamerican.com/article/trump-administration-seeks-big-budget-cuts-for-climate-research/>.

4. Threats to scientific integrity and scientific communication at the Agency could have imminent consequences for the American people. Such threats could jeopardize the dissemination of scientific information impacting public health and the environment and negatively impact the morale and work product of the federal scientific workforce. If such threats persist undisclosed, the harm suffered by the American people will increase, and the conditions creating that harm may become increasingly intractable and irreversible. If the public learns of those conditions only after scientific research, policies, and communication have already been impacted for a significant duration, the ability of concerned citizens to influence and engage with their government would be severely prejudiced.

Request for Fee Waiver

As a non-partisan, non-profit organization that provides information that is in the public interest, EDF respectfully requests a waiver of fees associated with this request. We are not seeking information for any commercial purpose and the records received will contribute to a greater public understanding of issues of considerable public interest: scientific research and communication about topics that include grave threats to the American people. 5 U.S.C. § 552(a)(4)(A)(iii). EDF is well positioned to disseminate the records to the public, as we routinely issue press releases, action alerts, reports, analyses, and other public outreach materials. Accordingly, we respectfully request that the documents be furnished without charge.

For ease of administration and to conserve resources, we will accept documents produced in a readily accessible electronic format. In the event EDF's request for a fee waiver is denied or if you have any questions about this request, please contact me immediately by telephone at (202) 572-3318 or by email at blevitan@edf.org.

Respectfully submitted,

Benjamin Levitan
Environmental Defense Fund
1875 Connecticut Avenue, NW
Suite 600
Washington, DC 20009

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Wednesday, March 29, 2017 1:29 PM
To: Lola Stith - NOAA Affiliate
Subject: Re: ACTION REQUIRED: Task for DOC-OS-2017-000770 (Review/Signature)
Attachments: NOAA Response_Gajria_DOC-OS-2017-000770 Fee Estimate Tasker mhg.pdf

I thought I'd signed and returned this back on 3/20. Is this tasker different? Either way, here it is again-- attached below.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Wed, Mar 29, 2017 at 1:23 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Mark (b)(5)

[REDACTED]. Please sign and return to me.

Thanks,

--
Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6))
lola.m.stith@noaa.gov



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer and
Assistant Secretary for Administration
Washington, D.C. 20230

March 10, 2017

MEMORANDUM FOR: Gordon Keller, OCIO Vernon E. Curry, Census
 Pam Moulder, ESA Stephen Kong, EDA
 Jennifer Kuo, BIS Victor Powers, ITA
 Josephine Arnold, MBDA Catherine Fletcher, NIST
 Wayne Strickland, NTIS Stacy Cheney, NTIA
 Robert Swisher, NOAA Jennifer Piel, OIG
 Ricou Heaton, PTO Dondi Staunton, BEA

FROM: Michael Toland, Ph.D.
 Departmental FOIA Officer
 Office of Privacy & Open Government

SUBJECT: Fee Estimate for FOIA Request – DOC-OS-2017-000770
 Shaan Gajria, Democratic Senatorial Campaign Committee

The Department has received a Freedom of Information Act (FOIA) request from Shaan Gajria, Democratic Senatorial Campaign Committee. The short description of the FOIA request is, “Any Freedom of Information Act requests and the responsive materials thereof filed January 2011 to present [March 10, 2017] regarding Senator Elizabeth Warren or the staff or representatives of Senator Elizabeth Warren, in both her capacity as a United States Senator and as a private citizen.” The FOIA requester is in the “Other” category. Per the statutory guidelines of 15 C.F.R.§4.11:

- The chargeable services for “Commercial” are search, review and duplication.
- The chargeable services for “Media, Educational, and/or Non-commercial Scientific Institution” are duplication, excluding the first 100 pages.
- The chargeable services for “Other” are search and duplication, excluding the first two hours of search and the first 100 pages.

Please determine the fee estimate with respect to responsive documents located within your office. **DO NOT SEARCH YET.** Rather, we need an **ESTIMATE** from you as to how many hours/pages you may locate for this request. **This is only a good faith estimate, you should not search in order to come up with the estimate.** Also, a search need not actually find documents in order to be chargeable, so long as, at the outset, there is a reasonable likelihood that there may be responsive documents, and the search is conducted with due diligence.

Please fill in the applicable information and return this sheet by C.O.B. March 15, 2017 to: Michael Toland, Departmental Freedom of Information Officer, Office of Privacy and Open Government, Room 52010FB, Washington, D.C. 20230, Telephone – 202-482-3842, e-mail – mtoland1@doc.gov.

For documents responsive under the Freedom of Information Act:

Computer Search (Complete applicable sections.)

Total estimated cost for duplication in electronic version (cost of disc or CD). 0

Total estimated hours of time for electronic search. 2

Total estimated dollar amount for electronic search. \$50.00

Total estimated hours for review. 3

Total estimated dollar amount for review. \$75.00

Manual Search (Complete applicable sections.)

Total estimated number of pages of documents. 0

Total estimated dollar amount for duplication. 0

Total estimated hours for search. 0

Total estimated dollar amount for search. 0

Total estimated hours for review. 0

Total estimated dollar amount for review. 0

This information is needed to compute a total “OS” fee estimate for the requester.

| | | | |
|---|--|---------------------------|----------------------------|
| GRAFF.MARK.HYR UM.1514447892 | Digitally signed by GRAFF.MARK.HYRUM.1514447892 DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=GRAFF.MARK.HYRUM.1514447892 Date: 2017.03.20 14:42:14 -04'00' | <u> NOAA </u> Bureau | <u> 3/20/17 </u> Date |
| Signature (Senior Official) | | | |

From: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>
Sent: Wednesday, March 29, 2017 1:42 PM
To: Mark Graff - NOAA Affiliate
Subject: Fwd: NEW DOC FOIA TASK: DOC-OS-2017-000628
Attachments: Cox_2017-000628- Dept Wide Input Memo (2).docx; DOC-OS-2017-000628 Fee Estimate Tasker.docx

Hi Mark (b)(5)

R/
Lola

----- Forwarded message -----

From: Eric Williams - NOAA Affiliate <eric.d.williams@noaa.gov>
Date: Fri, Mar 10, 2017 at 11:10 AM
Subject: Re: NEW DOC FOIA TASK: DOC-OS-2017-000628
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Cc: "Toland, Michael" <mtoland@doc.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Chi Kang - NOAA Federal <chi.y.kang@noaa.gov>

Mark,

We should discuss this further (b)(5)

On Fri, Mar 10, 2017 at 3:29 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) (C)

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On Fri, Mar 10, 2017 at 10:25 AM, Eric Williams - NOAA Affiliate <eric.d.williams@noaa.gov> wrote:

(b)(5)

On Fri, Mar 10, 2017 at 12:11 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
Hi Mike--

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) (C)

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----- Forwarded message -----

From: **Mark Graff - NOAA Federal** <mark.graff@noaa.gov>
Date: Fri, Mar 10, 2017 at 7:04 AM
Subject: Re: NEW DOC FOIA TASK: DOC-OS-2017-000628
To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>
Cc: Jerome McNamara <jerome.mcnamara@noaa.gov>, Chi Kang - NOAA Federal <chi.y.kang@noaa.gov>

Hi Lola--

(b)(5)

Let me ask Mike what his preference on this is.

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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On Thu, Mar 9, 2017 at 5:50 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Mark - (b)(5)

"?

See attachments. Please advise. If my suggestion is acceptable, please sign/return the attached tasker.

Thanks!

Lola

On Thu, Mar 9, 2017 at 5:28 PM, Chi Kang - NOAA Federal <chi.y.kang@noaa.gov> wrote:

Standing by :)

--

Chi Y Kang

Deputy Director for Operations (Acting), Cyber Security Division

Office of the Chief Information Officer

[\(301\) 628-5738](tel:3016285738), Chi.Y.Kang@noaa.gov

On Mar 9, 2017 2:40 PM, "Lola Stith - NOAA Affiliate" <lola.m.stith@noaa.gov> wrote:

Thank you for the reminder Jerry. (b)(5)

Thank you.

Lola

On Thu, Mar 9, 2017 at 2:10 PM, Jerome McNamara - NOAA Federal <jerome.mcnamara@noaa.gov>

wrote:

Lola,

(b)(5)

So I was not able to see how we answered last time.

FOIA Online is a frustrating system.

Jerry

On Thu, Mar 9, 2017 at 12:05 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Chi/Jerry - We have received task to respond to a DOC FOIA request for the following:

This is a request under the Freedom of Information Act. I hereby request the following records: - All incident reports about, concerning, or related to cyber attacks on the agency from January 1st 2010 to the date of this request [February 15, 2017]. Period of search is January 1, 2010 to February 15, 2017.

Chi (b)(5) Please let me know what you need from us to assist with this request. If there is someone else I should contact, please let me know.

Thank you very much.

R/

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6)

lola.m.stith@noaa.gov

--

Jerome.McNamara@noaa.gov

NOAA, Office of the Chief Information Officer

Governance and Portfolio Division

[\(301\) 628-5752](tel:(301)628-5752)

"The NOAA CIO Council's mission is to improve practices related to the design, acquisition, development, modernization, use, sharing, and performance of NOAA's information resources."

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov

--

Eric D. Williams <Eric.D.Williams@noaa.gov> - Sr. Security Engineer, Team Lead

NOAA Cyber Incident Response Team (N-CIRT) <ncirt@noaa.gov>

PGP Key: <https://www.csp.noaa.gov/ncirt.asc> (must remove spaces)

N-CIRT Hotline: [+1.301.713.9111](tel:+13017139111)

Direct Dial: [301-628-5773](tel:301-628-5773)

--

Eric D. Williams <Eric.D.Williams@noaa.gov> - Sr. Security Engineer, Team Lead

NOAA Cyber Incident Response Team (N-CIRT) <ncirt@noaa.gov>

PGP Key: <https://www.csp.noaa.gov/ncirt.asc> (must remove spaces)

N-CIRT Hotline: [+1.301.713.9111](tel:+13017139111)

Direct Dial: [301-628-5773](tel:301-628-5773)

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer and
Assistant Secretary for Administration
Washington, D.C. 20230

March 7, 2017

MEMORANDUM FOR: Gordon Keller, OCIO Vernon E. Curry, Census
 Pam Moulder, ESA Stephen Kong, EDA
 Jennifer Kuo, BIS Victor Powers, ITA
 Josephine Arnold, MBDA Catherine Fletcher, NIST
 Wayne Strickland, NTIS Stacy Cheney, NTIA
 Robert Swisher, NOAA Jennifer Piel, OIG
 Ricou Heaton, PTO Dondi Staunton, BEA

FROM: Michael Toland
 Departmental FOIA Officer
 Office of Privacy and Open Government

SUBJECT: FOIA Request from Joseph Cox
 - DOC-OS-2017-000628

(b) (5)

(b) (5)

(b)(5)



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer and
Assistant Secretary for Administration
Washington, D.C. 20230

March 15, 2017

MEMORANDUM FOR: Gordon Keller, OCIO

FROM: Michael Toland, Ph.D.
Departmental FOIA Officer
Office of Privacy & Open Government

SUBJECT: Fee Estimate for FOIA Request – DOC-OS-2017-000628
Joseph Cox

(b) (5)

(b) (5)

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Wednesday, March 29, 2017 3:27 PM
To: Stefan.C.Passantino@who.eop.gov
Cc: Ruth Ann Lowery - NOAA Federal; Myers, Jordan; Maria Williams - NOAA Federal; Lola Stith - NOAA Affiliate; Robert Swisher - NOAA Federal
Subject: FOIA Request Consultation in Litigation
Attachments: New Judicial Watch Request.pdf; Pages from 1st Interim Release Combined.pdf

Good Afternoon Stefan,



(b)(5) Thank you and best regards,

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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**Judicial
Watch**[®]
*Because no one
is above the law!*

February 6, 2017

VIA CERTIFIED MAIL

National Oceanographic and
Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Judicial Watch, Inc. (“Judicial Watch”) hereby requests that the National Oceanographic and Atmospheric Administration (“NOAA”) produce the following records pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”):

Any and all records of communication between NOAA scientist Thomas Karl and Director of the Office of Science and Technology Policy John Holdren.

The time frame for the requested records is January 20, 2009 through January 20, 2017.

Please determine whether to comply with this request within the time period required by FOIA and notify us immediately of your determination, the reasons therefor, and the right to appeal any adverse determination to the head of the agency or his or her designee. 5 U.S.C. § 552(a)(6)(i). Please also produce all responsive records in an electronic format (“pdf” is preferred), if convenient. We also are willing to accept a “rolling production” of responsive records if it will facilitate a more timely production.

Judicial Watch also hereby requests a waiver of both search and duplication fees. We are entitled to a waiver of search fees because we are a “representative of the news media.” *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also Cause of Action v. Federal Trade Comm.*, 799 F.3d 1108 (D.C. Cir. 2015); *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381 (D.C. Cir. 1989). For more than twenty years, Judicial Watch has used FOIA and other investigative tools to gather information about the operations and activities of government, a subject of undisputed public interest. We submit over 400 FOIA requests annually. Our personnel, which includes experienced journalists and professional writers on staff and under contract, use their editorial skills to turn this raw information into

NOAA FOIA Request

February 6, 2017

Page 2 of 3

distinct works that are disseminated to the public via our monthly newsletter, which has a circulation of over 300,000, weekly email update, which has over 600,000 subscribers, investigative bulletins, special reports, www.judicialwatch.org website, *Corruption Chronicles* blog, and social media, including Facebook and Twitter, among other distribution channels. We have authored several books, including *Corruption Chronicles* by Tom Fitton (Threshold Editions, July 24, 2012), and another book, *Clean House* by Tom Fitton (Threshold Editions, Aug. 30, 2016), is forthcoming. In 2012, we produced a documentary film, "District of Corruption," directed by Stephen K. Bannon. Our "news media" status has been confirmed in court rulings. See, e.g., *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000). As a tax exempt, 501(c)(3) non-profit corporation, we have no commercial interests and do not seek the requested records for any commercial use. Rather, we intend to use the requested records as part of our on-going investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

Judicial Watch also is entitled to a waiver of both search fees and duplication fees because "disclosure of the information is in the public interest." 5 U.S.C. § 552(a)(4)(A)(iii). Disclosure of the requested records undoubtedly will shed light on "the operations or activities of the government." *Cause of Action*, 799 F.3d at 1115 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Disclosure also is "likely to contribute significantly to the public understanding" of those operations or activities because, among other reasons, Judicial Watch intends to disseminate both the records and its findings to "a reasonably broad audience of persons interested in the subject" via its newsletter, email updates, investigative bulletins, website, blog, and its other, regular distribution channels. *Cause of Action*, 799 F.3d at 1116 (quoting *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994)). Again, Judicial Watch does not seek the requested records for any commercial benefit or for its own "primary" benefit, but instead seeks them as part of its ongoing investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

In the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch agrees to pay up to \$300.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5172 or bmarshall@judicialwatch.org.

Thank you for your cooperation.

NOAA FOIA Request
February 6, 2017
Page 3 of 3

Very respectfully,

A handwritten signature in black ink, appearing to read "William F. Marshall". The signature is fluid and cursive, with the first name "William" and last name "Marshall" clearly distinguishable.

William F. Marshall
Judicial Watch, Inc.

(b) (5)

From: Beverly Smith - NOAA Federal <beverly.smith@noaa.gov>
Sent: Wednesday, March 29, 2017 5:21 PM
To: Steven Goodman - NOAA Federal; Mark Graff - NOAA Federal
Cc: Samuel Dixon - NOAA Affiliate; Beverly Smith; Lola Stith - NOAA Affiliate
Subject: FOIA LAWSUIT Fwd: FW: Queen Conch record issues - DOC-NOAA-2015-000295
BARNES
Attachments: Jt Status Rpt & Mot Revised Sched - Ex A.pdf; Jt Status Rpt & Mot Revised Sched.pdf

For Your Information Only:

(b) (5)

If you need to speak with me Thursday-Friday, my cell i (b)(6) and I will be checking e-mails.

Bev.

----- Forwarded message -----

From: Michael Mclemore - NOAA Federal <michael.mclemore@noaa.gov>
Date: Wed, Mar 29, 2017 at 4:46 PM
Subject: Fwd: FW: Queen Conch record issues
To: Roy Crabtree <roy.crabtree@noaa.gov>, Andy Strelcheck <andy.strelcheck@noaa.gov>, Heather Blough <heather.blough@noaa.gov>, Lauren B Lugo <lauren.b.lugo@noaa.gov>, Beverly Smith <Beverly.Smith@noaa.gov>, John McGovern <john.mcgovern@noaa.gov>

FY (b)(5)

----- Forwarded message -----

From: Crable, Trent (ENRD) <Trent.Crable@usdoj.gov>
Date: Wed, Mar 29, 2017 at 2:50 PM
Subject: FW: Queen Conch record issues
To: Michael Mclemore - NOAA Federal <michael.mclemore@noaa.gov>

Hi Michael.

(b)(5)

Thanks.

Trent

From: Crable, Trent (ENRD)
Sent: Wednesday, March 29, 2017 2:47 PM
To: 'Iris Lowery - NOAA Federal' <iris.lowery@noaa.gov>
Subject: FW: Queen Conch record issues

FYI

From: Jennifer Best [<mailto:jennifer@friendsofanimals.org>]
Sent: Wednesday, March 29, 2017 2:43 PM
To: Crable, Trent (ENRD) <TCrable@ENRD.USDOJ.GOV>; Michael Harris <Michaelharris@friendsofanimals.org>
Cc: Courtney Mcvean <courtney.mcvean@friendsofanimals.org>
Subject: RE: Queen Conch record issues

Hi Trent,

I wanted to let you know that we filed a lawsuit and notice of related case for the Queen Conch FOIA. I attached a copy to this email.

Best Regards,

Jennifer

From: Crable, Trent (ENRD) [<mailto:Trent.Crable@usdoj.gov>]
Sent: Monday, March 27, 2017 2:34 PM
To: Michael Harris <Michaelharris@friendsofanimals.org>; Jennifer Best <jennifer@friendsofanimals.org>
Cc: Courtney Mcvean <courtney.mcvean@friendsofanimals.org>
Subject: RE: Queen Conch record issues

Thanks, Mike. I've sent the list to NOAA for their consideration.

Trent

From: Michael Harris [<mailto:Michaelharris@friendsofanimals.org>]
Sent: Monday, March 27, 2017 4:26 PM
To: Crable, Trent (ENRD) <TCrable@ENRD.USDOJ.GOV>; Jennifer Best <jennifer@friendsofanimals.org>
Cc: Courtney Mcvean <courtney.mcvean@friendsofanimals.org>
Subject: RE: Queen Conch record issues

Hi Trent,

Just wanted to let you know that we have reviewed most of the documents contained in the three post-AR (Jan. 10) interim FOIA releases that were sent to us. We have identified a number of documents that we would believe should be in the AR. I have attached a list. I am wondering what the agency's view on this might be. Do they agree? Also, where these documents included in what material was originally reviewed for compiling the record? My hope is if we can continue this discussion informally we can reduce or eliminate the issues that might need to be briefed in any motion to supplement.

Thank,

Mike

--

B. Michael McLemore, Section Chief
Southeast Section, NOAA General Counsel
263 13th Avenue S.
St. Petersburg, FL 33701
[727-824-5371](tel:727-824-5371)

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--

Beverly J. Smith
FOIA Coordinator
Southeast Region
NOAA's National Marine Fisheries Service
[727-551-5762](tel:727-551-5762)

Exhibit A

Documents to be Added to The Administrative Record In Case No. 16-CV-01540-RC

A. Documents provided in response to Plaintiffs' Freedom of Information Act Request.

2013_11_04 Invitation to participate on the Queen Conch extinction risk analysis team 2

2014_10_14 Queen Conch 2

email #46 Re Queen conch

email #53 Re Conservation actions sect of queen conch

email #56 Fwd Queen conch pop estimates

email #60 Fwd queen conch status report

email #73 Fwd Nassau grouper and queen conch listig petitions

email #81 Queen conch materials

email #89 Fwd Briefing on Nassau Grouper & Queen Conch

Queen Conch 12-Month Determination_GC1 (1)_DM

Queen Conch_6th Interim Release_p.501-711

Queen Conch_7th Interim Release_p.276

Queen Conch_7th Interim Release_pp.5-7

Queen Conch_7th Interim Release_pp.19-24

Queen Conch_7th Interim Release_pp.236-237

Queen Conch 12-Month Determination_GC1 (1)_DM.pdf

Re_ New QC memo

Re_ Queen conch

Re_ Report on queen conch meeting

Re_ the last of the information on queen conch

Re_ Verification of National Queen Conch Statistics

Roy_Spreadsheet

US Census Bureau Conch Import Data 1997-2012

B. Documents cited in Federal Defendants Not Warranted Finding.

Appeldoorn, RS. 1988c. Fishing pressure and reproductive potential in Stromboid conchs: is there a critical density for reproduction. *Memoria de la Sociedad de Ciencias Naturales La Salle*. No 3(XLVII): 275-288.

Appeldoorn, RS. 1994a. Queen conch management and research: Status, needs and priorities. Pages 301-320 in: RS Appeldoorn and B Rodriguez (eds.) *Queen conch biology, fisheries, and mariculture*. Fundación Científica Los Roques, Caracas, Venezuela.

Appeldoorn, RS. 1997. Deep Water Spatial Variability in the morphology of Queen Conch and its implication for management regulations. in: CFRAMP (ed.) *Lobster and Conch subproject specification and training workshop*. 9 to 12 October 1995, Kingston, Jamaica. CARICOM Fishery Research Document No 19.

Appeldoorn RS, E Castro Gonzalez, R Glazer and M Prada. 2011. Applying EBM to queen conch fisheries in the Caribbean. Pages 177-186 in: L Fanning, R Mahon and P. McConney (eds.) *Towards Marine Ecosystem-based Management in the Caribbean*.

Berg CJ Jr. and DA Olsen. 1989. Conservation and management of queen conch (*Strombus gigas*) fisheries in the Caribbean. Pages 421-442 in: JF Caddy (ed.) *Marine invertebrate fisheries: their assessment and management*. Wiley and Sons, New York.

Berg CJ Jr., J Ward, B Luckhurst, K Nisbet and F Couper. 1992a. Observations of breeding aggregations of the queen conch, *Strombus gigas*, in Bermuda. *Proceedings of the Gulf and Caribbean Fisheries Institute* 42: 161-171.

Brownell WN and JM Stevely. 1981. The biology, fisheries, and management of the queen conch, *Strombus gigas*. *Marine Fisheries Review*. 43: 1-12.

Carter *et al.* 1991 [cited in 12-month finding, 79 Fed. Reg. 65634]

Chakalall and Cochrane 1997 [cited in 12-month finding, 79 Fed. Reg. 65638]

CITES (Convention on International Trade in Endangered Species). 2006. Review of Significant Trade in *Strombus gigas*. 22nd Meeting of Animals Committee in Lima, Peru. 7-13 July 2006. AC22 Inf. 4.

de Jesus-Navarrete A and D Aldana-Aranda. 2000. Distribution and abundance of *Strombus gigas* veligers at six fishing sites of Banco Chinchorro, Quintana Roo, Mexico. *Journal of Shellfish Research*. 19(2): 891-895.

Delgado GA, CT Bartels, RA Glazer, NJ Brown-Peterson and KJ McCarthy. 2004. Translocation as a strategy to rehabilitate the queen conch (*Strombus gigas*) population in the Florida Keys. *Fishery Bulletin*. 102: 278-288.

Delgado GA, RA Glazer, D Hawtof, D Aldana Aranda, LA Rodriguez-Gil and A de Jesús-Navarrete. 2008. Do queen conch (*Strombus gigas*) larvae recruiting to the Florida Keys originate from upstream sources? Evidence from plankton and drifter studies. Pages 29-41 in: R Grober-Dunsmore and BD Keller (eds.) Caribbean connectivity: Implications for marine protected area management. Proceedings of a Special Symposium, 9-11 November 2006, 59th Annual Meeting of the Gulf and Caribbean Fisheries Institute, Belize City, Belize. Marine Sanctuaries Conservation Series ONMS-08-07. U.S. Department of Commerce. NOAA. Office of National Marine Sanctuaries. Silver Springs, MD.

Ehrhardt NM and M Valle-Esquivel. 2008. Conch (*Strombus gigas*) stock assessment manual. CFMC. San Juan PR. 128p.

Fabry *et al.* 2008 [cited in 12-month finding, 79 Fed. Reg. 65640]

Garibaldi 2012 [cited in 12-month finding, 79 Fed. Reg. 65636] [may be referring to Queen conch catches from FAO_Luca_Garibaldi_01312014]

Gascoigne and Lipcius 2004 [cited in 12-month finding, 79 Fed. Reg. 65632]

Glazer R and I Quintero. 1998. Observations on the sensitivity of queen conch to water quality: implications for coastal development. Proceedings of the Gulf and Caribbean Fisheries Institute 50: 78-93.

Glazer RA and GA Delgado. 2003. Towards a holistic strategy to managing Florida's queen conch (*Strombus gigas*) population. Pages 73-80 in: D Aldana Aranda (ed.) El caracol *Strombus gigas*: conocimiento integral para su manejo sustentable en el Caribe. CYTED, Programa Iberoamericano de Ciencia y Tecnología para el Desarrollo, Yucatán.

Glazer RA, GA Delgado, JA Kidney. 2003. Estimating queen conch (*Strombus gigas*) home ranges using acoustic telemetry: implications for the designs of marine fisheries reserves. Gulf and Caribbean Research. 14: 79-89.

McCarthy, K. 2008. A review of Queen Conch (*Strombus gigas*) life history. SEDAR 14-DW-4. National Marine Fishery Service, Southeast Fisheries Science Center, Sustainable Fisheries Division, Contribution SFD-2007-008. FL. 8 p

Meadows and Garcia-Moliner 2012 [cited in 12-month finding, 79 Fed. Reg. 65638]

Mitton JB, CJ Berg Jr. and KS Orr. 1989. Population structure larval dispersal, and gene flow in the queen conch, *Strombus gigas*, of the Caribbean. Biological Bulletin. 177: 356-362.

Mora *et al.* 2006 [cited in 12-month finding, 79 Fed. Reg. 65639]

Michael Ray Harris (DC Bar # C00049)
Friends of Animals
Wildlife Law Program
7500 E. Arapahoe Rd., Suite 385
Centennial, CO 80112
Tel: 720.949.7791
Fax: 888.236.3303
michaelharris@friendsofanimals.org

Attorney for Plaintiffs

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

FRIENDS OF ANIMALS,)
777 Post Road, Suite 205)
Darien, CT 06820; and)

CASE NO. 1:16-cv-01540-RC

WILDEARTH GUARDIANS,)
2590 Walnut Street)
Denver, CO 80205)

Plaintiffs,)

v.)

WILBUR ROSS,¹ in his official capacity)
as the Secretary of Commerce, U.S.)
Department of Commerce)
1401 Constitution Ave., NW)
Washington, D.C. 20230; and)

**JOINT STATUS REPORT AND MOTION FOR
A REVISED BRIEFING SCHEDULE**

NATIONAL OCEANIC AND)
ATMOSPHERIC ADMINISTRATION, an)
agency of the United States)
1401 Constitution Avenue, NW)
Washington, DC 20230)

Defendants.)

¹ Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Secretary of Commerce Wilbur Ross is substituted for Penny Pritzker.

² There is one document listed on Exhibit A that Defendants have not yet been able to locate. In the event Defendants cannot locate it in time to include it in the April 14

STATUS REPORT

Pursuant to the Court's March 17, 2017 Order, Plaintiffs, Friends of Animals and WildEarth Guardians (collectively, "Plaintiffs"), and Federal Defendants Wilbur Ross, in his official capacity as the Secretary of Commerce, and the National Oceanic and Atmospheric Administration (collectively, "Federal Defendants"), hereby jointly file the following status report and proposed briefing schedule regarding Plaintiffs planned motion for completion of the administrative record.

As the Court is aware, through this action Plaintiffs seek judicial review under Section 705 of the Administrative Procedure Act (APA) of the Federal Defendants' final determination and finding that listing the queen conch as endangered or threatened under the Endangered Species Act (ESA) is not warranted. *See* 79 Fed. Reg. 65628, Endangered and Threatened Wildlife and Plants: Notice of 12-Month Finding on a Petition To List the Queen Conch as Threatened or Endangered Under the Endangered Species Act (Nov. 5, 2014) (hereinafter, "12-Month Finding"). Accordingly, the parties agree that such review by the Court should generally be limited to the administrative record.

Pursuant to the October 19, 2016 Scheduling Order entered by the Court, Federal Defendants provided Plaintiffs a copy of the administrative record on January 10, 2017. *See* ECF No. 9; Minute Order of Oct. 19, 2016. As required by the Scheduling Order, on February 27, 2017, Plaintiffs provided Federal Defendants a letter that set out four (4) specific concerns regarding the completeness of that record. First, Plaintiffs noted numerous published works that had been expressly referenced in the 12-Month Finding or elsewhere as having been before the agency at the time the decision was made, but were not included in the January 10, 2017 record. Second, Plaintiffs raised concerns that many documents proffered as privileged had been, in their view, improperly redacted. Third, Plaintiffs requested further information be added to the privilege log that they believe is necessary

to allow Plaintiffs, and if necessary the Court, to determine the validity of asserted privileges. Finally, as explained more below, Plaintiffs believe that the record as provided on January 10, 2017, is generally incomplete as it may not include documents that were considered or otherwise before the agency during the decision-making process.

The parties have conferred extensively regarding these four (4) concerns. The Federal Defendants have agreed to produce, by April 14, 2017, additional documents identified by the Plaintiffs and a new privilege log to resolve the first three (3) of Plaintiffs' concerns. But the parties cannot reach agreement as to how Plaintiffs' final concern should be addressed. As such, the parties request an updated schedule allowing Federal Defendants time to include the additional documents and new privilege log as requested by Plaintiffs and briefing to resolve the parties remaining disputes over the completeness of the record.

PLAINTIFFS' POSITION REGARDING COMPLETENESS OF THE RECORD

As background, Plaintiffs' fourth concern regarding the completeness of the record involves a Freedom of Information Act (FOIA) request made on November 21, 2014, in which Friends of Animals and WildEarth Guardians asked the Department of Commerce for "all records in your possession, whether received, created, and/or distributed by NMFS, that the agency considered in making the initial positive 90-day finding on the petition as well as the final not warranted 12-month finding with respect to the Queen conch." To date, NMFS has not completed its response to Plaintiffs' FOIA request. Interim responses were provided on February 25, 2015; June 5, 2015; July 8, 2015; September 14, 2015; May 11, 2016; January 26, 2017; February 24, 2017; March 14, 2017; and March 21, 2017. The agency indicated that it has additional documents responsive to the FOIA request, and expects more releases in 2017.

In reviewing the FOIA documents provided by the agency after the record was produced in January, Plaintiffs have identified documents they believe should also be

contained in the administrative record. Plaintiffs' concern is that until NOAA completes its FOIA response, Plaintiffs will be unable to determine if the record in this case is complete. Plaintiffs are concerned that documents yet to be produced in response to the FOIA request might also need to be added to the record. Given this, Plaintiffs are reluctant to begin briefing the merits of this case until NOAA finalizes its response to the FOIA request.

It had been Plaintiffs' understanding to this point that the Federal Defendants generally understood Plaintiffs' concern, and were willing to allow NOAA to complete its responses to the FOIA request before requiring Plaintiff to accept completeness of the record and proceed with summary judgment briefing. Indeed, the parties had initially discussed jointly moving the Court to stay this action until sometime in July 2017. In fact, last Friday, March 17, 2017, Plaintiffs believed that the parties were essentially close to agreeing on a July 28, 2017 date for NOAA to complete its responses to the FOIA request.

On Monday, March 20, 2017, however, counsel for the Federal Defendants informed Plaintiffs that NOAA could not commit to finalizing the responses until the end of September 2017.

Plaintiffs' position is that it is not only unreasonable for the agency to demand nearly three years to complete the FOIA request, but also that NMFS should have already reviewed these yet to be released documents when it prepared the record provided on January 10, 2017—a date that it agreed to in Scheduling Order in this case. In any case, as the parties cannot agree how to resolve Plaintiffs' concern over completeness of the record, Plaintiffs intend to move the Court to compel completion of the record once the Federal Defendants provide additional documents and materials on April 14, 2017.

FEDERAL DEFENDANTS POSITION REGARDING COMPLETENESS OF THE RECORD

Federal Defendants consider the administrative record filed in this matter to be complete, and dispute Plaintiffs' position that the record as filed is incomplete. Of particular relevance here, Federal Defendants dispute that the scope of the administrative record in

this case is co-extensive with the scope of the full FOIA response. The FOIA request is far broader than just those documents the agency considered in making the 12-month finding challenged in this case. Nevertheless, in an effort to move the case forward they have agreed to supplement the administrative record with additional documents requested by Plaintiffs, and offered to stay briefing in this case until after all FOIA documents are produced to, and reviewed by, Plaintiffs. But the parties cannot agree upon a schedule for completion of the voluminous FOIA response. Federal Defendants require additional time, likely through the end of September, 2017, and Plaintiffs are unwilling to agree to time beyond an additional four months. The Federal Defendants have thus far provided nine interim releases of documents in response to Plaintiffs' FOIA request, and agency FOIA staff have not received any complaints from Plaintiffs regarding this approach to producing responsive records.

JOINT MOTION TO REVISE THE SCHEDULING ORDER

The parties agree that this action is an appeal under the Administrative Procedure Act. *See* LCvr 7(n). Due to the need to complete and certify the administrative record, the parties jointly propose that the case should proceed in the following manner:

- (1) Federal Defendants shall file a revised certified list of the contents of the administrative record and provide Plaintiffs a copy of the revised administrative record by April 14, 2017. The revised administrative record shall include the documents listed in Exhibit A as well as a revised privilege log.²
- (2) Plaintiffs shall file any motion to compel completion and/or supplement the agency record by April 28, 2017. Briefing of such motion shall proceed in accordance with local rules.

² There is one document listed on Exhibit A that Defendants have not yet been able to locate. In the event Defendants cannot locate it in time to include it in the April 14 supplement, they will contact Plaintiffs and discuss how to best address the issue.

(3) The parties will confer and propose a revised summary judgment briefing schedule to the Court within fourteen (14) days of resolution of any motion to compel completion and/or supplement the agency record.

CONCLUSION

For the reasons stated above, the parties request that the Court approve the briefing schedule, as set forth in the attached proposed order.

Dated: March 24, 2017

Respectfully Submitted,

Michael Ray Harris (DC Bar # C00049)
Friends of Animals
Wildlife Law Program
7500 E. Arapahoe Rd., Suite 385
Centennial, CO 80112
Tel: 720.949.7791
Fax: 888.236.3303
michaelharris@friendsofanimals.org

Attorney for Plaintiffs

JEFFREY H. WOOD,
Acting Assistant Attorney General

/s/ Trent S.W. Crable
Trent S.W. Crable,
Trial Attorney
Wildlife & Marine Resources Section
Environment & Natural Resources
Division United States Department of
Justice
P.O. Box 7611
Ben Franklin Station
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trent.crable@usdoj.gov

Attorneys for Federal Defendants

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

| | | |
|--|---|----------|
| FRIENDS OF ANIMALS, |) | |
| 777 Post Road, Suite 205 |) | |
| Darien, CT 06820; and |) | |
| |) | |
| WILDEARTH GUARDIANS, |) | CASE NO. |
| 2590 Walnut Street |) | |
| Denver, CO 80205 |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| WILBUR ROSS, in his official capacity as |) | |
| the Secretary of Commerce, U.S. |) | |
| Department of Commerce |) | |
| 1401 Constitution Ave., NW |) | |
| Washington, D.C. 20230; and |) | |
| |) | |
| NATIONAL OCEANIC AND |) | |
| ATMOSPHERIC ADMINISTRATION, an |) | |
| agency of the United States |) | |
| 1401 Constitution Avenue, NW |) | |
| Washington, DC 20230 |) | |
| |) | |
| Defendants. |) | |

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. Plaintiffs Friends of Animals and WildEarth Guardians bring this action to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et. seq.* Specifically, Plaintiffs challenge the failure of Defendants, Wilbur Ross, in his official capacity as the Secretary of Commerce and the National Oceanic and Atmospheric Administration (NOAA) to provide responsive documents within the time required under

FOIA regarding Plaintiffs' November 21, 2014 request for information (hereinafter "Request").

2. Plaintiffs requested all records considered by NOAA in determining that the queen conch (*Strombus gigas*) does not warrant listing under the Endangered Species Act (ESA).

3. Federal Defendants released interim responses on February 25, 2015; June 5, 2015; July 8, 2015; September 14, 2015; June 1, 2016; January 26, 2017; February 24, 2017; March 14, 2017; and March 21, 2017.¹

4. As of the date of this Complaint, Federal Defendants have not issued a final determination in response to Plaintiffs' Request.

5. Federal Defendants are unlawfully withholding public disclosure of information that Plaintiffs are entitled to receive under FOIA. Defendants failed to comply with the statutory mandates and deadlines imposed by FOIA by failing to provide a final determination resolving this Request within the time required by law. Accordingly, Plaintiffs seek declaratory relief establishing that Defendants have violated FOIA. Plaintiffs also seek injunctive relief directing Defendants to promptly provide the requested material free of cost.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question). This Court may grant the declaratory relief under 28 U.S.C. §§ 2201, *et seq.* (Declaratory Judgment Act) and injunctive relief under 5 U.S.C. § 552(a)(4)(B) (FOIA). An actual, justiciable controversy exists within the meaning of the Declaratory Judgment Act between Plaintiffs and Defendants. The Court has

¹ These reflect the dates that Plaintiffs first received responses via email. However, the June 1, 2016 release is dated May 11, 2016; the January 26, 2017 release is dated November 2, 2016; the February 24, 2017 release is dated February 1, 2017; the March 14, 2017 release is dated March 1, 2017; and the March 21, 2017 release is dated March 14, 2017.

jurisdiction, upon receipt of a complaint, “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

7. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district.

PARTIES

8. Plaintiff, Friends of Animals, is a not-for-profit international advocacy organization with nearly 200,000 members, incorporated in the state of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues as well as the organization’s progress in addressing these issues through its magazine called ActionLine, its website, and other reports. Friends of Animals has published articles and information advocating for the protection of wild species so that they can live unfettered in their natural habitats. Friends of Animals regularly submits request under FOIA to further its goals and mission.

9. Plaintiff, WildEarth Guardians (“Guardians”), is a not-for-profit conservation organization incorporated in the state of New Mexico since 1989, with offices in New Mexico, Arizona, Colorado, Montana, Oregon, California, and Wyoming. Guardians protects and restores the wildlife, wild places, wild rivers, and the health of the American West. Guardians advocates for imperiled species to receive the strong legal protections of the ESA. Through its “Wild Oceans” campaign, Guardians has launched an effort to list imperiled marine species under the ESA in order to stem the extinction crisis in the oceans brought on by human exploitation, habitat destruction, and climate change.

10. Defendant National Oceanic and Atmospheric Administration is an agency within the meaning of 5 U.S.C. § 552(f). NOAA is responsible for fulfilling Plaintiffs' Request and complying with all federal laws.

11. Defendant Ross Wilbur, in his official capacity as Secretary of Commerce, has ultimate responsibility for NOAA and ensuring the agency complies with federal law.

LEGAL FRAMEWORK

A. Freedom of Information Act.

12. Congress enacted FOIA to ensure public access to U.S. government records. FOIA carries a presumption of disclosure. The burden is on the government—not the public—to substantiate why information may not be released. Upon written request, agencies of the United States government are required to disclose their records, unless they can be lawfully withheld from disclosure under one of nine specific exemptions in FOIA.

13. FOIA requires agencies to “determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A).

14. On determination by an agency to comply with the request, the records shall be made “promptly available.” *Id.* at § 552(a)(6)(C).

15. In “unusual circumstances” an agency may extend the time limits for up to ten working days by providing written notice to the requester setting forth the unusual circumstance and the date on which the determination is expected to be dispatched. *Id.* at § 552(a)(6)(B). With respect to a request for which a written notice purports to apply the “unusual circumstances,” the agency must: (1) notify the requester if the request cannot be processed within the time limit specified in that clause, and (2) provide the requester an opportunity to limit the scope of the request so that it may be processed within that time

limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *Id.*

16. If the agency fails to complete its response to a request within twenty workdays, the requester is deemed to have constructively exhausted administrative remedies and may seek judicial review. 5 U.S.C. § 552 (a)(6)(C)(i).

17. Additionally, if the agency fails to comply with the statutory time limit it cannot assess search fees. 5 U.S.C. § 552(a)(4)(A)(viii).

FACTUAL BACKGROUND

18. Plaintiffs submitted its Request under FOIA to NOAA on November 21, 2014.

19. Plaintiffs requested “all records in [the agency’s] possession, whether received, created, and/or distributed by NMFS, that the agency considered in making the initial positive 90-day finding on the petition as well as the final not warranted 12-month finding with respect to the Queen conch.”

20. Friends of Animals received acknowledgment from NOAA confirming that the agency received the Request on November 25, 2014.

21. FOIA’s twenty-workday deadline for responding to Plaintiffs’ Request passed on December 24, 2014.

22. NOAA did not respond by December 24, 2014.

23. NOAA provided interim responses on February 25, 2015; June 5, 2015; July 8, 2015; September 14, 2015; May 11, 2016; January 26, 2017; February 24, 2017; March 14, 2017; and March 21, 2017.²

24. As of the date of this Complaint, NOAA has still not made a final determination in response to Plaintiffs’ FOIA Request.

² Some of the dates listed on the release did not match the date the agency sent the releases to Plaintiffs. *See supra* note 1.

25. NOAA has offered no reasonable explanation for its delay, and it has failed to provide a specific date for when it will finally be able to comply with its obligations under FOIA.

26. NOAA is unlawfully withholding public disclosure of information sought by Plaintiffs, information to which Plaintiffs are entitled to receive, and for which NOAA has not provided a valid disclosure exemption.

CAUSE OF ACTION
(Violation of Freedom of Information Act)

27. Plaintiffs herein incorporate all allegations contained in the proceeding paragraphs.

28. Plaintiffs properly requested records within the control of Defendants.

29. Defendants have failed to fully release the records Plaintiffs requested and failed to make any claims of statutory exemption regarding the requested records.

30. Accordingly, Plaintiffs are entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested.

PRAYER FOR RELIEF

Plaintiffs respectfully requests that the Court enter judgment providing the following relief:

1. Declare that Defendants violated the Freedom of Information Act by failing to lawfully satisfy, in full, Plaintiffs' Request under the Freedom of Information Act;
2. Order Defendants to process and release immediately all records responsive to Plaintiffs' Request at no cost to Plaintiffs;
3. Retain jurisdiction of this action to ensure the processing of Plaintiffs' Request, and to ensure that no agency records are wrongfully withheld;
4. Award Plaintiffs costs, including reasonable attorney fees and litigation costs in this action, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(E); and
5. Grant Plaintiffs any other relief that the Court deems just and proper.

Dated: March 29, 2017 Respectfully Submitted,

/s/ Jennifer Best
Jennifer Best (DC Bar # C00056)
Assistant Director, Wildlife Law Program
Friends of Animals
Western Region Office
7500 E. Arapahoe Road, Suite 385
Centennial, CO 80112
720-949-7791
jennifer@friendsofanimals.org

/s/ Michael Harris
Michael Ray Harris (DC Bar # C00049)
Director, Wildlife Law Program
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CLERK'S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOTICE OF DESIGNATION OF RELATED CIVIL CASES PENDING
IN THIS OR ANY OTHER UNITED STATES COURT

Civil Action No. _____
(To be supplied by the Clerk)

NOTICE TO PARTIES:

Pursuant to Rule 40.5(b)(2), you are required to prepare and submit this form at the time of filing any civil action which is related to any pending cases or which involves the same parties and relates to the same subject matter of any dismissed related cases. This form must be prepared in sufficient quantity to provide one copy for the Clerk's records, one copy for the Judge to whom the cases is assigned and one copy for each defendant, so that you must prepare 3 copies for a one defendant case, 4 copies for a two defendant case, etc.

NOTICE TO DEFENDANT:

Rule 40.5(b)(2) of this Court requires that you serve upon the plaintiff and file with your first responsive pleading or motion any objection you have to the related case designation.

NOTICE TO ALL COUNSEL

Rule 40.5(b)(3) of this Court requires that as soon as an attorney for a party becomes aware of the existence of a related case or cases, such attorney shall immediately notify, in writing, the Judges on whose calendars the cases appear and shall serve such notice on counsel for all other parties.

The plaintiff, defendant or counsel must complete the following:

I. RELATIONSHIP OF NEW CASE TO PENDING RELATED CASE(S).

A new case is deemed related to a case pending in this or another U.S. Court if the new case: [Check appropriate box(e's) below.]

- (a) relates to common property
- (b) involves common issues of fact
- (c) grows out of the same event or transaction
- (d) involves the validity or infringement of the same patent
- (e) is filed by the same pro se litigant

2. RELATIONSHIP OF NEW CASE TO DISMISSED RELATED CASE(ES)

A new case is deemed related to a case dismissed, with or without prejudice, in this or any other U.S. Court, if the new case involves the same parties and same subject matter.

Check box if new case is related to a dismissed case:

3. NAME THE UNITED STATES COURT IN WHICH THE RELATED CASE IS FILED (IF OTHER THAN THIS COURT):

4. CAPTION AND CASE NUMBER OF RELATED CASE(E'S). IF MORE ROOM IS NEED PLEASE USE OTHER SIDE.

Friends of Animals et al. v. Pritzker et al C.A. No. 16-cv-1540

3/28/2017
DATE

Joseph Best
Signature of Plaintiff/Defendant (or counsel)

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Thursday, March 30, 2017 7:36 AM
To: Robert Swisher - NOAA Federal; Dennis Morgan - NOAA Federal
Cc: Lola Stith - NOAA Affiliate
Subject: Fwd: FOIA LAWSUIT Fwd: FW: Queen Conch record issues - DOC-NOAA-2015-000295 BARNES
Attachments: Jt Status Rpt & Mot Revised Sched - Ex A.pdf; Jt Status Rpt & Mot Revised Sched.pdf

Another lawsuit (b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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----- Forwarded message -----

From: Beverly Smith - NOAA Federal <beverly.smith@noaa.gov>
Date: Wed, Mar 29, 2017 at 5:21 PM
Subject: FOIA LAWSUIT Fwd: FW: Queen Conch record issues - DOC-NOAA-2015-000295 BARNES
To: Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>, Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Cc: Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>, Beverly Smith <beverly.smith@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

For Your Information Only:

(b)(5)

(b)(5)

(b)(5)

If you need to speak with me Thursday-Friday, my cell i (b)(6) and I will be checking e-mails.

Bev.

----- Forwarded message -----

From: **Michael Mclemore - NOAA Federal** <michael.mclemore@noaa.gov>

Date: Wed, Mar 29, 2017 at 4:46 PM

Subject: Fwd: FW: Queen Conch record issues

To: Roy Crabtree <roy.crabtree@noaa.gov>, Andy Strelcheck <andy.strelcheck@noaa.gov>, Heather Blough <heather.blough@noaa.gov>, Lauren B Lugo <lauren.b.lugo@noaa.gov>, Beverly Smith <Beverly.Smith@noaa.gov>, John McGovern <john.mcgovern@noaa.gov>

(b)(5)
[Redacted]

----- Forwarded message -----

From: **Crable, Trent (ENRD)** <Trent.Crable@usdoj.gov>

Date: Wed, Mar 29, 2017 at 2:50 PM

Subject: FW: Queen Conch record issues

To: Michael Mclemore - NOAA Federal <michael.mclemore@noaa.gov>

Hi Michael.

(b)(5)
[Redacted]

Thanks.

Trent

From: Crable, Trent (ENRD)
Sent: Wednesday, March 29, 2017 2:47 PM
To: 'Iris Lowery - NOAA Federal' <iris.lowery@noaa.gov>
Subject: FW: Queen Conch record issues

FYI

From: Jennifer Best [<mailto:jennifer@friendsofanimals.org>]
Sent: Wednesday, March 29, 2017 2:43 PM
To: Crable, Trent (ENRD) <TCrable@ENRD.USDOJ.GOV>; Michael Harris <Michaelharris@friendsofanimals.org>
Cc: Courtney Mcvean <courtney.mcvean@friendsofanimals.org>
Subject: RE: Queen Conch record issues

Hi Trent,

I wanted to let you know that we filed a lawsuit and notice of related case for the Queen Conch FOIA. I attached a copy to this email.

Best Regards,

Jennifer

From: Crable, Trent (ENRD) [<mailto:Trent.Crable@usdoj.gov>]
Sent: Monday, March 27, 2017 2:34 PM
To: Michael Harris <Michaelharris@friendsofanimals.org>; Jennifer Best <jennifer@friendsofanimals.org>
Cc: Courtney Mcvean <courtney.mcvean@friendsofanimals.org>
Subject: RE: Queen Conch record issues

Thanks, Mike. I've sent the list to NOAA for their consideration.

Trent

From: Michael Harris [<mailto:Michaelharris@friendsofanimals.org>]
Sent: Monday, March 27, 2017 4:26 PM
To: Crable, Trent (ENRD) <TCrable@ENRD.USDOJ.GOV>; Jennifer Best <jennifer@friendsofanimals.org>
Cc: Courtney Mcvean <courtney.mcvean@friendsofanimals.org>
Subject: RE: Queen Conch record issues

Hi Trent,

Just wanted to let you know that we have reviewed most of the documents contained in the three post-AR (Jan. 10) interim FOIA releases that were sent to us. We have identified a number of documents that we would believe should be in the AR. I have attached a list. I am wondering what the agency's view on this might be. Do they agree? Also, where

these documents included in what material was originally reviewed for compiling the record? My hope is if we can continue this discussion informally we can reduce or eliminate the issues that might need to be briefed in any motion to supplement.

Thank,

Mike

--

B. Michael McLemore, Section Chief
Southeast Section, NOAA General Counsel
263 13th Avenue S.
St. Petersburg, FL 33701
[727-824-5371](tel:727-824-5371)

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--

Beverly J. Smith
FOIA Coordinator
Southeast Region
NOAA's National Marine Fisheries Service
[727-551-5762](tel:727-551-5762)

Exhibit A

Documents to be Added to The Administrative Record In Case No. 16-CV-01540-RC

A. Documents provided in response to Plaintiffs' Freedom of Information Act Request.

2013_11_04 Invitation to participate on the Queen Conch extinction risk analysis team 2

2014_10_14 Queen Conch 2

email #46 Re Queen conch

email #53 Re Conservation actions sect of queen conch

email #56 Fwd Queen conch pop estimates

email #60 Fwd queen conch status report

email #73 Fwd Nassau grouper and queen conch listig petitions

email #81 Queen conch materials

email #89 Fwd Briefing on Nassau Grouper & Queen Conch

Queen Conch 12-Month Determination_GC1 (1)_DM

Queen Conch_6th Interim Release_p.501-711

Queen Conch_7th Interim Release_p.276

Queen Conch_7th Interim Release_pp.5-7

Queen Conch_7th Interim Release_pp.19-24

Queen Conch_7th Interim Release_pp.236-237

Queen Conch 12-Month Determination_GC1 (1)_DM.pdf

Re_ New QC memo

Re_ Queen conch

Re_ Report on queen conch meeting

Re_ the last of the information on queen conch

Re_ Verification of National Queen Conch Statistics

Roy_Spreadsheet

US Census Bureau Conch Import Data 1997-2012

B. Documents cited in Federal Defendants Not Warranted Finding.

Appeldoorn, RS. 1988c. Fishing pressure and reproductive potential in Stromboid conchs: is there a critical density for reproduction. *Memoria de la Sociedad de Ciencias Naturales La Salle*. No 3(XLVII): 275-288.

Appeldoorn, RS. 1994a. Queen conch management and research: Status, needs and priorities. Pages 301-320 in: RS Appeldoorn and B Rodriguez (eds.) *Queen conch biology, fisheries, and mariculture*. Fundación Científica Los Roques, Caracas, Venezuela.

Appeldoorn, RS. 1997. Deep Water Spatial Variability in the morphology of Queen Conch and its implication for management regulations. in: CFRAMP (ed.) *Lobster and Conch subproject specification and training workshop*. 9 to 12 October 1995, Kingston, Jamaica. CARICOM Fishery Research Document No 19.

Appeldoorn RS, E Castro Gonzalez, R Glazer and M Prada. 2011. Applying EBM to queen conch fisheries in the Caribbean. Pages 177-186 in: L Fanning, R Mahon and P. McConney (eds.) *Towards Marine Ecosystem-based Management in the Caribbean*.

Berg CJ Jr. and DA Olsen. 1989. Conservation and management of queen conch (*Strombus gigas*) fisheries in the Caribbean. Pages 421-442 in: JF Caddy (ed.) *Marine invertebrate fisheries: their assessment and management*. Wiley and Sons, New York.

Berg CJ Jr., J Ward, B Luckhurst, K Nisbet and F Couper. 1992a. Observations of breeding aggregations of the queen conch, *Strombus gigas*, in Bermuda. *Proceedings of the Gulf and Caribbean Fisheries Institute* 42: 161-171.

Brownell WN and JM Stevely. 1981. The biology, fisheries, and management of the queen conch, *Strombus gigas*. *Marine Fisheries Review*. 43: 1-12.

Carter *et al.* 1991 [cited in 12-month finding, 79 Fed. Reg. 65634]

Chakalall and Cochrane 1997 [cited in 12-month finding, 79 Fed. Reg. 65638]

CITES (Convention on International Trade in Endangered Species). 2006. Review of Significant Trade in *Strombus gigas*. 22nd Meeting of Animals Committee in Lima, Peru. 7-13 July 2006. AC22 Inf. 4.

de Jesus-Navarrete A and D Aldana-Aranda. 2000. Distribution and abundance of *Strombus gigas* veligers at six fishing sites of Banco Chinchorro, Quintana Roo, Mexico. *Journal of Shellfish Research*. 19(2): 891-895.

Delgado GA, CT Bartels, RA Glazer, NJ Brown-Peterson and KJ McCarthy. 2004. Translocation as a strategy to rehabilitate the queen conch (*Strombus gigas*) population in the Florida Keys. *Fishery Bulletin*. 102: 278-288.

Delgado GA, RA Glazer, D Hawtof, D Aldana Aranda, LA Rodriguez-Gil and A de Jesús-Navarrete. 2008. Do queen conch (*Strombus gigas*) larvae recruiting to the Florida Keys originate from upstream sources? Evidence from plankton and drifter studies. Pages 29-41 in: R Grober-Dunsmore and BD Keller (eds.) Caribbean connectivity: Implications for marine protected area management. Proceedings of a Special Symposium, 9-11 November 2006, 59th Annual Meeting of the Gulf and Caribbean Fisheries Institute, Belize City, Belize. Marine Sanctuaries Conservation Series ONMS-08-07. U.S. Department of Commerce. NOAA. Office of National Marine Sanctuaries. Silver Springs, MD.

Ehrhardt NM and M Valle-Esquivel. 2008. Conch (*Strombus gigas*) stock assessment manual. CFMC. San Juan PR. 128p.

Fabry *et al.* 2008 [cited in 12-month finding, 79 Fed. Reg. 65640]

Garibaldi 2012 [cited in 12-month finding, 79 Fed. Reg. 65636] [may be referring to Queen conch catches from FAO_Luca_Garibaldi_01312014]

Gascoigne and Lipcius 2004 [cited in 12-month finding, 79 Fed. Reg. 65632]

Glazer R and I Quintero. 1998. Observations on the sensitivity of queen conch to water quality: implications for coastal development. Proceedings of the Gulf and Caribbean Fisheries Institute 50: 78-93.

Glazer RA and GA Delgado. 2003. Towards a holistic strategy to managing Florida's queen conch (*Strombus gigas*) population. Pages 73-80 in: D Aldana Aranda (ed.) El caracol *Strombus gigas*: conocimiento integral para su manejo sustentable en el Caribe. CYTED, Programa Iberoamericano de Ciencia y Tecnología para el Desarrollo, Yucatán.

Glazer RA, GA Delgado, JA Kidney. 2003. Estimating queen conch (*Strombus gigas*) home ranges using acoustic telemetry: implications for the designs of marine fisheries reserves. Gulf and Caribbean Research. 14: 79-89.

McCarthy, K. 2008. A review of Queen Conch (*Strombus gigas*) life history. SEDAR 14-DW-4. National Marine Fishery Service, Southeast Fisheries Science Center, Sustainable Fisheries Division, Contribution SFD-2007-008. FL. 8 p

Meadows and Garcia-Moliner 2012 [cited in 12-month finding, 79 Fed. Reg. 65638]

Mitton JB, CJ Berg Jr. and KS Orr. 1989. Population structure larval dispersal, and gene flow in the queen conch, *Strombus gigas*, of the Caribbean. Biological Bulletin. 177: 356-362.

Mora *et al.* 2006 [cited in 12-month finding, 79 Fed. Reg. 65639]

Michael Ray Harris (DC Bar # C00049)
Friends of Animals
Wildlife Law Program
7500 E. Arapahoe Rd., Suite 385
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Tel: 720.949.7791
Fax: 888.236.3303
michaelharris@friendsofanimals.org

Attorney for Plaintiffs

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

FRIENDS OF ANIMALS,)
777 Post Road, Suite 205)
Darien, CT 06820; and)

CASE NO. 1:16-cv-01540-RC

WILDEARTH GUARDIANS,)
2590 Walnut Street)
Denver, CO 80205)

Plaintiffs,)

v.)

WILBUR ROSS,¹ in his official capacity)
as the Secretary of Commerce, U.S.)
Department of Commerce)
1401 Constitution Ave., NW)
Washington, D.C. 20230; and)

**JOINT STATUS REPORT AND MOTION FOR
A REVISED BRIEFING SCHEDULE**

NATIONAL OCEANIC AND)
ATMOSPHERIC ADMINISTRATION, an)
agency of the United States)
1401 Constitution Avenue, NW)
Washington, DC 20230)

Defendants.)

¹ Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Secretary of Commerce Wilbur Ross is substituted for Penny Pritzker.

² There is one document listed on Exhibit A that Defendants have not yet been able to locate. In the event Defendants cannot locate it in time to include it in the April 14

STATUS REPORT

Pursuant to the Court's March 17, 2017 Order, Plaintiffs, Friends of Animals and WildEarth Guardians (collectively, "Plaintiffs"), and Federal Defendants Wilbur Ross, in his official capacity as the Secretary of Commerce, and the National Oceanic and Atmospheric Administration (collectively, "Federal Defendants"), hereby jointly file the following status report and proposed briefing schedule regarding Plaintiffs planned motion for completion of the administrative record.

As the Court is aware, through this action Plaintiffs seek judicial review under Section 705 of the Administrative Procedure Act (APA) of the Federal Defendants' final determination and finding that listing the queen conch as endangered or threatened under the Endangered Species Act (ESA) is not warranted. *See* 79 Fed. Reg. 65628, Endangered and Threatened Wildlife and Plants: Notice of 12-Month Finding on a Petition To List the Queen Conch as Threatened or Endangered Under the Endangered Species Act (Nov. 5, 2014) (hereinafter, "12-Month Finding"). Accordingly, the parties agree that such review by the Court should generally be limited to the administrative record.

Pursuant to the October 19, 2016 Scheduling Order entered by the Court, Federal Defendants provided Plaintiffs a copy of the administrative record on January 10, 2017. *See* ECF No. 9; Minute Order of Oct. 19, 2016. As required by the Scheduling Order, on February 27, 2017, Plaintiffs provided Federal Defendants a letter that set out four (4) specific concerns regarding the completeness of that record. First, Plaintiffs noted numerous published works that had been expressly referenced in the 12-Month Finding or elsewhere as having been before the agency at the time the decision was made, but were not included in the January 10, 2017 record. Second, Plaintiffs raised concerns that many documents proffered as privileged had been, in their view, improperly redacted. Third, Plaintiffs requested further information be added to the privilege log that they believe is necessary

to allow Plaintiffs, and if necessary the Court, to determine the validity of asserted privileges. Finally, as explained more below, Plaintiffs believe that the record as provided on January 10, 2017, is generally incomplete as it may not include documents that were considered or otherwise before the agency during the decision-making process.

The parties have conferred extensively regarding these four (4) concerns. The Federal Defendants have agreed to produce, by April 14, 2017, additional documents identified by the Plaintiffs and a new privilege log to resolve the first three (3) of Plaintiffs' concerns. But the parties cannot reach agreement as to how Plaintiffs' final concern should be addressed. As such, the parties request an updated schedule allowing Federal Defendants time to include the additional documents and new privilege log as requested by Plaintiffs and briefing to resolve the parties remaining disputes over the completeness of the record.

PLAINTIFFS' POSITION REGARDING COMPLETENESS OF THE RECORD

As background, Plaintiffs' fourth concern regarding the completeness of the record involves a Freedom of Information Act (FOIA) request made on November 21, 2014, in which Friends of Animals and WildEarth Guardians asked the Department of Commerce for "all records in your possession, whether received, created, and/or distributed by NMFS, that the agency considered in making the initial positive 90-day finding on the petition as well as the final not warranted 12-month finding with respect to the Queen conch." To date, NMFS has not completed its response to Plaintiffs' FOIA request. Interim responses were provided on February 25, 2015; June 5, 2015; July 8, 2015; September 14, 2015; May 11, 2016; January 26, 2017; February 24, 2017; March 14, 2017; and March 21, 2017. The agency indicated that it has additional documents responsive to the FOIA request, and expects more releases in 2017.

In reviewing the FOIA documents provided by the agency after the record was produced in January, Plaintiffs have identified documents they believe should also be

contained in the administrative record. Plaintiffs' concern is that until NOAA completes its FOIA response, Plaintiffs will be unable to determine if the record in this case is complete. Plaintiffs are concerned that documents yet to be produced in response to the FOIA request might also need to be added to the record. Given this, Plaintiffs are reluctant to begin briefing the merits of this case until NOAA finalizes its response to the FOIA request.

It had been Plaintiffs' understanding to this point that the Federal Defendants generally understood Plaintiffs' concern, and were willing to allow NOAA to complete its responses to the FOIA request before requiring Plaintiff to accept completeness of the record and proceed with summary judgment briefing. Indeed, the parties had initially discussed jointly moving the Court to stay this action until sometime in July 2017. In fact, last Friday, March 17, 2017, Plaintiffs believed that the parties were essentially close to agreeing on a July 28, 2017 date for NOAA to complete its responses to the FOIA request.

On Monday, March 20, 2017, however, counsel for the Federal Defendants informed Plaintiffs that NOAA could not commit to finalizing the responses until the end of September 2017.

Plaintiffs' position is that it is not only unreasonable for the agency to demand nearly three years to complete the FOIA request, but also that NMFS should have already reviewed these yet to be released documents when it prepared the record provided on January 10, 2017—a date that it agreed to in Scheduling Order in this case. In any case, as the parties cannot agree how to resolve Plaintiffs' concern over completeness of the record, Plaintiffs intend to move the Court to compel completion of the record once the Federal Defendants provide additional documents and materials on April 14, 2017.

FEDERAL DEFENDANTS POSITION REGARDING COMPLETENESS OF THE RECORD

Federal Defendants consider the administrative record filed in this matter to be complete, and dispute Plaintiffs' position that the record as filed is incomplete. Of particular relevance here, Federal Defendants dispute that the scope of the administrative record in

this case is co-extensive with the scope of the full FOIA response. The FOIA request is far broader than just those documents the agency considered in making the 12-month finding challenged in this case. Nevertheless, in an effort to move the case forward they have agreed to supplement the administrative record with additional documents requested by Plaintiffs, and offered to stay briefing in this case until after all FOIA documents are produced to, and reviewed by, Plaintiffs. But the parties cannot agree upon a schedule for completion of the voluminous FOIA response. Federal Defendants require additional time, likely through the end of September, 2017, and Plaintiffs are unwilling to agree to time beyond an additional four months. The Federal Defendants have thus far provided nine interim releases of documents in response to Plaintiffs' FOIA request, and agency FOIA staff have not received any complaints from Plaintiffs regarding this approach to producing responsive records.

JOINT MOTION TO REVISE THE SCHEDULING ORDER

The parties agree that this action is an appeal under the Administrative Procedure Act. *See* LCvr 7(n). Due to the need to complete and certify the administrative record, the parties jointly propose that the case should proceed in the following manner:

- (1) Federal Defendants shall file a revised certified list of the contents of the administrative record and provide Plaintiffs a copy of the revised administrative record by April 14, 2017. The revised administrative record shall include the documents listed in Exhibit A as well as a revised privilege log.²
- (2) Plaintiffs shall file any motion to compel completion and/or supplement the agency record by April 28, 2017. Briefing of such motion shall proceed in accordance with local rules.

² There is one document listed on Exhibit A that Defendants have not yet been able to locate. In the event Defendants cannot locate it in time to include it in the April 14 supplement, they will contact Plaintiffs and discuss how to best address the issue.

(3) The parties will confer and propose a revised summary judgment briefing schedule to the Court within fourteen (14) days of resolution of any motion to compel completion and/or supplement the agency record.

CONCLUSION

For the reasons stated above, the parties request that the Court approve the briefing schedule, as set forth in the attached proposed order.

Dated: March 24, 2017

Respectfully Submitted,

Michael Ray Harris (DC Bar # C00049)
Friends of Animals
Wildlife Law Program
7500 E. Arapahoe Rd., Suite 385
Centennial, CO 80112
Tel: 720.949.7791
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Attorney for Plaintiffs

JEFFREY H. WOOD,
Acting Assistant Attorney General

/s/ Trent S.W. Crable
Trent S.W. Crable,
Trial Attorney
Wildlife & Marine Resources Section
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Washington, DC 20044-7611
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Fax: (202) 305-0275
trent.crable@usdoj.gov

Attorneys for Federal Defendants

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

| | | |
|--|---|----------|
| FRIENDS OF ANIMALS, |) | |
| 777 Post Road, Suite 205 |) | |
| Darien, CT 06820; and |) | |
| |) | |
| WILDEARTH GUARDIANS, |) | CASE NO. |
| 2590 Walnut Street |) | |
| Denver, CO 80205 |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| WILBUR ROSS, in his official capacity as |) | |
| the Secretary of Commerce, U.S. |) | |
| Department of Commerce |) | |
| 1401 Constitution Ave., NW |) | |
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| |) | |
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| agency of the United States |) | |
| 1401 Constitution Avenue, NW |) | |
| Washington, DC 20230 |) | |
| |) | |
| Defendants. |) | |

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. Plaintiffs Friends of Animals and WildEarth Guardians bring this action to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et. seq.* Specifically, Plaintiffs challenge the failure of Defendants, Wilbur Ross, in his official capacity as the Secretary of Commerce and the National Oceanic and Atmospheric Administration (NOAA) to provide responsive documents within the time required under

FOIA regarding Plaintiffs' November 21, 2014 request for information (hereinafter "Request").

2. Plaintiffs requested all records considered by NOAA in determining that the queen conch (*Strombus gigas*) does not warrant listing under the Endangered Species Act (ESA).

3. Federal Defendants released interim responses on February 25, 2015; June 5, 2015; July 8, 2015; September 14, 2015; June 1, 2016; January 26, 2017; February 24, 2017; March 14, 2017; and March 21, 2017.¹

4. As of the date of this Complaint, Federal Defendants have not issued a final determination in response to Plaintiffs' Request.

5. Federal Defendants are unlawfully withholding public disclosure of information that Plaintiffs are entitled to receive under FOIA. Defendants failed to comply with the statutory mandates and deadlines imposed by FOIA by failing to provide a final determination resolving this Request within the time required by law. Accordingly, Plaintiffs seek declaratory relief establishing that Defendants have violated FOIA. Plaintiffs also seek injunctive relief directing Defendants to promptly provide the requested material free of cost.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question). This Court may grant the declaratory relief under 28 U.S.C. §§ 2201, *et seq.* (Declaratory Judgment Act) and injunctive relief under 5 U.S.C. § 552(a)(4)(B) (FOIA). An actual, justiciable controversy exists within the meaning of the Declaratory Judgment Act between Plaintiffs and Defendants. The Court has

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jurisdiction, upon receipt of a complaint, “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

7. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district.

PARTIES

8. Plaintiff, Friends of Animals, is a not-for-profit international advocacy organization with nearly 200,000 members, incorporated in the state of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues as well as the organization’s progress in addressing these issues through its magazine called ActionLine, its website, and other reports. Friends of Animals has published articles and information advocating for the protection of wild species so that they can live unfettered in their natural habitats. Friends of Animals regularly submits request under FOIA to further its goals and mission.

9. Plaintiff, WildEarth Guardians (“Guardians”), is a not-for-profit conservation organization incorporated in the state of New Mexico since 1989, with offices in New Mexico, Arizona, Colorado, Montana, Oregon, California, and Wyoming. Guardians protects and restores the wildlife, wild places, wild rivers, and the health of the American West. Guardians advocates for imperiled species to receive the strong legal protections of the ESA. Through its “Wild Oceans” campaign, Guardians has launched an effort to list imperiled marine species under the ESA in order to stem the extinction crisis in the oceans brought on by human exploitation, habitat destruction, and climate change.

10. Defendant National Oceanic and Atmospheric Administration is an agency within the meaning of 5 U.S.C. § 552(f). NOAA is responsible for fulfilling Plaintiffs' Request and complying with all federal laws.

11. Defendant Ross Wilbur, in his official capacity as Secretary of Commerce, has ultimate responsibility for NOAA and ensuring the agency complies with federal law.

LEGAL FRAMEWORK

A. Freedom of Information Act.

12. Congress enacted FOIA to ensure public access to U.S. government records. FOIA carries a presumption of disclosure. The burden is on the government—not the public—to substantiate why information may not be released. Upon written request, agencies of the United States government are required to disclose their records, unless they can be lawfully withheld from disclosure under one of nine specific exemptions in FOIA.

13. FOIA requires agencies to “determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A).

14. On determination by an agency to comply with the request, the records shall be made “promptly available.” *Id.* at § 552(a)(6)(C).

15. In “unusual circumstances” an agency may extend the time limits for up to ten working days by providing written notice to the requester setting forth the unusual circumstance and the date on which the determination is expected to be dispatched. *Id.* at § 552(a)(6)(B). With respect to a request for which a written notice purports to apply the “unusual circumstances,” the agency must: (1) notify the requester if the request cannot be processed within the time limit specified in that clause, and (2) provide the requester an opportunity to limit the scope of the request so that it may be processed within that time

limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *Id.*

16. If the agency fails to complete its response to a request within twenty workdays, the requester is deemed to have constructively exhausted administrative remedies and may seek judicial review. 5 U.S.C. § 552 (a)(6)(C)(i).

17. Additionally, if the agency fails to comply with the statutory time limit it cannot assess search fees. 5 U.S.C. § 552(a)(4)(A)(viii).

FACTUAL BACKGROUND

18. Plaintiffs submitted its Request under FOIA to NOAA on November 21, 2014.

19. Plaintiffs requested “all records in [the agency’s] possession, whether received, created, and/or distributed by NMFS, that the agency considered in making the initial positive 90-day finding on the petition as well as the final not warranted 12-month finding with respect to the Queen conch.”

20. Friends of Animals received acknowledgment from NOAA confirming that the agency received the Request on November 25, 2014.

21. FOIA’s twenty-workday deadline for responding to Plaintiffs’ Request passed on December 24, 2014.

22. NOAA did not respond by December 24, 2014.

23. NOAA provided interim responses on February 25, 2015; June 5, 2015; July 8, 2015; September 14, 2015; May 11, 2016; January 26, 2017; February 24, 2017; March 14, 2017; and March 21, 2017.²

24. As of the date of this Complaint, NOAA has still not made a final determination in response to Plaintiffs’ FOIA Request.

² Some of the dates listed on the release did not match the date the agency sent the releases to Plaintiffs. *See supra* note 1.

25. NOAA has offered no reasonable explanation for its delay, and it has failed to provide a specific date for when it will finally be able to comply with its obligations under FOIA.

26. NOAA is unlawfully withholding public disclosure of information sought by Plaintiffs, information to which Plaintiffs are entitled to receive, and for which NOAA has not provided a valid disclosure exemption.

CAUSE OF ACTION
(Violation of Freedom of Information Act)

27. Plaintiffs herein incorporate all allegations contained in the proceeding paragraphs.

28. Plaintiffs properly requested records within the control of Defendants.

29. Defendants have failed to fully release the records Plaintiffs requested and failed to make any claims of statutory exemption regarding the requested records.

30. Accordingly, Plaintiffs are entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested.

PRAYER FOR RELIEF

Plaintiffs respectfully requests that the Court enter judgment providing the following relief:

1. Declare that Defendants violated the Freedom of Information Act by failing to lawfully satisfy, in full, Plaintiffs' Request under the Freedom of Information Act;
2. Order Defendants to process and release immediately all records responsive to Plaintiffs' Request at no cost to Plaintiffs;
3. Retain jurisdiction of this action to ensure the processing of Plaintiffs' Request, and to ensure that no agency records are wrongfully withheld;
4. Award Plaintiffs costs, including reasonable attorney fees and litigation costs in this action, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(E); and
5. Grant Plaintiffs any other relief that the Court deems just and proper.

Dated: March 29, 2017 Respectfully Submitted,

/s/ Jennifer Best
Jennifer Best (DC Bar # C00056)
Assistant Director, Wildlife Law Program
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Western Region Office
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/s/ Michael Harris
Michael Ray Harris (DC Bar # C00049)
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CLERK'S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NOTICE OF DESIGNATION OF RELATED CIVIL CASES PENDING
IN THIS OR ANY OTHER UNITED STATES COURT

Civil Action No. _____
(To be supplied by the Clerk)

NOTICE TO PARTIES:

Pursuant to Rule 40.5(b)(2), you are required to prepare and submit this form at the time of filing any civil action which is related to any pending cases or which involves the same parties and relates to the same subject matter of any dismissed related cases. This form must be prepared in sufficient quantity to provide one copy for the Clerk's records, one copy for the Judge to whom the cases is assigned and one copy for each defendant, so that you must prepare 3 copies for a one defendant case, 4 copies for a two defendant case, etc.

NOTICE TO DEFENDANT:

Rule 40.5(b)(2) of this Court requires that you serve upon the plaintiff and file with your first responsive pleading or motion any objection you have to the related case designation.

NOTICE TO ALL COUNSEL

Rule 40.5(b)(3) of this Court requires that as soon as an attorney for a party becomes aware of the existence of a related case or cases, such attorney shall immediately notify, in writing, the Judges on whose calendars the cases appear and shall serve such notice on counsel for all other parties.

The plaintiff, defendant or counsel must complete the following:

I. RELATIONSHIP OF NEW CASE TO PENDING RELATED CASE(S).

A new case is deemed related to a case pending in this or another U.S. Court if the new case: [Check appropriate box(e's) below.]

- (a) relates to common property
- (b) involves common issues of fact
- (c) grows out of the same event or transaction
- (d) involves the validity or infringement of the same patent
- (e) is filed by the same pro se litigant

2. RELATIONSHIP OF NEW CASE TO DISMISSED RELATED CASE(ES)

A new case is deemed related to a case dismissed, with or without prejudice, in this or any other U.S. Court, if the new case involves the same parties and same subject matter.

Check box if new case is related to a dismissed case:

3. NAME THE UNITED STATES COURT IN WHICH THE RELATED CASE IS FILED (IF OTHER THAN THIS COURT):

4. CAPTION AND CASE NUMBER OF RELATED CASE(E'S). IF MORE ROOM IS NEED PLEASE USE OTHER SIDE.

Friends of Animals et al. v. Pritzker et al C.A. No. 16-cv-1540

3/28/2017
DATE

Joseph Best
Signature of Plaintiff/Defendant (or counsel)

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Thursday, March 30, 2017 10:23 AM
To: Stephen Lipps - NOAA Federal; John Almeida - NOAA Federal; Holmes, Colin; Robert Moller - NOAA Federal; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal
Cc: Tom Taylor; Kimberly Katzenbarger - NOAA FEDERAL; Charles; Dennis Morgan - NOAA Federal; Stacey Nathanson - NOAA Federal; Robert Swisher - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lola Stith - NOAA Affiliate; Zachary Goldstein - NOAA Federal; Douglas Perry - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Jeri Dockett - NOAA Affiliate; Cc: OCIO/OPPA; Troy Wilds - NOAA Federal; Lawrence Charters - NOAA Federal; Allison Soussi-Tanani - NOAA Federal; Bogomolny, Michael (Federal)
Subject: Weekly FOIA Incoming and High Visibility Requests
Attachments: JW-v-Commerce-NOAA-Karl-Holdren-complaint-00541.pdf; Friends of Animals Queen Conch_FOIA_Complaint_Filed.pdf; Weekly FOIA Incoming and High Visibility Requests 03.23.17 - 03.29.17.xls

Good Morning,

Attached below is the weekly report. One request received from Duke University, School of the Environment, is seeking all DOC data sets, across all Bureaus, that have been removed or relocated from Department websites since January 20, 2017. (DOC-NOAA-2017-000866). The Center for Media Democracy as well as the Center for Biological Diversity also filed similar requests, seeking nearly identical records. (DOC-NOAA-2017-000864 and DOC-NOAA-2017-000863 respectively) (b)(5)

In litigation, Judicial Watch filed suit on Friday against NOAA in a FOIA action in D.D.C. (attached). The underlying FOIA request sought communications between Tom Karl and Dr. John Holdren. (DOC-NOAA-2017-000580). (b)(5)

Additionally, Friends of Animals filed a FOIA suit against NOAA yesterday in D.D.C. (attached). The original request sought records considered by NOAA in determining that the queen conch does not warrant listing under the ESA. (b)(5). (DOC-NOAA-2015-000295).

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

Confidentiality Notice: This e-mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

| | | |
|--|---|----------|
| FRIENDS OF ANIMALS, |) | |
| 777 Post Road, Suite 205 |) | |
| Darien, CT 06820; and |) | |
| |) | |
| WILDEARTH GUARDIANS, |) | CASE NO. |
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| Denver, CO 80205 |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| WILBUR ROSS, in his official capacity as |) | |
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| 1401 Constitution Avenue, NW |) | |
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| |) | |
| Defendants. |) | |

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

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PRAYER FOR RELIEF

Plaintiffs respectfully requests that the Court enter judgment providing the following relief:

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4. Award Plaintiffs costs, including reasonable attorney fees and litigation costs in this action, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(E); and
5. Grant Plaintiffs any other relief that the Court deems just and proper.

Dated: March 29, 2017 Respectfully Submitted,

/s/ Jennifer Best
Jennifer Best (DC Bar # C00056)
Assistant Director, Wildlife Law Program
Friends of Animals
Western Region Office
7500 E. Arapahoe Road, Suite 385
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/s/ Michael Harris
Michael Ray Harris (DC Bar # C00049)
Director, Wildlife Law Program
Friends of Animals
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michaelharris@friendsofanimals.org

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

| | | |
|--------------------------------|---|------------------|
| JUDICIAL WATCH, INC., |) | |
| 425 Third Street SW, Suite 800 |) | |
| Washington, DC 20024, |) | |
| |) | |
| Plaintiff, |) | |
| |) | Civil Action No. |
| v. |) | |
| |) | |
| UNITED STATES DEPARTMENT |) | |
| OF COMMERCE, |) | |
| 1401 Constitution Avenue, NW |) | |
| Washington, DC 20230, |) | |
| |) | |
| Defendant. |) | |
| |) | |

COMPLAINT

Plaintiff Judicial Watch, Inc. brings this action against Defendant U.S. Department of Commerce to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As grounds therefor, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff Judicial Watch, Inc. is a not-for-profit, educational organization incorporated under the laws of the District of Columbia and headquartered at 425 Third Street SW, Suite 800, Washington, DC 20024. Plaintiff seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. As part of its mission, Plaintiff regularly requests records from federal agencies pursuant to FOIA. Plaintiff analyzes the

responses and disseminates its findings and the requested records to the American public to inform them about “what their government is up to.”

4. Defendant U.S. Department of Commerce is an agency of the United States Government. Defendant has possession, custody, and control of records to which Plaintiff seeks access. Defendant is headquartered at 1401 Constitution Avenue, NW, Washington, DC 20230.

STATEMENT OF FACTS

5. On February 6, 2017 Plaintiff submitted a FOIA request to the National Oceanic and Atmospheric Administration (“NOAA”), a component of Defendant, seeking the following:

Any and all records of communications between NOAA scientist
Thomas Karl and Director of the Office of Science and
Technology Policy John Holdren.

The timeframe of the request was identified as “January 20, 2009 through January 20, 2017.”

The request was submitted by certified mail.

6. According to U.S. Postal Service records, the request was received by NOAA on February 7, 2017.

7. NOAA confirmed that it received the request on February 8, 2017, assigning the request Tracking Number DOC-NOAA-2017-000580.

8. As of the date of this Complaint, Defendant has failed to: (i) produce the requested records or demonstrate that the requested records are lawfully exempt from production; (ii) notify Plaintiff of the scope of any responsive records Defendant intends to produce or withhold and the reasons for any withholdings; or (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

9. Plaintiff realleges paragraphs 1 through 8 as if fully stated herein.

10. Plaintiff is being irreparably harmed by reason of Defendant's violation of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with FOIA.

11. To trigger FOIA's administrative exhaustion requirement, Defendant was required to determine whether to comply with Plaintiff's request by March 9, 2017 at the latest. At a minimum, Defendant was required to: (i) gather and review the requested documents; (ii) determine and communicate to Plaintiff the scope of any responsive records Defendant intended to produce or withhold and the reasons for any withholdings; and (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination. *See, e.g., Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188-89 (D.C. Cir. 2013).

12. Because Defendant failed to determine whether to comply with Plaintiff's request within the time period required by FOIA, Plaintiff is deemed to have exhausted its administrative appeal remedies. 5 U.S.C. § 552(a)(6)(C)(i).

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request; (2) order Defendant to produce, by a date certain, any and all non-exempt records to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of

attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated: March 27, 2017

Respectfully submitted,

s/ Chris Fedeli

Chris Fedeli

D.C. Bar No. 472919

JUDICIAL WATCH, INC.

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

Counsel for Plaintiff

| Tracking Number | Type | Requester | Requester Organization |
|----------------------|---------|--------------------|---|
| DOC-NOAA-2017-000912 | Request | James Renaldi | Professional Aviation Safety Specialists |
| DOC-NOAA-2017-000896 | Request | Sandi Podskoc | Retirement Benefits Institute |
| DOC-NOAA-2017-000885 | Request | Radu Munteanu | |
| DOC-NOAA-2017-000884 | Request | Radu Munteanu | |
| DOC-NOAA-2017-000883 | Request | Radu Munteanu | |
| DOC-NOAA-2017-000882 | Request | Radu Munteanu | |
| DOC-NOAA-2017-000881 | Request | Radu Munteanu | |
| DOC-NOAA-2017-000880 | Request | Radu Munteanu | |
| DOC-NOAA-2017-000866 | Request | Stuart Pimm | Nicholas School of the Environment, Duke University |
| DOC-NOAA-2017-000865 | Request | Zeenat Mian | |
| DOC-NOAA-2017-000864 | Request | Nicholas P. Surgey | |
| DOC-NOAA-2017-000863 | Request | Margaret Townsend | |

Custom Report - 03/30/2017 07:37:02

| Submitted | Received | Assigned To | Case File Assigned To | Perfect? | Due | Closed Date |
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| 03/23/2017 | 03/23/2017 | NOAA | NOAA | No | TBD | TBD |
| 03/23/2017 | 03/23/2017 | NOAA | NOAA | No | TBD | TBD |

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| Assignment Determination | |

Detail

All Job codes and job titles/descriptions, organizational codes and organizational descriptions/titles, bargaining unit
March 28, 2017 FOIA REQUEST Department of Commerce National Oceanic and Atmospheric Administration To
FOIA REQUEST Dear FOIA Officer: As a candidate for the following position: Job title: Contract Specialist, GS-11C
FOIA REQUEST Dear FOIA Officer: As a candidate for the following position: Job title: Contract Specialist, GS-11C
FOIA REQUEST Dear FOIA Officer: As a candidate for the following position: Job title: Contract Specialist, GS-11C
FOIA REQUEST Dear FOIA Officer: As a candidate for the following position: Job title: Grants Management Specic
FOIA REQUEST Dear FOIA Officer: As a candidate for the following position: Job title: Grants Management Specic
FOIA REQUEST Dear FOIA Officer: As a candidate for the following position: Job title: Grants Management Specic
All data and/or datasets, including but not limited to those set forth in the attached Excel spreadsheet, generated on
Under the Freedom of Information Act I would like to request the following: - Commencement/start and end date of
See attached letter
The Center requests from the U.S. Department of Commerce the following: 1. All data and/or datasets, including b

[REDACTED]

: codes, and duty/work locations for all current employees under the Department of Commerce, NOAA, and whomever it may concern: Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I re
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ut not limited to those set forth in the attached Excel spreadsheet, generated or possessed by the U.S. I

[REDACTED]
National Weather Service.

request access to and copies of the names, addresses, phone numbers, email addresses, grade and step
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announcement number: SO-AGO-2016-0001 Series and Grade: GS-1109-09/12 and pursuant to the fed
department agencies, departments, and/or components, see Attachment A (Datasets Spreadsheet); and
until present. - Last communications between Barbara and Robert Billand with NOAA.

Department of Commerce ("Commerce Department") and/or any Commerce department agencies, depart

nd Atmospheric Administration offices in Alabama. I agree to pay reasonable duplication fees for the pro
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2017. A search for records pursuant to this request should therefore include but is not limited to data i

it agency, department, or components websites/webpages, since January 20, 2017.

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Thursday, March 30, 2017 3:35 PM
To: Borenstein, Seth
Subject: Re: Second FOIA request of the day from The Associated Press

Thank you Seth,

Please feel free to reach out to me with any questions or concerns as the request progresses. Best,

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Thu, Mar 30, 2017 at 3:28 PM, Borenstein, Seth <SBorenstein@ap.org> wrote:

Please see this (second of the day) FOIA request. I have attached it and pasted below.

Thank you,

Seth

Seth Borenstein

Science Writer

The Associated Press

1100 13th St. N.W., Suite 700

Washington, DC 20005-4076

sborenstein@ap.org

[202-641-9454](tel:202-641-9454)

Robert Swisher, Mark Graff, Andre Sivels

FOIA officers,

National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3) Room 9719
Silver Spring, Maryland 20910

March 30, 2017 (sent via email)

Dear sirs,

It's Seth Borenstein, national science writer for the Associated Press, the worldwide wire service. Pursuant to the federal Freedom of Information Act, 5 U.S.C. 552, I request access to and copies of the following materials:

- From Jan. 20, 2017 to March 29, 2017, all correspondence, emails, phone call transcripts, text messages, power point presentations, meeting minutes and files instructing staff, scientists, public affairs officers on the description, vocabulary or otherwise about the following words/issues: climate change, global warming, greenhouse gases, carbon dioxide or Paris Agreement.
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Now, let me specifically address the six hurdles used by the FOIA for fee-waiver determination by the U.S. Environmental Protection Agency and other federal agencies.

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2. The disclosure should be "likely to contribute" to an understanding of government operations or activities. This is about what scientists say is one of the most pressing issues of our time: climate change. And it is about the agency decides to tackle said issue, which affects the lives, health, safety and finances of taxpayers.

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5. The disclosure will not serve any commercial interest of me as an individual. My company does not sell newspapers individually. My company, The Associated Press, is a not-for-profit wire service (see the .org at the end of my e-mail) that is a consortium of members. Even the AP members will not likely sell a single newspaper more because of the disclosure. This is just a matter of a not-for-profit wire service fulfilling its public duty to ferret out the truth about the way government operates. In fact, the entire process will likely cost my company money because it involves my time.

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As I am making this information as a daily journalist and this information is of timely value, please contact me by telephone, rather than by mail if you have questions regarding this request. My phone number is [202-641-9454](tel:202-641-9454). My e-mail is sborenstein@ap.org. I look forward to your reply within 20 business days, as the statute requires.

Thank you in advance for your assistance.

Sincerely,

[signed]

Seth Borenstein

Science Writer

The Associated Press

Seth Borenstein

Science Writer

The Associated Press

On Twitter: [@borenbears](https://twitter.com/borenbears)

[202-641-9454](tel:202-641-9454)

Mobile: [202-841-4530](tel:202-841-4530); Signal enabled for privacy; <https://freedom.press/news/signal-beginners/>

1100 13th St. NW Suite 500

Washington DC 20005-4051

Skype: borenbears

<http://tinyurl.com/sethap>

<http://bigstory.ap.org/>

<http://bigstory.ap.org/content/seth-borenstein>

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From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Thursday, March 30, 2017 3:35 PM
To: Lola Stith - NOAA Affiliate
Subject: Fwd: Second FOIA request of the day from The Associated Press
Attachments: APFOIA-NOAA-ClimateChangeCommunications.doc

Another for input and routing--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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----- Forwarded message -----

From: Borenstein, Seth <SBorenstein@ap.org>
Date: Thu, Mar 30, 2017 at 3:28 PM
Subject: Second FOIA request of the day from The Associated Press
To: "robert.swisher@noaa.gov" <robert.swisher@noaa.gov>, "scott.smullen@noaa.gov" <scott.smullen@noaa.gov>, "mark.graff@noaa.gov" <mark.graff@noaa.gov>, "andre.sivels@noaa.gov" <andre.sivels@noaa.gov>, "foia@noaa.gov" <foia@noaa.gov>
Cc: "Borenstein, Seth" <SBorenstein@ap.org>

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Robert Swisher, Mark Graff, Andre Sivals

FOIA officers,

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The Associated Press

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Washington DC 20005-4051

Skype: borenbears

<http://tinyurl.com/sethap>

<http://bigstory.ap.org/>

<http://bigstory.ap.org/content/seth-borenstein>

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3. The disclosure must contribute to the understanding of the public at large, as opposed to the requester or a narrow segment of interested persons. The public at large wants to and needs to know about what its government is doing about climate change and how it is instructing its workers. The Associated Press, a non profit consortium, is the world's largest news gathering agency and is geared toward news for general interests, not narrow ones.
4. The disclosure must contribute "significantly" to the public understanding of government operations. As said above, this is about what scientists say is one of the most pressing issues of our time: climate change. NOAA is one of the major agencies monitoring and dealing with this issue. And it is about a taxpayer funded agency's treatment of this issue, which affects the lives, health, safety and finances of taxpayers. who runs NOAA and in what capacity is significant who pay for and benefit from NOAA's proper operations.
5. The disclosure will not serve any commercial interest of me as an individual. My company does not sell newspapers individually. My company, The Associated Press, is a not-for-profit wire service (see the .org at the end of my e-mail) that is a consortium of members. Even the AP members will not likely sell a single newspaper more because of the disclosure. This is just a matter of a not-for-profit wire service fulfilling its public duty to ferret out the truth about the way government operates. In fact, the entire process will likely cost my company money because it involves my time.
6. The public interest in disclosure far outweighs commercial interest. First, as shown above there is massive amount of public interest. Second, as shown above, there is little if any commercial interest.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the Act and release all segregable portions of otherwise exempt material. I reserve the right to appeal.

As I am making this information as a daily journalist and this information is of timely value, please contact me by telephone, rather than by mail if you have questions regarding this request. My phone number is 202-641-9454. My e-mail is sborenstein@ap.org. I look forward to your reply within 20 business days, as the statute requires.

Thank you in advance for your assistance.

Sincerely,

[signed]
Seth Borenstein
Science Writer
The Associated Press

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Thursday, March 30, 2017 4:26 PM
To: foiastatus@state.gov; eric.stein@state.gov
Cc: Ruth Ann Lowery - NOAA Federal; Maria Williams - NOAA Federal; Lola Stith - NOAA Affiliate
Subject: FOIA Request Consultation in Litigation
Attachments: Pages from 1st Interim Release Combined.pdf; New Judicial Watch Request.pdf

Good Afternoon Mr. Stein,

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]

[Redacted]
[Redacted]
[Redacted]

Thank you and best regards,

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

Confidentiality Notice: This e-mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.



Judicial Watch®

*Because no one
is above the law!*

February 6, 2017

VIA CERTIFIED MAIL

National Oceanographic and
Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Judicial Watch, Inc. (“Judicial Watch”) hereby requests that the National Oceanographic and Atmospheric Administration (“NOAA”) produce the following records pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”):

Any and all records of communication between NOAA scientist Thomas Karl and Director of the Office of Science and Technology Policy John Holdren.

The time frame for the requested records is January 20, 2009 through January 20, 2017.

Please determine whether to comply with this request within the time period required by FOIA and notify us immediately of your determination, the reasons therefor, and the right to appeal any adverse determination to the head of the agency or his or her designee. 5 U.S.C. § 552(a)(6)(i). Please also produce all responsive records in an electronic format (“pdf” is preferred), if convenient. We also are willing to accept a “rolling production” of responsive records if it will facilitate a more timely production.

Judicial Watch also hereby requests a waiver of both search and duplication fees. We are entitled to a waiver of search fees because we are a “representative of the news media.” *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also Cause of Action v. Federal Trade Comm.*, 799 F.3d 1108 (D.C. Cir. 2015); *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381 (D.C. Cir. 1989). For more than twenty years, Judicial Watch has used FOIA and other investigative tools to gather information about the operations and activities of government, a subject of undisputed public interest. We submit over 400 FOIA requests annually. Our personnel, which includes experienced journalists and professional writers on staff and under contract, use their editorial skills to turn this raw information into

NOAA FOIA Request

February 6, 2017

Page 2 of 3

distinct works that are disseminated to the public via our monthly newsletter, which has a circulation of over 300,000, weekly email update, which has over 600,000 subscribers, investigative bulletins, special reports, www.judicialwatch.org website, *Corruption Chronicles* blog, and social media, including Facebook and Twitter, among other distribution channels. We have authored several books, including *Corruption Chronicles* by Tom Fitton (Threshold Editions, July 24, 2012), and another book, *Clean House* by Tom Fitton (Threshold Editions, Aug. 30, 2016), is forthcoming. In 2012, we produced a documentary film, "District of Corruption," directed by Stephen K. Bannon. Our "news media" status has been confirmed in court rulings. See, e.g., *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000). As a tax exempt, 501(c)(3) non-profit corporation, we have no commercial interests and do not seek the requested records for any commercial use. Rather, we intend to use the requested records as part of our on-going investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

Judicial Watch also is entitled to a waiver of both search fees and duplication fees because "disclosure of the information is in the public interest." 5 U.S.C. § 552(a)(4)(A)(iii). Disclosure of the requested records undoubtedly will shed light on "the operations or activities of the government." *Cause of Action*, 799 F.3d at 1115 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Disclosure also is "likely to contribute significantly to the public understanding" of those operations or activities because, among other reasons, Judicial Watch intends to disseminate both the records and its findings to "a reasonably broad audience of persons interested in the subject" via its newsletter, email updates, investigative bulletins, website, blog, and its other, regular distribution channels. *Cause of Action*, 799 F.3d at 1116 (quoting *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994)). Again, Judicial Watch does not seek the requested records for any commercial benefit or for its own "primary" benefit, but instead seeks them as part of its ongoing investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

In the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch agrees to pay up to \$300.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5172 or bmarshall@judicialwatch.org.

Thank you for your cooperation.

NOAA FOIA Request
February 6, 2017
Page 3 of 3

Very respectfully,

A handwritten signature in black ink, appearing to read "William F. Marshall". The signature is written in a cursive style with a large initial "W".

William F. Marshall
Judicial Watch, Inc.

(b) (5)

From: postmaster@state.gov
Sent: Thursday, March 30, 2017 4:29 PM
To: mark.graff@noaa.gov
Subject: Undeliverable: FOIA Request Consultation in Litigation
Attachments: details.txt; FOIA Request Consultation in Litigation

Delivery has failed to these recipients or groups:

eric.stein@state.gov

The e-mail address you entered couldn't be found. Please check the recipient's e-mail address and try to resend the message. If the problem continues, please contact your helpdesk.

Diagnostic information for administrators:

Generating server: state.gov

eric.stein@state.gov

#550 5.1.1 RESOLVER.ADR.RecipNotFound; not found ##rfc822;eric.stein@state.gov

Original message headers:

Received: from EEMAILINLINE03.state.gov (10.47.98.125) by
EEAPPSEREX03.appservices.state.sbu (10.47.98.203) with Microsoft SMTP Server
id 14.3.339.0; Thu, 30 Mar 2017 16:29:14 -0400
Received: by EEMAILINLINE03.state.gov (Postfix, from userid 600) id
3vvGSV1vSVz3wkkt; Thu, 30 Mar 2017 20:28:47 +0000 (UTC)
Received: from ipssl-host78.is.centurylink.net (unknown [65.127.216.78]) by
EEMAILINLINE03.state.gov (Postfix) with ESMTPS id 3vvGQc34Nvz3wklP for
<eric.stein@state.gov>; Thu, 30 Mar 2017 20:27:36 +0000 (UTC)
X-Qwest-Status: hEUBLG9ErOsrnKeZ
Received: from haig-ee.state.gov (unknown [169.253.9.82]) by
ipssl-host78.is.centurylink.net (Postfix) with ESMTTP id A5A252FFE351 for
<eric.stein@state.gov>; Thu, 30 Mar 2017 20:27:13 +0000 (UTC)
Received-SPF: Pass (haig-ee.state.gov: domain of
mark.graff@noaa.gov designates 209.85.128.178 as permitted
sender) identity=mailfrom; client-ip=209.85.128.178;
receiver=haig-ee.state.gov;
envelope-from="mark.graff@noaa.gov";
x-sender="mark.graff@noaa.gov"; x-conformance=spf_only;
x-record-type="v=spf1"
Received-SPF: None (haig-ee.state.gov: no sender authenticity
information available from domain of
postmaster@mail-wr0-f178.google.com) identity=helo;
client-ip=209.85.128.178; receiver=haig-ee.state.gov;
envelope-from="mark.graff@noaa.gov";
x-sender="postmaster@mail-wr0-f178.google.com";
x-conformance=spf_only

Authentication-Results: haig-ee.state.gov; spf=Pass smtp.mailfrom=mark.graff@noaa.gov; spf=None smtp.helo=postmaster@mail-wr0-f178.google.com; dkim=pass (signature verified) header.i=@noaa-gov.20150623.gappssmtp.com
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Received: from mail-wr0-f178.google.com ([209.85.128.178]) by haig-ee.state.gov with ESMTTP/TLS/AES128-GCM-SHA256; 30 Mar 2017 20:27:06 +0000
Received: by mail-wr0-f178.google.com with SMTP id l43so78419230wre.1 for <eric.stein@state.gov>; Thu, 30 Mar 2017 13:27:06 -0700 (PDT)
DKIM-Signature: v=1; a=rsa-sha256; c=relaxed/relaxed; d=noaa-gov.20150623.gappssmtp.com; s=20150623; h=mime-version:from:date:message-id:subject:to:cc; bh=qqRz4CSbck8RuE9PUk8RGTcge9x06pel05BmIDB+Di0=; b=bldlaJ43qyDB1EPTIEwDHO3Pzk3LavWDZXurheFyQIUfBRAMS1q4ihnHemh+VrkX03DxVIEWiHcwcHfpp4Bj0b1WN6rqi5fMjnfknaEo5CN34pRpoQdeSsdr7dbQTU6/5HHP37004PwIImKobsu4ZSsqSpsoYJZqYvpqBcqV0nP7uY3VrkchuWe9wdIn+MjkkEWUdq3RBhKb4dXdd/0SSGNzr3M6V5bCBbEk8IJ0nrWuipI70r7S05X8/rq60/A10U31XahnB/8xyJM4KHBB4fh2WF146VC+ccNn34qu/rYw2g4c9j71Z2foa3ZA+00ljpiRuluTwK5hhJNZek7wC9A==
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X-Gm-Message-State: AFeK/H2iOopXStiff+LmnqJ3xT3rI1fG4jD5B4TSRRMt6e+O6rL0oCz5DmIs5Wo48OhtkMiJSRnpl68we7+kWz++
X-Received: by 10.28.156.69 with SMTP id f66mr77921wme.56.1490905624997; Thu, 30 Mar 2017 13:27:04 -0700 (PDT)
MIME-Version: 1.0
Received: by 10.28.167.19 with HTTP; Thu, 30 Mar 2017 13:26:23 -0700 (PDT)
From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Thu, 30 Mar 2017 16:26:23 -0400
Message-ID: <CAFW6A-2J69LGjnaeTBK6hQfJT1CKb_n++SGpefwjxfCh6Rg@mail.gmail.com>
Subject: FOIA Request Consultation in Litigation
To: <foiastatus@state.gov>, <eric.stein@state.gov>
CC: Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>, Maria Williams - NOAA Federal <Maria.Williams@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>
Content-Type: multipart/mixed; boundary="001a114b7e2a2e1175054bf884eb"
Return-Path: mark.graff@noaa.gov

Reporting-MTA: dns;state.gov
Received-From-MTA: dns;EEMAILINLINE03.state.gov
Arrival-Date: Thu, 30 Mar 2017 20:29:14 +0000

Original-Recipient: rfc822;eric.stein@state.gov
Final-Recipient: rfc822;eric.stein@state.gov
Action: failed
Status: 5.1.1
Diagnostic-Code: smtp;550 5.1.1 RESOLVER.ADR.RecipNotFound; not found

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Thu, 30 Mar 2017 16:26:23 -0400
Subject: FOIA Request Consultation in Litigation
To: <foiastatus@state.gov>, <eric.stein@state.gov>
Cc: Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>, "Maria Williams - NOAA Federal" <Maria.Williams@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>
[Pages from 1st Interim Release Combined.pdf](#)
[New Judicial Watch Request.pdf](#)

Good Afternoon Mr. Stein,

(b)(5) [Redacted]

Thank you and best regards,

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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(b) (5)



**Judicial
Watch**[®]

*Because no one
is above the law!*

February 6, 2017

VIA CERTIFIED MAIL

National Oceanographic and
Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Judicial Watch, Inc. (“Judicial Watch”) hereby requests that the National Oceanographic and Atmospheric Administration (“NOAA”) produce the following records pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”):

Any and all records of communication between NOAA scientist Thomas Karl and Director of the Office of Science and Technology Policy John Holdren.

The time frame for the requested records is January 20, 2009 through January 20, 2017.

Please determine whether to comply with this request within the time period required by FOIA and notify us immediately of your determination, the reasons therefor, and the right to appeal any adverse determination to the head of the agency or his or her designee. 5 U.S.C. § 552(a)(6)(i). Please also produce all responsive records in an electronic format (“pdf” is preferred), if convenient. We also are willing to accept a “rolling production” of responsive records if it will facilitate a more timely production.

Judicial Watch also hereby requests a waiver of both search and duplication fees. We are entitled to a waiver of search fees because we are a “representative of the news media.” *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also Cause of Action v. Federal Trade Comm.*, 799 F.3d 1108 (D.C. Cir. 2015); *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381 (D.C. Cir. 1989). For more than twenty years, Judicial Watch has used FOIA and other investigative tools to gather information about the operations and activities of government, a subject of undisputed public interest. We submit over 400 FOIA requests annually. Our personnel, which includes experienced journalists and professional writers on staff and under contract, use their editorial skills to turn this raw information into

NOAA FOIA Request

February 6, 2017

Page 2 of 3

distinct works that are disseminated to the public via our monthly newsletter, which has a circulation of over 300,000, weekly email update, which has over 600,000 subscribers, investigative bulletins, special reports, www.judicialwatch.org website, *Corruption Chronicles* blog, and social media, including Facebook and Twitter, among other distribution channels. We have authored several books, including *Corruption Chronicles* by Tom Fitton (Threshold Editions, July 24, 2012), and another book, *Clean House* by Tom Fitton (Threshold Editions, Aug. 30, 2016), is forthcoming. In 2012, we produced a documentary film, "District of Corruption," directed by Stephen K. Bannon. Our "news media" status has been confirmed in court rulings. See, e.g., *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000). As a tax exempt, 501(c)(3) non-profit corporation, we have no commercial interests and do not seek the requested records for any commercial use. Rather, we intend to use the requested records as part of our on-going investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

Judicial Watch also is entitled to a waiver of both search fees and duplication fees because "disclosure of the information is in the public interest." 5 U.S.C. § 552(a)(4)(A)(iii). Disclosure of the requested records undoubtedly will shed light on "the operations or activities of the government." *Cause of Action*, 799 F.3d at 1115 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Disclosure also is "likely to contribute significantly to the public understanding" of those operations or activities because, among other reasons, Judicial Watch intends to disseminate both the records and its findings to "a reasonably broad audience of persons interested in the subject" via its newsletter, email updates, investigative bulletins, website, blog, and its other, regular distribution channels. *Cause of Action*, 799 F.3d at 1116 (quoting *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994)). Again, Judicial Watch does not seek the requested records for any commercial benefit or for its own "primary" benefit, but instead seeks them as part of its ongoing investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

In the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch agrees to pay up to \$300.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5172 or bmarshall@judicialwatch.org.

Thank you for your cooperation.

NOAA FOIA Request
February 6, 2017
Page 3 of 3

Very respectfully,

A handwritten signature in black ink, appearing to read "William F. Marshall". The signature is fluid and cursive, with the first name "William" and last name "Marshall" clearly distinguishable.

William F. Marshall
Judicial Watch, Inc.

From: Corinne Brown - NOAA Federal <corinne.brown@noaa.gov>
Sent: Thursday, March 30, 2017 6:23 PM
To: Kimberly Katzenbarger - NOAA Federal
Cc: Heather Sagar - NOAA Federal; John Almeida - NOAA Federal; Ayeisha Brinson - NOAA Federal; Jeff Lonergan - NOAA Federal; Stephen Lipps - NOAA Federal; Alesia Read - NOAA Federal; Brianne Szczepanek - NOAA Federal; Mark Graff - NOAA Federal; Robert Moller - NOAA Federal; Amanda Patterson - NOAA Federal; Samuel Dixon - NOAA Affiliate
Subject: RE: NE Monuments FOIA batching and review
Attachments: Clearwell BASIC Reviewer Guide V1.pdf; Reviewing by Discussion Chain.docx

Sorry for my delayed response – swamped by others.

Several things I need to mention:

1. (b)(5) [Redacted]

Please let me know if you have questions! I am out Monday but back in Tuesday.

Corinne

Corinne Brown
NOAA Fisheries MB7
Program Manager
209-283-0807 (PST)

From: Kimberly Katzenbarger - NOAA Federal [mailto:kimberly.katzenbarger@noaa.gov]
Sent: Thursday, March 30, 2017 7:04 AM
To: Samuel Dixon
Cc: Heather Sagar - NOAA Federal; John Almeida - NOAA Federal; Corinne Brown - NOAA Federal; Ayeisha Brinson - NOAA Federal; Jeff Lonergan - NOAA Federal; Stephen Lipps - NOAA Federal; Alesia Read - NOAA Federal; Brianne Szczepanek - NOAA Federal; Mark Graff - NOAA Federal; Robert Moller - NOAA Federal
Subject: Re: NE Monuments FOIA batching and review

Good very early morning to you Corinne! Thanks for the batching.

(b)(5) [Redacted]

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Kim

On Thu, Mar 30, 2017 at 9:31 AM, Samuel Dixon <samuel.dixon@noaa.gov> wrote:
I'll take a look and see if I can figure it out, but this may need Corinne's expertise.

Samuel Dixon
Contractor - IBSS Corp
NMFS Assistant FOIA Liaison
(301) 427-8739
samuel.dixon@noaa.gov

On Thu, Mar 30, 2017 at 9:25 AM, Heather Sagar - NOAA Federal <heather.sagar@noaa.gov> wrote:
Thanks John!

(b)(5) [Redacted] ? I'm just a
beginner so Im not sure how to do that. It would be greatly appreciated!

Thanks for your quick response!
Heather

On Thu, Mar 30, 2017 at 9:18 AM, John Almeida - NOAA Federal <john.almeida@noaa.gov> wrote:

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]

[Redacted]

On Thu, Mar 30, 2017 at 9:12 AM, Heather Sagar - NOAA Federal <heather.sagar@noaa.gov> wrote:
Thanks Corinne-

I have some questions for the lawyers:

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

[Redacted]
[Redacted]

(b)(5) [Redacted]

[Redacted]

[Redacted]?

Thanks!
Heather

On Wed, Mar 29, 2017 at 11:48 PM, Corinne Brown - NOAA Federal <corinne.brown@noaa.gov> wrote:

OK Folks

(b)(5) [Redacted]

[Redacted]

[Redacted]

(b)(5) [Redacted]

(b)(5)

(b)(5) [Redacted]

Let me know if you want me to change any folder names – that is easy.

C

Corinne Brown

NOAA Fisheries MB7

Program Manager

[209-283-0807](tel:209-283-0807) (PST)

From: Ayeisha Brinson - NOAA Federal [mailto:ayeisha.brinson@noaa.gov]

Sent: Tuesday, March 28, 2017 3:01 PM

To: Jeff Lonergan - NOAA Federal; Stephen Lipps - NOAA Federal; Alesia Read - NOAA Federal; Brianne Szczepanek - NOAA Federal; Corinne Brown - NOAA Federal; Heather Sagar - NOAA Federal; John Almeida - NOAA Federal; Kimberly Katzenbarger - NOAA FEDERAL; Mark Graff - NOAA Federal; Robert Moller; Samuel Dixon

Subject: NE Monuments FOIA batching and review

All-

Thank you for joining today's call and for your patience with the various technical issues of the day. A few people had to jump off as we ran over time and I wanted to recap our process going forward.

(b)(5) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

(b)(5)
[Redacted]

[Redacted]

Thank you again!

Best,

Ayeisha

Ayeisha A. Brinson, Ph.D.

On detail to the:

Deputy Under Secretary

National Oceanic & Atmospheric Administration (NOAA)

U.S. Department of Commerce

14th and Constitution Ave. NW, HCHB 58012RA

Washington, D.C. 20230

Phone: [202-482-4569](tel:202-482-4569)

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Clearwell Reviewer Guide – JUST THE BASICS! Clearwell Version 8.1.1

29 March 2017 Version 1



| INDEX | PAGE # |
|---|--------|
| Introduction | 2 |
| Logging in | 2 |
| Logging out | 3 |
| Understanding the Analysis & Review Interface | 4 |
| Documents versus Items | 5 |
| Reviewing Documents | 6 |
| Tagging Documents | 8 |
| The NMFS Standard FOIA Tag Set | 9 |
| Redacting Documents | 12 |
| Multiple Exemptions | 12 |
| The Redaction Interface | 12 |
| Redaction Tools | 13 |
| Redact Whole Item Discussion | 16 |
| Drop Down Reason Box | 17 |
| Redaction Display Options | 17 |
| DeDuplication | 18 |
| Filters | 19 |
| Advanced Search | 20 |

Appendices

Review/Redaction Mode

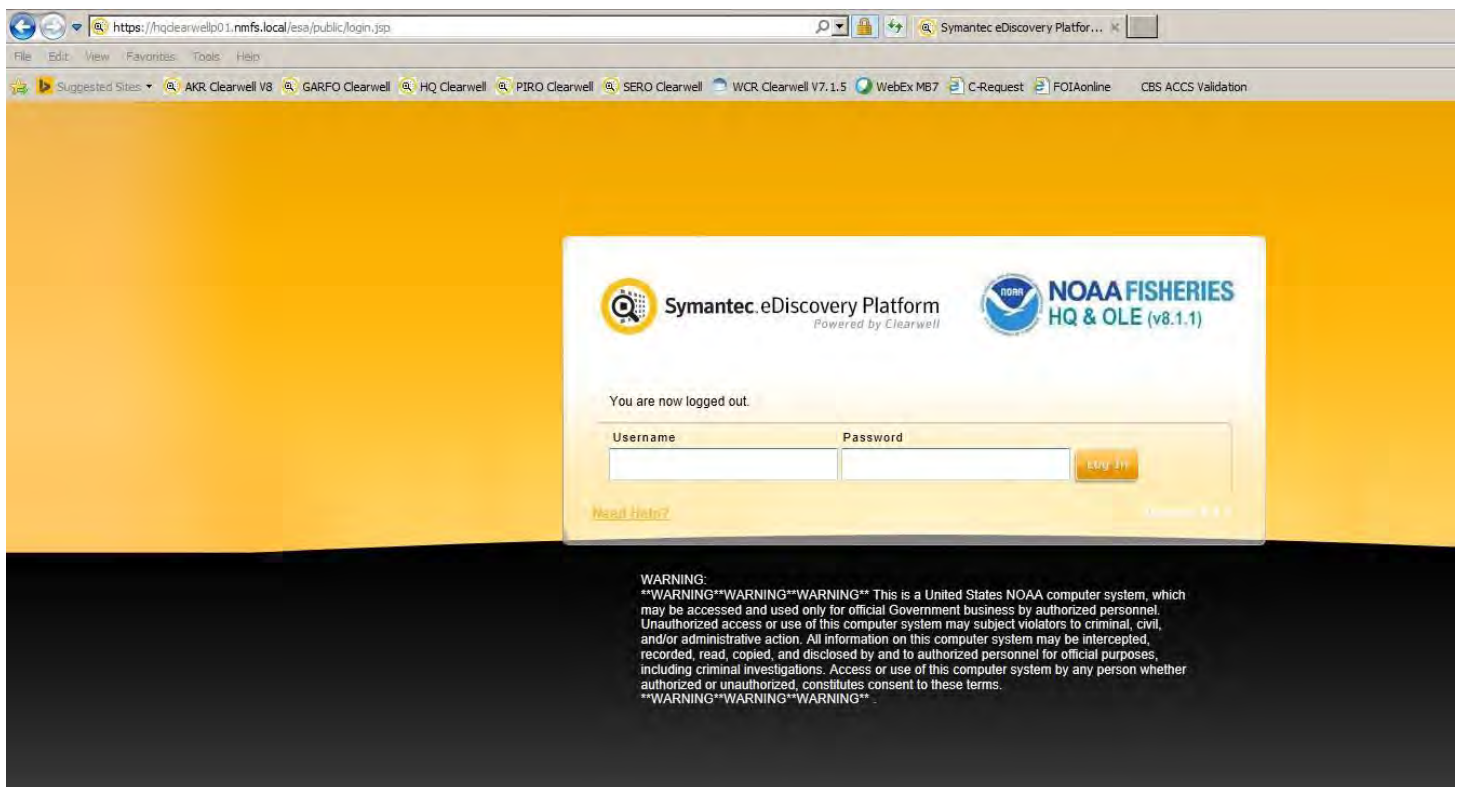
Introduction

Clearwell is the NMFS standard for processing Freedom of Information Act Requests (FOIAs). Many sites use it to process ARs and Litigations as well. This document is intended to cover the basics of reviewing documents in Clearwell. It is not meant to be a FOIA guide. For FOIA and related exemption questions please consult with your local FOIA expert or your General Counsel. Although Clearwell is web-based, there are several things that must be installed on your desktop to ensure Clearwell works properly. You will need the Clearwell ActiveX plugin and the Reasons.ini file. Contact your local IT Helpdesk for these. If you have Clearwell questions or need training contact your local Clearwell System Manager.

Logging in

1. Using INTERNET EXPLORER go to the URL of your Clearwell Site.
2. Login using your Google email username and password
(Email address minus “@noaa.gov” and Google email password)

NOTE: Keep in mind that you will not find a Clearwell icon on your desktop. Clearwell must be accessed using a URL in Internet Explorer. Access must be from a NMFS network or via VPN. If your first attempt to log on fails, please try again before contacting the Clearwell System Manager. At some locations, Clearwell always fails the first time.

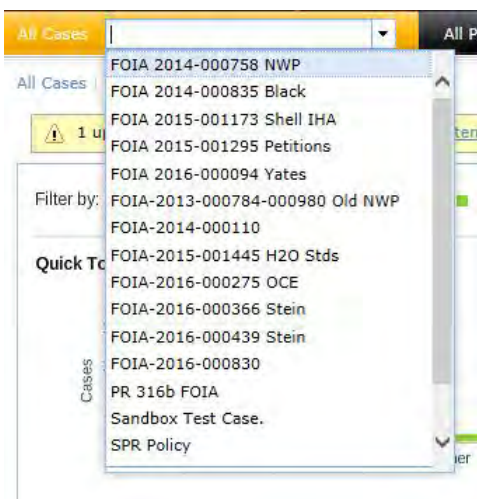


A successful login to Clearwell brings you to a screen that includes the example window shown below (exact location depends on the access level you have):



Select the drop down arrow. If you have access to more than one case, highlight the name of the case you want.

NOTE: The Sandbox Test Case is a practice case that you can use to become familiar with Clearwell. Most training for Clearwell will use this practice case.

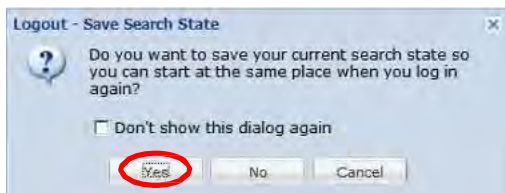


After you select your case, select the “Analysis and Review Tab.” This is where you will spend all of your reviewing time.

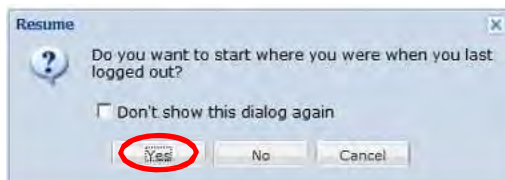


Logging Out - Don't lose your place!

Clearwell will prompt you upon exit “do you want to save your current search state so that you can start at the same place when you log in again?”

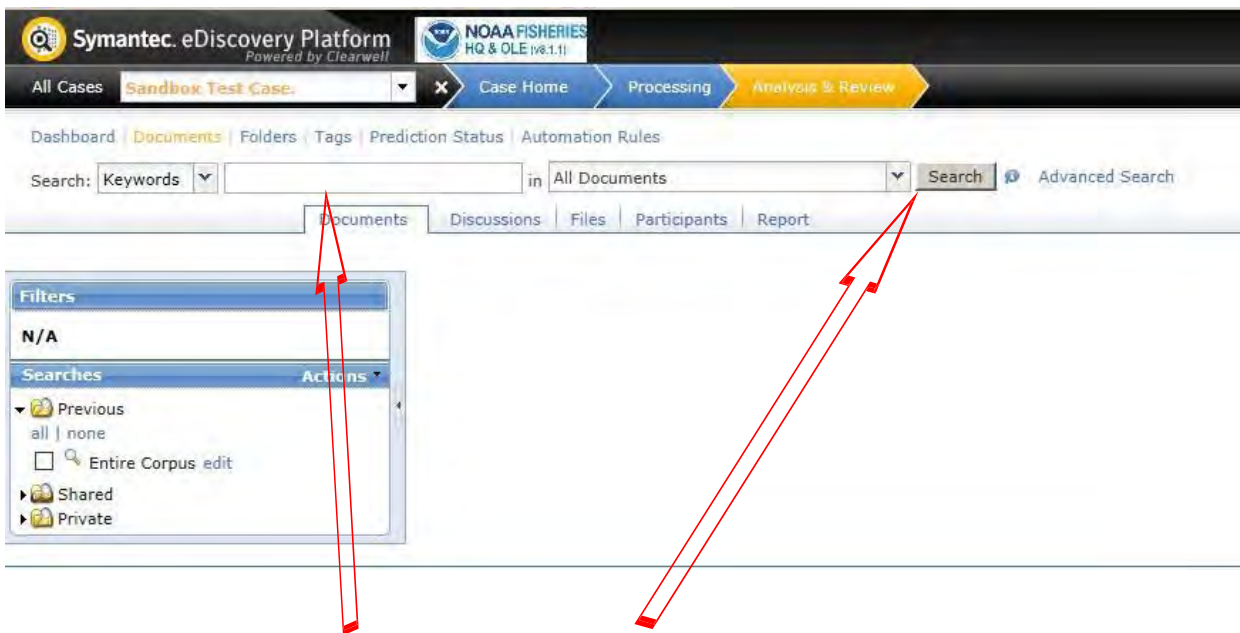


Select YES. When you log into the system (the next time), you will be asked if you want to return to the same place where you left off.



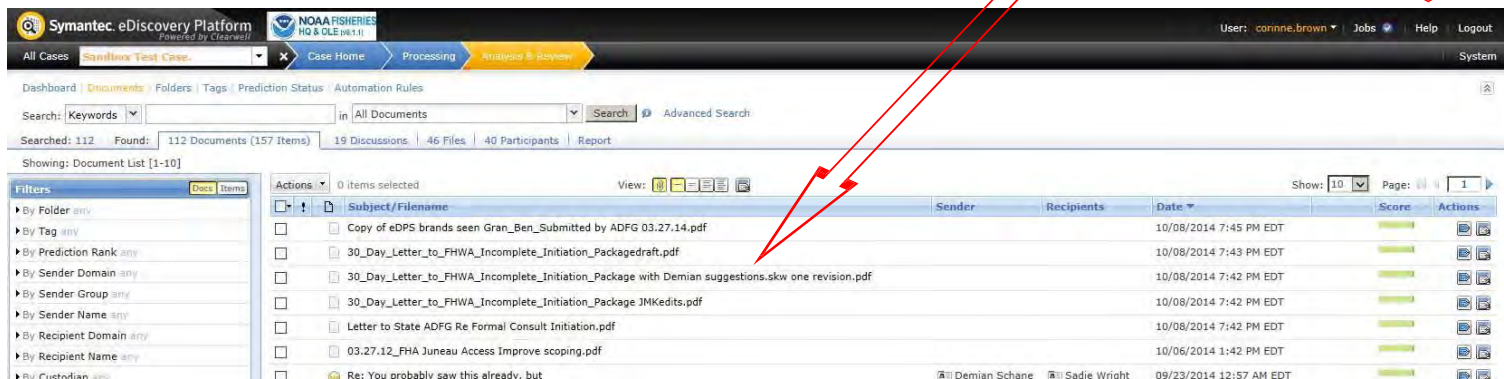
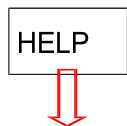
UNDERSTANDING THE ANALYSIS AND REVIEW INTERFACE

The screen will look like the one below:



Leave the search field blank and select "Search." You will see the list of all documents in the case.

NOTE: With the search field empty, selecting Search also acts as a Refresh – Refreshing the screen to show all documents.



Document versus Item

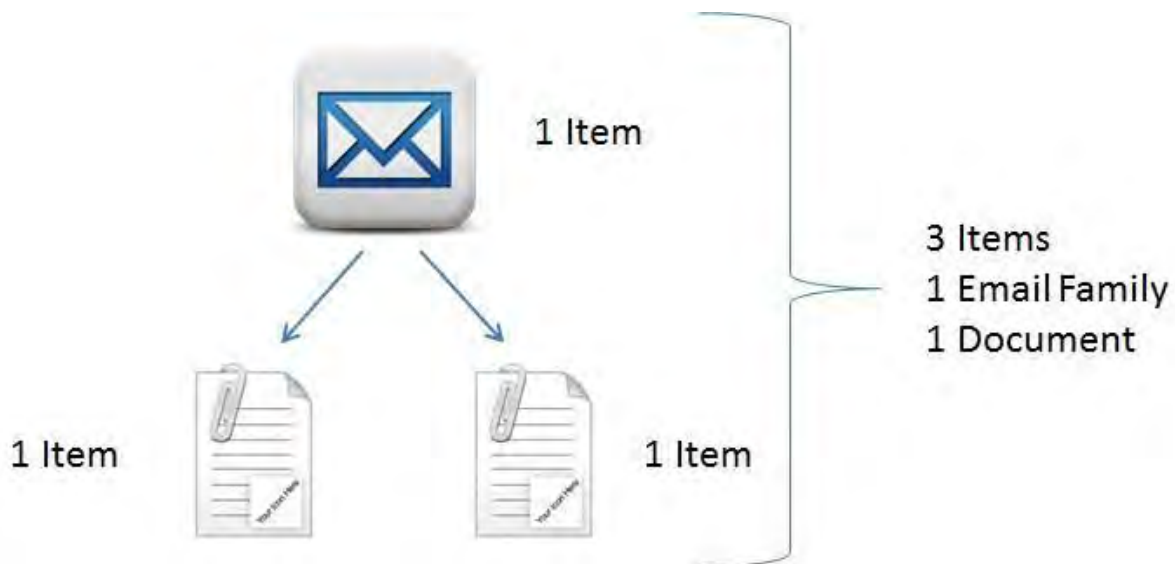
The screenshot shows a software interface with a search bar and navigation tabs. The search bar contains 'Keywords' and 'All Documents'. Below the search bar, it displays 'Searched: 112' and 'Found: 112 Documents (157 Items)'. Other statistics shown are '19 Discussions', '46 Files', and '40 Participants'. A blue arrow points from the '157 Items' text to a callout box.

112 DOCUMENTS (loose documents or document families)

157 ITEMS (counts the attachments as separate items from the e-mail)

In Clearwell terminology, there is a major difference between an item and a document. A document is a single loose document or an email with all of its attachments. An email with no attachments is one document. An email with 2 attachments is one document (also known as an email family). In the case of the email with 2 attachments, **the email and each attachment is a separate item**, for a total of 3 items.

**** Think of the number of items as the number of things that have to be individually reviewed!!!**



Reviewing Documents

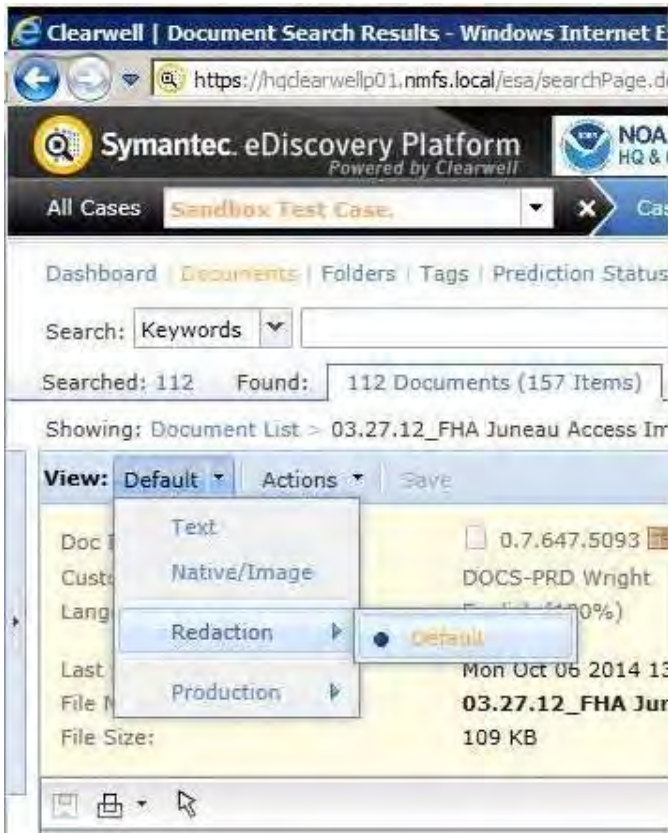
From the document list as shown below, select "Review" from above the list of documents to start reviewing with the first document or "Review" at the far right of the document you wish to specifically review. The document will open in "Text" mode. Using the pull down arrow at the top left of the screen, next to "View:" select "Native/Image" view.

The screenshot displays the Symantec eDiscovery Platform interface. At the top, the user is logged in as 'corinne.brown'. The main area shows a document list with columns for 'Subject/Filename', 'Sender', 'Recipients', 'Date', 'Score', and 'Actions'. A red arrow points to the 'Review' icon in the 'Actions' column of the first document. Another red arrow points to the 'Review' icon at the far right of the list. A text box with the text 'Select to review all items starting with the first' is positioned over the first document's 'Review' icon. A second text box with the text 'Select to review an individual item' is positioned over the 'Review' icon at the far right of the list. The interface also includes a search bar, filters, and a sidebar with various options.

This image shows a close-up of the 'View:' dropdown menu in the document viewer. The menu is open, showing options: 'Text' (selected), 'Native/Image', 'Redaction', and 'Production'. A red arrow points to the 'Native/Image' option.

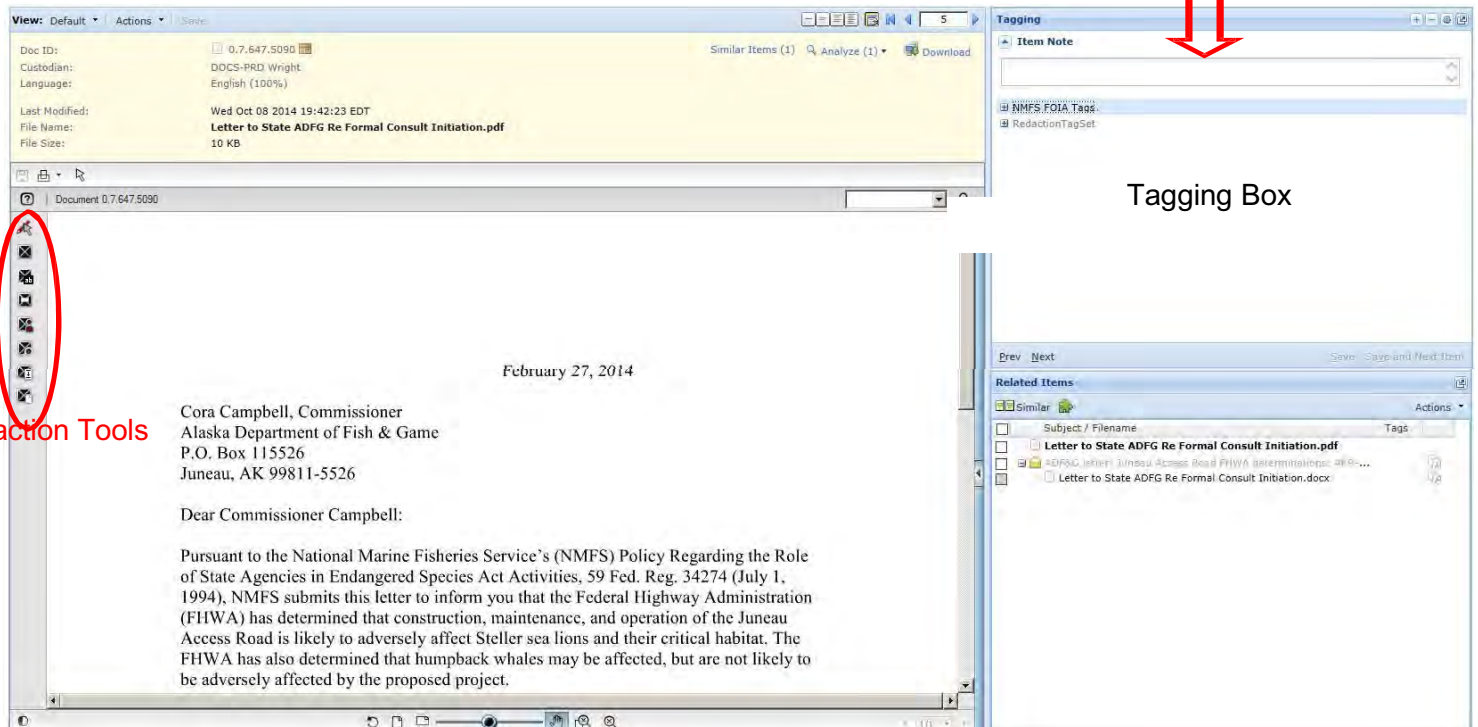
Note: If you can't see the document in Native/Image mode you probably need the ActiveX plugin. Contact your IT Helpdesk and ask for the Clearwell ActiveX plugin and the Clearwell Reasons.ini file.)

Now select Redaction/Default view



Keep in mind that "Item Notes" will print on the index. Discuss how the Notes field will be used prior to starting review of documents. Many people use Item Note to enter a description of the document at review time.

Below is what Redaction View looks like:



Redaction Tools

Tagging Box

Tagging Documents

The reviewer, subject matter expert and/or GC will determine if a document is responsive to the case.

If an item is fully or partially redacted it must be tagged **AND** redacted. These are two operations. The redaction tools are to the left of the document. Redacting blacks out portions of text on the document itself. Tagging adds the metadata to the document about its releasability and, if redacted, specifically why. This metadata is then written to the index. Tagging is done to the right of the document in the "Tagging Box".

At the beginning of the case, the Tags can be altered if it makes them more appropriate. If you choose to use this option, remember that it must be requested before Tagging and Redactions begin.

The NMFS Standard FOIA Tag Template

A complete FOIA tag set is shown below. The AR tag set is very similar. The AR tags use words instead of (b) references (eg "PII" instead of (B)(6)).

Tagging

Item Note

NMFS FOIA Tags

- Non-Responsive
- Full Release
- Consult/Refer
 - Which Agency/Agencies?
 -
- Redacted
 - Partially Redacted
 - (b)(2) Internal-Human Resources
 - What type of info justifies redaction?
 -
 - (b)(3) Exempted by Statute
 - MSA 16 U.S.C. 1881 et seq.
 - MMPA 16 U.S.C. 1361
 - Other Statute
 - Which other statute?
 -
 - What type of info justifies redaction?
 -
 - (b)(4) Trade/Commercial/Financial
 - What type of info justifies redaction?
 -
 - (b)(5) Inter/Intra-Agency Communications
 - ACP (Attorney Client Privilege)
 - AWP (Attorney Work Product)
 - Deliberative Process
 - What type of communication justifies redaction?
 -
 - (b)(6) PII
 - What type of info justifies redaction?
 -
 - (b)(7) Law Enforcement
 - (A) Interference
 - (B) Fair Trial
 - (C) Personal Privacy
 - (D) Confidential Source
 - (E) Techniques & Procedures
 - (F) Endangerment
 - What type of info justifies redaction?
 -
 - Non-responsive Text

The Item Note box can be a great resource - allowing you to add document-specific information or make notes about the document that will show up on the index.

Fully Redacted/Withheld
 (b)(2) Internal-Human Resources
What type of info justifies redaction?

(b)(3) Exempted by Statute
 MSA 16 U.S.C. 1881 et seq.
 MMPA 16 U.S.C. 1361
 Other Statute
Which other statute?

What type of info justifies redaction?

(b)(4) Trade/Commercial/Financial
What type of info justifies redaction?

(b)(5) Inter/Intra-Agency Communications
 ACP (Attorney Client Privilege)
 AWP (Attorney Work Product)
 Deliberative Process
What type of info justifies redaction?

(b)(6) PII
What type of info justifies redaction?

(b)(7) Law Enforcement
 (A) Interference
 (B) Fair Trial
 (C) Personal Privacy
 (D) Confidential Source
 (E) Techniques & Procedures
 (F) Endangerment
What type of info justifies redaction?

Uncertain how to tag
 Program Issue/Question
Nature of question (to remind yourself)

GC Issue/Question
Nature of question (to remind yourself)

Software/Technical Problem
Briefly describe the problem

Uncertain how to tag

If you are checking the “Uncertain” block, you **must** state “*why or who needs to be consulted*” and then skip to next document. When your question/problem has been cleared you must uncheck “Uncertain” box and select the final tag(s) for the document.

NOTES:

1. The “No Selection” tag is a system default that indicates that the document has not yet been tagged.
2. If you select a lower level tag, Clearwell will automatically fill the tags above it – saving you a few steps.
3. Remember to SAVE after every tag!!!
4. Emails with attachments: the attachments have the same Clearwell ID number as the parent item. You cannot search directly on an attachment number (eg 0.7.647.5027-000001) but if you search on the parent (0.7.647.5027) then you can go to the attachment.
5. You can tell if the document has been successfully tagged if you see the blue tag in the item header. If you hover over the tag a window will be displayed identifying how the item is tagged.

Exemption Rationales

Most tags have a text block for you to enter the rationale for claiming the exemption. The tags are setup so you cannot continue until you have entered a rationale. Examples of rationales include: birthdate, observer data, attorney comments on draft document, etc.

The image shows a list of exemption tags with associated sub-options and a text box for a rationale. Red arrows point to the text boxes for (b)(4), (b)(5), (b)(6), and (b)(7).

- (b)(4) Trade/Commercial/Financial
What type of info justifies redaction?
[Text Box]
- (b)(5) Inter/Intra-Agency Communications
 - ACP (Attorney Client Privilege)
 - AWP (Attorney Work Product)
 - Deliberative ProcessWhat type of info justifies redaction?
[Text Box]
- (b)(6) PII
What type of info justifies redaction?
[Text Box]
- (b)(7) Law Enforcement
 - (A) Interference
 - (B) Fair Trial
 - (C) Personal Privacy
 - (D) Confidential Source
 - (E) Techniques & Procedures
 - (F) EndangermentWhat type of info justifies redaction?
[Text Box]

Multiple Exemptions

An item might have more than one EXEMPTION. Make sure the tagged exemptions are in agreement with the exemption(s) you stamped on the document when redacting. Be certain to save after each tag and each redaction!

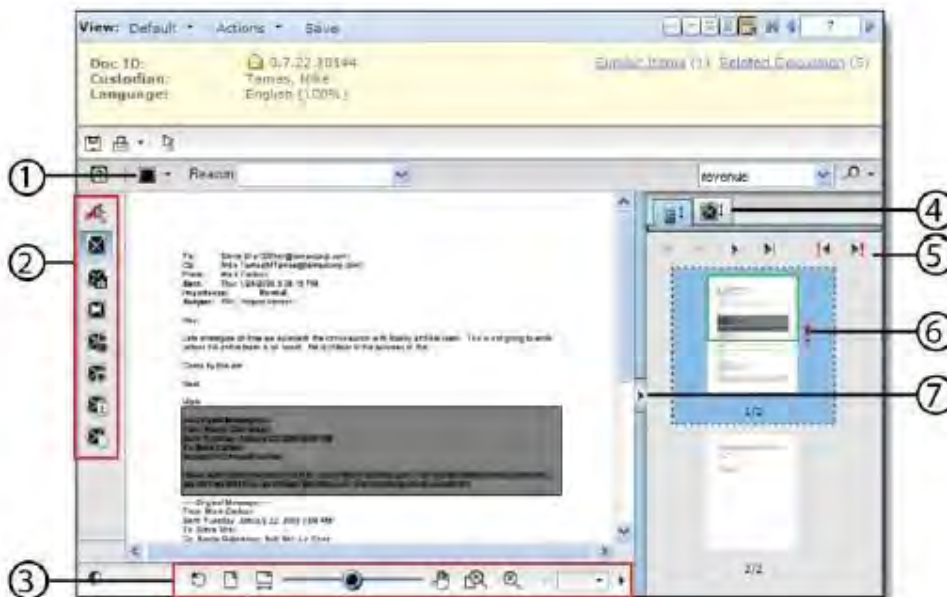
Redacting Documents

If an item is tagged fully or partially redacted, it must be physically redacted (blacked out) as well. This is very important! It is a TWO step process!

NOTE: If you have multiple partial redactions in an item, save after each to ensure all redactions are completed correctly.









The Redaction Interface

Redaction Mode provides the tools to redact case items, verify your redactions, and customize how items are displayed. The following diagram illustrates key functionality within Redaction Mode.



1. **Edit Color.** Select the color to use for redaction
2. **Redaction Tools.** Apply various redaction options to the item.
3. **Viewer Display and Magnification Options.** Select display options such as background color, monochrome, rotate, etc.
4. **Document Viewing Tabs.** Click to view thumbnails redaction verification options.
5. **Navigation Arrows.** Click to jump to the next redacted page.
6. **Redaction Indicator.** Exclamation mark indicates this page was redacted.
7. **Expansion toggle.** Click to hide or display the thumbnail pane.

Redaction Tools

| | |
|--|---|
|  | "Select Redactions" on page 180 |
|   | "Redact Area and Redact Text" on page 181 |
|  | "Allow Area" on page 181 |
|  | "Redact Privacy Information" on page 182 |
|  | "Find and Redact" on page 182 |
|  | "Find and Redact From/To" on page 183 |
|  | "Redact Pages" on page 183 |

Select Redactions



Select and modify redactions. This includes changing the selected shape or area, modifying redaction reasons, or deleting the redaction altogether.

To edit a redaction

Select the Select Redactions tool, then press the SHIFT key and click the redaction to edit.

The redaction is selected and the redaction reason displays in the document header.

Redact Area and Redact Text



Redact area enables you to create a redaction on any part of the viewable document. You can draw redaction boxes over any part of a document. With Redact text, select text for redaction.

Once redacted, the document can then be printed or produced with these redacted areas burned into the printed or produced image thereby permanently hiding privileged or confidential information.

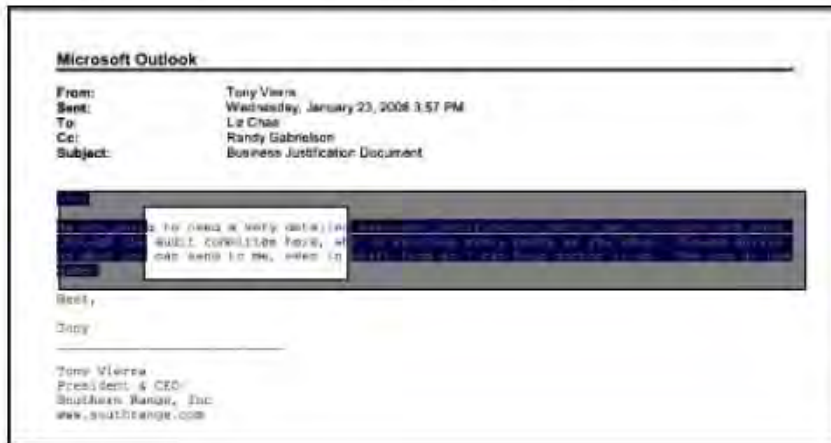
To redact an area

Click the icon and then hold down your mouse and drag to select an area to redact. Type a reason in the pop-up window, if prompted to do so, and click **OK**. The reason is displayed in the redacted area.

Allow Area



Allow area allows a portion of a redacted area to be revealed (i.e. un-redacted). This provides efficiency when all but a small area of the document needs to be redacted.



To allow an area within a redacted area

Click the icon and then hold down your mouse and drag to select an area within a redaction area to keep visible.

Redact Privacy Information



The Redact Privacy Information tool can be used to quickly find and automatically redact sensitive information commonly found in documents and forms including Social Security numbers, phone numbers, email addresses, dates of birth, and names. This can significantly improve the speed of redaction.

To redact privacy information

Click to open a pop-up window that allows you to modify privacy settings for redactions. The settings that you configure in the pop-up window apply until you modify these settings. Configure the following settings and click **Redact** to apply the settings or click **Cancel** to close the window without applying the settings.

- **Color**—Choose background color for the redacted content.
- **Reason**—Enter a default reason, which can be overridden for a specific redaction.
- **SSN (Social Security Number)**—Select to automatically redact any social security numbers found in the documents.
- **Phone numbers**—Select to automatically redact any phone numbers found in the documents. To exclude specific phone numbers from redaction, click **Use Exceptions** and specify the following:
 - Enter a phone number and click **Add**. Add additional phone numbers as needed.
 - Click **Edit** to modify a phone number.
 - Click **Open** to add a CSV file that contains phone numbers.
 - Click **Save** to save the phone number list.
 - Click **Delete** to remove a phone number.
 - Click **Clear All** to remove all phone numbers from the list.
 - Click **OK** to save the phone numbers and close the window.
 - Click **Cancel** to close the window without saving.

Find and Redact



This tool lets you find and mark for redaction multiple instances of a common word or phrase within the Redaction view of an open document. Reason codes and colors can also be applied. Find and Redact can help reduce the time required to redact a document by automatically redacting key phrases or confidential information.

To find and redact specific text

Click to open a pop-up window that allows you to find and automatically redact specified text. Enter the text, and click **Find whole word only** if you want to limit the search to whole words. Choose a redaction color and reason, and click **Redact**.

Find and Redact From/To



Find and Redact From/To finds and redacts sections of a document between two defined phrases including the application of specified reason codes and colors. This allows for fast redaction of blocks of text.

To find and redact from text string to a different text string

Click to open a pop-up window that allows you to find and automatically redact content that begins with a specified text string and ends with another text string. Enter the from and to text, and click **Include end text in redaction** if you want to include the ending text (the beginning text is automatically included). Choose a redaction color and reason, and click **Redact**.

Redact Pages



Redact Page allows you to quickly redact one or more full pages of email or file items with one command. Redaction reason codes and colors can also be applied as part of this command. ~~An alternative is to use the Redact whole e-mail option from the Actions menu, explained in the table, "Document Review Screen Icons and Functions" in this section. The latter produces only one completely redacted page as output, regardless of the total number of pages the document originally had.~~

To redact an entire page

Click to open a pop-up window that allows you to find and automatically redact specified pages. You can choose to redact all pages, the current page, or a page range. Choose a redaction color and reason, and click **Redact**.

In production, all pages print with black redaction fields.

~~**Note:** To redact an entire document, select Redact Whole E-mail from the Actions menu. The production, the document is replaced with a single slip sheet.~~

Redact Whole Item Discussion

As you can see from the lined out text above, there are two ways to redact an entire item:

1. Actions>Redact Whole Document OR
2. The Redaction Tool "Redact Pages" and select "All Pages"

ALWAYS use Redaction Tool "Redact Pages" and select "All Pages"

Why?

* Actions>Redact Whole Document replaces all of the pages with one blank page no matter how many pages there are, therefore the item gets one BATES number. Also, this method does not allow a Reason stamp on each page as required by FOIA rules.

* Redact Pages>All Pages blacks out and BATES numbers each page of the item and has a drop-down Reasons box to select from so the Reason will be stamped on each blacked out page.


While BATES numbering may not be important for a FOIA, if that FOIA is appealed or if it ultimately becomes an AR, BATES stamping becomes very important. If Actions>Redact Whole Document was used in the FOIA, someone would have to go back and change them all to Redact Pages>All Pages. Redact Pages>All Pages works for both FOIAs and ARs.

Saving Redactions

You can save redacted documents three ways:

- **Automatically**
The Auto-save feature saves your redactions when you advance to the next document. Auto-save is enabled by default.
- **When prompted**
If Auto-save is disabled, you are prompted to save your changes when you advance to the next document. Clicking **OK** saves your changes.
- **Manually**
You can click the **Save** icon anytime to save your redactions.

Editing Redacted Documents

If necessary, you can edit another reviewer's redactions on a document. Within the Redaction tools in Review Mode, select the "Select Redactions" () icon on the left toolbar. With the arrow cursor, press Shift and click on the redaction you want to change. This will make you the author of the redaction even if you do not subsequently edit the document.

When editing someone else's redactions, hold down the SHIFT key when selecting the redaction to gain control of the redaction and be able to change/delete the redaction.

Deleting Redactions

You can delete redactions one at a time by selecting them with the **Select Redactions** tool and pressing the Delete key, or you can delete all the redactions in a document from the **Actions** menu by clicking **Delete Redactions...**

When deleting all redactions from an item, it is OK to do it this way.

Viewing Redaction History Information

Hovering over a redaction provides information on the user who last created or edited the redaction, the time at which the edit was made and reason code for that redaction. This information makes it easier to perform quality control on redactions.

Drop Down Reason Box

When you redact any portion or all of a document, it must be stamped with the FOIA Exemption that justifies the redaction. Obviously then, the Reason when you are doing a redaction and the Tag on the right hand side of the screen must match.

NOTE: If you have an empty Reasons drop down box, call your IT Helpdesk and tell them that you need the Clearwell Reasons.ini file.

The screenshot shows a document viewer interface. On the left, a dropdown menu is open, showing "Reason (b)(6)" selected and circled in red. The main document content is visible, with a redaction box over the text "Aleria Jensen on [redacted]". On the right, a "Tagging" panel is open, showing a list of FOIA tags. The tag "(b)(6) PII" is selected and circled in red. The document content includes sections for "II. Issues Overview" and "III. Discussion".

II. Issues Overview
Reuben said the purpose of this meeting is to clarify several questions regarding Section 7 consultation with NMFS. The following issues were discussed:

- 1) Who will be the primary point of contact for NMFS? Will this consultation be lead by the Juneau office or the Anchorage office?
- 2) Status of delisting of eastern Distinct Population Segment (eDPS) Steller sea lions including anticipated date for completion
- 3) Formal vs. informal consultation: discountable impacts to wDPS vs. incidental take of wDPS individuals.
- 4) Critical habitat designation changes and how it should be handled under current consultation and assessment
- 5) New data about the year around presence of western Distinct Population Segment (wDPS) Steller sea lions and how it changes earlier assumptions

III. Discussion
Sadie said she will be the NMFS lead point of contact while Aleria Jensen on [redacted] have. Once Aleria returns, they will likely co-lead. The consultation will be run out of the Juneau office. Lisa Rotterman is leading the delisting effort for the eDPS Steller sea lions.

Reuben said Alternative 2B is the DOT&PF preferred alternative, but FHWA will not identify their preferred alternative until after the public comment period for the SEIS. Typically, consultation is initiated but a Biological Assessment (BA) is not submitted for concurrence until FHWA has identified their preferred alternative. Particularly in this case where some alternatives (3, 4B, 4D) were determined to have adverse effects so they

Redaction Display Options

The screenshot shows a document viewer displaying a letterhead for the United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service. The letter is dated March 27, 2012, and is addressed to Tim Haugh at the Federal Highway Administration. The subject line is "Re: Juneau Access Improvement STP-000S(131)/71100". A redaction box is visible over the subject line, and the redaction reason "(b)(6) PII" is circled in red.

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668




March 27, 2012

Tim Haugh
Federal Highway Administration
P.O. Box 21648
709 West 9th Street, Room 851
Juneau, Alaska 99802-1648











Re: Juneau Access Improvement
STP-000S(131)/71100

Redaction Display Options

Viewer Display Options

| Display Controls | | |
|---|--------------------------------------|---|
|  | Rotate 90 | Rotate the document 90 degrees clockwise. |
|  | Display Monochrome/ Display Color | Click to change the background color to black, white, gray, or default. Click to display the item in monochrome or color. |
|  | Paging Controls | Click the arrows to page through the document. |

Viewer Magnification Options

| Markup, Print, and Page Controls | | |
|---|-------------|--|
|  | Markup Save | Click to save markups. |
|  | Print | Click to print the document with the specified redactions. |
|  | Select | Click and then use your mouse to select text. |
|  | Fit All | Click to display the whole page. |
|  | Fit Width | Click to display size the page to display the full width. |
|  | Pan/Zoom | Click to clear the zoom and magnifier settings. |
|  | Zoom Window | Click and then use your mouse to select an area. A zoomed version of the area is displayed. To return to the original size, using the page percent controls. |
|  | Zoom In/Out | Click and then move your mouse back and forth to change the zoom level. |
|  | Magnifier | Click and then click an area of the document to zoom in or that section. |
|  | Find | Find specified text in the document. |

Deduplication

Clearwell automatically deduplicates items loaded into a case. For an item to be a duplicate it must be EXACTLY the same. For a loose document this means the exact same title, size, date modified, etc. For an email this means that the Subject, Date and Time Sent, From, To, Cc and all of the attachments must be identical to another email. Although emails often contain identical attachments, if any other part of the email is not the same, it is not a duplicate. Clearwell never deduplicates out an attachment. Email families are always left intact.

Filters:

Filters

Docs Items

▸ By Folder any

▼ By Tag any

any | none

<Not Tagged> (7) only

▸ By Image Status Tags any

▼ By NMFS FOIA Tags Nov15 any

any | none | open | close

Non-Responsive (1) only

Full Release (23) only

▼ Redacted (43) only

▼ Partially Redacted (22) only

▼ (b)(5) Inter/Intra-Agency Communications (22) only

ACP (Attorney Client Privilege) (22) only

▼ Fully Redacted/Withheld (21) only

▼ (b)(5) Inter/Intra-Agency Communications (21) only

ACP (Attorney Client Privilege) (21) only

▼ Uncertain how to tag (1) only

Software/Technical Problem (1) only

▸ By RedactionTagSet any

▸ By Prediction Rank any

▸ By Sender Domain any

▸ By Sender Group any

▸ By Sender Name any

▸ By Recipient Domain any

▸ By Recipient Name any

▸ By Custodian any

▸ By Document Type any

▸ By File Type any

▸ By Document Size any

▸ By Language any

▸ By Message Flag any

▸ By File Flag any

Apply Clear Refresh

If there is a number next to <Not Tagged> then there are untagged documents. Click on the number (7) to bring up just those items that are not yet tagged.

You can find all items tagged a certain way. 22 is the number of items tagged partially redacted/(b)(5)/ACP

The number 1 next to Software Technical Problem indicates that there is one document that won't display as normal and needs IT attention.

See what domain emails are from (eg noaa.gov or dot.gov or usacoe.gov or gmail.com). This is a good way to quickly identify email that most likely has other agency implications.

Quickly find emails sent from specific people.

Advanced Search

Running a search in Clearwell is easy! There are several ways you can search depending on what you are looking for. Below is a screen shot of the Advanced Search Screen. There are many options. For more information about using the Advanced Search feature please see page 86 of the Symantec eDiscovery User Guide 8.1.1

<https://clearwelldocs.symantec.com/manuals/8.1.1/UserGuide.pdf>

Symantec eDiscovery Platform
Powered by Clearwell

NOAA FISHERIES
HQ & OLE (W411)

All Cases | **FOIA 2015-001173 Shell IHA** | Case Home | Processing | Analysis & Review

Dashboard | Documents | Folders | Tags | Prediction Status | Automation Rules

Search: Keywords in All Documents Search Advanced Search

Searched: 75 Found: 75 Documents (75 Items) 0 Discussions 69 Files 2 Participants Report

Search Name: Entire Corpus

Style Keyword Concept Freeform Tag Event History **Run Search** **Save...** **Save As...** **Back** **Clear**

Scope Find by type and by folder **Date** Find by sent or last modified date

Families Include document families **File** Find by file properties

Keywords Find by keyword or phrase
Any of these words
All of the words
The exact phrase
None of the words
Fields to search
All Clearwell fields and custom fields
 Search all variations of the keyword terms (stemmed search)
Filter and Count Generation
 Limit filter and count generation for improved search speed
 Normal filter and count generation
 Generate keyword details for filters and report

Size Find by size

Languages Find by language properties

Tags Find by tags or notes

Actions Find by the history of actions taken on them

Custom Fields Find by using fields imported through 3rd party load files

Email Headers Find by email header fields

Production Numbers Find by production or Imported number

Identifiers Find by Document ID, Source Location, Custodian, or Batch

Run Search **Save...** **Save As...** **Back** **Clear**

Comments on this document

If you have comments on or suggestions for improving this document please contact:
Corinne Brown at corinne.brown@noaa.gov

Appendices

Review Mode

Note: Certain documents in Review Mode may be unavailable if they have not been designated for review.

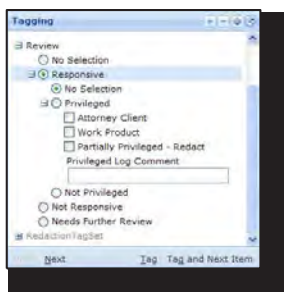
- 1 Run a search query or open your review folder.
- 2 Open Review Mode. (In 8.0: also expand the collapsed filter pane)
- 3 View documents in Native/Image View.
- 4 Undock the Tagging & Related Items windows.
- 5 Collapse the filter pane.

Getting Started

tagging documents

Tags are a simple way to indicate the status and relevance of a document. Tags enable you to classify documents based on selection criteria predefined by your case administrator.

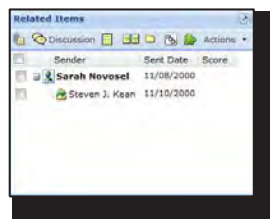
To tag a document:
Select a tag.
Click the Tag button to save the selection.



Viewing Related Items

The **Related Items** window accelerates review by providing a single place to view everything related to a document.

Attachments, Discussions, Topics, Similar Docs, Folders, Tag History, and Custom Attributes are all accessible from **Related Items** enabling you to view, tag, and bulk tag without changing modes.



ReView tips & tricks

Expand & Collapse the Tag Decision Tree

You can open the entire decision tree by clicking the + button.

Use Hit Highlighting

Use the arrow buttons or keyboard shortcuts to display the next hit.



- Circle arrow buttons move to the next, or previous hit.

- Arrows surrounding the document number field move to the next, or previous document.

View Attachments before clicking Next Document

Choose your View mode deliberately:

Text Mode. Faster display and multicolor highlighting.

Native Mode. Faster review by displaying messages in full, native fidelity.

Sort Records Chronologically
Before entering Review Mode, you can sort your records by date.

Keyboard Shortcuts:

- F11 hides browser toolbar
- ALT+N displays next document
- ALT+P displays previous document
- ALT+T saves marked tags
- ALT↓ displays next hit
- ALT↑ displays previous hit

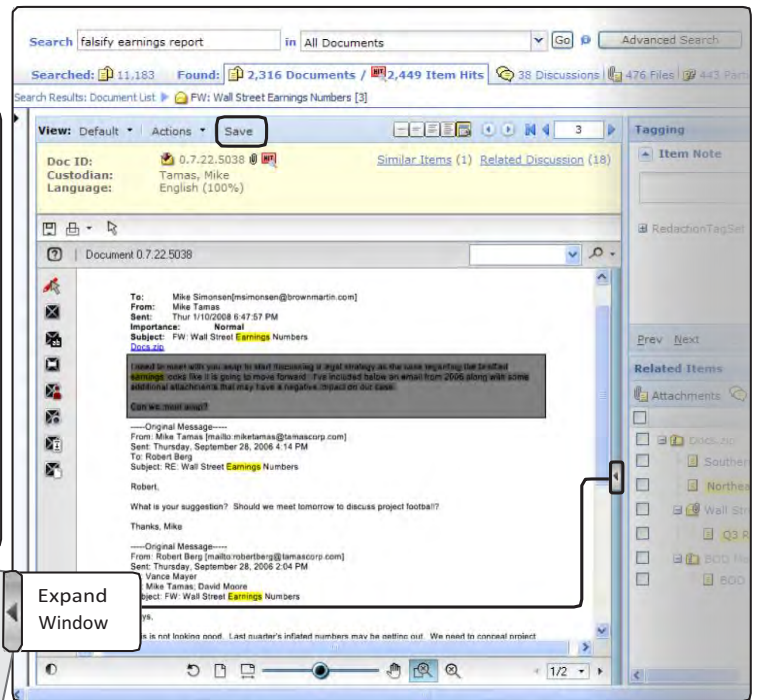
Redaction Mode

Note: Redaction Mode may be unavailable for certain documents if they have not been designated for review.

Getting Started

1. Open Redaction Mode. (View:>Redaction>set_name)
2. Redact the document using the Redaction drawing tools.
3. Save your redactions.
4. Use the Thumbnail & Verification views to review your redactions.
5. Produce the document to burn in your redactions.

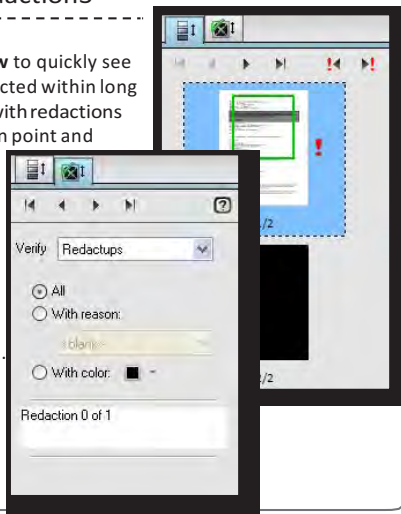
| | |
|-------------------------------|---------------------|
| Edit Tool | Select Redactions |
| Basic Tools | Redact Area |
| | Redact Text |
| | Allow Area |
| Search-Based Redaction | Redact Privacy Data |
| | Find and Redact |
| Bulk Redaction | Redact Section |
| | Redact Page |



Verifying Redactions

Use thumbnail view to quickly see what has been redacted within long documents. Pages with redactions have an exclamation point and highlighted border.

Verify redaction accuracy by stepping through documents or searching based on case-specific criteria.



Expand Window

Redaction tips & tricks

For a faster redaction session, cache the review set first.

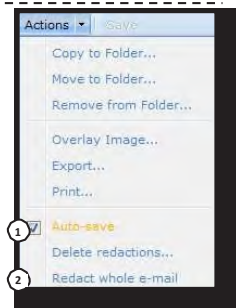
The Auto-save feature automatically saves your redactions when you move to the next document.

You can redact an entire document two ways:

Redact whole document (preferred).
Produced document is replaced with a single slipsheet.

Redact Pages
All pages print with black redaction fields. This option is available from the vertical Redaction tool bar.

Redactions should be either black or white.



THIS PAGE UNINTENTIONALLY LEFT BLANK

(b) (5)

Reviewing by Discussion Chain

1. Go to the Discussions tab

Search: Keywords in All Documents [Advanced Search](#)

Searched: 116 Found: 116 Documents (161 Items) 19 Discussions 50 Files 40 Participants Report

Showing: Discussion List [1-10] > Discussion 2

2. Go to Thread

Discussion Analysis: meeting dates |< < Prev | 2 | Next >

Summary Thread Terms Conversations Senders Attachments

Chronological Thread of the Discussion: meeting dates
Note: Derived messages may be shown below for discussion thread clarity, but cannot be tagged or exported.

Actions (2 of 8 selected)

3. Review each part of the chain to find ones that have all parts of the chain above included and put a check in the box next to the ones that just contain pieces of the chain (be careful to check that attachments are still part of lower level parts of the chain). NOTE: Parts of the chain with boxes that are grayed out are messages that Clearwell was able to derive from other parts of the chain but don't actually exist. Therefore they cannot be checked/tagged/redacted.

Discussion Analysis: meeting dates |< < Prev | 2 | Next >

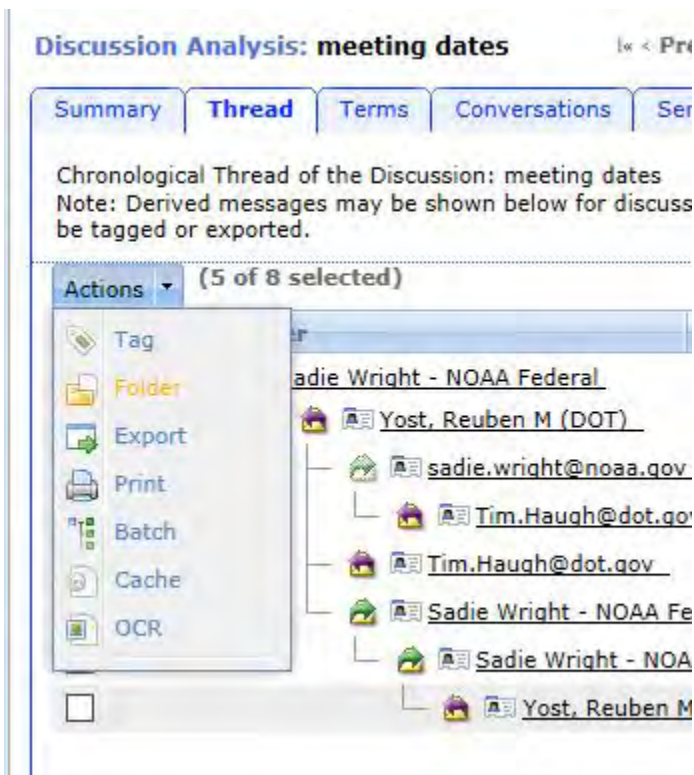
Summary Thread Terms Conversations Senders Attachments

Chronological Thread of the Discussion: meeting dates
Note: Derived messages may be shown below for discussion thread clarity, but cannot be tagged or exported.

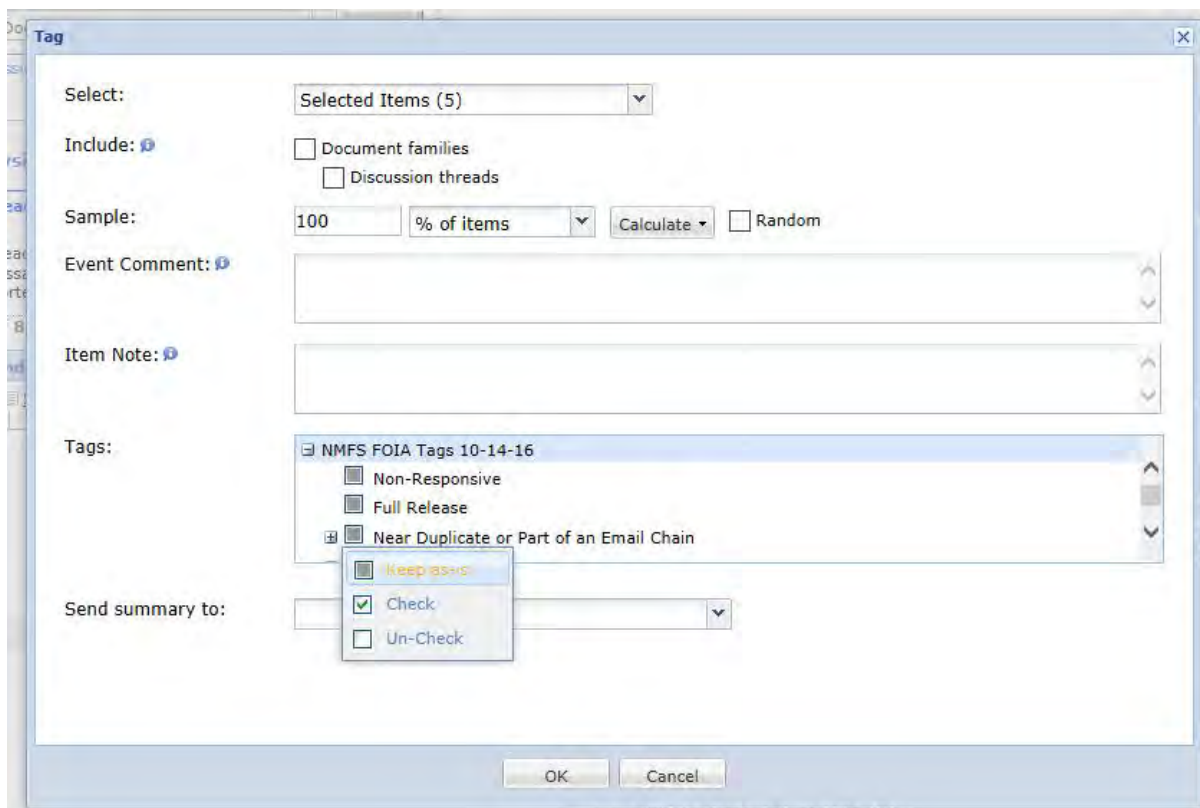
Actions (5 of 8 selected)

| <input type="checkbox"/> | Sender | Recipients |
|-------------------------------------|------------------------------------|------------|
| <input checked="" type="checkbox"/> | <u>Sadie Wright - NOAA Federal</u> | Reuben Yc |
| <input checked="" type="checkbox"/> | <u>Yost, Reuben M (DOT)</u> | |
| <input type="checkbox"/> | <u>sadie.wright@noaa.gov</u> | |
| <input type="checkbox"/> | <u>Tim.Haugh@dot.gov</u> | |
| <input checked="" type="checkbox"/> | <u>Tim.Haugh@dot.gov</u> | |
| <input checked="" type="checkbox"/> | <u>Sadie Wright - NOAA Federal</u> | |
| <input checked="" type="checkbox"/> | <u>Sadie Wright - NOAA Federal</u> | |
| <input type="checkbox"/> | <u>Yost, Reuben M (DOT)</u> | |

- Using the dropdown arrow at the right side of the Actions box, select TAG



- Ensure the number of Selected Items is what you intend. UNCHECK Document Families and Discussion Threads!! Leave Sample at 100% (always!). Click on the tag Near Duplicate or Part of an Email Chain and then Check. Don't bother to send a summary because Clearwell can't communicate with Google email. Select OK.



6. You will now see that the selected parts of the chain are tagged.

Discussion Analysis: meeting dates | < Prev | 2 | Next >

Summary | **Thread** | Terms | Conversations | Senders | Attachments

Chronological Thread of the Discussion: meeting dates
Note: Derived messages may be shown below for discussion thread clarity, but cannot be tagged or exported.

Actions (0 of 8 selected)

| | Sender | Recipients |
|--------------------------|-----------------------------|-------------|
| <input type="checkbox"/> | Sadie Wright - NOAA Federal | Reuben Yost |
| <input type="checkbox"/> | Yost, Reuben M (DOT) | |
| <input type="checkbox"/> | sadie.wright@noaa.gov | |
| <input type="checkbox"/> | Tim.Haugh@dot.gov | |
| <input type="checkbox"/> | Tim.Haugh@dot.gov | |
| <input type="checkbox"/> | Sadie Wright - NOAA Federal | |
| <input type="checkbox"/> | Sadie Wright - NOAA Federal | |
| <input type="checkbox"/> | Yost, Reuben M (DOT) | |

7. Select one of the parts of the chain not tagged and highlight the Clearwell ID so you can copy it.

Discussion Analysis: meeting dates | < Prev | 2 | Next >

Summary | **Thread** | Terms | Conversations | Senders | Attachments

Chronological Thread of the Discussion: meeting dates
Note: Derived messages may be shown below for discussion thread clarity, but cannot be tagged or exported.

Actions (0 of 8 selected)

| | Sender | Recipients |
|--------------------------|-----------------------------|-------------|
| <input type="checkbox"/> | Sadie Wright - NOAA Federal | Reuben Yost |
| <input type="checkbox"/> | Yost, Reuben M (DOT) | |
| <input type="checkbox"/> | sadie.wright@noaa.gov | |
| <input type="checkbox"/> | Tim.Haugh@dot.gov | |
| <input type="checkbox"/> | Tim.Haugh@dot.gov | |
| <input type="checkbox"/> | Sadie Wright - NOAA Federal | |
| <input type="checkbox"/> | Sadie Wright - NOAA Federal | |
| <input type="checkbox"/> | Yost, Reuben M (DOT) | |

Extend view

Doc ID: 0.7.1170.5097
Custodian: EML_PRD Wright
Language: English (100%)

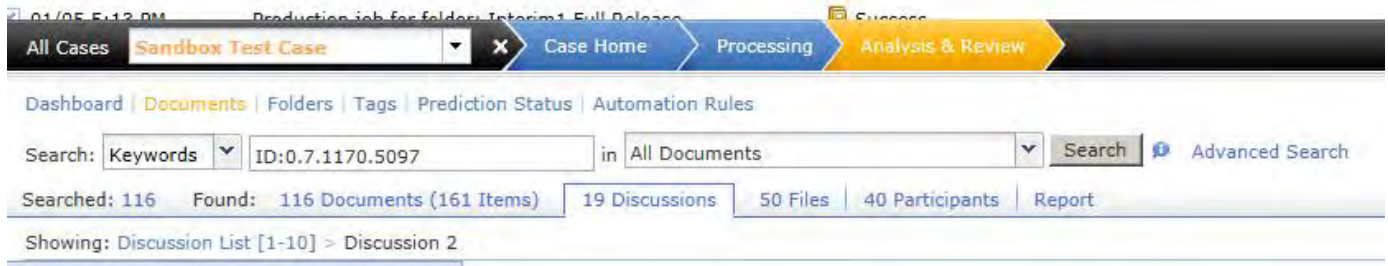
From: Tim.Haugh@dot.gov <tim.haugh@dot.gov>
To: sadie.wright@noaa.gov <sadie.wright@noaa.gov>
Cc: reuben.yost@alaska.gov <reuben.yost@alaska.gov>
Sent: Mon Oct 21 2013 17:21:47 EDT
Subject: RE: meeting dates

Yes, Sadie – if you can get a conference room with telecon capabilities, I might be able to get one here

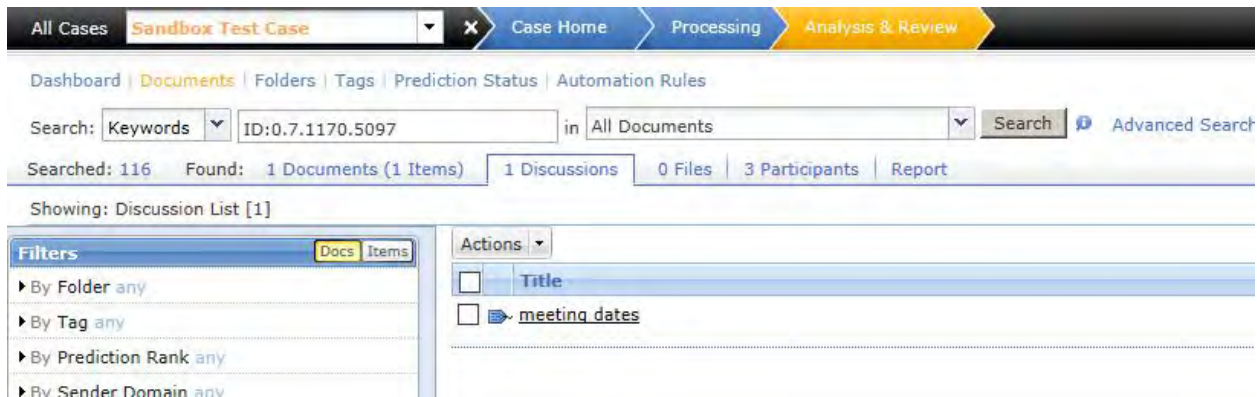
Thanks!

Tim A. Haugh
Environmental Program Manager,
FHWA Alaska Division Office;

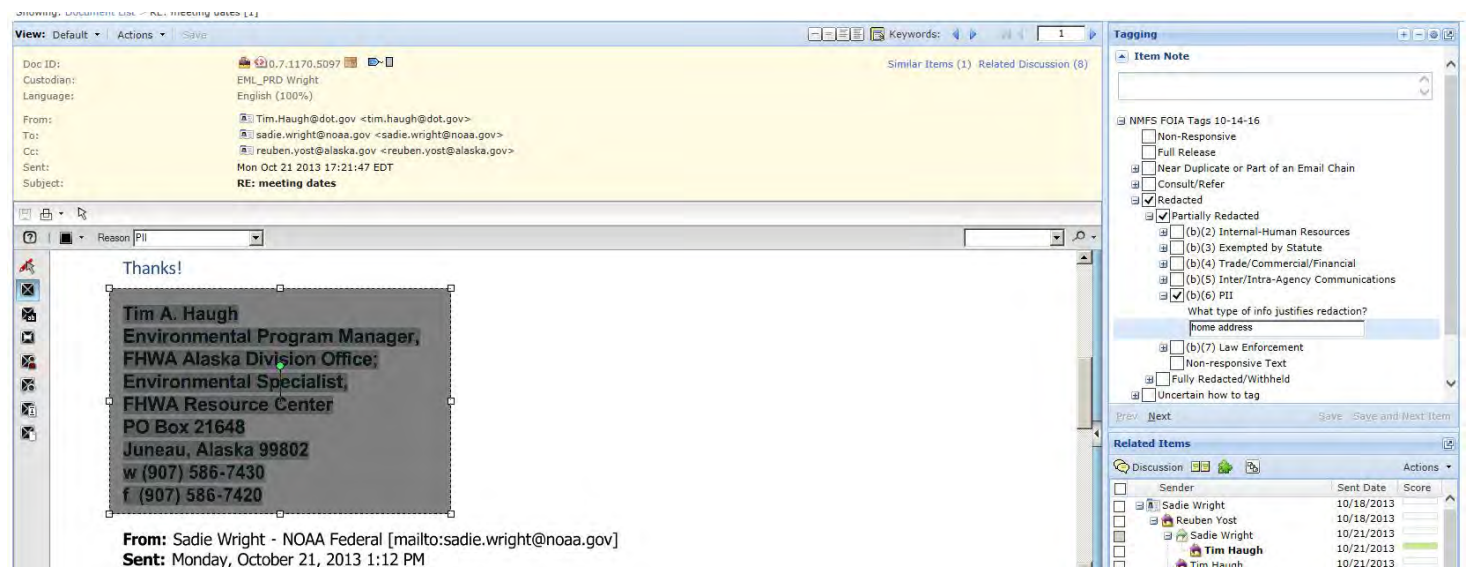
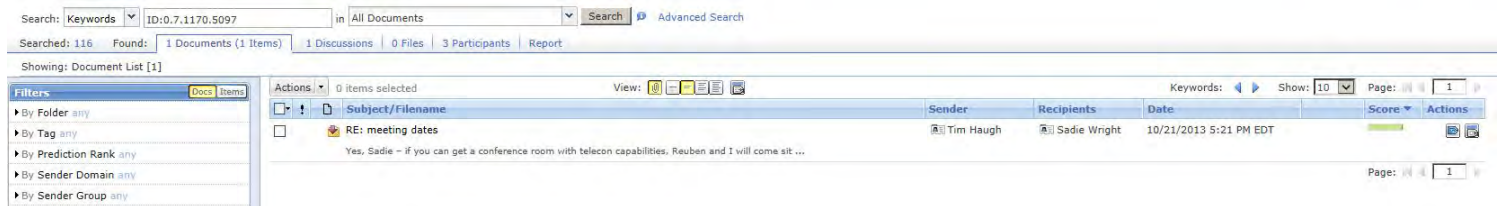
- Type ID: in the Search box at the top of the screen and paste the CW DocID just to the right of ID: (no space). Select Search.



- That one document appears on the screen.



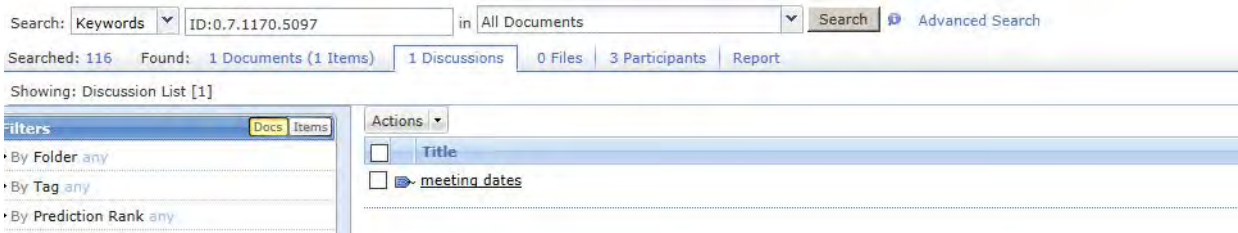
- Click on the Documents tab. The item can now be viewed in Redaction View and tagged/redacted.



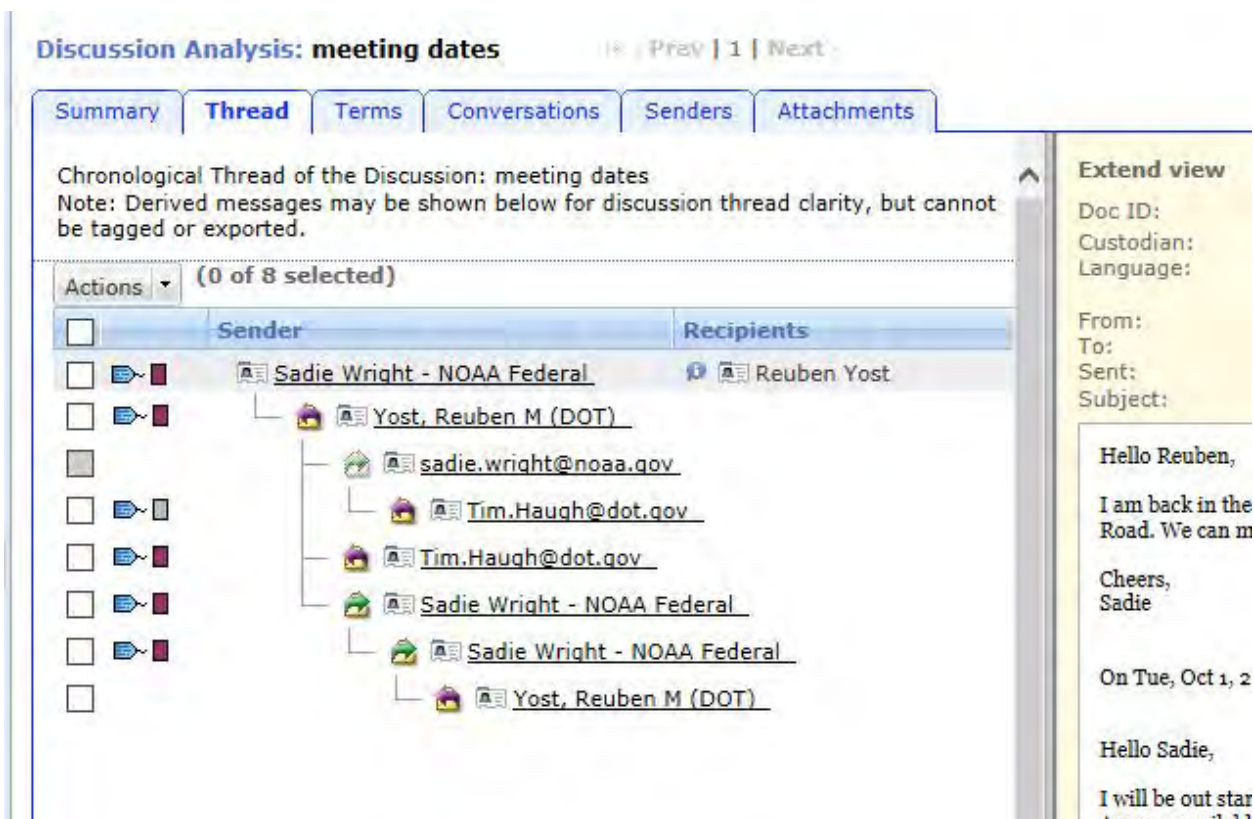
11. Return to List View



12. Return to the Discussions Tab



13. Click on the item name to return to the Discussion View.



14. Repeat until all parts of the chain are tagged or grayed out by Clearwell.

From: Kelton, Cindy (Federal) <ckelton@doc.gov>
Sent: Friday, March 31, 2017 9:05 AM
To: tknudson@cironline.org
Cc: Graff, Mark (Federal)
Subject: FOIA Appeal DOC-NOAA-2016-000196 - Final Disposition
Attachments: DOC-NOAA-2016-000196 - Final Disposition.pdf

Mr. Knudson,

Please find attached the final disposition for FOIA appeal DOC-NOAA-201-000196.

Thanks,

Cindy Kelton
Administrative Assistant
Department of Commerce
Office of General Counsel
LEO/FOIA Group
202-482-8103

Confidentiality Notice: This e-mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

MAR 31 2017



UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel

Washington, D.C. 20230

Thomas Knudson
1400 65th St. Suite 200
Emeryville, CA 94608
tknudson@cironline.org

Re: FOIA Appeal # DOC-OS-2017-000742, Request # DOC-NOAA-2016-000196

Dear Mr. Knudson:

This responds to the administrative appeal you filed under the Freedom of Information Act (FOIA) (5 U.S.C. § 552) on March 7, 2017 concerning the National Oceanic and Atmospheric Administration (NOAA)'s closure of your FOIA request with no response (FOIA Online Request # DOC-NOAA-2016-000196). Your appeal is being categorized administratively as a denial because it is now moot.

Your request that is the subject of this appeal (subject request) is for "[a] copy of the speech given by William Karp, NMFS Science and Research Director, NE Fisheries Science Center at the 8th International Fisheries Observer and Monitoring Conference in San Diego this year, along with an audio recording of the speech."

NOAA combined the subject request with another request that you submitted on the same date as this one (FOIA Online Request # DOC-NOAA-2016-000195) because the two requests involve clearly related matters. NOAA modified that other request to incorporate the subject request, and closed the subject request with the disposition of "Aggregate cases" noted in FOIA Online.

On March 24, 2017, NOAA provided an interim response to you for the combined request. The interim response released to you in its entirety the only document NOAA located that is responsive to that portion of the combined request that concerns the subject request. Because NOAA has now effectively responded fully to the subject request, your appeal is now moot. For your convenience, enclosed is a copy of NOAA's March 24, 2017 interim response.

This is the final decision of the Department of Commerce. You have the right to obtain judicial review of this denial of your FOIA appeal as provided for in 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in blue ink that reads "Brian DiGiacomo".

Brian DiGiacomo
Acting Assistant General Counsel
for Employment, Litigation and Information

Enclosure

cc: Mark Graff



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Office of Science and Technology
1315 East-West Highway
Silver Spring, MD 20910

Thomas Knudson
1400 65th St. Suite 200
Emeryville, CA 94608

Re: Request No. DOC-NOAA-2016-000195

Dear Mr. Knudson,

This letter is in response to your Freedom of Information Act (FOIA) request, which was received by our office on November 17, 2017 in which you requested:

"... All email correspondence sent and received by NOAA/NMFS employees on the steering committee for the 8th annual International Fisheries Observer and Monitoring Conference in San Diego pertaining to any aspect of the conference for the time period Jan. 1, 2016 to present, including attachments.

I also request a copy of the speech given by William Karp, NMFS Science and Research Director, NE Fisheries Science Center at the 8th International Fisheries Observer and Monitoring Conference in San Diego this year, along with an audio recording of the speech."

This constitutes our 1st interim response to your request. We have located one Power Point presentation in response to your request. You are granted full access to this record, and a copy is enclosed.

Although we do not consider this to be a denial of your request, you have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 30 calendar days of the date of this response letter at the following address:

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to [202-482-2552](tel:202-482-2552), or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.



UNITED STATES DEPARTMENT OF COMMERCE

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- "Freedom of Information Act Appeal" must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 30th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov

Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence, please contact **LCDR Jennifer E. Pralgo, NOAA** at Jennifer.pralgo@noaa.gov or by phone at **301-427-8118**.

Sincerely,

LCDR Jennifer E. Pralgo, NOAA
Executive Officer, NMFS Office of Science and Technology

Fisheries Monitoring – Past, Present and Future

William A. Karp, Ph.D.
Science & Research Director, Northeast Fisheries Science Center

International Fisheries Observer and Monitoring Conference
San Diego, California, August 2016

Outline

- Historical perspective
- Why do we monitor fisheries?
- How do we monitor fisheries?
- The future

Historical Perspective



Justinian the Great
Byzantine Emperor
540 AD

- Public ownership of natural resources
- “Doctrine of Public Trust” establishes the public as major stakeholders
- Accountability and monitoring as a shared obligation of management authorities and those that harvest the resource

Historical Perspective

MINISTRY OF AGRICULTURE, FISHERIES AND FOOD
FISHERIES LABORATORY, LOVESTOFT, SUFFOLK, ENGLAND

1971 RESEARCH VESSEL PROGRAMME

REPORT: BY YELLINA: CHUISE 9

(PROVISIONAL: Not to be quoted without prior reference to the author)

STAFF

Part A

J D Riley 15-18 & 21-27 August
G T Thacker 6-14 & 19-20 August
P T Withness 6-14 August
M G Rice (Student) 15-27 August

Part B

J D Riley 6-14 September
W A Karp 6-14 September
‘Push Net’ Survey (Shore based)
A Jones 6-14 September
B Baxter 6-14 September

LOCALITY

South coast of England and north coast of Cornwall



Historical Perspective

- Modern stock assessment methods rely on accurate estimates of catch quantity and composition and, increasingly, size and age composition
- Logbooks, delivery reports, port sampling as primary sources of information but concerns about bias
- Emerging realization of magnitude and importance of discard as well as concerns about interactions with protected species
- Need for sea-going biological technicians to supplement port sampling and address specific discard and interaction questions – also processing as sea
- Emergence of observers as an essential component of monitoring and data collection programs
- Quota based management programs increase monitoring requirements for catch accounting
- Advances in technology and IT enhance monitoring options
- Increased emphasis of industry role in designing and implementing monitoring programs within a “co-management” framework

Historical Perspective

Estimates of total catch are an essential ingredient of stock production models, of VPA and all the techniques that depend on it.....No effort should be spared to acquire these data.

John Shepherd. 1988.

Why do we monitor fisheries?

- Science
 - Catch Quantity & Composition
 - Size & Age, Other Biological Information
 - Discard/Bycatch
 - Seabird/Mammal/Turtle Interactions
 - Fishing Effort & Operations
- Management and Compliance
 - Quota Monitoring
 - Bycatch Avoidance
 - Regulatory Compliance
 - Observer Regulations
- Business Operations
 - Responsible Fishing/Certification
 - Performance

Why do we monitor fisheries?

As the accuracy of the scientific advice is directly related to the reliability of the original basic data, it is not only desirable for all countries to collect the necessary information but also their moral responsibility. - *T. Williams in John Gulland "Fish Population Dynamics" 1977*

- Required under:
 - FAO Code of Conduct
 - US Magnuson-Stevens Act, other statutes
 - Common Fisheries Policy
 - Other national and international guidelines/directives

How do we monitor fisheries?

- Self Reporting
 - Traditional source of basic information
 - Logbooks & trip reports
 - Progressive use of electronic reporting
 - Concerns regarding accuracy
 - Will continue to be important

How do we monitor fisheries?

- Port Sampling
 - Traditional approach will continue to be important
 - Could take on a larger role under maximized retention with EM
 - Important role of port samplers in communications and outreach

How do we monitor fisheries?

- Observers
 - Reliable and accurate reporting
 - Flexibility in training and deployment
 - Data collection with high temporal and spatial resolution
 - High costs for high quality
 - Only appropriate approach in many cases
 - Role of observers in communications and outreach
 - Professionalism and safety concerns

How do we monitor fisheries?

- Recreational Fishing
 - Difficult and expensive to monitor
 - Increasingly important
 - Sampling and estimation concerns
 - Increased use of electronic reporting
 - Observers on "for-hire" vessels

How do we monitor fisheries?

- **Electronic Technologies**
 - Electronic reporting is not new and is becoming increasingly important
 - Electronic monitoring has proved to be effective and efficient in many applications – continuing development
 - Advances in EM and other technologies will continue and we must encourage innovation
 - Investment in IT infrastructure essential for effective monitoring
 - Importance of information dissemination to scientists, managers, stakeholders, public

The Future

NMFS and the Councils should invest in finding ways to improve data from commercial and recreational fisheries to make these data more useful in stock assessments rather than establishing new fishery-independent surveys.

It is important that all observer programs that use less than 100% coverage institute statistical designs that apportion observer coverage in a statistically valid manner, with special attention to possible effects on catches of having an observer onboard.

National Research Council "Collection, management, and Use of Marine Fisheries Data". 2000

The Future

- **Standards**
 - Regulatory vs Certification standards
 - Electronic reporting
 - Observer training, support and safety
 - Regulation and monitoring systems must not degrade data quality and/or must incentive accurate reporting
 - Regulatory actions that require monitoring can only be implemented if information needs are fully met
 - Assumption of bias must be disproved
 - Precision standards based on risk – sensitivity of assessments or management actions
 - Management authority should set standards – vessel operators submit plans that meet standards – multiple solutions that encourage innovation

The Future

- **Partnerships**
 - Successful and cost effective monitoring requires a shared vision and commitment – trust and transparency are essential
 - Well-designed monitoring programs address science, management and business information needs
 - Role of NGOs and foundations
 - Collaboration encourages innovation and shared ownership
 - Public trust and accountability

The Future

- Innovation
 - Increased use of EM and other technologies
 - Information management and dissemination
 - Configuring systems to meet specific needs
 - Defining goals and objectives
 - Using appropriate tools
 - Accurate and timely data that meets varying information needs

The Future

- Observers
 - Continued reliance on observers
 - Increased focus on observer professionalism
 - Safety as an ongoing concern
 - Increased role of observers in outreach & communication

In Closing

Perhaps most valuable in reducing errors, however, is the attitude of the person in charge of the data collection.

John Pope. 1988.

From: Torczon, Andrea (Federal) <aTorczon@doc.gov>
Sent: Friday, March 31, 2017 11:01 AM
To: Lowery, Ruth Ann (Federal)
Cc: Graff, Mark (Federal); Nathanson, Stacey (Federal); Almeida, John (Federal)
Subject: RE: FW: FOIA Appeal re: Request # DOC-NOAA-2016-000605
Attachments: 2017.02.13 DOC-NOAA-2016-000605 SPOR Policy Appeal Letter (1).pdf

Ruth Ann,

Yes, a phone call next week would be great. My schedule looks good except for mid-day on Wednesday.

Attached is a copy of the appeal.

Thank you.

Andrea

Andrea Torczon
Senior Attorney
General Law Division
Office of the General Counsel
U.S. Department of Commerce
202-482-8028

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From: Ruth Ann Lowery - NOAA Federal [mailto:ruthann.lowery@noaa.gov]
Sent: Friday, March 31, 2017 10:50 AM
To: Torczon, Andrea (Federal) <aTorczon@doc.gov>
Cc: Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>
Subject: FW: FW: FOIA Appeal re: Request # DOC-NOAA-2016-000605

Hi, Andrea,

I am an attorney with NOAA GC who worked on the above-referenced matter (b)(5)

Thanks,
Ruth Ann

Ruth Ann Lowery, Attorney-Advisor

NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
(301)713-9671
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----- Forwarded message -----

From: **Mark Graff - NOAA Federal** <mark.graff@noaa.gov>
Date: Thu, Mar 30, 2017 at 10:54 AM
Subject: Re: FOIA Appeal re: Request # DOC-NOAA-2016-000605
To: "Torczon, Andrea (Federal)" <aTorczon@doc.gov>
Cc: Lamar Turner - NOAA Federal <lamar.turner@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>

Hello Andrea,

(b)(5)
[Redacted]

[Redacted]. Please let me know if you need me to dig deeper on this one.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:(301)628-5658) (O)

(b)(6) (C)

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On Thu, Mar 30, 2017 at 8:31 AM, Torczon, Andrea (Federal) <aTorczon@doc.gov> wrote:

Mark,

I am helping the OGC FOIA Team with FOIA appeals, and I have been assigned to work on an appeal by Margaret Townsend of the Center for Biological Diversity concerning FOIA Request DOC-NOAA-2016-000605.

The request is for records concerning interpretation of the phrase “Significant Portion of Its Range” in the Endangered Species Act.

(b)(5)
[Redacted text block]

Thank you!

Andrea

Andrea Torczon

Senior Attorney

General Law Division

Office of the General Counsel

U.S. Department of Commerce

[202-482-8028](tel:202-482-8028)

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--

Lola Stith

Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov

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"Opportunity: when nothing is sure, everything is possible" ... Margaret Dabblers

Jerenda Burroughs
FOIA Admin & Point of Contact / Planning & Program Coordination Division (PR4)
Contractor

I B S S

In support of

National Marine Fisheries Service
Office of Protected Resources

301-427-8421



February 13, 2017

VIA OVERNIGHT DELIVERY AND ELECTRONIC MAIL

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230
FOIAAppeals@doc.gov

Re: FREEDOM OF INFORMATION APPEAL: DOC-NOAA-2016-000605 (SPOR Policy)

Dear Assistant General Counsel:

On behalf of the Center for Biological Diversity (“Center”), I appeal the U.S. Department of Commerce, National Oceanic and Atmospheric Administration’s (“NOAA”) response to the Center’s request for records pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), assigned FOIA Request tracking number DOC-NOAA-2016-000605 (“FOIA Request”). For the reasons set forth below, NOAA has violated FOIA by: (1) failing to conduct an adequate search for all responsive records; (2) failing to prove that it may withhold portions of records pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5); (3) improperly redacting information that it referred to partner agencies; and (4) failing to provide all reasonably segregable portions of any lawfully-exempt records. The Center is hopeful that NOAA will work to remedy these issues to facilitate FOIA’s presumption of openness.

You have 20 working days to respond to this appeal. You are advised that the Center intends to pursue legal action if NOAA does not remedy its FOIA violations by conducting a search reasonably calculated to uncover all relevant records and by disclosing all portions of responsive records immediately, in accordance with FOIA’s disclosure mandate and federal policies, or at a minimum, justifying its withholding of this information from disclosure.

FACTUAL BACKGROUND

On February 9, 2016, the Center sent via email a request pursuant to FOIA, to NOAA. Attachment A (The Center’s February 9, 2016 FOIA Request Email to NOAA). The Center requested all records from NOAA related to the Joint Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species.” 79 Fed. Reg. 37,578 (July 1, 2014); 76 Fed. Reg. 76,987 (Dec. 9, 2011), and all records related to, concerning, and/or generated by or in connection with

the Significant Portion of Range Team consisting of representatives from the U.S. Fish and Wildlife Service and NOAA Fisheries (or National Marine Fisheries Service's ("NMFS")). *Id.*

On February 10, 2016, NOAA sent an email requesting that the FOIA request be submitted via FOIAOnline. Attachment B (NOAA's February 10, 2016 Email to the Center). The Center resubmitted the FOIA request via FOIAOnline the same day, and NOAA responded with an email acknowledging receipt of the request and assigning it tracking number DOC-NOAA-2016-000605. Attachment C (NOAA's February 10, 2016 Acknowledgement Email to the Center).

On February 16, 2016, NOAA FOIA Officer Mark Graff sent a letter via FOIAOnline confirming that NOAA had granted the Center's fee waiver request. Attachment D (NOAA's February 16, 2016 Fee Waiver Grant Letter to the Center).

On February 17, 2016, NMFS's FOIA Coordinator Lamar Turner sent a letter via email acknowledging the Center's FOIA request and confirming NOAA's grant of the fee waiver. Attachment E (NOAA's February 17, 2016 Acknowledgement and Fee Waiver Grant Letter).

On March 9, 2016, Mr. Turner sent another letter via email to the Center stating that the FOIA request would require an additional 10-day extension as allowed under 15 C.F.R. § 4.6(c). Attachment F (NOAA's March 9, 2016 Letter Requesting 10-Day Extension). The letter also provided an estimated date of completion of a determination on the FOIA Request of March 29, 2016. *Id.*

On March 11, 2016, NOAA's Attorney Advisor in the Office of General Counsel Ruth Ann Lowery sent an email detailing the content of a phone call with me earlier that day concerning updating the estimated completion date and narrowing the scope of the FOIA request. Attachment G (NOAA's March 11, 2016 Email Memorializing Phone Call). Ms. Lowery estimated that only the first release of records would be ready by the March 29, 2016 due date, and not the entire release. *Id.* She also proposed to exclude "emails of the persons who are no longer at NOAA from further search at this time." *Id.*

On March 14, 2016, I replied to Ms. Lowery March 11, 2016, email confirming the scope of the FOIA request. Attachment H (The Center's March 14, 2016 Email to NOAA Confirming Scope of FOIA Request). In the email, I agreed to limit the scope of the FOIA Request "to the date of publication of the proposed rule," and emphasized that the Center "would still like to receive all records from around and just before the time that the 2010 white paper was written," which "would initially narrow the scope of the [] FOIA [Request] with the notion that we would still ultimately like to receive all records responsive to this request." *Id.* The email did not agree to exclude emails of deceased or departed persons no longer at NOAA. *Id.*

On March 30, 2016, Mr. Turner sent an email explaining that NOAA would need more time to process the FOIA request due to the complex nature of the request and because NOAA's "capabilities have been slowed" due to a planned upgrade to the agency's Clearwell document management system, which took the system offline for a period of time and "affected [NOAA's] ability to work with the documents already loaded for the administrative record for the Significant Portion of its Range Policy as agreed would be [the] starting point" for the agency's

response. Attachment I (NOAA's March 30, 2016 Email to the Center Requesting More Time). That same day, Mr. Turner sent another email referencing DOC-NOAA-2016-000603, DOC-NOAA-2016-000604, and DOC-NOAA-2016-000605. Attachment J (NOAA's March 30, 2016 Email to the Center Requesting More Time for Three Requests). The second email stated that NOAA would need additional time to respond to all three requests. *Id.* NOAA did not provide an estimated date of completion of a determination on the FOIA Request in either email. *Id.*

On June 8, 2016, I sent Mr. Turner an email requesting a status update and an estimated date of completion of a determination on the FOIA Request, and Mr. Turner replied on June 13, 2016 notifying me that the first release was available on FOIAOnline. Attachment K (The Center and NOAA's June 21016 Email Chain Discussing Release of Records to FOIAOnline). Apparently, on June 3, 2016, Mr. Turner uploaded the first release of 37 records to FOIAOnline, but the Center did not receive notification that the records were available.

On June 28, 2016, Mr. Turner sent me a letter notifying me of the second release of records to FOIAOnline. Attachment L (NOAA's June 28, 2016 Email Notifying the Center of Released Records to FOIAOnline).

On August 11, 2016, Samuel Dixon, Contractor with the International Business Sales and Services Corporation and NMFS's Assistant FOIA Liaison, sent an email requesting to combine FOIA requests DOC-NOAA-2016-00603, DOC-NOAA-2016-00603, and DOC-NOAA-2016-00603. Attachment M (NOAA's August 11, 2016 Email Requesting to Combine the Center's FOIA Requests). On August 12, 2016, I replied with a request for clarification regarding reasoning and process for the combination of the multiple FOIA requests. Attachment N (The Center's August 12, 2016 Reply Email to NOAA).

On October 3, 2016, after 35 workdays had passed with no further response from NOAA, I sent a letter on behalf of the Center notifying NOAA that it had violated FOIA's statutory deadline for a final determination and offering to assist the agency with its response to the Center's FOIA Request. Attachment O (The Center's Notice of Deadline Violation Letter and Offer to Assist).

On November 14, 2016, I had a call with Mr. Dixon to discuss the status of NOAA's response to the Center's FOIA Request, during which Mr. Dixon said that there was a response ready to go, and that we should be getting it that week.

In a letter dated November 14, 2016, NOAA conveyed its final response to the FOIA Request. Attachment P (NOAA's Final Response Letter to the Center). In the final response letter, NOAA said that because the Center indicated that we were "interested in also receiving documents dated 'from around and just before the time that the 2010 white paper was written,' [NOAA] conducted a new search for and collected documents going back to the start of the joint drafting team that developed the Policy, which was in October 2009." *Id.* NOAA also said that it "did not search for records of departed or deceased employees." *Id.*

THE FREEDOM OF INFORMATION ACT

The purpose of FOIA is to “to open agency action to the light of public scrutiny.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). FOIA requires federal agencies to expeditiously disclose requested information, *see* 5 U.S.C. § 552, and “mandates a policy of broad disclosure of government documents.” *Church of Scientology v. Dep’t of the Army*, 611 F.2d 738, 741 (9th Cir. 1980). Any inquiry under FOIA brings with it a “strong presumption in favor of disclosure.” *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991).

On his first day in office, former President Obama reinforced FOIA’s strong presumption of disclosure with regard to all FOIA decisions. *See* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (directing agencies to administer FOIA under a presumption that “[i]n the face of doubt, openness prevails”). Former Attorney General Eric Holder issued FOIA guidelines that reinforce a commitment to open government, encouraging federal agencies to both “make discretionary releases of information” and to “make partial disclosures” when an agency determines full disclosure is not possible. Former Attorney General Eric Holder’s Memorandum for Heads of Executive Departments and Agencies (Mar. 19, 2009). In his memo, the Former Attorney General also announced a “foreseeable harm” standard for defending agency decisions to withhold information under FOIA. Thus, the DOJ will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *See id.*

To that end, nothing in FOIA should be read to “authorize withholding of information or limit the availability of records to the public, except as specifically stated.” 5 U.S.C. § 552(c). Congress recognized that in certain, limited instances, records may be exempt from FOIA’s broad disclosure mandate, and thus created nine categories of exemptions. *Id.* § 552(b). These exemptions, however, must be “narrowly construed,” *Nat’l Sec. Counselors II*, 960 F. Supp. 2d at 132 (quoting *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1262 (2011)), so as to ensure that the “exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *see also Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010).

Even where an exemption might otherwise apply, FOIA also provides that agencies “shall” disclose “[a]ny reasonably segregable portion of a record ... after deletion of the portions which are exempt” 5 U.S.C. § 552(b). As a result, unless they are “inextricably intertwined with exempt portions,” *Schiller v. Nat’l Labor Relations Bd.*, 964 F.2d 1205, 1209 (D.C. Cir. 1991) (internal citations omitted), agencies must disclose all “purely factual material contained in deliberative memoranda,” even where the deliberative portions may be withheld. *EPA v. Mink*, 410 U.S. 73, 87-88 (1972). This “segregability” requirement “applies to all ... documents and all exemptions in the FOIA.” *Schiller*, 964 F.2d at 1209, quoting *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984).

Because FOIA carries a strong presumption of openness, and because “FOIA requesters face an information asymmetry given that the agency possesses the requested information and decides

whether it should be withheld or disclosed,” *COMPTEL v. U.S. Fed. Comm’n Comm.*, 910 F. Supp. 2d 100, 111 (D.D.C. 2012) (internal citations omitted), federal agencies bear the burden to prove the validity of claimed exemptions. *Pub. Citizen*, 598 F.3d at 869 (citation omitted).

It is well established law that a plaintiff in a FOIA case is entitled to an index identifying the records and/or portions of records that the defendant agency has withheld. *Vaughn v. Rosen (I)*, 484 F.2d 820 (D.C. Cir. 1973). Moreover, the description of the withheld material must be “sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA.” *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Dir. 1979). Although this FOIA matter is not yet in litigation, in order to help avoid such an eventuality, it would be helpful if NOAA would provide an index if it were to decide to continue withholding of any portions of the requested records.

DISCUSSION

I. NOAA DID NOT CONDUCT AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS.

NOAA failed to conduct an adequate search for responsive records. To achieve FOIA’s core purpose of disclosure, a federal agency must perform an adequate search for all responsive records. *Founding Church of Scientology of Wash., D.C., Inc. v. Nat’l Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979). The agency “must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir.1990). A court will apply “a ‘reasonableness’ test” to assess whether an agency’s search for responsive records was adequate. *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998). This reasonableness test is “consistent with congressional intent tilting the scale in favor of disclosure.” *Id.*

Here, the final response letter that NOAA released contains information that suggests NOAA failed to conduct an adequate search. Attachment P. For example, the letter states: “As we discussed, ... we did not search for records of departed or deceased employees.” *Id.* However, although NOAA mentioned that there would be difficulty in searching the files of departed or deceased employees, the Center never agreed that NOAA should not search such files. Attachment H. In fact, the Center expressly stated that it “would still like to receive all records from around and just before the time that the 2010 white paper was written,” and that although the Center agreed to “initially narrow the scope of the [] FOIA [Request],” it did so “with the notion that we would still ultimately like to receive all records responsive to this request.” *Id.* Hence, it is likely not reasonable to conclude that NOAA conducted an adequate search that was reasonably calculated to find all records that are responsive to the Center’s request – including emails, attachments, memoranda, correspondence, meeting notes, draft documents, etc. – because NOAA did not search files of deceased or departed employees.

Thus, based on available information, NOAA failed to conduct a search that is reasonably expected to produce all of the requested records. Additionally, because the Center believes there may be further evidence of NOAA’s inadequate search, the Center reserves its right to pursue

any such additional records once it receives additional records from NOAA and has an opportunity to review them.

II. NOAA HAS NOT CARRIED ITS BURDEN TO PROVE THAT IT LAWFULLY WITHHELD INFORMATION FROM RESPONSIVE RECORDS UNDER THE DELIBERATIVE PROCESS PRIVILEGE OF EXEMPTION 5.

NOAA failed to prove that the deliberative process privilege of Exemption 5, 5 U.S.C. § 552(b)(5), applies to the records that the agency withheld. NOAA has refused to disclose portions of responsive records on the grounds that the records are subject to the deliberative process privilege of FOIA's Exemption 5, 5 U.S.C. § 552(b)(5) – *i.e.*, the “the ‘withhold it because you want to’ exemption.” Staff of H. Comm. on Oversight and Gov't Reform, 114th Cong., FOIA Is Broken: A Report 1 (2016) at 10 (quoting National Security Archive, *The Next FOIA Fight: The B(5) “Withhold It Because You Want To” Exemption*, Mar. 27, 2014, <https://nsarchive.wordpress.com/2014/03/27/the-next-foia-fight-the-b5-withhold-it-because-you-want-toexemption/>).

Federal agencies bear the burden to prove the validity of claimed exemptions. *Pub. Citizen*, 598 F.3d at 869 (citation omitted). Accordingly, an agency must provide a sufficiently detailed explanation to justify each exemption. *Nat'l Sec. Counselors II*, 960 F. Supp. 2d at 132 (citing *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011)). The agency must “describe[] the documents withheld or redacted and the FOIA exemptions invoked, and explain[] why each exemption applies.” *Prison Legal News v. Samuels*, 787 F.3d 1142, 1145 n.1 (D.C. Cir. 2015).

An agency can only meet its burden to show that a record may be withheld under the deliberative process privilege where it can demonstrate that the record is both “‘predecisional’ – [i.e.] it was generated before the adoption of an agency policy – and [] is ‘deliberative’ – [i.e.] reflects the give-and-take of the consultative process.” *Ctr. for Biological Diversity v. U.S. Marine Corps*, No. 00-2387, 2003 U.S. Dist. LEXIS 26856, *12-13 (D.D.C. Aug. 21, 2003) (quoting *Coastal States*, 617 F.2d at 866); *Abtew v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895, 898 (D.C. Cir. 2015) (to qualify for the privilege, a record must be “both pre-decisional and deliberative”) (citing *Coastal States*, 617 F.2d at 866) (emphasis added). Portions of a record are “deliberative” when they involve opinions or are recommendatory in nature. U.S. Department of Justice Guide to the Freedom of Information Act 26 (July 24, 2013), available at <http://www.justice.gov/oip/doj-guide-freedom-information-act-0> (hereinafter *DOJ Guide*).

The D.C. Circuit Court of Appeals has held that records qualify as deliberative only if they “reflect[] advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C. Cir. 1981). The key factor, the D.C. Circuit has stressed, is the “role, if any, that the document plays in the process of agency deliberations.” *Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (internal citations omitted).

Orders, decisions, interpretations or guidelines which have precedential weight are not deliberative, and are therefore not protected. *Scheffler v. U.S.*, 702 F.2d 233 (D.C. Cir. 1983). Moreover, factual information generally does not fall under the privilege because facts do not

reveal agency process that would expose agency deliberations to any purported “chilling effect.” DOJ Guide at 26 (factual information is not deliberative); *Julian v. U.S. Dept. of Justice*, 806 F.2d 1411, 1419 (9th Cir. 1986) (“communications containing purely factual material are not typically within the purview of Exemption 5.”). In fact, FOIA “favor[s] disclosure of factual documents, or the factual portions of deliberative documents where such a separation is feasible.” *Assembly of Cal. v. U.S. Dept. of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992).

To explain how the information qualifies for the privilege, an agency must explain, at a minimum, what the records consist of – i.e., who generated them, who received them, and what they contain. *Prison Legal News v. Samuels*, 787 F.3d at 1145 n.1. Simply reciting the legal standard for withholding information under an exemption is wholly inadequate for an agency to overcome FOIA’s strong disclosure presumption and withhold information from records under the narrowly construed deliberative process privilege. *Founding Church of Scientology v. NSA*, 610 F.2d at 830 (internal quotations and citation omitted) (“conclusory and generalized allegations of exemptions are unacceptable”); *see also COMPTTEL*, 910 F. Supp. at 119 (“conclusory assertions of privilege will not suffice to carry the Government’s burden of proof in defending FOIA cases”); *Senate of P.R.*, 823 F.2d at 585 (emphasis in original) (an assertion of privilege is “conclusory” when “no factual support is provided for an *essential* element of the claimed privilege”).

Here, NOAA provided no detail whatsoever, let alone any justification as to why it may withhold information from the records. Attachment P. NOAA merely provided the legal standard for the privilege, and nothing more. *Id.* NOAA did not indicate how the privilege applies to each record with specificity, as FOIA requires. Instead, NOAA provided a breakdown of the number of records with exempted materials and then provided conclusory language to explain the exemption. For example, NOAA said: “8 documents, totaling 33 pages pursuant to 5 U.S.C. § 552 (b)(5) which exempts from disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. The records are exempted from disclosure by application of the Deliberative Process Privilege.” Attachment P. This approach is woefully inadequate for NOAA to overcome FOIA’s strong presumption in favor of disclosure.

Moreover, NOAA did not identify any particular decision, with any specificity, to which the records are purportedly “predecisional.” *Id.*; *Senate of P.R.*, 823 F.2d at 585 (agency must be able to point to a specific agency decision to which a withheld record pertained). Even if NOAA had claimed that the records were predecisional to a specific decision, the agency still failed to explain how it may withhold information from records which post-date any decisions, and therefore cannot be “predecisional.”

The Center requested all records from NOAA related to the Joint Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species,” 79 Fed. Reg. 37,578 (July 1, 2014); 76 Fed. Reg. 76,987 (Dec. 9, 2011), and all records related to, concerning, and/or generated by or in connection with the Significant Portion of Range Team consisting of representatives from the U.S. Fish and Wildlife Service and NOAA Fisheries. Assuming that the withheld portions of responsive records relate to the ultimate decision about the significant portion of range policy –

which, again, is impossible to ascertain given the paucity of information provided by NOAA in its final determination letter – then such records likely contain (at least in part) final policy decision, and the subsequent opinions and discussion in support of those decisions, as well as general matters of policy or regulatory interpretation which may not be withheld as deliberative. *Ashley v. U.S. Dep’t of Labor*, 589 F. Supp. 901, 908 (D.D.C. 1983) (“final opinions ... typically flow from a superior with policymaking authority to a subordinate who carries out the policy”); *Rockwell Int’l Corp. v. Dep’t of Justice*, 235 F.3d 598, 603 (D.C. Cir. 2001) (final opinions, and discussions that support those decisions, generally must be disclosed).

Where the withheld portions of records also include factual information, NOAA may not withhold that information that therefore is not “deliberative,” from disclosure under the deliberative process privilege. Thus, NOAA must promptly release any and all improperly withheld information, including portions of records.

III. NOAA IMPROPERLY REDACTED FROM RESPONSIVE RECORDS INFORMATION THAT IT REFERRED TO OTHER AGENCIES.

NOAA acted improperly by redacting portions of the records that were referred to other agencies, including the U.S. Department of Interior (“DOI”) and to the U.S. Fish and Wildlife Service (“FWS”). *See, e.g., Attachment F (Sample Redacted Records for Referrals)*. FOIA does not provide a valid disclosure exception for records originated by sister agencies that are in NOAA’s possession, or that include communications with NOAA personnel. The records are plainly NOAA agency records subject to disclosure within the meaning of FOIA. Under FOIA, a record is an agency record if the agency “either create[s] or maintain[s] the record,” and where the agency is “in control of the requested materials at the time the FOIA request is made.” *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-145 (1989). In *Tax Analysts*, the Supreme Court held that “[b]y control we mean that the materials have come into the agency’s possession in the legitimate conduct of its official duties.” *Id.* at 145.

Even where it is proper for an agency to refer a FOIA request to another agency, the referring agency must provide a “reasonable explanation” for its action – including by showing that the procedure “significantly improves” the process for determining whether the records are to be released or withheld. *McGehee v. Cent. Intelligence Agency*, 697 F.2d 1095, 1110 (D.C. Cir. 1983), *vacated in part on other grounds*, 711 F.2d 1076 (D.C. Cir. 1983).

There is no question that NOAA maintains the records at issue, since the records include numerous email chains in which NOAA employees are both senders and recipients of the emails included within the chain. Further, NOAA controls the records because they came into their possession in the course of the agency discussing with DOI and FWS the Significant Portion of Range policy. Indeed, there is no statutory or regulatory requirement that NOAA must refer the emails within the chain to the other agencies. Thus, NOAA must treat the records at issue as responsive records, regardless of their origin.

IV. NOAA HAS FAILED TO SHOW THAT THERE ARE NO NON-EXEMPT, SEGREGABLE PORTIONS OF THE WITHHELD RECORDS.

Even if NOAA had adequately established that withholding information from the responsive records under the deliberative process privilege of Exemption 5 was proper (which it did not), NOAA has not carried its burden to prove that any of the records or portions of records were properly withheld and that there are no reasonably segregable, non-exempt portions, such as purely factual information. This issue was not even mentioned in the final response letter at all.

FOIA “requires partial disclosure of records reflecting deliberative or policy making processes on the one hand, and purely factual, investigative matters on the other,” and therefore, NOAA “has the burden of showing that no segregable information exists.” *Ethyl Corp. v. U.S. EPA*, 25 F.3d 1241, 1250 (4th Cir. 1994) (internal citations omitted); 5 U.S.C. § 552(b) (“[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record”).

Thus, NOAA must disclose all reasonably segregable, non-privileged, and/or factual portions of all responsive records without further delay.

V. CONCLUSION

As described above, NOAA has not carried its burden to show that it conducted an adequate search, that it lawfully withheld information from responsive records under the deliberative process privilege, or that it produced all reasonably-segregable, non-exempt portions of responsive records. Additionally, NOAA improperly redacted portions of records which it referred to FWS and DOI and that are plainly NOAA agency records within the meaning of FOIA. Accordingly, NOAA must immediately provide all of the withheld information. In so doing, NOAA must also provide an estimated date of completion of its release of the improperly withheld information. 5 U.S.C. § 552(a)(7)(B).

We expect your timely resolution of this appeal. If you have any questions, please do not hesitate to contact me at (971) 717-6409 or foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,



Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
(971) 717-6409
foia@biologicaldiversity.org

Attachments:

- Attachment A (The Center's February 9, 2016 FOIA Request Email to NOAA).
- Attachment B (NOAA's February 10, 2016 Email to the Center).
- Attachment C (NOAA's February 10, 2016 Acknowledgement Email to the Center).
- Attachment D (NOAA's February 16, 2016 Fee Waiver Grant Letter to the Center).
- Attachment E (NOAA's February 17, 2016 Acknowledgement and Fee Waiver Grant Letter).
- Attachment F (NOAA's March 9, 2016 Letter Requesting 10-Day Extension).
- Attachment G (NOAA's March 11, 2016 Email Memorializing Phone Call).
- Attachment H (The Center's March 14, 2016 Email to NOAA Confirming Scope of FOIA Request).
- Attachment I (NOAA's March 30, 2016 Email to the Center Requesting More Time).
- Attachment J (NOAA's March 30, 2016 Email to the Center Requesting More Time).
- Attachment K (The Center and NOAA's June 21016 Email Chain Discussing Release of Records to FOIAOnline).
- Attachment L (NOAA's June 28, 2016 Email Notifying the Center of Released Records to FOIAOnline).
- Attachment M (NOAA's August 11, 2016 Email Requesting to Combine the Center's FOIA Requests).
- Attachment N (The Center's August 12, 2016 Reply Email to NOAA).
- Attachment O (The Center's Notice of Deadline Violation Letter and Offer to Assist).
- Attachment P (NOAA's Final Response Letter to the Center).

Attachment A



February 9, 2016

VIA ELECTRONIC MAIL

Mark Graff, FOIA Officer
Public Reference Facility (SOU1000)
1305 East-West Highway, Room 9719 (SSMC3)
Silver Spring, MD 20910
(301) 628-5658
FOIA@noaa.gov

Re: Freedom of Information Act Request: Significant Portion of Range Policy

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

REQUESTED RECORDS

The Center requests the following records from the National Oceanic and Atmospheric Administration, Fisheries Service (“NOAA Fisheries”):

Significant Portion of Range Policy

1. All records related to the Joint Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species.” 79 Fed. Reg. 37,578 (July 1, 2014); 76 Fed. Reg. 76,987 (Dec. 9, 2011).
2. All records related to, concerning, and/or generated by or in connection with the Significant Portion of Range Team consisting of representatives from the U.S. Fish and Wildlife Service and NOAA Fisheries.

For purposes of this request, “records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced

or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, data bases, drawings, surveys, graphs, charts, photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained. All of the foregoing is included in this request if it is in NOAA Fisheries' possession and control. If such records are no longer under the control of NOAA Fisheries but were at any time, please refer this request to the relevant federal agency or agencies. This request is being sent to the headquarters for NOAA Fisheries with the understanding that it will be forwarded to any other agency offices where responsive records may be located.

This request is not meant to be exclusive of any other records that, although not specially requested, have a reasonable relationship to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Should you decide to invoke a FOIA exemption, please include in your full or partial denial letter sufficient information for us to appeal the denial. Please include a detailed ledger which includes:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the denial, including the identification of the category within the governing statutory provision under which the record (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, please segregate the exempt portions and mail the remaining records to my attention at the address below location within the statutory time limit.

The Center is willing to receive responsive records on a rolling basis.

FORMAT OF REQUESTED RECORDS

Under the FOIA, you are obligated to provide the records in a readily-accessible electronic format and in the format requested. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) ("In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.").

The Center would like to receive all responsive records in an electronic PDF format that is text searchable/OCR formatted. Specifically, we ask that you provide the records as *separate* .pdf or other files – *i.e., not in “batched” form* – and either in: (1) a load-ready format with a CSV file index or excel spreadsheet; or if that is not possible (2) in PDF format and without the inclusion of any profiles, embedded files, or portfolios, all of which are not readily accessible with our record-review software; this is why we are requesting that you provide all records as PDFs (or Word documents) instead. We would appreciate the inclusion of an index in an Excel format.

RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i); 5 C.F.R. § 1303.10(c). Failure to comply within the statutory timeframe may result in the Center taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. You may email or mail copies of the requested records to:

Margaret E. Townsend
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
mtownsend@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please call me at (971) 717-6409 to discuss the scope of this request.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA’s basic purpose is to “open agency action to the light of public scrutiny,” with a focus on the public’s “right to be informed about what their government is up to.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA’s fee waiver provision requires that “[d]ocuments shall be furnished without any charge or at a [reduced] charge,” if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA’s fee-waiver requirement is “liberally construed.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The fee waiver amendments of 1986 were designed specifically to provide non-profit organizations such as the Center access to government records without the payment of fees. Indeed, FOIA’s fee waiver provision was intended “to prevent government agencies from using high fees to discourage certain types of requesters and requests,” which are “consistently associated with requests from journalists, scholars, and *non-profit public interest groups*.” *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, “[a]gencies should not be allowed to use fees as an offensive weapon against requesters

seeking access to Government information” 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by “watchdog” organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As a District of Columbia Circuit Court has stated, this waiver provision was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” in clear reference to requests from journalists, scholars, and, most importantly for our purposes, non-profit public-interest groups. *Better Gov’t Ass’n v. Department of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984).

I. The Center Qualifies for a Fee Waiver.

Under FOIA, a requester is entitled to a fee waiver when “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 [Federal] government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The Department of Commerce FOIA regulations at 15 C.F.R. § 4.11(l) establish the same standard.

Thus, NOAA Fisheries must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 15 C.F.R. § 4.11(l)(2)(i) – (iv). As shown below, the Center meets each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request relates to NOAA Fisheries’ development of a policy for interpretation of the phrase “significant portion of its range” in the definitions of “endangered” and “threatened” under the Endangered Species Act (“ESA”). This policy development is a specific and identifiable activity of the government. See *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (Internal quotations omitted).

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records will provide the Center with crucial insight on NOAA Fisheries’ development of a policy for interpretation of the phrase “significant portion of its range” in the definitions of “endangered” and “threatened” under the ESA (“SPR Policy”). The release of

these records will contribute to better public understanding of NOAA Fisheries' activities and operations regarding this policy. Numerous studies have demonstrated that there is broad public support for the protection of endangered species and biodiversity conservation. The public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, such as the survival and recovery of species, have been conducted. *See Judicial Watch*, 326 F.3d at 1314 (“[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.”).

In *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1286, the court made clear that FOIA's “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...” In this instance, the requested records potentially provide new information about NOAA Fisheries' actions, especially regarding the protection of endangered species.

Moreover, the information will provide important oversight of NOAA Fisheries activities by revealing information on how NOAA Fisheries developed the SPR Policy and the reasons for its contents. The information we seek is not available in other publicly available records. *See Western Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); *see also Community Legal Services v. HUD*, 405 F.Supp.2d 553 (D. Pa. 2005) (“[T]he CLS request would likely shed light on information that is new to the interested public.”). Finally, this request will also shed light on whether NOAA Fisheries is appropriately implementing environmental laws, policies, and regulations.

Thus, the requested records are likely to contribute to an understanding of NOAA Fisheries' operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of NOAA Fisheries' Rules and Policies for Endangered Species Critical Habitat.

Public understanding of NOAA Fisheries', other federal agencies', and other parties' development of a new rule for regulating take of endangered and threatened species will significantly increase as a result of disclosure, because the requested information will help determine the activities and plans of NOAA Fisheries in regards to listing determinations for species under the ESA. Once the public is more aware of actions by NOAA Fisheries, the public will have a better understanding of NOAA Fisheries' listing determinations. Then the public can better gauge whether NOAA Fisheries decisions and activities are appropriate or whether certain actions should be undertaken.

The records are also certain to shed light on NOAA Fisheries' compliance with environmental law. Such public oversight of agency action is vital to our democratic system and clearly

envisioned by the drafters of the FOIA. The Center intends to fulfill its well-established function of public oversight of agency action. It is irrelevant whether any portion of the Center's request may currently be in the public domain, because the Center requests considerably more than any piece of information that may currently be available to other individuals. *Judicial Watch*, 326 F.3d at 1315.

In addition, the Center plans to take the information it learns from the disclosed records and educate the public about listing determinations, and also to educate the public about whether NOAA Fisheries' actions are appropriate in light of the known information and the law. The requested information will make public the information that NOAA Fisheries has and will rely on, regarding listing determinations. Disclosure of the requested records may provide information that will significantly enhance the public's understanding of NOAA Fisheries' legal obligations and its protection of endangered and threatened species in general. Even if the records fail to reveal that certain actions need to be taken does not mean the records do not serve the public interest. *See Judicial Watch*, 326 F.3d at 1314.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of how NOAA Fisheries developed the rule for documenting allowable take of endangered and threatened species under the ESA. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about NOAA Fisheries' compliance with the ESA and how it will make listing determinations. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of FOIA. Thus, the Center meets this factor as well.

II. The Center has a Demonstrated Ability to Disseminate the Requested Information Broadly.

Public oversight and enhanced understanding of Service duties is necessary. The Center and its members' track record of active participation in oversight of governmental agency activities and its consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons who are interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Center need not show how it intends to distribute the requested information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the management activities of numerous government agencies since

1989, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee waivers, agencies have recognized that (1) the Center's requested information contributes significantly to the public understanding of the operations or activities of the government, (2) the Center's requested information enhances the public's understanding to a greater degree than currently exists, (3) the Center possesses the expertise to explain the requested information to the public (*e.g.*, the Center has several staff biologists, staff attorneys, and media specialists), (4) the Center possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that the Center is an established expert in the field of imperiled species, biodiversity, and impacts on protected species. See <http://biologicaldiversity.org/news/breaking/index.html>.

The Center's work appears in more than 2,000 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. Many media outlets have reported on how NOAA Fisheries makes listing determinations, utilizing information obtained by the Center from federal agencies including NOAA Fisheries. Records produced by the Center on the status of imperiled species prepared in light of the requested information will be available on the Center's website, which is regularly used by students, journalists, other organizations, and members of the public to obtain information on the conservation and legal status of rare species, *see*: <http://www.biologicaldiversity.org/species/index.html>. The Center sends out more than 350 email newsletters and action alerts per year to more than 991,000 members and supporters. Three times a year, the Center sends printed newsletters to more than 50,000 members. More than 89,500 people have "liked" the Center on Facebook, and there are regular postings regarding biodiversity protection. The Center also regularly tweets to more than 40,000 followers on Twitter.

In addition, our informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally. Our informational publications also contribute information to public media outlets. For example, information such as that presently requested is often disseminated through our e-mail biodiversity alerts, which are sent to over 400,000 people approximately once a week, and our web page, which is accessed more than 2.4 million times each month.

The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request. The records sought in this FOIA request will be used to determine the reasons for the contents of the SPR Policy, how NOAA Fisheries anticipates how listing determinations will be made, and what actions NOAA Fisheries and other parties are taking regarding anticipated future activities. They will also be used to determine whether and how NOAA Fisheries is complying with and implementing its obligations under environmental laws.

Concurrent with any action which the Center may take after obtaining the requested records, the Center will publicize the reasons for the action and the underlying actions of FWS and/or other agencies that have prompted the action. This is certain to result in a significant increase in public

understanding of government agency activity, and in particular of NOAA Fisheries' responsibilities. The Center has enforced or publicized agency compliance with the provisions of various environmental laws many times through information gained from FOIA requests like this one, and has also many times publicized the status of species and the conservation measures being taken on their behalf through information gained from records obtained under FOIA.

Information obtained through this request will likely be disseminated through all of these means. *See Forest Guardians v. DOI*, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

Please note that the request for a fee waiver should not be construed as an extension of time in which to reply to this FOIA request.

III. Obtaining the Requested Records is of No Commercial Interest to the Center.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 991,000 members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. Conclusion

For all of the foregoing reasons, the Center qualifies for a full fee waiver. We hope that NOAA Fisheries will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at (971) 717-6409 or foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below. If I am unavailable, contact Amy Atwood at (971) 717-6401 or atwood@biologicaldiversity.org.

Sincerely,



Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374

Portland, OR 97211-0374
foia@biologicaldiversity.org

Attachment B

Amy Atwood

From: FOIA Office - NOAA Service Account [foia@noaa.gov]
Sent: Wednesday, February 10, 2016 8:19 AM
To: Amy Atwood
Subject: Re: FOIA Request: Significant Portion of Range Policy

Good morning,

The NOAA FOIA Office uses FOIAonline* which is located at: <https://foiaonline.regulations.gov>.

Please choose one of these options.

- 1) Enter your request into FOIAonline as a Guest or establish an account.
- 2) Reply to this email that you agree to have the NOAA FOIA Office staff copy and paste your request into FOIAonline for you. *This means that you will not be able to take advantage of the benefits of FOIAonline**. Please be sure to include your FOIA request and any necessary attachments with your reply. Also, please be sure to include full contact information in your reply (full name/address/phone/email).

Please let us know if you have any questions.

*FOIAonline is a multi-agency FOIA tracking and processing system which provides a single interface through which you may submit requests to NOAA and other participating agencies. FOIAonline will automatically provide tracking numbers for requests. Registered users may view the status of all your requests online, eliminating the wait time for replies from agency staff. It will provide NOAA a convenient place to post FOIA documents in electronic format after they have been released to the requester. Many users will choose to search these records before filing requests in the future.

Thank you,

NOAA FOIA Office

On Tue, Feb 9, 2016 at 3:34 PM, Amy Atwood <atwood@biologicaldiversity.org> wrote:

Dear FOIA Coordinator,

Please see attached FOIA request. Contact Margaret Townsend or me with any questions. Thank you,

Amy Atwood

Amy R. Atwood
Senior Attorney, Endangered Species Legal Director

Center for Biological Diversity | www.biologicaldiversity.org
PO Box 11374 | Portland OR 97211

o [503-283-5474](tel:503-283-5474) | direct [971-717-6401](tel:971-717-6401)
cell [503-504-5660](tel:503-504-5660) | atwood@biologicaldiversity.org

To live on earth is no more than duty to make it well.

--José Martí

This email may contain material that is confidential, privileged and/or attorney work product for the sole use of the intended recipient. Any review, reliance or distribution by others or forwarding without express permission is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies.

Attachment C

Amy Atwood

From: foia@noaa.gov
Sent: Wednesday, February 10, 2016 11:19 AM
To: foia@biologicaldiversity.org
Subject: FOIA Request DOC-NOAA-2016-000605 Submitted

This message is to confirm your request submission to the FOIAonline application: [View Request](#). Request information is as follows:

- Tracking Number: DOC-NOAA-2016-000605
- Requester Name: Margaret Townsend
- Date Submitted: 02/10/2016
- Request Status: Submitted
- Description: Significant Portion of Range Policy 1. All records related to the Joint Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species.” 79 Fed. Reg. 37,578 (July 1, 2014); 76 Fed. Reg. 76,987 (Dec. 9, 2011). 2. All records related to, concerning, and/or generated by or in connection with the Significant Portion of Range Team consisting of representatives from the U.S. Fish and Wildlife Service and NOAA Fisheries.

Attachment D



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

February 16, 2016

Attn: Margaret Townsend
Center for Biological Diversity
PO Box 11374
Portland, OR 97211-0374

Re: FOIA Request No. DOC-NOAA-2016-000605

Dear Ms. Townsend:

This letter is in response to your Freedom of Information Act (FOIA) request entered into FOIAonline on February 10, 2016, for the following records:

Significant Portion of Range Policy

1. All records related to the Joint Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species.” 79 Fed. Reg. 37,578 (July 1, 2014); 76 Fed. Reg. 76,987 (Dec. 9, 2011).
2. All records related to, concerning, and/or generated by or in connection with the Significant Portion of Range Team consisting of representatives from the U.S. Fish and Wildlife Service and NOAA Fisheries.

In order to determine whether your request qualifies for a fee waiver or reduction in fees, pursuant to 5 C.F.R. § 4.11(k) (2010), we must evaluate whether disclosure of the requested information is: 1) in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government, and 2) not primarily in the commercial interest of the requester.

In determining whether your request meets the first fee waiver requirement, we considered the following factors.

- 1) Whether the subject of the requested records concerns the operations or activities of the Government.
- 2) Whether the disclosure is “Likely to contribute” to an understanding of Government operations or activities.
- 3) Whether disclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.

4) Where the disclosure is likely to contribute “significantly” to public understanding of Government operations or activities.

In determining whether your request meets the second fee waiver requirement, we considered the following factors:

1) Whether the requester has a commercial interest that would be furthered by the requested disclosure.

2) Whether any identified commercial interests of the requester is sufficiently great, in comparison with the public interest in disclosure that disclosures are “primarily in the commercial interest of the requester.”

Based on the above criteria, we have determined that you adequately addressed the statutory requirements for a waiver of fees in your February 10, 2016 submission. You have been granted a full waiver for the records requested. Please be advised however, granting this waiver does not automatically apply to future requests submitted by you or your organization. Requests for fee waivers are determined on a case-by-case basis for the records requested under statutory fee waiver requirements.

If you have any questions concerning the response to your fee waiver request, please call (301) 628-5658.

Sincerely,

/S/

Mr. Mark Graff
NOAA FOIA Officer

Attachment E



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

February 17, 2016

Ms. Margaret Townsend
Center for Biological Diversity
P. O Box 11374
Portland, OR 97211-0374

Dear Ms. Townsend:

This letter is to acknowledge receipt of your Freedom of Information Act (FOIA) request by National Marine Fisheries Service via FOIA online on February 10, 2016, and assigned to our office February 16, 2016.

You requested Significant Portion of Range Policy;

1. All records related to the Joint Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species." 79 Fed. Reg. 37,578 (July 1, 2014); 76 Fed. Reg. 76,987 (Dec. 9, 2011).
2. All records related to, concerning, and/or generated by or in connection with the Significant Portion of Range Team consisting of representatives from the U.S. Fish and Wildlife Service and NOAA Fisheries.

Your request was assigned **FOIA# DOC-NOAA-2016-000605** for tracking purposes. Please refer to the assigned tracking number in any future communications regarding this request.

Pursuant to the FOIA fee schedule cited at <http://www.osec.doc.gov/omo/FOIA/foiarequest.htm>, 15 CFR §4.11, we determined that you are classified category "**Other**". Per NOAA FOIA, you have been granted a full fee waiver.

If you have any questions regarding your request, please contact me at (301) 427-8492 or nmfs.hq.pr.foia@noaa.gov .

Sincerely,
//s//
Lamar Turner



Attachment F



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

March 9, 2016

Ms. Margaret Townsend
Center for Biological Diversity
P. O Box 11374
Portland, OR 97211-0374

Re: FOIA Request **DOC-NOAA-2016-000605**

Dear Ms. Townsend:

This letter is in response to your Freedom of Information Act (FOIA) request entered into FOIAonline on February 16, 2016. You requested Significant Portion of Range Policy;

1. All records related to the Joint Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species.” 79 Fed. Reg. 37,578 (July 1, 2014); 76 Fed. Reg. 76,987 (Dec. 9, 2011).
2. All records related to, concerning, and/or generated by or in connection with the Significant Portion of Range Team consisting of representatives from the U.S. Fish and Wildlife Service and NOAA Fisheries.

15 C.F.R. § 4.6(c) allows an agency to extend the FOIA response deadline by ten business days for unusual circumstances. Due to the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are the subject of a single request; we are choosing to invoke this 10 day extension and anticipate completing your request by **March 29, 2016**.

Please contact us if you are interested in narrowing the scope of your request to help expedite its processing.

If you have questions regarding your request, please contact Mr. Lamar Turner, nmfs.hq.pr.foia@noaa.gov or by phone, 301-427-8492.

Sincerely,

Lamar N. Turner, FOIA Coordinator
Office of Protected Resources



Attachment G

From: [Ruth Ann Lowery - NOAA Federal](#)
To: [Margaret Townsend](#)
Cc: [Lamar Turner - NOAA Federal](#); [NMFS HQ PR FOIA Requests - NOAA Service Account](#)
Subject: Re: FOIAs DOC-NOAA-2016-000603 and DOC-NOAA-2016-000605
Date: Friday, March 11, 2016 4:07:14 PM

Dear Margaret,

Thank you for taking time today to discuss the pending NOAA FOIA requests 2016-000603 and 2016-000605, and to allow us to present our proposals for managing the requests to ensure we can get you the most relevant documents in the most efficient way possible. Below, I'll recap what we discussed and highlight our proposals.

Timing

As you know, we have determined these complex requests present unusual circumstances, due to the need to collect voluminous records and to coordinate with the Department of the Interior (DOI), and likely also other agencies, as required under 15 C.F.R. § 4.5(b). Thus, the agency has invoked the automatic 10-day extension under 15 C.F.R. §4.6(c). We anticipate making at least one interim release by March 29, at which time we will have a better sense of the next steps in the process and when you can expect additional interim releases. How long it actually takes to complete the requests will depend on the extent of new searches we must complete, the time needed to upload the material for processing into our Clearwell database, the time required to “de-duplicate” the material, and the time needed for privilege review.

Issues of Scope Common to Both FOIAs

Thank you for confirming that you are seeking documents that reflect development of the policies and rule up through their signing, *i.e.*, the decision files. You indicated your client might be willing to further limit the scope to just those documents created after the proposed versions of the policies and rule were published. **Please let us know if it would be agreeable to apply that narrowed scope to our searches, so that we begin our search from publication of the proposed policies/rule.**

We noted that some of the responsive documents likely will cross categories of your requests (*i.e.*, some documents address more than one regulatory reform effort). Rather than produce documents in multiple instances, we will strive to produce those only once. **However, as you requested, we will also attempt to make clear in the transmittal letters for each release how many documents fit this description.**

Special Complexities Regarding the “Significant Portion of its Range” (SPR) Policy

As we discussed, the request regarding the SPR policy is significantly complicated by the fact that we have already compiled and filed NOAA's Administrative Record (AR) for the pending litigation in the District of Colorado. Because the AR itself has been filed with the court, it is now publicly available and will not be produced again here. The complications arise in that we have already gone through the very time-consuming exercise of collecting the most relevant documents from all affected personnel in the agency for the AR, including reviewing archived emails of persons who are no longer with the agency (and, in one case, deceased). Although the original search throughout the agency was limited in scope as to

both time (June 2010 forward) and scope (we excluded materials that should already be in the DOI record), we believe that the original search was reasonably likely to have already yielded the vast majority of NOAA documents that might be relevant and informative regarding development of the policy for that time period.

For the period June 21, 2010 forward, then, we would propose to satisfy the request by reviewing those documents that have already been collected for the AR but that were excluded per the NOAA 2012 Administrative Record Guidance, to determine if additional material can be released. Since these documents have already been uploaded into our Clearwell database, we can relatively quickly and efficiently identify and review those documents and make determinations about potential release. Of course, the same privileges that applied for compiling the AR will also apply to these documents, but we do anticipate some documents will be releasable.

Regarding the personnel no longer with NOAA, we believe that it is not reasonably likely that significant additional records will be turned up by searching their email archives. The most relevant records should already have been gathered in the search to compile the AR. Yet the process will be very time consuming, both to have the Information Technology department conduct a search and upload the materials for review, and for us to complete review of the materials for responsiveness, de-duplication, and potential privilege. Considering that the effort to develop the SPR Policy got underway in earnest in 2010, and since if necessary we can still collect earlier email from the staff with the most direct and active roles in developing the policy (who are still with the agency), **we propose to exclude the emails of the persons who are no longer at NOAA from further search at this time.**

I apologize for the length of this email. Please let me know if you have any questions and whether you client agrees with our proposed approach.

Thanks,

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor

NOAA Office of General Counsel

Fisheries & Protected Resources Section

1315 East-West Highway, SSMC III, Room 15114

Silver Spring, MD 20910

(301)713-9671

Fax: (301) 713-0658

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Attachment H

From: [Margaret Townsend](#)
To: [Ruth Ann Lowery - NOAA Federal](#)
Cc: [Lamar Turner - NOAA Federal](#); [NMFS HQ PR FOIA Requests - NOAA Service Account](#);
["foia@biologicaldiversity.org"](mailto:foia@biologicaldiversity.org)
Subject: RE: FOIAs DOC-NOAA-2016-000603 and DOC-NOAA-2016-000605
Date: Monday, March 14, 2016 2:06:06 PM

Dear Ruth Ann,

Thank you for your email describing our phone conversation of last Friday and outlining your proposal to limit the scope of these FOIA requests.

Your proposal is acceptable to the Center with the following caveats. The requester would agree to limit the scope of the SPOR FOIA to the date of publication of the proposed rule, but would still like to receive all records from around and just before the time that the 2010 white paper was written. This would initially narrow the scope of the SPOR FOIA with the notion that we would still ultimately like to receive all records responsive to this request.

Regarding the 4(b)(2) and adverse mod. rule FOIA, the requester agrees to limit the scope for the time being in the manner that you propose. If in reviewing those records, we discover facts or information that suggests the scope should be broader, we will ask you for more records.

Please let me know if you have any further questions.

Thank you,
Margaret

Margaret E. Townsend
Open Government Staff Attorney | Endangered Species Program
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
Office: (971) 717-6409
Fax: (503) 283-5528
mtownsend@biologicaldiversity.org

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From: Ruth Ann Lowery - NOAA Federal [<mailto:ruthann.lowery@noaa.gov>]
Sent: Friday, March 11, 2016 4:06 PM

To: Margaret Townsend
Cc: Lamar Turner - NOAA Federal; NMFS HQ PR FOIA Requests - NOAA Service Account
Subject: Re: FOIAs DOC-NOAA-2016-000603 and DOC-NOAA-2016-000605

Dear Margaret,

Thank you for taking time today to discuss the pending NOAA FOIA requests 2016-000603 and 2016-000605, and to allow us to present our proposals for managing the requests to ensure we can get you the most relevant documents in the most efficient way possible. Below, I'll recap what we discussed and highlight our proposals.

Timing

As you know, we have determined these complex requests present unusual circumstances, due to the need to collect voluminous records and to coordinate with the Department of the Interior (DOI), and likely also other agencies, as required under 15 C.F.R. § 4.5(b). Thus, the agency has invoked the automatic 10-day extension under 15 C.F.R. §4.6(c). We anticipate making at least one interim release by March 29, at which time we will have a better sense of the next steps in the process and when you can expect additional interim releases. How long it actually takes to complete the requests will depend on the extent of new searches we must complete, the time needed to upload the material for processing into our Clearwell database, the time required to “de-duplicate” the material, and the time needed for privilege review.

Issues of Scope Common to Both FOIAs

Thank you for confirming that you are seeking documents that reflect development of the policies and rule up through their signing, *i.e.*, the decision files. You indicated your client might be willing to further limit the scope to just those documents created after the proposed versions of the policies and rule were published. **Please let us know if it would be agreeable to apply that narrowed scope to our searches, so that we begin our search from publication of the proposed policies/rule.**

We noted that some of the responsive documents likely will cross categories of your requests (*i.e.*, some documents address more than one regulatory reform effort). Rather than produce documents in multiple instances, we will strive to produce those only once. **However, as you requested, we will also attempt to make clear in the transmittal letters for each release how many documents fit this description.**

Special Complexities Regarding the “Significant Portion of its Range” (SPR) Policy

As we discussed, the request regarding the SPR policy is significantly complicated by the fact that we have already compiled and filed NOAA's Administrative Record (AR) for the pending litigation in the District of Colorado. Because the AR itself has been filed with the court, it is now publicly available and will not be produced again here. The complications arise in that we have already gone through the very time-consuming exercise of collecting the most relevant documents from all affected personnel in the agency for the AR, including reviewing archived emails of persons who are no longer with the agency (and, in one case, deceased). Although the original search throughout the agency was limited in scope as to both time (June 2010 forward) and scope (we excluded materials that should already be in the DOI record), we believe that the original search was reasonably likely to have already yielded the vast majority of NOAA documents that might be relevant and informative

regarding development of the policy for that time period.

For the period June 21, 2010 forward, then, we would propose to satisfy the request by reviewing those documents that have already been collected for the AR but that were excluded per the NOAA 2012 Administrative Record Guidance, to determine if additional material can be released. Since these documents have already been uploaded into our Clearwell database, we can relatively quickly and efficiently identify and review those documents and make determinations about potential release. Of course, the same privileges that applied for compiling the AR will also apply to these documents, but we do anticipate some documents will be releasable.

Regarding the personnel no longer with NOAA, we believe that it is not reasonably likely that significant additional records will be turned up by searching their email archives. The most relevant records should already have been gathered in the search to compile the AR. Yet the process will be very time consuming, both to have the Information Technology department conduct a search and upload the materials for review, and for us to complete review of the materials for responsiveness, de-duplication, and potential privilege. Considering that the effort to develop the SPR Policy got underway in earnest in 2010, and since if necessary we can still collect earlier email from the staff with the most direct and active roles in developing the policy (who are still with the agency), **we propose to exclude the emails of the persons who are no longer at NOAA from further search at this time.**

I apologize for the length of this email. Please let me know if you have any questions and whether you client agrees with our proposed approach.

Thanks,

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor

NOAA Office of General Counsel

Fisheries & Protected Resources Section

1315 East-West Highway, SSMC III, Room 15114

Silver Spring, MD 20910

(301)713-9671

Fax: (301) 713-0658

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Attachment I

From: foia@noaa.gov
To: foia@biologicaldiversity.org
Subject: FOIA Request: DOC-NOAA-2016-000605 - Status Update
Date: Wednesday, March 30, 2016 7:04:44 AM

03/30/2016 10:01 AM
FOIA Request: DOC-NOAA-2016-000605

Dear Ms. Townsend,

We are writing to update you as to the status of processing of your FOIA requests DOC-NOAA-2016-000605 (re: the final policy interpreting "Significant Portion of Its Range").

As we discussed, these complex requests present unusual circumstances, due to the need to collect voluminous records from multiple offices within NOAA and to coordinate with the Department of the Interior (DOI) and other agencies, as required under 15 C.F.R. § 4.5(b). Due to the need to develop a search plan for multiple offices and to coordinate the privilege review, we need more time to determine how many responsive documents we may be producing and when we will be making additional releases. In addition, our capabilities have been slowed due to a planned upgrade to our Clearwell document management system, which took the system offline for a period of time. This outage affected our ability to work with the documents already loaded for the administrative record for the Significant Portion of its Range Policy as agreed would be our starting point for responding to your request in DOC-NOAA-2016-00605.

Please be assured we are working diligently to prepare interim releases for each of these matters and to make them available as soon as possible.

Lamar Turner

FOIA Coordinator, Office of Protected Resources

NOAA Fisheries

Attachment J

From: foia@noaa.gov
To: foia@biologicaldiversity.org
Subject: FOIA Request: DOC-NOAA-2016-000605 - Status Update
Date: Wednesday, March 30, 2016 7:18:49 AM

03/30/2016 10:15 AM
FOIA Request: DOC-NOAA-2016-000605

Dear Ms. Townsend,

We are writing to update you as to the status of processing of your FOIA requests DOC-NOAA-2016-000603 (re: the final 4(b)(2) policy and final rule defining "destruction or adverse modification"), DOC-NOAA-2016-000604 (re: the "incidental take statement" rule), and DOC-NOAA-2016-000605 (re: the final policy interpreting "Significant Portion of Its Range").

As we discussed, these complex requests present unusual circumstances, due to the need to collect voluminous records from multiple offices within NOAA and to coordinate with the Department of the Interior (DOI) and other agencies, as required under 15 C.F.R. § 4.5(b). Due to the need to develop a search plan for multiple offices and to coordinate the privilege review, we need more time to determine how many responsive documents we may be producing and when we will be making additional releases.

Please be assured we are working diligently to prepare interim releases for each of these matters and to make them available as soon as possible.

Lamar Turner

FOIA Coordinator, Office of Protected Resources

NOAA Fisheries

Attachment K

From: Margaret Townsend
To: ["foia@noaa.gov"](mailto:foia@noaa.gov)
Subject: RE: FOIA Request: DOC-NOAA-2016-000605 - Status Update
Date: Wednesday, June 8, 2016 10:03:00 AM

Dear Mr. Turner,

I wanted to check in about the status of NOAA's FOIA response to DOC-NOAA-2016-000695 for the Significant Portion of Range policy.

In your email below you mentioned that you needed more time to complete the response, but it has been over two months now and we have not yet heard back from you about this specific request. At this time we ask that you please provide us with an estimated date of completion for a determination on this FOIA request, as required by FOIA 5 U.S.C. § 552(a)(7)(B)(ii).

Thank you,
Margaret

Margaret E. Townsend
Open Government Staff Attorney | Endangered Species Program
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
Office: (971) 717-6409
Fax: (503) 283-5528
mtownsend@biologicaldiversity.org

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From: foia@noaa.gov [mailto:foia@noaa.gov]
Sent: Wednesday, March 30, 2016 7:16 AM
To: foia@biologicaldiversity.org
Subject: FOIA Request: DOC-NOAA-2016-000605 - Status Update

03/30/2016 10:15 AM
FOIA Request: DOC-NOAA-2016-000605

Dear Ms. Townsend,

We are writing to update you as to the status of processing of your FOIA requests DOC-NOAA-2016-000603 (re: the final 4(b)(2) policy and final rule defining “destruction or adverse modification”), DOC-NOAA-2016-000604 (re: the “incidental take statement” rule), and DOC-NOAA-2016-000605 (re: the final policy interpreting “Significant Portion of Its Range”).

As we discussed, these complex requests present unusual circumstances, due to the need to collect voluminous records from multiple offices within NOAA and to coordinate with the Department of the Interior (DOI) and other agencies, as required under 15 C.F.R. § 4.5(b). Due to the need to develop a search plan for multiple offices and to coordinate the privilege review, we need more time to determine how many responsive documents we may be producing and when we will be making additional releases.

Please be assured we are working diligently to prepare interim releases for each of these matters and to make them available as soon as possible.

Lamar Turner

FOIA Coordinator, Office of Protected Resources

NOAA Fisheries

Attachment L



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

Ms. Margaret Townsend
Center for Biological Diversity
P. O. Box 11374
Portland, OR 97211-0374

JUN 28 2016

Re: FOIA Request # DOC-NOAA-2016-000605

Dear Ms. Townsend:

This letter is in response to your Freedom of Information Act (FOIA) request # 2016-000605 dated *February 10, 2016* and received by our office on *February 16, 2016*. You requested records relating to "Significant Portion of Range Policy":

1. All records related to the Joint Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species." 79 Fed. Reg. 37,578 (July 1, 2014); 76 Fed. Reg. 76,987 (Dec. 9, 2011).
2. All records related to, concerning, and/or generated by or in connection with the Significant Portion of Its Range Team consisting of representatives from the U.S. Fish and Wildlife Service and NOAA Fisheries.

Per our scope conversation and email on March 11, 2016, and your response email dated March 14, 2016, we are processing this request with the following understanding:

You have indicated that you are only seeking NOAA records forming the decision file for this policy, which would include documents up through the signing of the final policy (June 19, 2014). You recognize that this request is complicated by the fact that we have already conducted an extensive search for records in compiling the Administrative Record for this policy, in connection with litigation regarding FWS' listing determination for the Gunnison sage grouse, (D. Colorado). Therefore, for the period covered in that administrative record (June 21, 2010, through June 19, 2014), we will not conduct a new search for agency records, but will review those documents that have already been collected but that were either excluded from the administrative record per the NOAA 2012 Administrative Record Guidance or provided to the plaintiffs after filing of the record. Because the NOAA administrative record has already been filed with the court and provided to the plaintiffs, it is now publicly available and will not be produced again here.

However, you have indicated you are interested in also receiving documents dated "from around and just before the time that the 2010 white paper was written." Thus, we will conduct a new search for and collect documents going back to the start of the joint drafting team that developed the Policy, which was in October 2009. In doing this, we will not search for records of departed or deceased employees. We note that both of NOAA's team members are still employees.



Although some of the responsive documents will cross categories of your pending requests (i.e., some documents address more than one regulatory reform effort, including some that are the subject of separate FOIA requests), we need only produce those once. However, as you requested, we will also attempt to make clear in the transmittal letters for each release, as applicable, how many documents are responsive to more than one request.

This constitutes our **2nd interim** response to this request. Our search within the National Marine Fisheries Service, office of Protected Resources, Headquarters has thus far located **82 responsive records**

- **49 documents** are being released to you in their entirety.
- **29 documents** are being partially withheld pursuant to exemption:
 - 5 U.S.C. § 552 (b)(5) which exempts from disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. The records are exempted from disclosure through Deliberate Process Privilege, Attorney Client Communication and Attorney Work Product, as appropriate;
 - Also some text is partially withheld and identified as non-responsive and/or Other Agency equities.
- **4 documents** are being withheld in full pursuant to exemption:
 - 5 U.S.C. § 552 (b)(5) which exempts from disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. The records are exempted from disclosure through Deliberate Process Privilege and Attorney Client Communication, as appropriate.

Note: These documents have been provided to the plaintiffs in the Gunnison sage grouse litigation but have not yet been formally made part of the administrative record.

The 1st interim released on April 19, 2016 consisted of 37 documents released to you in their entirety; to date Protected Resources has released a total of 119 files to you.

As we discussed, this complex request presents unusual circumstances, and we will keep you apprised of our progress.

Information on Appeals:

We encourage you to speak with us if you have concerns as we continue to process this request. Although you have the ability to appeal at this time, we encourage you to focus the appeal/mediation/NOAA discussion, if needed, on documents provided as part of this interim release, but hold specific challenges about production until you have received and reviewed more of the voluminous records that the agency is still in the process of gathering and processing.

You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 30 calendar days of the date of this response letter at the following address:

**Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230**

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov by facsimile (fax) to 202-482-2552, or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- "Freedom of Information Act Appeal" must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 30th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

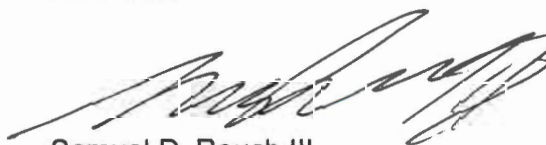
The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

**Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road, Room 2510
College Park, MD 20740-6001**

**Email: ogis@nara.gov
Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448**

If you have any questions regarding this request, please contact NMFS Headquarters' Protected Resources FOIA personnel at 301-427-8404 x 8492 or nmfs.hq.pr.foia@noaa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Samuel D. Rauch III', written in a cursive style.

Samuel D. Rauch III,
Deputy Assistant Administrator
for Regulatory Programs

Attachment M

From: Samuel Dixon [mailto:samuel.dixon@noaa.gov]

Sent: Thursday, August 11, 2016 11:49 AM

To: foia@biologicaldiversity.org; Margaret Townsend; Lola Stith - NOAA Affiliate; Stacey Nathanson - NOAA Federal; NMFS HQ PR FOIA Requests - NOAA Service Account

Subject: Pending FOIA requests with NOAA Fisheries

Dear Ms. Townsend,

We would like to combine FOIA requests DOC-NOAA-2016-000**603**, DOC-NOAA-2016-000**604**, and DOC-NOAA-2016-000**605**, into a single request in order to make the processing of these FOIA requests more efficient.

Please let us know if you have any objections or questions regarding this process.

Thanks,

Samuel Dixon

Contractor - IBSS Corp

NMFS Assistant FOIA Liaison

301-427-8739

samuel.dixon@noaa.gov

Attachment N

From: Margaret Townsend
To: ["Samuel Dixon"](mailto:Samuel.Dixon); foia@biologicaldiversity.org; [Lola Stith - NOAA Affiliate](#); [Stacey Nathanson - NOAA Federal](#); [NMFS HQ PR FOIA Requests - NOAA Service Account](#)
Subject: RE: Pending FOIA requests with NOAA Fisheries
Date: Friday, August 12, 2016 3:17:00 PM

Mr. Dixon,

Before the Center is able to agree to NMFS's proposal of combining these three FOIA requests, we would appreciate it if you would please provide your reasoning for why this would make responding to these requests more efficient.

We would also want confirmation that the responsive records would clearly indicate to which original request they respond.

Thank you,
Margaret

Margaret E. Townsend
Open Government Staff Attorney | Endangered Species Program
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
Office: (971) 717-6409
Fax: (503) 283-5528
mtownsend@biologicaldiversity.org

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From: Samuel Dixon [<mailto:samuel.dixon@noaa.gov>]
Sent: Thursday, August 11, 2016 11:49 AM
To: foia@biologicaldiversity.org; Margaret Townsend; Lola Stith - NOAA Affiliate; Stacey Nathanson - NOAA Federal; NMFS HQ PR FOIA Requests - NOAA Service Account
Subject: Pending FOIA requests with NOAA Fisheries

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Please let us know if you have any objections or questions regarding this process.

Thanks,

Samuel Dixon

Contractor - IBSS Corp

NMFS Assistant FOIA Liaison

301-427-8739

samuel.dixon@noaa.gov

Attachment O



October 3, 2016

VIA ELECTRONIC MAIL

Lamar Turner
FOIA Coordinator
NOAA Fisheries
1315 East West Highway
Bldg. SSMC3, Room 13733
Silver Spring, Maryland 20910

RE: Notice of Deadline Violation and Request for Estimated Date of Completion for NOAA FOIA Request DOC-NOAA-2016-000605/Offer to Assist.

Dear FOIA Officer:

I am writing regarding the above-referenced request by the Center for Biological Diversity (“Center”) pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”).

On February 9, 2016, the Center sent via email a request pursuant to FOIA, to the National Oceanic and Atmospheric Administration (“NOAA”). The Center requested all records related to the Joint Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species.” 79 Fed. Reg. 37,578 (July 1, 2014); 76 Fed. Reg. 76,987 (Dec. 9, 2011), and all records related to, concerning, and/or generated by or in connection with the Significant Portion of Range Team consisting of representatives from the U.S. Fish and Wildlife Service and NOAA Fisheries.

On February 10, 2016, NOAA sent an email requesting that the FOIA request be submitted via FOIAOnline. The Center resubmitted the FOIA request was resubmitted via FOIAOnline the same day, and NOAA responded with an email acknowledging receipt of the request and assigning it the tracking number DOC-NOAA-2016-000605.

On February 16, 2016, Mark Graff sent a letter via FOIAOnline confirming that NOAA had granted the Center’s fee waiver request.

On February 17, 2016, you sent a letter via email acknowledging the Center’s FOIA request and confirming NOAA’s grant of the fee waiver.

On March 9, 2016, you sent another letter via email stating that the FOIA request would require additional 10 day extension as allowed under 15 C.F.R. § 4.6(c). The letter provided an estimated completion date of March 29, 2016.

On March 11, 2016, Ruth Ann Lowery from NOAA sent an email detailing the content of a phone call with me earlier that day concerning updating the estimated time of completion and narrowing the scope of the FOIA request. Ms. Lowery estimated that only the first release of records would be ready by the March 29, 2016 due date, rather than the entire release.

On March 14, 2016, I replied to the March 11, 2016, email confirming that the proposed limits to the scope of the FOIA request were acceptable, with the caveat that it may need to be broadened again once the initial releases have been reviewed.

On March 30, 2016, you sent an email explaining NOAA would need more time to process the FOIA request due to the complex nature of the request and a system upgrade at NOAA that made systems unavailable for a time. On the same date, you sent another email referencing DOC-NOAA-2016-000603, DOC-NOAA-2016-000604, and DOC-NOAA-2016-000605. The second email stated that additional time would be needed for NOAA to respond to all three referenced requests. No updated estimated date of completion was provided in either email.

On June 3, 2016, you uploaded the first release of 37 records, but we did not receive an email notification. On June 8, 2016, I sent you an email requesting an update and estimated date of completion and you replied on June 13, 2016 notifying me that the first release was available on FOIAOnline.

On June 28, 2016, you sent me a letter notifying me of the second release of records.

On August 11, 2016, Samuel Dixon with NOAA sent an email requesting to combine FOIA requests DOC-NOAA-2016-00603, DOC-NOAA-2016-00603, and DOC-NOAA-2016-00603. On August 12, 2016, I replied with a request for clarification regarding reasoning and process for the combination of the multiple FOIA requests.

Since that time, 35 workdays have passed with no further response from NOAA.

Pursuant to FOIA, 5 U.S.C. § 552(a)(6)(A)(i), a determination on this request was due 20 business days after your receipt of the request, or March 10, 2016. Furthermore, FOIA allows an agency to extend the decision deadline beyond the 20 workdays only with “written notice to the person making such request setting forth unusual circumstances for the requested extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days ...” 5 U.S.C. § 552(a)(6)(B)(i). We are now well past the limited extension of ten working days that 5 U.S.C. § 552(a)(6)(B)(i) allows. Indeed, NOAA’s August 11, 2016 email was itself sent long after the expiration of that extended deadline.

At this time, the Center is not exercising our legal option under FOIA to file suit to compel NOAA’s compliance with FOIA’s time limits. 5 U.S.C. § 552(a)(6)(C). However, be informed that time is of the essence in this matter and our patience is not without limits. As the Center informed you in its request letter, the requested information is for use as part of the Center’s well-established function of public oversight of agency action, and the Center intends to use the

requested information to better understand NOAA Fisheries' development of a policy for interpretation of the phrase "significant portion of its range" in the definitions of "endangered" and "threatened" under the Endangered Species Act ("SPR Policy"), and to educate the public on these matters. The rationale driving this request is to inform the public about these present issues and the Center's need to access the requested records is therefore very time sensitive.

Nevertheless, the Center does not wish to initiate litigation at this time because it believes that a cooperative approach is a more productive way to manage and resolve NOAA's delay. Therefore, I am offering to assist your office in any way that I can in order to facilitate NOAA's prompt release of the requested records.

Additionally, beyond the estimated decision date mandate that 5 U.S.C. § 522(a)(6)(B)(i) imposes, as noted above, for any response taking longer than ten days, NOAA must inform the requester "(i) the date on which the agency originally received the request; and (ii) an estimated date on which the agency will complete action on the request." *Id.* at § 522(a)(7)(B). Therefore, as required by 5 U.S.C. § 522(a)(7)(B)(ii), we request that NOAA immediately provide an estimated date by which we can expect completion of the agency's unlawfully delayed response to our FOIA request. The Center is mindful that we have legal options available if NOAA fails to respond. *See, e.g., Muttitt v. U.S. Central Command*, 813 F.Supp.2d 221 (D.D.C. 2011) (requester permitted to bring free-standing FOIA claim for agency's failure to provide ECD).

As we evaluate the need to seek judicial review of this matter, it would be useful if you could let us know whether you have implemented a "first-in/first-out" system for processing a backlog of FOIA requests and, if so, the number of requests in line ahead of this one.

Although the Center is not pursuing litigation at this time, because of the time-sensitive nature of the requested data, legal action will be required if NOAA fails to make a prompt determination.

If you have any questions, please contact me at (971) 717-6409 or foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below. We look forward to your timely response.

Sincerely,



Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
foia@biologicaldiversity.org

Attachment P



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

Ms. Margaret Townsend
Center for Biological Diversity
P. O. Box 11374
Portland, OR 97211-0374

NOV 14 2016

Re: FOIA Request DOC-NOAA-2016-000605

Dear Ms. Townsend:

This letter is in response to your Freedom of Information Act (FOIA) request # 2016-000605 dated *February 10, 2016* and received by our office on *February 16, 2016*. You requested records relating to the National Marine Fisheries Service's (NMFS) and United States Fish and Wildlife Service's (FWS) joint "Significant Portion of Range Policy":

1. All records related to the Joint Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species." 79 Fed. Reg. 37,578 (July 1, 2014); 76 Fed. Reg. 76,987 (Dec. 9, 2011).
2. All records related to, concerning, and/or generated by or in connection with the Significant Portion of Its Range Team consisting of representatives from the U.S. Fish and Wildlife Service and NOAA Fisheries.

Per our scope conversation and email on March 11, 2016, and your response email dated March 14, 2016, we processed this request with the understanding that you seek documents reflecting development of the policy up through its signing, i.e., the decision file. As we discussed, we tailored our search in light of the fact that NMFS had already compiled an administrative record for the policy, which has been filed as a supplemental record to the record of the Department of the Interior (DOI) in litigation regarding FWS' listing determination for the Gunnison sage grouse (D. Colorado).

As we agreed, for the period covered in that administrative record (June 21, 2010, through June 19, 2014), we did not conduct a new search for agency records, but rather reviewed those documents that had already been collected but that were either excluded from the administrative record per the NOAA 2012 Administrative Record Guidance or provided to the plaintiffs in that litigation after filing of the record. Because you indicated you were interested in also receiving documents dated "from around and just before the time that the 2010 white paper was written," we conducted a new search for and collected documents going back to the start of the joint drafting team that developed the Policy, which was in October 2009. As we discussed, in doing this, we did not search for records of departed or deceased employees.



This constitutes our final response to this request. Our search within the National Marine Fisheries Service and the NOAA Office of the General Counsel located a total of 559 documents responsive to your request, setting aside duplicates; this final response provides **444 responsive records**, totaling 1,744 pages. A summary of the releases are as follows:

- **37 documents** were previously released to you in full on April 19, 2016.
- **78 documents** were previously released to you on June 28, 2016 [49 in full, 29 in part, and 4 were withheld in full].
- **27 documents** [totaling 69 pages] are currently being released to you in their entirety.
- **58 documents** [totaling 466 pages] are currently being partially withheld:
 - 50 documents, totaling 433 pages pursuant to 5 U.S.C. § 552 (b)(5) which exempts from disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. The records are exempted from disclosure by application of the Attorney Client Privilege and Deliberative Process Privilege.
 - 8 documents, totaling 33 pages pursuant to 5 U.S.C. § 552 (b)(5) which exempts from disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. The records are exempted from disclosure by application of the Deliberative Process Privilege.
- **1 document** [totaling 6 pages] is currently being withheld in full pursuant to exemption:
 - 5 U.S.C § 552 (b)(5) which exempts from disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. The record is exempted from disclosure by application of the Deliberative Process Privilege and the Attorney-Client Privilege.
- **358 documents** (totaling 1,249 pages) were found pertaining to this request that originated in their entirety from FWS or DOI. Although we believe the majority of this material qualifies for protection under (b)(5), due to their deliberative nature and/or the inclusion of attorney-client information, FWS has the primary concern and is in the best position to evaluate and process the records. Accordingly, per our governing regulations, 15 C.F.R. § 4.5(b), we are simultaneously referring these documents for review and release determination. You can contact them at:

HEADQUARTERS OFFICE
Carrie Hyde-Michaels, FWS FOIA Officer
U.S. Fish and Wildlife Service

5275 Leesburg Pike
MS:IRTM
Falls Church, VA 22041
Phone: 703-358-2291
Fax: 703-358-2251
FWS FOIA Officer at fwhq_foia@fws.gov

Some of the 58 documents released in part to you as described above include records originating in part from FWS or DOI, and those portions of the documents are marked as "other agency." These consist of **22 documents** (totaling 55 pages). As indicated above, we have redacted the privileged NOAA-origin portions as warranted and, in some cases, from the FWS-origin text as well, where privileged material bearing on NOAA's interests has been identified, due to the joint nature of the underlying process. Pursuant to 15 C.F.R. § 4.5(b), we will refer the portions of documents originating from FWS/DOI to FWS for a separate release determination, and you should receive a response directly from them.

You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

**Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230**

An appeal may also be sent by e-mail to FOIAAppeals@dpc.gov, by facsimile (fax) to [202-482-2552](tel:202-482-2552), or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- "Freedom of Information Act Appeal" must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

**Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001**

**Email: ogis@nara.gov
Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448**

If you have questions regarding this correspondence please contact **Lamar Turner** at nmfs.hq.pr.foia@noaa.gov or by phone at **301-427-8492**, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,



Samuel D. Rauch III,
Deputy Assistant Administrator
for Regulatory Programs

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Tuesday, April 4, 2017 2:59 PM
To: Boyd, Harriette (Federal)
Cc: Davis, James (Contractor); Parsons, Bobbie (Federal); Heaton, John; Dennis Morgan - NOAA Federal; Lola Stith - NOAA Affiliate
Subject: Re: Transition FOIA Report 4/4/2017
Attachments: FOIA_Listing_2017-02-02_ (1) (1) revised.xls

Hello Harriette,

Attached is the updated spreadsheet. (b)(5)

. With this response we consider this data call complete.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Fri, Mar 31, 2017 at 11:35 AM, Boyd, Harriette (Federal) <hBoyd1@doc.gov> wrote:

Please provide updated to Report for April 4, 2017 by 2:00pm April 3, 2017. Attached is the Report as of 3/28/2017. Please make your updates in red directly in the report. Thanks, Harriette

Harriette Boyd

Freedom of Information Act Specialist

U.S. Department of Commerce

Office of Privacy and Open Government

Office: [\(202\) 482-1485](tel:(202)482-1485)

Email: hboyd1@doc.gov

| BOU | Tracking Number | Type | Requester |
|-----|----------------------|---------|--------------------|
| | DOC-NOAA-2017-000331 | Request | Adam J. Rappaport |
| | DOC-NOAA-2017-000346 | Request | Anthony V. Schick |
| | DOC-NOAA-2017-000362 | Request | Jaclyn Prange |
| | DOC-NOAA-2017-000497 | Request | Rachel Clattenburg |
| | DOC-NOAA-2017-000351 | Request | Yogin Kothari |

DOC REQUESTS - ASSIGNED TASKS TO NOAA

| | | | |
|--|--------------------|------|------------------|
| | DOC-OS-2017-000267 | TASK | Stephen S. Braun |
| | DOC-OS-2017-000308 | TASK | Michael Best |

| Requester Organization | Submitted | Assigned To | Perfected | Due |
|--|------------|--------------------|-----------|------------|
| Citizens for Responsibility and Ethics in Washington | 12/16/2016 | LA | YES | 01/24/2017 |
| Oregon Public Broadcasting | 12/19/2016 | Ana Liza Malabanan | YES | 02/23/2017 |
| | 12/22/2016 | USEC | YES | 02/09/2017 |
| Public Citizen | 01/25/2017 | USEC | YES | 03/02/2017 |
| UCS | 12/20/2016 | USEC | YES | |

| | | | | |
|------------------|------------|-----------|-----|------------|
| | | | | |
| Associated Press | 12/19/2016 | NOAA/USEC | YES | 01/11/2017 |
| | 01/26/2017 | NOAA/USEC | YES | 02/27/2017 |

| Closed Date | Status | Dispositions |
|-------------|--|--------------|
| TBD | Closed--final response (No Records) issued 3/24/17. | TBD |
| TBD | Fee waiver granted and requester notified. Two files (UR and RR) have been uploaded to the Records tab. Still in production phase via Clearwell. Request is open and in progress. Final response has not been sent to the requester--FAL ready to be sent for final review. | TBD |
| TBD | Fee waiver granted and requester notified. No further actions have been taken in response to the request. No interaction with the requester. Final response has not been sent to the requester--Awaiting instruction if DOC will conduct any searches, or whether a search by NOAA would be considered sufficient. | TBD |
| TBD | Fee waiver granted and requester notified. No further actions have been taken in response to the request. No interaction with the requester. Final response has not been sent to the requester. Search will be tasked for OOC for any responsive records unless DOC intends to coordinate the search and issue search taskers. | TBD |
| TBD | Fee waiver granted and requester notified. No further actions have been taken in response to the request. No interaction with the requester. Final response has not been sent to the requester. Search will be tasked to CIO(UMS), USEC and OOC unless DOC intends to coordinate the search and issue the search tasker. | TBD |

| | | |
|-----|--|-----|
| TBD | FOIA liasion polling USEC group to identify if there are responsive records. | TBD |
| TBD | FOIA liasion polling USEC group to identify if there are responsive records. | TBD |

Detail

CREW requests copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

I request copies of any communications from regional staff in Oregon, Washington or Idaho since July 2016 involving both of the following keywords: 'Trump', 'President'. Scope modified to limit search by NMFS West Coast Region "Supervisory" staff located in Oregon, Washington or Idaho.

Please produce records in possession, custody, or control that are, include, or reflect communications between National Oceanic and Atmospheric Administration's (NOAA's) staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Wilbur Ross, Ray Washburne, David Bohigian, Joan Maginnis, George Sifakis, William Gaynor, A. Mark Neuman, and Tom Leppert.

On behalf of Public Citizen, Inc., and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. s. 552, I request:

1. All records of communications from or on behalf of the Trump Administration and/or the Trump Transition Team to the National Oceanic and Atmospheric Administration (NOAA) providing guidance on which agency matters NOAA employees may or may not publicly discuss and/or regulating how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request. Background discussion of the concerns motivating this request is provided in the January 24, 2017, article in Politico by Andrew Restuccia, Alex Guillén, and Nancy Cook, entitled Information lockdown hits Trump's federal agencies, available at <http://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122>.
2. All records of communications disseminated internally to NOAA employees to provide guidance on which agency matters NOAA employees may or may not publicly discuss and/or to regulate how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and on behalf of the Union of Concerned Scientists, I write to request access to and copies of all communications and attachments between National Oceanic and Atmospheric Administration staff and the following individuals from November 14, 2016 to present:

1. Anyone with the following email domain: @ptt.gov
2. Anyone with the following email domain: @donaldjtrump.com

copies of All emails sent to or sent from your agency employees in which the Internet domains "trump.com", "trumporg.com", "ptt.gov", "donaldjtrump.com" or "donaldtrump.com" are in email addresses in the To, From, CC,BCC, Subject or Body fields of the message. The time frame for this request is June 3, 2016 through December 5, 2016. for the following Officials: Secretary of Commerce Penny Pritzker Deputy Secretary Bruce H. Andrews Chief of Staff Jim Hock General Counsel Kelly R. Welsh Undersecretary for National Oceanic and Atmospheric Administration Dr Kathryn Sullivan Acting Undersecretary for International Trade Kenneth E. Hyatt Undersecretary for Industry and Security Eric L. Hirschhorn Director of the U.S. Census Bureau John Thompson Assistant Secretary for Economic Development Jay Williams

Under the Freedom of Information Act, I hereby request any emails produced or received by your agency to or from any member or part of the transition team, as well as any emails which include any or all of the following terms or phrases: • Trump • Transition • President-Elect • New administration • New boss

From: Stewart, Korrina (US - Arlington) <kostewart@deloitte.com>
Sent: Wednesday, April 5, 2017 7:08 AM
To: Seeley, Sue (US - Parsippany); Mark Graff - NOAA Federal
Cc: Knox, Christopher S (US - Austin); Devine, Eamon (US - Arlington)
Subject: RE: Meeting recap

Hey Mark!

Just wanted to check in from our last email to you all...

I know Sue was working on some updated vehicle information still. In the meantime were there any questions that came up that we can help you all work through?

Talk to you soon,

-Korrina

From: Seeley, Sue (US - Parsippany)
Sent: Monday, March 13, 2017 11:17 AM
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>; Stewart, Korrina (US - Arlington) <kostewart@deloitte.com>
Cc: Knox, Christopher S (US - Austin) <csknox@deloitte.com>; Devine, Eamon (US - Arlington) <eadevine@DELOITTE.com>
Subject: RE: Meeting recap

Mark,

It was a pleasure speaking with you again the other week. As we discussed, Deloitte is providing follow-ups to our conversation in two areas – (1) sample descriptions of direct gap support and diagnostic services we have provided to other agencies and (2) information regarding potential vehicles with Deloitte.

Immediate Gap Support

Faced with increasing internal and external requests to identify and disclose information, NOAA may need immediate support to prevent delays in responding from occurring or growing. Deloitte can provide professionals with experience in assisting agencies in identifying, collecting, and reviewing requested information. As described below, this direct support will provide valuable insight for any diagnostic services as well.

Sample Diagnostic Services

In seeking to improve and streamline information disclosure procedures, whether from agency or Congressional request, pursuant to the Freedom of Information Act (FOIA), or litigation discovery requirements, an agency should first perform a diagnosis of their current program to identify current efficiencies, potential gaps, and better define requirements for improvement. This diagnostic should include three (3) steps:

Step 1: Define and Map Existing Process.

Combining direct support for the agency's data request process (using Deloitte staff to perform all steps in the current workflow) with interviews of key stakeholders in the existing process, Deloitte will identify all elements of the current approach. In addition, Deloitte will evaluate all workflow and technologies used throughout the lifecycle of responding to a data request.

Step 2: Gap Analysis – evaluation of existing people, process, and technology.

Based on the direct support and interviews conducted in Step 1, Deloitte will identify:

- People: how best to leverage current agency staff and subject matter expertise as well as needs for staff growth and augmentation (e.g. contractor support).
- Process: the impact of gaps in process and workflow. For example, the impact of gaps between data response and business teams that may lead to under- or over-collection of potentially responsive material.
- Technology: how best to leverage current technologies in use at the agency and identification of additional technology options available in the marketplace, including how best to utilize technology within an optimized workflow.

Step 3: Prepare Report and Recommendations.

Based on Steps 1 and 2, Deloitte will prepare a summary report of existing process, gap analysis, and recommendations, including a range of workflow optimization, staffing recommendations, and technology options.

Potential Contract Vehicles:

We are in on-going conversations with our colleagues to determine if there are any active contract vehicles between both NOAA and Commerce that would be applicable for you in this situation. I will follow-up with you again later this week with more information.

In addition, Deloitte has GSA schedule that matches the scope of the diagnostic services described above – GSA Schedule 36, 51-508. This schedule has the advantage of a select population of contractors allowing for a shorter timeline for procurement.

Perhaps it might make sense to chat again once I have additional information on contract vehicles later this week?

Best Regards,

Sue.

Sue Seeley

Deloitte Transactions and Business Analytics

Tel/Mobile: +1 (b)(6)

www.deloitte.com

From: Mark Graff - NOAA Federal [<mailto:mark.graff@noaa.gov>]

Sent: Wednesday, March 1, 2017 1:29 PM

To: Stewart, Korrina (US - Arlington) <kostewart@deloitte.com>

Cc: Knox, Christopher S (US - Austin) <csknox@deloitte.com>; Seeley, Sue (US - Parsippany) <sseeley@deloitte.com>;

Devine, Eamon (US - Arlington) <eadevine@DELOITTE.com>

Subject: Re: Meeting recap

Outstanding--thank you Korrina. I appreciate the follow up. I'll also circle back after I have a chance to speak with the Director of our Cyber Security Division (Robert Hembrook) to get a read on the extent of their burden with data calls. Thanks again,

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

(301) 628-5658 (O)

(b)(6) (C)

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On Wed, Mar 1, 2017 at 1:12 PM, Stewart, Korrina (US - Arlington) <kostewart@deloitte.com> wrote:

Hey Mark,

Thanks again for coordinating today. Very nice to meet Rob and Dennis!

So as our team shared, we have seen similar problems facing other agencies and have worked with them on solutions, but while we understand you need more robust workflow management and reporting from your solution, the collaborative and real-time nature of your current solution is far ahead of others facing similar challenges.

As discussed, we have found that the most effective way to identify sources for efficiency, innovation, and improvement is a combination of “boots-on-the-ground” support and diagnostic interviews to elicit stakeholder perspectives. In instances where we haven’t been able to place an individual with an agency to learn “on the job,” we have used limited shadowing instead, but we agree with you that hands on experience is the best approach. That being said...

By next Friday, March 10th, our team will get back to you with the following:

- (1) Sample scopes/statements of work for where we have done this in the past
- (2) Information about potential vehicles for working with Deloitte

Copied on the email are Chris, Sue and Eamon so that you have all of our email addresses and can pass them on.

In the meantime, please feel free to reach out if any questions come up.

Talk to you soon,

Korrina

This message (including any attachments) contains confidential information intended for a specific individual and purpose, and is protected by law. If you are not the intended recipient, you should delete this message and any disclosure, copying, or distribution of this message, or the taking of any action based on it, by you is strictly prohibited.

v.E.1

From: Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov>
Sent: Tuesday, April 4, 2017 4:45 PM
To: Mark Graff - NOAA Federal
Cc: Swisher Robert; Lola Stith - NOAA Affiliate; Morgan Dennis
Subject: Re: Transition FOIA Report 4/4/2017
Attachments: FOIA_Listing_2017-02-02_ (1) (1) revised.xls

This is a data call?

On Tue, Apr 4, 2017 at 2:59 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
Hello Harriette,

Attached is the updated spreadsheet. (b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. With this response we consider this data call complete.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) [REDACTED] (C)

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On Fri, Mar 31, 2017 at 11:35 AM, Boyd, Harriette (Federal) <hBoyd1@doc.gov> wrote:

Please provide updated to Report for April 4, 2017 by 2:00pm April 3, 2017. Attached is the Report as of 3/28/2017. Please make your updates in red directly in the report. Thanks, Harriette

Harriette Boyd
Freedom of Information Act Specialist
U.S. Department of Commerce
Office of Privacy and Open Government

Office: [\(202\) 482-1485](tel:2024821485)

Email: hboyd1@doc.gov

| BOU | Tracking Number | Type | Requester |
|-----|----------------------|---------|--------------------|
| | DOC-NOAA-2017-000331 | Request | Adam J. Rappaport |
| | DOC-NOAA-2017-000346 | Request | Anthony V. Schick |
| | DOC-NOAA-2017-000362 | Request | Jaclyn Prange |
| | DOC-NOAA-2017-000497 | Request | Rachel Clattenburg |
| | DOC-NOAA-2017-000351 | Request | Yogin Kothari |

DOC REQUESTS - ASSIGNED TASKS TO NOAA

| | | | |
|--|--------------------|------|------------------|
| | DOC-OS-2017-000267 | TASK | Stephen S. Braun |
| | DOC-OS-2017-000308 | TASK | Michael Best |

| Requester Organization | Submitted | Assigned To | Perfected | Due |
|--|------------|--------------------|-----------|------------|
| Citizens for Responsibility and Ethics in Washington | 12/16/2016 | LA | YES | 01/24/2017 |
| Oregon Public Broadcasting | 12/19/2016 | Ana Liza Malabanan | YES | 02/23/2017 |
| | 12/22/2016 | USEC | YES | 02/09/2017 |
| Public Citizen | 01/25/2017 | USEC | YES | 03/02/2017 |
| UCS | 12/20/2016 | USEC | YES | |

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|------------------|------------|-----------|-----|------------|
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| Associated Press | 12/19/2016 | NOAA/USEC | YES | 01/11/2017 |
| | 01/26/2017 | NOAA/USEC | YES | 02/27/2017 |

| Closed Date | Status | Dispositions |
|-------------|--|--------------|
| TBD | Closed--final response (No Records) issued 3/24/17. | TBD |
| TBD | Fee waiver granted and requester notified. Two files (UR and RR) have been uploaded to the Records tab. Still in production phase via Clearwell. Request is open and in progress. Final response has not been sent to the requester--FAL ready to be sent for final review. | TBD |
| TBD | Fee waiver granted and requester notified. No further actions have been taken in response to the request. No interaction with the requester. Final response has not been sent to the requester--Awaiting instruction if DOC will conduct any searches, or whether a search by NOAA would be considered sufficient. | TBD |
| TBD | Fee waiver granted and requester notified. No further actions have been taken in response to the request. No interaction with the requester. Final response has not been sent to the requester. Search will be tasked for OOC for any responsive records unless DOC intends to coordinate the search and issue search taskers. | TBD |
| TBD | Fee waiver granted and requester notified. No further actions have been taken in response to the request. No interaction with the requester. Final response has not been sent to the requester. Search will be tasked to CIO(UMS), USEC and OOC unless DOC intends to coordinate the search and issue the search tasker. | TBD |

| | | |
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| TBD | FOIA liasion polling USEC group to identify if there are responsive records. | TBD |
| TBD | FOIA liasion polling USEC group to identify if there are responsive records. | TBD |

Detail

CREW requests copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

I request copies of any communications from regional staff in Oregon, Washington or Idaho since July 2016 involving both of the following keywords: 'Trump', 'President'. Scope modified to limit search by NMFS West Coast Region "Supervisory" staff located in Oregon, Washington or Idaho.

Please produce records in possession, custody, or control that are, include, or reflect communications between National Oceanic and Atmospheric Administration's (NOAA's) staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Wilbur Ross, Ray Washburne, David Bohigian, Joan Maginnis, George Sifakis, William Gaynor, A. Mark Neuman, and Tom Leppert.

On behalf of Public Citizen, Inc., and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. s. 552, I request:

1. All records of communications from or on behalf of the Trump Administration and/or the Trump Transition Team to the National Oceanic and Atmospheric Administration (NOAA) providing guidance on which agency matters NOAA employees may or may not publicly discuss and/or regulating how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request. Background discussion of the concerns motivating this request is provided in the January 24, 2017, article in Politico by Andrew Restuccia, Alex Guillotine, and Nancy Cook, entitled Information lockdown hits Trump's federal agencies, available at <http://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122>.
2. All records of communications disseminated internally to NOAA employees to provide guidance on which agency matters NOAA employees may or may not publicly discuss and/or to regulate how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and on behalf of the Union of Concerned Scientists, I write to request access to and copies of all communications and attachments between National Oceanic and Atmospheric Administration staff and the following individuals from November 14, 2016 to present:

1. Anyone with the following email domain: @ptt.gov
2. Anyone with the following email domain: @donaldjtrump.com

copies of All emails sent to or sent from your agency employees in which the Internet domains "trump.com", "trumporg.com", "ptt.gov", "donaldjtrump.com" or "donaldtrump.com" are in email addresses in the To, From, CC,BCC, Subject or Body fields of the message. The time frame for this request is June 3, 2016 through December 5, 2016. for the following Officials: Secretary of Commerce Penny Pritzker Deputy Secretary Bruce H. Andrews Chief of Staff Jim Hock General Counsel Kelly R. Welsh Undersecretary for National Oceanic and Atmospheric Administration Dr Kathryn Sullivan Acting Undersecretary for International Trade Kenneth E. Hyatt Undersecretary for Industry and Security Eric L. Hirschhorn Director of the U.S. Census Bureau John Thompson Assistant Secretary for Economic Development Jay Williams

Under the Freedom of Information Act, I hereby request any emails produced or received by your agency to or from any member or part of the transition team, as well as any emails which include any or all of the following terms or phrases: • Trump • Transition • President-Elect • New administration • New boss

From: Mroz, Jessica <mroz.jessica@epa.gov>
Sent: Wednesday, April 5, 2017 2:13 PM
To: mark.graff@noaa.gov
Subject: Request for Assistance: EPA FOIA Consultation Re Social Cost of Carbon
Attachments: Horner (Carbon Emails) Rqst.pdf; FOIA_SCC_NOAA_Review_Set_040517.pdf

Hello:

Attached is a FOIA request for records from EPA and a set of documents containing NOAA equities for your consultation.

I am seeking a point-of-contact to review the records and provide comments to me by April 20, 2017. Please let me know if I can provide you with any additional information to help process this request.

Thank you for your assistance.

Best,
Jessie

Jessica C. Mroz
Environmental Protection Specialist/ Presidential Management Fellow
U.S. Environmental Protection Agency
Office of Air and Radiation | Office of Air Policy and Program Support
Telephone: (202) 564-1094

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REQUEST UNDER THE FREEDOM OF INFORMATION ACT

September 22, 2015

U.S. Environmental Protection Agency
Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, D.C. 20460
Email: hq.foia@epa.gov

Re: Request for Certain Agency Records — Social Cost of Carbon Emails

To EPA Freedom of Information Officer,

On behalf of the Competitive Enterprise Institute (CEI), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days,¹ copies of **emails sent to or from Elizabeth Kopits or Alex Martens which a) contain, in the To or From, cc: and/or**

¹ See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion, *infra*.

bcc: fields, the Subject field, and/or the email body, any of the terms or parties: “SCC”, “social cost”, Maureen Cropper, Richard Newell, William Pizer and/or John Weyant², b) which were sent or received during 2015, through the date you process this request.

We request the entire thread in which any email responsive to the above description appears regardless if portions of the thread(s) pre-date 2015.

We agree to pay up to \$150.00 for responsive records in the event EPA denies our fee waiver request detailed, *infra*.

Relevant Background to this Request and the Public Interest

This request seeks certain EPA correspondence with or mentioning outside third parties and relevant to a panel established by the National Academies of Science — specifically, by its contract, research consulting firm the National Research Council — on Assessing Approaches to Updating the Social Cost of Carbon. The Social Cost of Carbon is a term for claims of the cumulative damage allegedly inflicted by an incremental ton of carbon dioxide emitted in a particular year (and only damage, not benefits of affordable energy or the social costs of carbon mitigation, although the economic and social costs of carbon mitigation likely and vastly exceed the social costs of carbon (dioxide)).

The SCC is a product of speculative climatology combined with speculative economics and is an unknown quantity, discernible in neither meteorological nor

² That is, an email is responsive if is to, from, copies *or* references any of the parties anywhere. This includes referencing a party, for example Maureen Cropper, in a To, From or cc:/bcc: field if her address (e.g., cropper@econ.umd.edu) appears therein, or the party’s name appears in any form, e.g., “Cropper, Maureen” or “Maureen Cropper”.

economic data. Regardless, government regulators have assigned a figure that appears to be designed to support a conclusion rather than reflect one. By fiddling with inputs in complex computer models, SCC analysts can obtain just about any result they desire. However interesting as an academic exercise, when used to guide policy, SCC has a political function of making fossil fuels look unaffordable no matter how cheap, and renewable energy — which remains uneconomic in most applications after as much as 125 years of competition (e.g., wind, solar) with more reliable sources of energy — appear to be a bargain at any price. (For example, PAGE model creator [Chris Hope](#) argues the discount rate should be 1%, which yields an SCC in 2010 of \$266, which implies that replacing existing coal generation with new solar photovoltaic is “economically efficient”).

Correspondence discussing this issue, including with and/or about outside parties tasked with evaluating the government’s assigned figure, is of public interest because regulators including EPA, and allies among other climate campaigners, desire ever-bigger SCC values to justify ever-more costly anti-carbon (dioxide) regulations. Further, if panelists selected for this *post facto* review of the government’s SCC have indicated their minds are already made up on the issue or on key elements of the analysis, this, too, is of great public interest in evaluating the utility of any panel conclusions.

Regardless, FOIA requests require no demonstration of wrongdoing, and the public interest prong of a FOIA response is the only aspect to which these factors are relevant; we address the public interest in the issue as relates to CEI’s request for fee waiver in detail, *infra*, and respectfully remind EPA that federal agencies acknowledge

CEI is a representative of the news media such that, at most, CEI can be charged the costs of copying these records (for electronic records, those costs should be *de minimis*).

EPA Must Err on the Side of Disclosure

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed’n of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the recent Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act... is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the President has directed that FOIA “be

administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.”

Request for Fee Waiver

This discussion through the top of page 20 is detailed as a result of our recent experience of federal agencies improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records to groups whose requests are, apparently, unwelcome, including and particularly CEI. This is also despite our history of regularly obtaining fee waivers. It is only relevant if EPA considers denying our fee waiver request.

Disclosure would substantially contribute to the public at large’s understanding of governmental operations or activities, on a matter of demonstrable public interest.

CEI’s principal request for waiver or reduction of all costs is pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any 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 government and is not primarily in the commercial interest of the requester”).

CEI does not seek these records for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as 501(c)3 educational organization. As such, requester also has no commercial interest possible in these records. If no commercial interest exists, an assessment of that non-existent interest is not required in any balancing test with the public’s interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010).

The public interest fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987). The Requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. “The legislative history of the fee waiver provision reveals that it was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,’ in particular those from journalists, scholars and nonprofit public interest groups.” *Better Government Ass’n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); S. COMM.

ON THE JUDICIARY, AMENDING the FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).³

“This is in keeping with the statute’s purpose, which is ‘to remove the roadblocks and technicalities which have been used by... agencies to deny waivers.’” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987) (quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy)).

Requester’s ability — as well as many nonprofit organizations, educational institutions and news media that will benefit from disclosure — to utilize FOIA depends on their ability to obtain fee waivers. For this reason, “Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the ‘public benefit’ test for FOIA fee waivers. This waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and

³ This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that “rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” *Better Gov’t v. State*. They therefore, like Requester, “routinely make FOIA requests that potentially would not be made absent a fee waiver provision”, requiring the court to consider the “Congressional determination that such constraints should not impede the access to information for appellants such as these.” *Id.*

requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as “toll gates” on the public access road to information.” *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986).

As the *Better Government* court also recognized, public interest groups employ FOIA for activities “essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” *Id.*

Congress enacted FOIA clearly intending that “fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.” *Ettlinger v. F.B.I.*, 596 F. Supp. 867, 872 (D. Mass. 1984), citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Id.* at 874.

Therefore, “insofar as... [agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood --

information.” *Better Gov’t v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that “‘chill’ the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage.” *Id.* As such, agency implementing regulations may not facially or in practice interpret FOIA’s fee waiver provision in a way creating a fee barrier for Requester.

Courts have noted FOIA’s legislative history to find that a fee waiver request is likely to pass muster “if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286 (9th Cir. 1987).

This information request meets that description, for reasons both obvious and specified.

1) The subject matter of the requested records specifically concerns identifiable operations or activities of the government. Potentially responsive records reflect EPA involvement with EPA on high-profile, highly controversial regulations as part of what is colloquially known as the administration’s “war on coal”, particularly its efforts to regulate greenhouse gases (GHGs) under the Clean Air Act,⁴ the costs and benefits (EPA’s domain) and how agencies are seemingly attempting to finesse

⁴ For a timeline of this rule making *see e.g.*, http://www.epa.gov/climatechange/Downloads/endangerment/EndangermentFinding_Timeline.pdf.

them having become one of the rules' more contentious aspects.⁵ Further, EPA's involvement in constructing the "social cost of carbon" figure has impacts on rules throughout the federal government, including but by no means limited to the Department of Energy.

Release of these records also directly relates to high-level promises by the President and the Attorney General to be "the most transparent administration in history."⁶ This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and study which prompted further media and public interest as well as congressional oversight (*see e.g.*, an internet search of "study Obama transparency").

The Department of Justice Freedom of Information Act Guide concedes that this threshold is easily met. There can be no question that it is met here and, for that potentially responsive records unquestionably reflect "identifiable operations or activities of the government" with a connection that is direct and clear, not remote.

2) Requester intends to broadly disseminate responsive information. As demonstrated herein requester has both the intent and the ability to convey any information obtained through this request to the public.

⁵ *See e.g.*, U.S. Chamber of Commerce and Institute for Energy Research on this at <https://www.uschamber.com/blog/epa-pumps-benefits-proposed-carbon-regulation> and <http://instituteforenergyresearch.org/analysis/epas-absurd-justifications-power-plant-regulations/>, respectively.

⁶ Jonathan Easley, *Obama says his is 'most transparent administration' ever*, THE HILL, Feb. 14, 2013, <http://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history>.

CEI regularly publishes works and are regularly cited in newspapers and trade and political publications, representing a practice of broadly disseminating public information obtained under FOIA, which practice requester intends to continue in the instant matter.⁷

⁷ Print examples include *e.g.*, Stephen Dinan, *Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle*, WASHINGTON TIMES, Apr. 30, 2011, at A1; Peter Foster, *More Good News for Keystone*, NATIONAL POST, Jan. 9, 2013, at 11; Juliet Eilperin, *EPA IG Audits Jackson's Private E-mail Account*, WASHINGTON POST, Dec. 19, 2013, at A6; James Gill, *From the Same Town, But Universes Apart*, NEW ORLEANS TIMES-PICAYUNE, Jan. 2, 2013, at B1; Kyle Smith, *Hide & Sneak*, NEW YORK POST, Jan. 6, 2013, at 23; Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, WASHINGTON TIMES, Apr. 9, 2013, at A4; Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, WASHINGTON TIMES, Apr. 2, 2013, at A1, Dinan, "Researcher: NASA hiding climate data", WASHINGTON TIMES, Dec. 3, 2009, at A1, Dawn Reeves, *EPA Emails Reveal Push To End State Air Group's Contract Over Conflict*, INSIDE EPA, Aug. 14, 2013; Dinan, [EPA's use of secret email addresses was widespread: report](#), WASHINGTON TIMES, Feb. 13, 2014. *See also*, Christopher C. Horner, *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012, <http://washingtonexaminer.com/epa-administrators-invent-excuses-to-avoid-transparency/article/2514301#.UL0aPYf7L9U>; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, <http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-Email-Scandal>; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013; *The FOIA coping response in climate scientists*, WATTS UP WITH THAT, Jan. 21, 2014; *Nothing to See Here! Shredding Parties and Hiding the Decline in Taxpayer-Funded Science*, WATTS UP WITH THAT, Feb. 17, 2014; *The Collusion of the Climate Crowd*, WASHINGTON EXAMINER, Jul. 6, 2012; *Obama Admin Hides Official IPCC Correspondence from FOIA Using Former Romney Adviser John Holdren*, BREITBART, Oct. 17, 2013; *Most Secretive Ever? Seeing Through 'Transparent' Obama's Tricks*, WASHINGTON EXAMINER, Nov. 3, 2011; *NOAA releases tranche of FOIA documents -- 2 years later*, WATTS UP WITH THAT (two-time "science blog of the year"), Aug. 21, 2012; *The roadmap less traveled*, WATTS UP WITH THAT, Dec. 18, 2012; *EPA Doc Dump: Heavily redacted emails of former chief released*, BREITBART, Feb. 22, 2013; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, *DOJ to release secret emails*, BREITBART, Jan. 16, 2013; *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012; *Chris Horner responds to the EPA statement today on the question of them running a black-ops program*, WATTS UP WITH THAT, Nov. 20, 2012; *FOIA and the coming US Carbon Tax via the US Treasury*, WATTS UP WITH THAT, Mar. 22, 2013; *Today is D-Day -- Delivery Day -- for Richard Windsor Emails*, WATTS UP WITH THAT, Jan. 14, 2013; *EPA Doubles Down on 'Richard Windsor' Stonewall*, WATTS UP WITH THAT, Jan. 15, 2013; *Treasury evasions on carbon tax email mock Obama's 'most transparent administration ever' claim*, WASHINGTON EXAMINER, Oct. 25, 2013.

3) **Disclosure is “likely to contribute” to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.** Requester intends to broadly disseminate responsive information. The requested records have an informative value and are “likely to contribute to an understanding of Federal government operations or activities,” just as did requester’s other FOIA requests of EPA, and just as with those requests this SCC issue is of significant and increasing public interest. An internet search for the social cost of carbon affirms that this is not subject to reasonable dispute.

However, **the Department of Justice’s Freedom of Information Act Guide makes it clear that, in the DoJ’s view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain.** It cannot be denied that, to the extent the requested information is available to any parties, this is information held only by EPA or EPA, is therefore clear that the requested records are “likely to contribute” to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

Thus, disclosure and dissemination of this information will facilitate meaningful public participation in the policy debate, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of your agency's dealings with interested parties outside the agency and interested -- but not formally involved -- employees who may nonetheless be having an

impact on the federal permitting process, state and local processes and/or activism on the issue.

4) The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. Requester has an established practice of utilizing FOIA to educate the public, lawmakers, and news media about the government's operations and, in particular and as illustrated in detail above, have brought to light important information about policies grounded in energy and environmental policy. CEI intends to continue this effort in the context of and using records responsive to this request, as debate, analysis and publication continue on these regulations.

CEI is dedicated to and has a documented record of promoting the public interest, advocating sensible policies to protect human health and the environment, broadly disseminating public information, and routinely receiving fee waivers under FOIA.

With a demonstrated interest and record in the relevant policy debates and expertise in the subject of energy- and environment-related regulatory policies, CEI unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

5) The disclosure will contribute "significantly" to public understanding of government operations or activities. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is "likely to contribute" to an understanding of specific government operations or activities.*

There is no publicly available information on the discussions this request seeks. Because there is no such information or any such analysis in existence, any increase in public understanding of this issue is a significant contribution to this increasingly important issue as regards the operation and function of government.

Because CEI has no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

Other Considerations

EPA must consider four conditions to determine whether a request is in the public interest and uses four factors in making that determination. We have addressed all factors, but add the following additional considerations relevant to factors 2 and 4.

Factor 2

FOIA requires the Requester to show that the disclosure is likely to contribute to an understanding of government operations or activities. Under this factor, agencies assess the “informative value” of the records and demands “an increase” in understanding. This factor 2 has a fatal logical defect. Agencies offer no authority for requiring an “increase” in understanding, nor does it provide a metric by which to measure an increase. And, agencies offer no criteria by which to determine under what conditions information that is in the records and is already somewhere in the public domain would be likely to contribute to public understanding.

Agencies typically argue that they evaluate Factor 2 (and all others) on a case by case basis. In doing so, it “must pour ‘some definitional content’ into a vague statutory term by ‘defining the criteria it is applying.’” *PDK Labs. v. United States DEA*, 438 F.3d

1184, 1194, (D.C. Cir. 2006)(citations omitted). “To refuse to define the criteria it is applying is equivalent to simply saying no without explanation.” *Id.* “A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush.”

Paralyzed Veterans of Am. V. D.C. Arena LP, 117 F.3d 579, 584 (D.C. Cir. 1997). Agency failure to pour any definitional content into the term “increase” does not even rise to the level of mush.

Despite the lack of any metric on what would constitute a sufficient increase in public understanding, the Requester meets the requirement because for the information we seek there is no public information. The information we seek will be used to increase the public’ understanding of a current EPA’s employee’s role in the EPA’s endangerment regulations. There is no public information available on this issue Any information on that would increase the public’s knowledge.

The public has no other means to secure information on these government operations other than through the Freedom of Information Act. Absent access to the public record, the public cannot learn about these governmental activities and operations.

Factor 4

Agencies requires the Requester to show how the disclosure is likely to contribute significantly to public understanding of government operations or activities.

Once again, we note that agencies have not provided any definitional content into the vague statutory term “significantly,” offering no criteria or metric by which to measure the significance of the contribution to public understanding CEI will provide.

Nevertheless, as previously explained, the public has no source of information on the issue. Any increase in public understanding of this issue is a significant contribution to this highly visible and politically important issue as regards the operation and function of government, especially at a time when agency transparency is (rightly) so controversial.

As such, requester has stated “with reasonable specificity that their request pertains to operations of the government,” that they intend to broadly disseminate responsive records. “[T]he informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

We note that federal agencies regularly waive requester CEI’s fees for substantial productions arising from requests expressing the same intention, even using the same

language as used in the instant request.⁸ This request is unlikely to yield substantial document production.

For all of these reasons, CEI's fees should be waived in the instant matter.

Alternately, CEI qualifies as a media organization for purposes of fee waiver

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event EPA/EPA refuses to waive our fees under the "significant public interest" test, which we would then appeal while requesting EPA proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) ("fees shall be limited to reasonable standard charges for document duplication when records are not

⁸ See, e.g., no fees required by other agencies for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language include: **DoI** OS-2012-00113, OS-2012-00124, OS-2012-00172, FWS-2012-00380, BLM-2014-00004, BLM-2012-016, BLM: EFTS 2012-00264, CASO 2012-00278, NVSO 2012-00277; **NOAA** 2013-001089, 2013-000297, 2013-000298, 2010-0199, and "Peterson-Stocker letter" FOIA (August 6, 2012 request, no tracking number assigned, records produced); **DoL** (689053, 689056, 691856 (all from 2012)); **FERC** 14-10; **DoE** HQ-2010-01442-F, 2010-00825-F, HQ-2011-01846, HQ-2012-00351-F, HQ-2014-00161-F, HQ-2010-0096-F, GO-09-060, GO-12-185, HQ-2012-00707-F; **NSF** (10-141); **OSTP** 12-21, 12-43, 12-45, 14-02.; **EPA** HQ-2013-000606, HQ-FOI-01087-12, HQ-2013-001343, R6-2013-00361, R6-2013-00362, R6-2013-00363, HQ-FOI-01312-10, R9-2013-007631, HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12, HQ-2014-006434. These latter examples involve EPA either waiving fees, not addressing the fee issue, or denying fee waiver but dropping that posture when requester sued.

sought for commercial use and the request is made by.... a representative of the news media...”).

However, we note that as documents (emails) are requested and available electronically, there are no copying costs.

Requester repeats by reference the discussion as to its publishing practices, reach and intentions to broadly disseminate, all in fulfillment of CEI’s mission, set forth *supra*.

Also, the federal government has already acknowledged that CEI qualifies as a media organization under FOIA.⁹

The key to “media” fee waiver is whether a group publishes, as CEI most surely does. *See supra*. In *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the D.C. Circuit wrote:

The relevant legislative history is simple to state: because one of the purposes of FIRA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: “It is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected.... If fact, *any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a ‘representative of the news media.’*”

Id. at 1385-86 (emphasis in original).

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact is determinative, the “*plan to act, in essence, as a publisher*, both in print and other media.” *EPIC v. DOD*, 241 F.Supp.2d at 10 (*emphases added*). “In short,

⁹ *See e.g.*, Treasury FOIA Nos. 2012-08-053, 2012-08-054.

the court of appeals in National Security Archive held that “[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.” *Id.* at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

For these reasons, CEI plainly qualifies as a “representative of the news media” under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public.

The information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with EPA/EPA activities in this controversial area, or as the Supreme Court once noted, what their government is up to.

For these reasons, requester qualifies as a “representative[] of the news media” under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See EPIC v. Dep’t of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, particularly after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep’t*

of Justice, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women’s Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format, so there should be no costs.

Conclusion

We expect EPA to release within the statutory period all responsive records and any segregable portions of responsive records containing properly exempt information, to disclose records possibly subject to exemptions to the maximum extent permitted by FOIA’s discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law’s clear intent, judicial precedent affirming this bias, and President Obama’s directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) (“The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears”).

We expect all aspects of this request including the search for responsive records be processed free from conflict of interest. We request EPA provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is

processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). EPA must at least inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires EPA to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013). *See also, Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, *e.g., CREW v. Fed. Election Comm'n*, 711 F.3d 180 (D.C. Cir. 2013).

If you have any questions please do not hesitate to contact me. I look forward to your timely response.

Sincerely,



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From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Wednesday, April 5, 2017 10:44 AM
To: Toland, Michael
Cc: Bogomolny, Michael (Federal); Chua, Alvin; John Almeida - NOAA Federal; Robert Swisher - NOAA Federal; Lola Stith - NOAA Affiliate
Subject: List of Litigation Cases
Attachments: Cause of Action Complaint.pdf; CREW v DOC - Complaint.PDF; Friends of Animals Queen Conch_FOIA_Complaint_Filed.pdf; FOA v. NOAA Complaint.pdf; JW-v-Commerce-NOAA-Karl-Holdren-complaint-00541.pdf; Judicial Watch DDC complaint.pdf; Complaint Klamath 6.12.15.pdf; Complaint 11-4365.pdf; Complaint 15-2558.pdf; PEER v. NOAA.pdf; 15-1221 NMFS complaint FINAL.pdf; Complaint Stein 7.30.15.pdf

Hello Mike,

As discussed yesterday in the briefing, (b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

For reference I am attaching a copy of the complaint from each of these cases. Please let me know anything else you need on my end.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) [REDACTED] (C)

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17
18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**

20 SIERRA CLUB, INC.,
21
22 Plaintiff,

23 v.

24 NATIONAL MARINE FISHERIES SERVICE,
25
26 Defendant.

Case No. _____

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

(Freedom of Information Act,
5 U.S.C. § 552 *et seq.*)

27 SIERRA CLUB, INC. (hereinafter “Sierra Club”), by and through its undersigned counsel,
28 hereby alleges:

I. NATURE OF THE CASE

1. Plaintiff asserts violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, by Defendant National Marine Fisheries Service (“NMFS”), a federal agency situated within the United States Department of Commerce. NMFS has failed to produce records that Sierra Club requested under FOIA on August 11, 2014.

2. Sierra Club’s FOIA request concerns a formal consultation (hereinafter, the “ESA Consultation”) undertaken by NMFS under the Endangered Species Act (“ESA”) with respect to regulations promulgated by the U.S. Environmental Protection Agency (“EPA”) under Section 316(b)

1 of the Clean Water Act (hereinafter, the “316(b) Rule”). Section 316(b) requires regulatory standards
2 to minimize the adverse environmental impacts on fish and wildlife caused by cooling water intake
3 structures at existing power plants and other industrial facilities.

4 3. Industrial cooling water systems are, by far, the largest source of water withdrawals in
5 the United States, drawing trillions of gallons per year from America’s rivers, lakes, and oceans. The
6 enormous volume and force of these water withdrawals kills and injures billions of fish and other
7 aquatic organisms each year, including many federally-listed threatened and endangered species, and
8 damages the broader ecosystem.

9 4. More than 16 months after receiving the FOIA request, and long past FOIA’s statutory
10 deadline, NMFS has still not completed its production of responsive documents. NMFS has repeatedly
11 unilaterally extended its estimated date of completion. Further, NMFS’s interim productions have
12 withheld records that Sierra Club contends it is entitled to under FOIA.

13 5. As a result of NMFS’s failures, Sierra Club is being deprived of critical information
14 regarding the government’s development of the 316(b) Rule and the measures for protecting threatened
15 and endangered species from intake structures.

16 **II. JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

17 6. This Court has jurisdiction “to enjoin the agency from withholding agency records and
18 to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. §
19 552(a)(4)(B).

20 7. Venue is proper in this District because Plaintiff’s principal places of business are
21 located in this District. 5 U.S.C. § 552(a)(4)(B).

22 8. Pursuant to Civil Local Rule 3-2(c), assignment to the San Francisco Division is
23 appropriate because Plaintiff Sierra Club is incorporated in California and resides and maintains its
24 headquarters in San Francisco County.

25 **III. PARTIES**

26 9. Plaintiff Sierra Club was founded in 1892 and is the nation’s oldest grass-roots
27 environmental organization. The Sierra Club is a national nonprofit organization that is incorporated in
28 California and has its headquarters in San Francisco, California. It has more than one million members

1 and supporters, including thousands of members in California. The Sierra Club is dedicated to the
2 protection and preservation of the natural and human environment, including protecting threatened and
3 endangered species and their habitat. The Sierra Club’s purpose is to explore, enjoy and protect the
4 wild places of the earth; to practice and promote the responsible use of the earth’s ecosystem and
5 resources; and to educate and enlist humanity to protect and restore the quality of the natural and
6 human environments.

7 10. Defendant National Marine Fisheries Service, also known as “NOAA Fisheries” is a
8 federal agency within the National Oceanic and Atmospheric Administration within the United States
9 Department of Commerce, which is subject to the requirements of FOIA and has possession or control
10 of records that Plaintiff seeks in this action.

11 **IV. STATUTORY AND REGULATORY BACKGROUND**

12 11. “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning
13 of a democratic society, needed to check against corruption and to hold the governors accountable to
14 the governed.” *NRLB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). In other words, as the
15 Supreme Court has declared, “FOIA is often explained as a means for citizens to know what the
16 Government is up to.” *Nat’l Archive & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (internal
17 quotations and citations omitted).

18 12. In particular, FOIA requires agencies of the federal government to release, upon request,
19 information to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C. §
20 552(a)(3)(A). These exemptions are narrowly construed, and the agency bears the burden of
21 establishing the applicability of each exemption as to each document for which it is claimed.

22 13. Upon receiving a FOIA request, an agency has twenty working days to respond by
23 determining whether responsive documents exist and whether the agency will release them. 5 U.S.C. §
24 552(a)(6)(A).

25 14. FOIA allows an agency to delay an initial response for ten working days – but only ten
26 working days – past the statutory deadline, if the agency can demonstrate that it faces “unusual
27 circumstances” in responding to the request. 5 U.S.C. § 552(a)(6)(B). “Unusual circumstances”
28 include the need to search for and collect requested documents from other offices, the need to

1 appropriately examine a voluminous amount of separate and distinct records, and the need to consult
2 with another agency. 5 U.S.C. § 552(a)(6)(B)(iii)(I-III). Even under “unusual circumstances,”
3 however, an agency must provide notice of the delay and also provide “the date on which a
4 determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i).

5 15. The agency must provide information about the status of the request including “an
6 estimated date on which the agency will complete action on the request.” 5 U.S.C. § 552(a)(7)(B)(ii).
7 This date and other information about the status of the request must be available through a telephonic
8 line or internet service established by the agency. *Id.*

9 16. When an agency denies, in whole or in part, a request for records under FOIA, the
10 agency must make a “reasonable effort to estimate the volume of any requested matter the provision of
11 which is denied, and shall provide any such estimate to the person making the request.” 5 U.S.C. §
12 552(a)(6)(F).

13 17. FOIA expressly provides that a requester “shall be deemed to have exhausted his
14 administrative remedies . . . if the agency fails to comply with the applicable time limit provisions”
15 governing its response to a FOIA request or an appeal. 5 U.S.C. § 552(a)(6)(C).

16 **V. STATEMENT OF FACTS**

17 **A. Cooling Water Intake Structures Kill Billions of Fish Every Year.**

18 18. Power plants and other industrial facilities use cooling water intake structures to
19 withdraw massive volumes of water for cooling. Collectively, the nation’s industrial cooling systems
20 withdraw more water than is used for municipal water supplies and irrigated agriculture combined.

21 19. The largest plants in the country can draw enough water from a river to fill an Olympic
22 swimming pool in less than 30 seconds. It is no wonder, then, that every year, hundreds of billions of
23 juvenile fish, larvae, eggs and other aquatic organisms – including the young of many threatened and
24 endangered species – are trapped and killed by the incredibly powerful pumps at such facilities.

25 20. The withdrawal of cooling from natural water bodies causes multiple types of
26
27
28

1 undesirable adverse environmental impacts, including but not limited to entrainment¹ and
2 impingement;² reductions of threatened, endangered or other protected species; damage to critical
3 aquatic organisms, including important elements of the food chain; diminishment of fish population's
4 compensatory reserve; losses to populations including reductions of indigenous species populations and
5 commercial and recreational fishery stocks; and stresses to overall communities and ecosystems.

6 21. By EPA's highly conservative estimates, industrial cooling water withdrawals annually
7 result in the death of at least 2.2 billion age one-equivalent fish, crabs, and shrimp, and a minimum of
8 528 billion eggs and larvae that serve as the basis of the aquatic food chain. In many cases, the toll on
9 fisheries by power plants rivals or exceeds that of the fishing industry. These withdrawals also destroy
10 individuals from at least 266 federally-listed threatened and endangered species, and adversely impact
11 the designated critical habitat of certain protected species.

12 22. "The environmental impact of these systems is staggering: A single power plant might
13 impinge a million adult fish in just a three-week period, or entrain some 3 to 4 billion smaller fish and
14 shellfish in a year, destabilizing wildlife populations in the surrounding ecosystem." *Riverkeeper, Inc.*
15 *v. U.S. EPA*, 358 F.3d 174, 181 (2d Cir. 2004).

16 **B. EPA's Regulations and the Endangered Species Act Consultation.**

17 23. In the Clean Water Act of 1972, Congress ordered EPA to minimize the devastating
18 environmental impacts that cooling water intake structures have on America's waters by setting
19 nationally uniform and binding regulations. *See CWA Section 316(b); 33 U.S.C. § 1326(b).*

20 24. In 2001, 2004 and 2006 EPA promulgated Section 316(b) regulations that were
21 challenged and upheld in part and remanded in part. *See Riverkeeper, Inc. v. U.S. EPA*, 358 F.3d 174
22 (2d Cir. 2004) ("*Riverkeeper I*"); *Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83 (2d Cir. 2007)
23 ("*Riverkeeper II*"); *ConocoPhillips Co. v. EPA*, 612 F.3d 822 (5th Cir. 2010).

24
25 ¹ *Entrainment* refers to the extracting of fish eggs and larvae and other small organisms from a source
26 waterbody into and through a power plant's cooling system, where they are killed or injured by
thermal, physical and chemical shocks.

27 ² *Impingement* refers to the trapping of adult and juvenile fish and other large aquatic organisms,
28 including sea turtles and marine mammals, on the screens of an intake structure, which can kill or
injure those animals through asphyxiation, descaling and other harms.

1 25. In 2007, EPA suspended the regulations that were remanded in large part by the Second
2 Circuit in *Riverkeeper II*. 72 Fed. Reg. 37,107, 37,108 (July 9, 2007).

3 26. On remand from the circuit courts, in 2011, EPA proposed new Section 316(b)
4 regulations for existing facilities and revised its regulations for new facilities.

5 27. On June 18, 2013, EPA initiated the formal ESA Consultation with NMFS and the U.S.
6 Fish and Wildlife Service following comments by environmental groups, including Sierra Club, that
7 EPA must undertake such consultation.

8 28. The ESA Consultation concluded approximately eleven months later, on May 19, 2014,
9 with the Services' release of a programmatic biological opinion on EPA's issuance and implementation
10 of the 316(b) Rule ("Biological Opinion").

11 29. On May 19, 2014, the EPA Administrator signed the final 316(b) Rule, entitled *National*
12 *Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling*
13 *Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities* (EPA-
14 HQ-OW-2008-0667).

15 30. EPA published the 316(b) Rule in the Federal Register on August 15, 2014.

16 **C. The FOIA Request.**

17 31. On August 11, 2014, Sierra Club submitted a FOIA request to NMFS asking that it
18 make available for inspection and copying eight categories of records relating to the 316(b) Rule,
19 Biological Opinion and ESA Consultation. *See* Exhibit A.

20 **D. NMFS's Response.**

21 32. NMFS's response to Sierra Club's request has been wholly inadequate.

22 33. On August 13, 2014, NMFS mailed an initial response acknowledging receipt of Sierra
23 Club's August 11, 2014, request and assigned that request a tracking number, FOIA# DOC-NOAA-
24 2014-001474. *See* Exhibit B.

25 34. On August 27, 2014, counsel for the parties conferred regarding the scope of the
26 request.

27 35. On September 8, 2014, Sierra Club agreed to narrow the scope of the request to exclude
28 records containing routine administrative matters and personally identifiable information. *See* Exhibit

1 C.

2 36. On September 25, 2014, Sierra Club received an email from NMFS estimating that the
3 “earliest [NMFS] can provide a response is November 21[, 2014].” *See* Exhibit D.

4 37. Having received no records from NMFS, on December 3, 2014, Sierra Club requested a
5 status update from NMFS.

6 38. On December 11, 2014, NMFS responded that it was not able to provide an estimated
7 date of completion, but “anticipate[d] being able to provide a date certain for providing our response”
8 by the end of January 2015. *See* Exhibit E.

9 39. After January 2015 passed with no information from NMFS, on February 24, 2015,
10 Sierra Club requested a status update from NMFS, followed by another request for a status update on
11 March 4, 2015.

12 40. On March 3, 2015, more than six months after Sierra Club submitted its FOIA request,
13 NMFS released the first production of responsive records, which was composed of only five documents
14 totaling 51 pages.

15 41. On March 4, 2015, after a telephone conversation between the parties, counsel for
16 NMFS sent Sierra Club an email stating that “review of the documents responsive to the FOIA request
17 will occur in conjunction with the preparation of the administrative record in the pending litigation
18 We anticipate being able to provide a final response approximately one month after the filing of the
19 administrative record [in *Cooling Water Intake Structure v. U.S. Environmental Protection Agency*,
20 U.S. Court of Appeals for the Second Circuit, No. 14-4645 and consolidated cases].” *See* Exhibit F.
21 Sierra Club and NMFS are parties to the referenced *Cooling Water Intake Structure v. EPA* case in the
22 Second Circuit. The administrative record in that case was due on July 13, 2015 (and, indeed, was
23 filed on that date). Thus, the anticipated date of completion in NMFS’s March 4, 2015, email was
24 August 13, 2015.

25 42. In July 2015, NMFS informed Sierra Club that it would not complete its response to the
26 FOIA request by August 13, 2015, and that the new estimated completion date for the FOIA request
27 would be October 30, 2015.

28 43. On or about August 3, 2015, Sierra Club received a second partial production from

1 NMFS consisting of 353 documents. *See* Exhibit G.

2 44. On or about September 10, 2015, Sierra Club received a third partial production from
3 NMFS consisting of 73 documents. *See* Exhibit H.

4 45. On September 29, 2015, NMFS notified Sierra Club that it would be unable to complete
5 its response to the FOIA request by October 30, 2015, and anticipated providing a final release of
6 documents by January 31, 2016. *See* Exhibit I.

7 46. On November 2, 2015, Sierra Club received a fourth partial production consisting of
8 268 emails and attachments. In its November 2nd response, NMFS redacted 75 documents and
9 withheld 688 documents. *See* Exhibit J.

10 47. On or about November 13, 2015, Sierra Club submitted an administrative appeal to
11 NMFS concerning NMFS's excessive and undue delay in complying with FOIA as well as NMFS's
12 misuse of the deliberative process privilege to withhold responsive records. *See* Exhibit K.

13 48. The statutory deadline for responding to Sierra Club's appeal was December 14, 2015,
14 *See* 5 U.S.C. § 552(a)(6)(A)(ii) (agencies must respond to appeals within 20 business days). NMFS did
15 not timely respond to the appeal.

16 49. On or about December 11, 2015, Sierra Club received a fifth partial production
17 consisting of 268 emails and attachments. In its December 11th response, NMFS partially redacted
18 269 documents, fully redacted 212 documents, and withheld 392 documents. *See* Exhibit L.

19 50. More than sixteen months has now passed since NMFS received Sierra Club's FOIA
20 request, NMFS has repeatedly extended the date by which it would complete production of documents
21 responsive to the request, has not completed its production, and has unlawfully redacted and withheld
22 responsive documents.

23 **VI. CLAIMS FOR RELIEF**

24 **FIRST CAUSE OF ACTION**

25 **Failure to properly and timely respond to FOIA request**

26 **(Violation of FOIA, 5 U.S.C. §§ 552)**

27 51. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs of this
28 Complaint as if fully set forth herein.

1 52. By failing to properly and timely respond to Sierra Club's August 11, 2014, FOIA
2 request and provide all records responsive thereto, NMFS has violated FOIA's mandate to release
3 agency records to the public. *See* 5 U.S.C. §§ 552(a)(3)(A) and (a)(6).

4 53. NMFS has wrongfully withheld the requested records from Sierra Club.

5 54. Sierra Club has exhausted any and all applicable administrative remedies.

6 55. Sierra Club is entitled to obtain the requested records immediately.

7 **SECOND CAUSE OF ACTION**

8 **Improperly withholding responsive records**

9 **(Violation of FOIA, 5 U.S.C. §§ 552)**

10 56. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs of this
11 Complaint as if fully set forth herein.

12 57. NMFS has withheld documents, purportedly on the basis of a FOIA exemption, without
13 meeting its burden of establishing that the exemption applies.

14 58. NMFS has improperly withheld and redacted documents responsive to Sierra Club's
15 FOIA request that are not within the scope of the exemption asserted by NMFS.

16 59. NMFS has wrongfully withheld requested records from Plaintiff.

17 60. Plaintiff has exhausted any and all applicable administrative remedies.

18 61. Sierra Club is entitled to obtain the requested records immediately.

19 **VII. RELIEF REQUESTED**

20 **WHEREFORE**, Plaintiff requests that this Court enter an order and judgment:

21 a. Declaring that Defendant NMFS has violated FOIA by failing to properly respond to
22 Plaintiff's FOIA request and provide all responsive records;

23 b. Declaring that Defendant NMFS has failed to comply with FOIA's statutory
24 deadlines.

25 c. Ordering that Defendant NMFS immediately produce all requested records to
26 Plaintiff along with a "*Vaughn* index" of any records withheld under claim of exemption;

27 d. Ordering that Defendant NMFS produce any documents listed on its *Vaughn* index
28 that the Court determines are not exempt from FOIA;

- 1 e. Awarding Plaintiff its litigation costs and reasonable attorneys' fees in this action;
- 2 and
- 3 f. Ordering such other and further relief as the Court may deem just and proper.

4 Dated: December 21, 2015

Respectfully submitted,
SUPER LAW GROUP, LLC.

5
6 By: s/ Reed W. Super
Reed W. Super
7 Attorney for Plaintiff
8 Sierra Club
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|--------------------------|
| CAUSE OF ACTION INSTITUTE |) | |
| 1875 Eye Street, N.W., Suite 800 |) | |
| Washington, D.C. 20006, |) | |
| Plaintiff, |) | |
| v. |) | Civil Action No. 16-2178 |
| NATIONAL OCEANIC & ATMOSPHERIC |) | |
| ADMIN. |) | |
| United States Department of Commerce |) | |
| 1401 Constitution Avenue, N.W., Room 5128 |) | |
| Washington, D.C. 20230, |) | |
| Defendants. |) | |

COMPLAINT

This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking access to records requested by Plaintiff Cause of Action Institute (“CoA Institute”) and improperly withheld by Defendant National Oceanic and Atmospheric Administration (“NOAA”). The records at issue concern potential abuses in determining the membership of the New England Fishery Management Council (“NEFMC”), a regulatory body created by the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.*

NATURE OF THE ACTION

1. The Magnuson-Stevens Fishery Conservation and Management Act (“MSA”) establishes the basis for the federal management of domestic fisheries in the United States. 16 U.S.C. §§ 1801(a)(6), (b)(1), (b)(3). The MSA provides for eight Fishery Management Councils (“FMCs”), each charged with regulating a region of the national coastal waters. The NEFMC is

the FMC relevant to this lawsuit, and it includes the coastal waters of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. 16 U.S.C. § 1852(a)(1)(A).

2. The NEFMC is composed of eighteen (18) voting members, *id.*, including twelve (12) appointees chosen by the Secretary of Commerce from lists of nominees provided by the governors of states within the boundaries of the FMC. *Id.* §§ 1852(b)(1)(C), (b)(2)(A)–(C). The NEFMC includes the “principal State official with marine fishery management responsibility and expertise” from each state, *id.* § 1852(b)(1)(A), as well as the Administrator of the National Marine Fisheries Service (“NMFS”) Mid-Atlantic Regional Office, or his designee. *Id.* § 1852(b)(1)(B).

3. Some commentators have suggested that the membership of the NEFMC—and, indeed, the membership of all the regional FMCs—is not representative of the fishing industry. Representation of the fishing industry is “generally skewed towards the larger corporate interests that support larger sized vessels, whereas the small-scale vessel fleets that are the traditional core of coastal communities (and more likely to have conservation interests) are often less represented[.]” Thomas A. Okey, *Membership in the Eight Regional Fishery Management Councils in the United States: Are Special Interests Over-Represented?*, 27 *Marine Pol’y* 193, 199 (2003).

4. Although the FMCs are supervised by NMFS, and ultimately by the Secretary of Commerce, their members exercise significant independent power. They propose Fishery Management Plans (“FMPs”), amendments, and framework adjustments; they conduct hearings; and they determine annual catch limits. *See* 16 U.S.C. § 1852(h). The FMCs even have the ability to constrain the Secretary of Commerce. *See* 16 U.S.C. § 1854(a) (Secretary may only

approve, disapprove, or partially approve FMPs given to him; he may not modify them on his own authority); *id.* § 1854(h) (Secretary may not repeal or revoke FMPs without FMC approval).

5. The FOIA request at issue here is aimed at providing transparency into how the Secretary of Commerce determines the membership of the FMCs, including the NEFMC. NOAA has not disclosed records about this process to the public before, and there is danger for politicization in how members are actually chosen.

6. The records at issue in this case, which include records of communication between high-ranking agency officials, will permit the public to understand how the most recent round of membership selection for the NEFMC was handled, and whether that process was at all tinged by political considerations or other untoward government action.

JURISDICTION AND VENUE

7. Jurisdiction is asserted pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(E)(iii).

8. Venue is proper pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).

PARTIES

9. CoA Institute is a non-profit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair. In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. CoA Institute regularly requests access under the FOIA to the public records of federal agencies, entities, and offices, including NOAA, and disseminates its findings, analysis, and commentary to the general public.

10. NOAA is an agency within the meaning of 5 U.S.C. § 552(f)(1). NOAA has possession, custody, and control of the records to which CoA Institute seeks access and that are the subject of this Complaint.

FACTS

11. By letter, dated July 13, 2016, CoA Institute submitted a FOIA request to NOAA seeking access to “[a]ll documents related to the appointment or reappointment of members of the New England Fishery Management Council[.]” Ex. 1 at 1. CoA Institute further specified that its request included “all communications, both inside the government and with outside parties, including .gov e-mail, personal e-mail, text messaging, and any other methods of communication.” Ex. 1 at 1. The time period for the request was “November 1, 2015 to the present.” Ex. 1 at 1.

12. CoA Institute provided a non-exhaustive list of potential record custodians whose correspondence on personal or official e-mail accounts could be responsive to the July 13, 2016 FOIA request. *See* Ex. 1 at 2.

13. CoA Institute also requested a public interest fee waiver and classification as a representative of the news media for fee purposes. Ex. 1 at 2–4.

14. By letter, dated July 29, 2016, NOAA informed CoA Institute that it received the FOIA request on July 19, 2016. Ex. 2 at 1. NOAA indicated that it would invoke the ten-day automatic statutory extension of its response deadline due to “unusual circumstances,” namely, the “need to search for and collect the requested records from field facilities or other establishments separate from the office processing the request[.]” Ex. 2 at 1.

15. This same letter assigned the CoA Institute FOIA request the tracking number “DOC-NOAA-2016-001453.” Ex. 2 at 1.

16. On August 1, 2016, NOAA granted the CoA Institute request for a public interest fee waiver. Ex. 3. The agency did not issue a determination on the CoA Institute request for categorization as a representative of the news media for fee purposes.

17. By letter, dated August 30, 2016, NOAA released its first interim response and production of responsive records. Ex. 4. The agency indicated that it “located 19 documents,” to which CoA Institute was “granted full access.” Ex. 4. The interim production also provided CoA Institute with appeal rights. Ex. 4.

18. On September 26, 2016, CoA Institute filed an administrative appeal from the August 30, 2016 interim production because NOAA improperly withheld material from three (3) responsive records. Ex. 5. The material in question was redacted as “non-responsive.” Ex. 5.

19. The Department of Commerce (“DOC”) acknowledged receipt of the CoA Institute administrative appeal on September 29, 2016. Ex. 6. The agency has failed to provide a final response or to provide an estimate date of completion for processing the appeal.

20. To date, NOAA has failed to provide any additional interim responses or productions of responsive records, let alone a final determination. According to FOIAonline, the current estimated date of completion for the CoA Institute request is “August 30, 2016.” Ex. 7.

COUNT 1

Violation of the FOIA: Failure to Comply with Statutory Deadlines

21. CoA Institute repeats paragraphs 1 through 20.

22. The FOIA requires an agency to respond to a record request within twenty (20) business days or, in “unusual circumstances,” within thirty (30) business days. 5 U.S.C. §§ 552(a)(6)(A)–(B). If an agency requires additional time, it must provide the requester “an

opportunity to arrange . . . an alternative time frame for processing the request[.]” *Id.*

§ 552(a)(6)(B)(ii).

23. More than thirty (30) business days have passed since NOAA received CoA Institute’s FOIA request on July 19, 2016.

24. NOAA has failed to issue a final determination on and promptly produce all records responsive to CoA Institute’s FOIA request within the applicable statutory time limits.

25. When attempting to cite “unusual circumstances,” NOAA failed to comply with the FOIA in that it never “arrange[d] . . . an alternative time frame” for responding to CoA Institute’s request, failed to issue an estimated date of completion, and did not invite CoA Institute to contact NOAA for the purposes of negotiating an “alternative” response date.

26. CoA Institute has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C).

RELIEF REQUESTED

WHEREFORE, CoA Institute respectfully requests and prays that this Court:

- a. Order NOAA to process the July 13, 2016 FOIA request and to make a final determination within twenty (20) business days of the date of the Order;
- b. Order NOAA to produce all responsive records promptly after issuing its final determination;
- c. Order NOAA to issue a *Vaughn* index accompanying the records produced and explaining each redaction or withholding, if applicable;¹

¹ See generally *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (requiring an agency to prepare an index correlating each withheld document, or portion thereof, with a specific FOIA exemption and nondisclosure justification).

d. Award CoA Institute its costs and reasonable attorney fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

e. Grant such other relief as the Court may deem just and proper.

Dated: November 1, 2016

Respectfully submitted,

/s/ Ryan P. Mulvey

Ryan P. Mulvey

D.C. Bar No. 1024362

Eric R. Bolinder

D.C. Bar No. 1028335

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14 Attorneys for Plaintiffs
15 OUR CHILDREN 'S EARTH FOUNDATION and
16 ECOLOGICAL RIGHTS FOUNDATION

17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA

19 OUR CHILDREN 'S EARTH FOUNDATION, a
20 non-profit corporation, and ECOLOGICAL
RIGHTS FOUNDATION, a non-profit corporation,

21 Plaintiffs,

22 v.

23 NATIONAL MARINE FISHERIES SERVICE,
24 PENNY PRITZKER, as Secretary of Commerce,
25 WILLIAM STELLE as Regional Administrator of
26 the National Marine Fisheries Service West Coast
27 Region, UNITED STATES ARMY CORPS OF
ENGINEERS, and JOHN MCHUGH as Secretary
of the Army

Defendants.

Civil Case No. _____

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

FREEDOM OF INFORMATION ACT
CASE

1 Our Children's Earth Foundation ("OCE") and Ecological Rights Foundation ("ERF")
2 (collectively, "Plaintiffs") allege as follows:

3 **INTRODUCTION**

4 1. Plaintiffs bring this action under the Freedom of Information Act ("FOIA"), which allows an
5 aggrieved party to seek relief when documents are unlawfully withheld, and authorizes a reviewing
6 court to enjoin the agency from withholding records and to order the production of any agency records
7 improperly withheld from the complainant. 5 U.S.C. § 552(a)(4)(B). Plaintiffs seek declaratory and
8 injunctive relief for FOIA violations by the National Marine Fisheries Service ("NMFS") and the Army
9 Corps of Engineers ("Corps") (collectively "Federal Defendants"). At issue in this case are two FOIA
10 requests to NMFS seeking documents related to NMFS's regulatory oversight of Stanford University
11 ("Stanford")'s operations and infrastructure that adversely impact steelhead trout which are listed as a
12 threatened species under the Endangered Species Act ("ESA"). Plaintiffs allege that Federal Defendants:
13 1) failed to provide final determinations concerning requested documents within statutory time limits; 2)
14 failed to release all documents not subject to specific, enumerated exemptions; 3) failed to provide
15 legally adequate explanations for the withholding of requested documents; and 4) failed to promptly
16 release documents that are responsive to Plaintiff's FOIA requests. In addition, Plaintiffs allege that
17 NMFS set improper cut-off dates for the agencies searches for documents responsive to Plaintiffs' FOIA
18 requests, failed to perform legally adequate searches for documents in its possession that are responsive
19 to Plaintiffs' FOIA requests, and improperly referred documents to the Corps for its release
20 determination and direct response to Plaintiffs. NMFS's inadequate response to Plaintiffs' FOIA requests
21 at issue in this case is part of a continuing pattern and practice of violating FOIA which has thwarted
22 Plaintiffs' efforts to timely receive current information in NMFS's possession and has hampered
23 Plaintiffs' efforts to serve as an effective public interest watchdog over NMFS's regulation of Stanford's
24 steelhead harming activities and infrastructure.

25 **JURISDICTION**

26 2. This Court has subject matter jurisdiction under 5 U.S.C. section 552(a)(4)(B), which allows an
27 aggrieved party to seek relief when documents are unlawfully withheld, and authorizes a reviewing

1 court to enjoin the agency from withholding records and to order the production of any agency records
2 improperly withheld from the complainant.

3 3. This Court has personal jurisdiction over NMFS, the Corps, and the named parties, all of
4 which are agencies or officials of the federal government and operating within the United States.

5 **VENUE**

6 4. Venue in the United States District Court for the Northern District of California is proper under
7 5 U.S.C. section 552(a)(4)(B) because the complainants have their principal place of business in the
8 Northern District, and many of the records sought by complainants are most likely situated in the NMFS
9 office located at 777 Sonoma Avenue, Santa Rosa, California--which is located within the Northern
10 District.

11 **INTRADISTRICT ASSIGNMENT**

12 5. Intradistrict assignment of this matter to the San Francisco Division of the Court is appropriate
13 pursuant to Civil Local Rule 3-2(e) because the Plaintiffs reside in San Francisco County and many of
14 the documents sought by Plaintiffs' FOIA claims are likely located in Sonoma County.

15 **THE PARTIES**

16 6. Our Children's Earth Foundation ("OCE") is a non-profit corporation based in San Francisco,
17 California dedicated to protecting the environment, including the San Francisco Bay Area. OCE
18 promotes public awareness of domestic and international environmental impacts through information
19 dissemination, education, and private enforcement of environmental protection statutes. OCE
20 enforcement cases aim to achieve public access to government information, ensure proper
21 implementation of environmental statutes and permitting, and enjoin illegal violations. OCE has an
22 active membership of people from all over the United States with a majority of its members residing in
23 the San Francisco Bay Area.

24 7. Ecological Rights Foundation ("ERF") is a non-profit, public benefit corporation, organized
25 under the laws of the State of California, devoted to furthering the rights of all people to a clean,
26 healthful and biologically diverse environment. To further its environmental advocacy goals, ERF
27

1 actively seeks federal and state agency implementation of state and federal water quality related laws,
2 and as necessary, directly initiates enforcement actions on behalf of itself and its members.

3 8. Defendant NMFS, a branch of the National Oceanic and Atmospheric Administration, a
4 division of the Department of Commerce, is the agency of the United States Government responsible for
5 administering and implementing the ESA for anadromous fisheries and generally is responsible for the
6 stewardship of the nation's living marine resources and their habitat.

7 9. Defendant Penny Pritzker, Secretary of Commerce, is sued in her official capacity only. If
8 ordered by the Court, Ms. Pritzker has the authority and ability to remedy the harm inflicted by NMFS's
9 actions.

10 10. Defendant William Stelle, Regional Administrator of the NMFS West Coast Region, is sued
11 in his official capacity only. If ordered by the Court, Mr. Stelle has the authority and ability to remedy
12 the harm inflicted by NMFS's actions.

13 11. Defendant United States Army Corps of Engineers, a division of the Department of the Army,
14 is the agency of the United States Government responsible for providing engineering services to the
15 nation.

16 12. Defendant John McHugh, Secretary of the Army, is sued in his official capacity only. If
17 ordered by the Court, Mr. McHugh has the authority and the ability to remedy the harm inflicted by the
18 Corps's actions.

19 **STATUTORY BACKGROUND**

20 13. The Freedom of Information Act requires that an agency, upon any request for records, shall
21 make the records available promptly. 5 U.S.C. § 552(a)(3)(A). An agency shall make a determination
22 whether to comply with a request within twenty (20) business days after the receipt of the request and
23 shall immediately notify the party making the request of such determination, the reasons for the
24 determination, and the party's right to appeal. 5 U.S.C. § 552(a)(6)(A)(i). In unusual circumstances, the
25 agency may extend the time for the determination, for no more than ten (10) days, by written notice to
26 the party, specifying the reasons for the extension and the date on which the determination is expected to
27 be sent. 5 U.S.C. § 552(a)(6)(B)(i). Alternatively, if the agency cannot make a determination within the

1 time limits, it can notify the requesting party and allow that party an opportunity to limit the scope of the
2 request so that the agency may respond within the time limits or an alternative time frame. 5 U.S.C. §
3 552(a)(6)(B)(ii).

4 14. Federal agencies are under a duty to conduct a reasonable search for records responsive to a
5 party's request using methods that can be reasonably expected to produce the information requested to
6 the extent they exist. 5 U.S.C. § 522(a)(3)(C).

7 15. FOIA requires that an agency disclose records to any person except where the documents fall
8 under a specifically enumerated exemption. 5 U.S.C. § 552(b). When an agency decides to withhold
9 records under a claim of exemption it must notify the person making such request of such determination
10 and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i). Government agencies bear the burden of proof to
11 show that any withheld documents are exempt from the duty to disclose. 5 U.S.C. § 522(a)(4)(B).

12 16. A party may appeal to the head of the agency any adverse determination. 5 U.S.C. §
13 552(a)(6)(A)(i). An agency shall make a determination with respect to any appeal within twenty (20)
14 business days after the receipt of such appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

15 17. If an agency does not respond within the FOIA time limits, a party will be deemed to have
16 exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

17 **FACTUAL BACKGROUND**

18 18. In keeping with their organizational purposes, Plaintiffs have sent NMFS a series of FOIA
19 requests seeking up-to-date information about NMFS's exercise of regulatory oversight of various
20 activities and infrastructure conducted or maintained by Stanford that is adversely impacting critical
21 habitat for Central California Coast steelhead ("steelhead"), a threatened species listed for protection
22 under the ESA. As public interest environmental organizations, Plaintiffs remain concerned that despite
23 years of documentation that Stanford's activities and infrastructure are harmful to steelhead, NMFS has
24 done little to require Stanford to change its ways. Plaintiffs sent their FOIA requests to learn more about
25 what Stanford could do to curb its harms to steelhead and what NMFS was doing or planning to do to
26 exercise its regulatory authority in a fashion that would halt these harms. Plaintiffs have intended to use
27 this information to advocate publicly for greater NMFS involvement in addressing these environmental

1 harms and to otherwise advocate for actions to preserve steelhead in the creeks flowing in and around
2 Stanford. For these purposes, it has remained critically necessary for Plaintiffs to timely receive current
3 information in NMFS's possession about these topics. Without current information, Plaintiffs are
4 hampered, possibly even entirely thwarted, in their efforts to serve as an effective public interest
5 watchdog over NMFS regulation of Stanford's steelhead harming activities and infrastructure.

6 19. The FOIA requests at issue in the present case were sent on June 26, 2014 and August 12,
7 2014. Four previous FOIA requests to NMFS seeking information related to NMFS's regulatory
8 oversight of Stanford are the subject of *Our Children's Earth Foundation, et al. v. National Marine*
9 *Fisheries Service, et al.* ("OCE v. NMFS"), Civil Case No. 3:14-cv-01130-S.C. (N.D. Cal. 2014).

10 **June 26, 2014 FOIA Request**

11 20. On June 26, 2014 Plaintiffs sent a FOIA request ("June 2014 FOIA Request") to NMFS's
12 West Coast Region, requesting all documents addressing compliance with, or implementation of Term
13 and Condition 3, 4, and 5 and/or the Reasonable and Prudent Measures in the biological opinion
14 ("SHEP BiOp")¹ issued by NMFS to the Corps for the Corps' issuance of a Clean Water Act ("CWA")
15 permit to Stanford to upgrade two of its water diversion facilities. Plaintiffs also requested records of
16 communications between Stanford, NMFS, and the Corps related to the CWA permit and reinitiation of
17 ESA section 7 consultation on the SHEP BiOp. Plaintiffs also requested all documents that had not yet
18 been produced related to the "Interim Measures" that Stanford could, might, or had taken to lessen the
19 impacts of Stanford's operations or infrastructure on species listed under the ESA pending completion
20 of a Stanford study known as the Searsville Alternatives Study conducted by the Stanford committee
21 known as "the Searsville Committee" and/or Stanford's securing an incidental take permit. Plaintiffs
22 also requested all documents related to any investigation or evaluation into Stanford's ESA violations
23 related to Searsville Dam and Stanford water diversion infrastructure conducted by NMFS Special
24 Agent Roy Torres.

25
26 ¹ The term "SHEP BiOp" refers to the April 21, 2008 biological opinion issued by NMFS to the Corps related to the Corps'
27 issuance of a CWA permit to Stanford for upgrades of two water diversion facilities, euphemistically dubbed the Steelhead
Habitat Enhancement Project.

1 21. Plaintiffs further requested that if NMFS decided to invoke a FOIA exemption to withhold all
2 or part of a responsive document that NMFS's explanation for withholding the document include basic
3 factual material about each withheld item, including the originator, date, length, general subject matter,
4 and location of each item. Plaintiffs also requested that NMFS provide explanations and justifications
5 for withholding documents, including the identification of the category within the governing statutory
6 provision under which the document was withheld and a full explanation of how each exemption fit the
7 withheld material.

8 22. The 20 working day deadline for NMFS to provide its determination concerning the June
9 2014 FOIA Request was July 25, 2014. On July 28, 2014 NMFS sent a letter acknowledging receipt of
10 the June 2014 FOIA Request, citing unusual circumstances, asking for more time to complete the
11 response, and estimating an August 11, 2014 completion date. The statutory 30 working day deadline
12 for NMFS's final determination concerning the June 2014 FOIA request was August 8, 2014. NMFS
13 did not meet the statutory deadline for the June 2014 FOIA Request determination nor did it meets its
14 estimated completion date of August 11, 2014. Instead, on August 11, 2014, NMFS sent another letter
15 stating that it was releasing 31 documents but was continuing to review additional records responsive to
16 the June 2014 FOIA Request, and granting itself "at least" another ten day extension to finish
17 processing the request. On August 11 and 12, 2014, NMFS released 31 documents as an interim
18 response to the June 2014 FOIA Request.

19 23. On September 24, 2014 NMFS sent a letter stating that it had identified ten documents that
20 originated with the Corps and that these documents had been referred to the Corps for a release
21 determination/direct response to Plaintiffs. NMFS also stated it needed additional time to complete its
22 final review of 80 documents that had been preliminarily identified for either partial or full withholding
23 and that it expected to send Plaintiffs a final determination on or before September 30, 2014.

24 **August 12, 2014 FOIA Request**

25 24. On August 12, 2014, Plaintiffs sent another FOIA request ("August 2014 FOIA Request") to
26 NMFS's West Coast Region requesting documents reflecting any NMFS communications with Stanford
27 concerning NMFS's response to the FOIA requests at issue in *OCE v. NMFS*. Plaintiffs also requested

1 14 categories of documents related to the SHEP BiOp; four categories of documents related to "Interim
2 Measures" that Stanford could, might, or had taken to lessen the impacts of Stanford's operations or
3 infrastructure on species listed under the ESA pending completion of the Searsville committee
4 deliberations and/or Stanford's securing an incidental take permit; and all documents that constituted
5 documents circulated to members of the Searsville Advisory Committee created by Stanford. Plaintiffs
6 also requested that if NMFS decided to invoke a FOIA exemption to withhold all or part of a
7 responsive document that NMFS's explanation for withholding the document include basic factual
8 material about each withheld item, including the originator, date, length, general subject matter, and
9 location of each item. Plaintiffs also requested that NMFS provide explanations and justifications for
10 withholding including the identification of the category within the governing statutory provision under
11 which the document was withheld and a full explanation of how each exemption fits the withheld
12 material. The 20 working day deadline for NMFS's final determination concerning the August 2014
13 FOIA request was September 10, 2014.

14 25. On September 10, 2014 NMFS sent a letter acknowledging receipt of the August 2014 FOIA
15 Request, citing unusual circumstances, asking for more time to complete the response, and estimating a
16 September 24, 2014 completion date. The 30 working day deadline for NMFS's final determination on
17 the August 2014 FOIA Request was September 24, 2014. However, NMFS did not issue its final
18 determination for the August 2014 FOIA Request on September 24, 2014. Instead, on September 24,
19 2014 NMFS sent an "interim response" to this request stating that it had located 161 responsive
20 documents determined to be releasable, that it had referred an additional ten documents to the Corps for
21 a release determination/direct response to Plaintiffs, and that NMFS needed additional time to review
22 22 remaining documents preliminarily identified for either partial or full withholding. NMFS estimated
23 that it expected to send the final determination for this request by September 30, 2014. To date
24 Plaintiffs have not received any documents responsive to the August 2014 FOIA Request.

25 #

26 #

27 #

FIRST CLAIM FOR RELIEF
NMFS Violation of FOIA
5 U.S.C. §§ 552(a) and (b)

Request for Declaratory Relief and Injunction To Compel NMFS To Respond to Plaintiffs' FOIA Requests within Statutory Deadlines, Produce Requested Records and Adequately Explain the Withholding of Records

26. Plaintiffs reassert and reallege paragraphs 1 through 25 above.

27. NMFS has violated 5 U.S.C. §§ 552(a)(6)(A) and (B) by failing to provide final determinations concerning Plaintiffs' June 26, 2014 FOIA request and August 12, 2014 FOIA request within the statutory deadlines. 5 U.S.C. § 552(a)(6)(A)(i) is plain: within 20 working days of the date that a request is made federal agencies must provide a determination that (1) informs the requester as to the disposition of its request, *i.e.*, whether documents will be provided or withheld and if the latter, why, and (2) that informs the requester of a right to appeal any decision not to provide requested documents. Federal agencies at most can extend this 20 working day deadline by an additional 10 working days by informing the requester in writing (1) that "unusual circumstances" necessitate such an extension and (2) when the agency will respond. 5 U.S.C. § 552(a)(6)(B)(i). NMFS invoked § 552(a)(6)(B)(i)'s unusual circumstances provision to extend the statutory deadline for the June 2014 FOIA Request final determination to August 8, 2014 and the statutory deadline for the August 2014 FOIA Request final determination to September 24, 2014. However, neither NMFS nor the Corps provided final determinations for the June 2014 and August 2014 FOIA Requests by these statutory deadlines. NMFS thus has violated FOIA's statutory deadlines for responding to these FOIA requests. Plaintiffs have constructively exhausted their administrative remedies given NMFS's and the Corps's failure to provide their final determinations for the June 2014 FOIA Request and the August 2014 FOIA Request within FOIA's statutory time limits. 5 U.S.C. § 552(a)(6)(C)(i).

28. NMFS has violated FOIA by failing to "promptly" produce all documents responsive to the June 2014 and August 2014 FOIA Requests not subject to a lawful FOIA exemption. 5 U.S.C. § 552(a)(3)(A). More than seven weeks have passed since the statutory deadline for NMFS's final determination for the June 2014 FOIA Request and NMFS has failed to produce the large majority of documents it has identified as responsive to the June 2014 FOIA Request. Further, NMFS delayed

1 referring the June 2014 FOIA Request responsive documents to the Corps until two months after the
2 request was made, and the Corps has failed to produce a single responsive document referred to it by
3 NMFS. Given that NMFS failed to refer the June 2014 FOIA Request to the Corps until two months
4 after the request was made, the Corps's response to the June 2014 FOIA Request is likely to be
5 substantially delayed even further.

6 29. NMFS further violated FOIA by delaying referral of the June 2014 and August 2014 FOIA
7 Requests to the Corps for the latter agency's review and determination as to whether to release certain
8 documents responsive to these requests until well after FOIA's deadlines for responding to these FOIA
9 requests. To the extent that NMFS may lawfully refer documents to another agency for determination,
10 NMFS has a duty under FOIA to refer such documents within FOIA's deadlines for responses.

11 30. In responses to several past FOIA requests submitted by Plaintiffs or their counsel, NMFS
12 staff have improperly withheld documents that did not fall within one of FOIA's specifically
13 enumerated disclosure exemptions and appears to have a pattern and practice of withholding documents
14 without proper justification. To the extent that NMFS continues this practice when it responds to the
15 June 2014 and August 2014 FOIA Requests, this will also constitute violations of 5 U.S.C. § 552(b).
16 Such violations are hereby pled as incorporated within this complaint.

17 31. In responses to several past FOIA requests submitted by Plaintiffs or their counsel, NMFS
18 staff have improperly withheld documents under a claim of exemption without explaining how and why
19 a particular document falls within a particular exemption as required by 5 U.S.C. § 552(a)(6)(A)(i). . To
20 the extent that NMFS continues this practice when it responds to the June 2014 and August 2014 FOIA
21 Requests, this will also constitute violations of 5 U.S.C. § 552(a)(6)(A)(i). Such violations are hereby
22 pled as incorporated within this complaint.

23 **SECOND CLAIM FOR RELIEF**

24 **Corps Violation of FOIA**
25 **5 U.S.C. §§ 552(a) and (b)**

26 **Request for Declaratory Relief and Injunction To Compel the Corps To Respond to**
27 **Plaintiffs' FOIA Requests within Statutory Deadlines, Produce Requested Records and**
Adequately Explain the Withholding of Records

32. Plaintiffs reassert and reallege paragraphs 1 through 31 above.

1 33. The Corps has violated 5 U.S.C. §§ 552(a)(6)(A) and (B) by failing to provide final
2 determinations concerning Plaintiffs' June 26, 2014 FOIA request and August 12, 2014 FOIA request
3 within the statutory deadlines. 5 U.S.C. § 552(a)(6)(A)(i) is plain: within 20 working days of the date
4 that a request is made federal agencies must provide a determination that (1) informs the requester as to
5 the disposition of its request, *i.e.*, whether documents will be provided or withheld and if the latter,
6 why, and (2) that informs the requester of a right to appeal any decision not to provide requested
7 documents. Federal agencies at most can extend this 20 working day deadline by an additional 10
8 working days by informing the requester in writing (1) that "unusual circumstances" necessitate such an
9 extension and (2) when the agency will respond. 5 U.S.C. § 552(a)(6)(B)(i). NMFS invoked §
10 552(a)(6)(B)(i)'s unusual circumstances provision to extend the statutory deadline for the June 2014
11 FOIA Request final determination to August 8, 2014 and the statutory deadline for the August 2014
12 FOIA Request final determination to September 24, 2014. However, neither NMFS nor the Corps
13 provided final determinations for the June 2014 and August 2014 FOIA Requests by these statutory
14 deadlines. The Corps thus has violated FOIA's statutory deadlines for responding to the portions of
15 these FOIA requests referred to it by NMFS. Plaintiffs have constructively exhausted their
16 administrative remedies given NMFS's and the Corps's failure to provide their final determinations for
17 the June 2014 FOIA Request and the August 2014 FOIA Request within FOIA's statutory time limits.
18 5 U.S.C. § 552(a)(6)(C)(i).

19 34. The Corps has violated FOIA by failing to "promptly" produce all documents responsive to
20 the June 2014 and August 2014 FOIA Requests not subject to a lawful FOIA exemption. 5 U.S.C. §
21 552(a)(3)(A). More than seven weeks have passed since the statutory deadline for NMFS's and the
22 Corps' final determinations for the June 2014 FOIA Request and NMFS has failed to produce the large
23 majority of documents it has identified as responsive to the June 2014 FOIA Request. Further, NMFS
24 delayed referring the June 2014 FOIA Request responsive documents to the Corps until two months
25 after the request was made, and the Corps has failed to produce a single responsive document referred
26 to it by NMFS. Given that NMFS failed to refer the June 2014 FOIA Request to the Corps until two
27

1 months after the request was made, the Corps's response to the June 2014 FOIA Request is likely to be
2 substantially delayed even further.

3 **THIRD CLAIM FOR RELIEF**

4 **NMFS Violation of FOIA**
5 **5 U.S.C. §§ 552(a)(3)(C)**

6 **Request for Declaratory Relief and Injunction to Compel NMFS to Perform a Reasonable
7 Search and Produce Requested Records**

8 35. Plaintiffs reassert and reallege paragraphs 1 through 34 above.

9 36. On information and belief based on extensive information available to Plaintiffs concerning
10 NMFS's pattern and practices, Plaintiffs allege that NMFS has violated 5 U.S.C. § 552(a)(3)(C) by
11 failing to conduct a reasonable, legally adequate search for records responsive to the June 2014 FOIA
12 Request and the August 2014 FOIA Request. Plaintiffs allege that NMFS has set improper cut-off dates
13 for its searches for documents responsive to the June 2014 and August 2014 FOIA Requests and has
14 failed to search all locations and record systems where responsive documents are likely to be found.

15 **FOURTH CLAIM FOR RELIEF**

16 **NMFS Violation of FOIA**
17 **5 U.S.C. § 552**

18 **Request for Declaratory Relief and Injunction to Compel NMFS to Cease Its Patterns and
19 Practices that Violate FOIA**

20 37. Plaintiffs reassert and reallege paragraphs 1 through 36 above.

21 38. Defendant NMFS has violated and is in ongoing violation of 5 U.S.C. § 552 by continuing a
22 pattern and practice of illegally delaying final determinations for Plaintiffs' FOIA requests; continuing a
23 pattern and practice of illegally delaying referral of responsive documents to other agencies for their
24 release determinations; continuing a pattern and practice of illegally withholding documents that are
25 responsive to Plaintiffs' FOIA requests; continuing a pattern and practice of providing inadequate
26 explanations for the withholding of documents responsive to Plaintiffs' FOIA requests; continuing a
27 pattern and practice of performing inadequate, unreasonable searches for documents responsive to
Plaintiffs' FOIA requests; continuing a pattern and practice of setting improper cut-off dates for

1 searches for documents responsive to Plaintiffs' FOIA requests; and continuing a pattern and practice of
2 delaying production of documents responsive to Plaintiffs' FOIA requests.

3 39. NMFS's pattern and practice of responding to Plaintiffs' FOIA requests necessarily causes
4 many types of relevant documents to be released only after considerable delay and in some cases
5 completely precludes Plaintiffs from obtaining documents and the information they contain when the
6 information is still relevant.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiffs seek the following relief:

9 a. A declaratory judgment pursuant to 5 U.S.C. § 552 that Federal Defendants violated FOIA by:
10 failing to provide final determinations for the June 2014 FOIA Request and the August 2014 FOIA
11 Request in accordance with the statutory deadlines; withholding documents responsive to the June 2014
12 FOIA Request and the August 2014 FOIA Request that are not subject to a lawful FOIA exemption set
13 forth at 5 U.S.C. section § 552(b); withholding documents responsive to the June 2014 FOIA Request
14 and the August 2014 FOIA Request without providing a legally adequate explanation for finding the
15 documents exempt from disclosure; and failing to promptly produce documents responsive to the June
16 2014 FOIA Request and the August 2014 FOIA Request.

17 b. A declaratory judgment pursuant to 5 U.S.C. § 552 that NMFS violated FOIA by: failing to
18 perform adequate, reasonable searches for documents responsive to the June 2014 FOIA Request and
19 the August 2014 FOIA Request; setting improper cut-off dates for the searches for documents
20 responsive to the June 2014 FOIA Request and the August 2014 FOIA Request; delaying referral of the
21 June 2014 and August 2014 FOIA Requests responsive documents to the Corps for release
22 determination and thereby failing to produce documents promptly; continuing a pattern and practice of
23 illegal delaying final determinations for Plaintiffs' FOIA requests; continuing a pattern and practice of
24 illegally delaying referral of responsive documents to other agencies for their release determinations;
25 continuing a pattern and practice of illegally withholding documents that are responsive to Plaintiffs'
26 FOIA requests; continuing a pattern and practice of providing inadequate explanations for the
27 withholding of documents responsive to Plaintiffs' FOIA requests; continuing a pattern and practice of

1 performing inadequate, unreasonable searches for documents responsive to Plaintiffs' FOIA requests;
2 continuing a pattern and practice of setting improper cut-off dates for searches for documents responsive
3 to Plaintiffs' FOIA requests; and continuing a pattern and practice of delaying production of documents
4 responsive to Plaintiffs' FOIA requests.

5 c. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) ordering Federal Defendants to:
6 immediately produce all documents in their possession responsive to the June 2014 and August 2014
7 FOIA Requests, and immediately provide Plaintiffs with a detailed, legally adequate explanation for the
8 withholding of documents or portions of documents responsive to the June 2014 and August 2014 FOIA
9 Requests.

10 d. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) ordering NMFS to immediately provide
11 Plaintiffs with the requested documents that originated with the Corps.

12 e. An injunction pursuant to 5 U.S.C. section 552(a)(4)(B) ordering NMFS to cease its pattern
13 and practice of: illegally delaying final determinations for Plaintiffs' FOIA requests; illegally delaying
14 referral of responsive documents to other agencies for their release determinations; illegally withholding
15 documents responsive to Plaintiffs' FOIA requests that are not subject to a lawful FOIA exemption set
16 forth at 5 U.S.C. section 552(b); providing legally inadequate explanations for the withholding of
17 documents or portions of documents responsive to Plaintiffs' FOIA requests; performing legally
18 inadequate and unreasonable searches for documents responsive to Plaintiffs' FOIA requests; setting
19 improper search cut-off dates; and illegally delaying production of documents responsive to Plaintiffs'
20 FOIA requests.

21 f. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) ordering NMFS to provide final
22 determinations for Plaintiffs' pending and future FOIA requests within the statutory deadlines and to
23 produce all responsive documents within 30 working days of NMFS's final determination, including
24 those responsive documents in NMFS's possession which originated with a different federal agency.

25 g. An award of attorneys fees and costs to the Plaintiffs pursuant to 5 U.S.C. § 504(a), and/or 5
26 U.S.C. § 552(a)(4)(E); and

27 h. Such other and further relief as this Court deems just and proper.

DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

Based on Plaintiffs' knowledge to date, pursuant to Civil L.R. 3-15, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Respectfully Submitted,

Dated: September 28, 2014

By: */s/ Patricia Weisselberg*

Patricia Weisselberg
Counsel for Plaintiffs
Our Children's Earth Foundation and
Ecological Rights Foundation

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Our Children's Earth Foundation, Ecological Rights Foundation

(b) County of Residence of First Listed Plaintiff San Francisco
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Christopher Sproul, Jodene Isaacs, Environmental Advocates, 5135 Anza Street,
San Francisco, California 94121, (415) 533-3376; see attachment

DEFENDANTS
National Marine Fisheries Service, Secretary of Commerce Penny Pritzker,
National Marine Fisheries Service West Coast Regional Administrator William
Stelle, United States Army Corps of Engineers, Secretary of the Army John
McHugh

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known) _____

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

2 U.S. Government Defendant

3 Federal Question (U.S. Government Not a Party)

4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

| | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

| CONTRACT | TORTS | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES | |
|---|--|--|---|---|---|
| <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise | PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice | PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions | <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 | <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes |
| REAL PROPERTY | CIVIL RIGHTS | PRISONER PETITIONS | | | |
| <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property | <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities Employment <input type="checkbox"/> 446 Amer. w/Disabilities Other <input type="checkbox"/> 448 Education | Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement | | | |

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from Another District (specify)

6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
5 U.S.C. section 552

Brief description of cause:
Freedom of Information Act violations

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)
(Place an "X" in One Box Only)

(x) SAN FRANCISCO/OAKLAND () SAN JOSE () EUREKA

DATE September 28, 2014 SIGNATURE OF ATTORNEY OF RECORD: /s/ Patricia Weisselberg

Additional Attorneys

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14 Attorneys for Plaintiffs
15 OUR CHILDREN 'S EARTH FOUNDATION and
16 ECOLOGICAL RIGHTS FOUNDATION

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18 OUR CHILDREN 'S EARTH FOUNDATION, a
19 non-profit corporation, and ECOLOGICAL
20 RIGHTS FOUNDATION, a non-profit corporation,

21 Plaintiffs,

22 v.

23 NATIONAL MARINE FISHERIES SERVICE,
24 PENNY PRITZKER, as Secretary of Commerce,
25 WILLIAM STELLE as Regional Administrator of
26 the National Marine Fisheries Service West Coast
27 Region,

Defendants.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

FREEDOM OF INFORMATION ACT
CASE

1 Our Children's Earth Foundation ("OCE") and Ecological Rights Foundation ("ERF")
2 (collectively, "Plaintiffs") allege as follows:

3 **INTRODUCTION**

4 1. Plaintiffs bring this action under the Freedom of Information Act ("FOIA"), which allows an
5 aggrieved party to seek relief when documents are unlawfully withheld, and authorizes a reviewing
6 court to enjoin the agency from withholding records and to order the production of any agency records
7 improperly withheld from the complainant. 5 U.S.C. § 552(a)(4)(B). Plaintiffs seek declaratory and
8 injunctive relief for FOIA violations by the National Marine Fisheries Service ("NMFS"). At issue in
9 this case is an April 24, 2015 FOIA request ("Request") to NMFS seeking documents related to NMFS's
10 regulatory oversight of Stanford University ("Stanford")'s operations and infrastructure that adversely
11 impact steelhead trout which are listed as a threatened species under the Endangered Species Act
12 ("ESA"). Plaintiffs allege that NMFS failed to provide a final determination concerning requested
13 documents within the statutory time limit. NMFS's failure to comply with FOIA's statutory deadline has
14 thwarted Plaintiffs' efforts to timely receive current information in NMFS's possession and has
15 hampered Plaintiffs' efforts to serve as an effective public interest watchdog over NMFS's regulation of
16 Stanford's steelhead harming activities and infrastructure.

17 **JURISDICTION**

18 2. This Court has subject matter jurisdiction under 5 U.S.C. section 552(a)(4)(B), which allows an
19 aggrieved party to seek relief when documents are unlawfully withheld, and authorizes a reviewing
20 court to enjoin the agency from withholding records and to order the production of any agency records
21 improperly withheld from the complainant.

22 3. This Court has personal jurisdiction over NMFS, which is an agency of the federal
23 government, and the named parties, who are officials of the federal government, operating within the
24 United States.

25 **VENUE**

26 4. Venue in the United States District for the Northern District of California is proper under 5
27 U.S.C. section 552(a)(4)(B) because the complainants have their principal place of business in the

1 Northern District, and many of the records sought by complainants are most likely situated in the NMFS
2 office located at 777 Sonoma Avenue, Santa Rosa, California--which is located within the Northern
3 District.

4 **INTRADISTRICT ASSIGNMENT**

5 5. Intradistrict assignment of this matter to the San Francisco Division of the Court is appropriate
6 pursuant to Civil Local Rule 3-2(e) because OCE and the Plaintiffs' counsel reside in San Francisco
7 County and many of the documents sought by Plaintiffs' FOIA claim are likely located in Sonoma
8 County.

9 **THE PARTIES**

10 6. Our Children's Earth Foundation ("OCE") is a non-profit corporation based in San Francisco,
11 California dedicated to protecting the environment, including the San Francisco Bay Area. OCE
12 promotes public awareness of domestic and international environmental impacts through information
13 dissemination, education, and private enforcement of environmental protection statutes. OCE
14 enforcement cases aim to achieve public access to government information, ensure proper
15 implementation of environmental statutes and permitting, and enjoin illegal violations. OCE has an
16 active membership of people from all over the United States with a majority of its members residing in
17 the San Francisco Bay Area.

18 7. Ecological Rights Foundation ("ERF") is a non-profit, public benefit corporation, organized
19 under the laws of the State of California, devoted to furthering the rights of all people to a clean,
20 healthful and biologically diverse environment. To further its environmental advocacy goals, ERF
21 actively seeks federal and state agency implementation of state and federal water quality related laws,
22 and as necessary, directly initiates enforcement actions on behalf of itself and its members.

23 8. Defendant NMFS, a branch of the National Oceanic and Atmospheric Administration, a
24 division of the Department of Commerce, is the agency of the United States Government responsible for
25 administering and implementing the ESA for anadromous fisheries and generally is responsible for the
26 stewardship of the nation's living marine resources and their habitat.
27

1 9. Defendant Penny Pritzker, Secretary of Commerce, is sued in her official capacity only. If
2 ordered by the Court, Ms. Pritzker has the authority and ability to remedy the harm inflicted by NMFS's
3 actions.

4 10. Defendant William Stelle, Regional Administrator of NMFS's West Coast Region, is sued in
5 his official capacity only. If ordered by the Court, Mr. Stelle has the authority and ability to remedy the
6 harm inflicted by NMFS's actions.

7 **STATUTORY BACKGROUND**

8 11. The Freedom of Information Act requires that an agency, upon any request for records, shall
9 make the records available promptly. 5 U.S.C. § 552(a)(3)(A). An agency shall make a determination
10 whether to comply with a request within twenty (20) business days after the receipt of the request and
11 shall immediately notify the party making the request of such determination, the reasons for the
12 determination, and the party's right to appeal. 5 U.S.C. § 552(a)(6)(A)(i). In unusual circumstances, the
13 agency may extend the time for the determination, for no more than ten (10) days, by written notice to
14 the party, specifying the reasons for the extension and the date on which the determination is expected to
15 be sent. 5 U.S.C. § 552(a)(6)(B)(i). Unusual circumstances means (1) the need to search for and collect
16 requested records from field facilities or other establishments separate from the office processing the
17 request; (2) the need to search for, collect, and appropriately examine a voluminous amount of separate
18 and distinct records; or (3) the need for consultation with another agency or agency component having a
19 substantial interest in the determination of the request. *Id.* Consultation with another agency shall be
20 conducted with all practicable speed. 5 U.S.C. § 552(a)(6)(B)(iii)(III).

21 12. Federal agencies are under a duty to conduct a reasonable search for records responsive to a
22 party's request using methods that can be reasonably expected to produce the information requested to
23 the extent they exist. 5 U.S.C. § 522(a)(3)(C).

24 13. FOIA requires that an agency disclose records to any person except where the documents fall
25 under a specifically enumerated exemption. 5 U.S.C. § 552(b). When an agency decides to withhold
26 records under a claim of exemption it must notify the person making such request of such determination
27

1 and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i). Government agencies bear the burden of proof to
2 show that any withheld documents are exempt from the duty to disclose. 5 U.S.C. § 522(a)(4)(B).

3 14. A party may appeal to the head of the agency any adverse determination. 5 U.S.C. §
4 552(a)(6)(A)(i). An agency shall make a determination with respect to any appeal within twenty (20)
5 business days after the receipt of such appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

6 15. If an agency does not respond within the FOIA time limits, a party will be deemed to have
7 exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

8 FACTUAL BACKGROUND

9 16. In keeping with their organizational purposes, Plaintiffs have sent NMFS a series of FOIA
10 requests seeking up-to-date information about NMFS's exercise of regulatory oversight of various
11 activities and infrastructure conducted or maintained by Stanford that is adversely impacting critical
12 habitat for Central California Coast steelhead ("steelhead"), a threatened species listed for protection
13 under the ESA. As public interest environmental organizations, Plaintiffs remain concerned that despite
14 years of documentation that Stanford's activities and infrastructure are harmful to steelhead, NMFS has
15 done little to require Stanford to change its ways. Plaintiffs sent their FOIA requests to learn more about
16 what Stanford could do to curb its harms to steelhead and what NMFS was doing or planning to do to
17 exercise its regulatory authority in a fashion that would halt these harms. Plaintiffs have intended to use
18 this information to advocate publicly for greater NMFS involvement in addressing these environmental
19 harms and to otherwise advocate for actions to preserve steelhead in the creeks flowing in and around
20 Stanford. For these purposes, it has remained critically necessary for Plaintiffs to timely receive current
21 information in NMFS's possession about these topics. Without current information, Plaintiffs are
22 hampered, possibly even entirely thwarted, in their efforts to serve as an effective public interest
23 watchdog over NMFS regulation of Stanford's steelhead harming activities and infrastructure.

24 17. The FOIA request at issue in the present case was sent on April 24, 2015. Eight previous
25 FOIA requests to NMFS seeking information related to NMFS's regulatory oversight of Stanford are the
26 subject of *Our Children's Earth Foundation, et al. v. National Marine Fisheries Service, et al.* ("OCE v.
27 *NMFS I*"), Civil Case No. 3:14-cv-01130-SC (N.D. Cal. 2014), and *Our Children's Earth Foundation, et*

1 *al. v. National Marine Fisheries Service, et al. ("OCE v. NMFS II")*, Civil Case No. 3:14-cv-04365-SC
2 (N.D. Cal. 2014). NMFS failed to respond to all eight of these FOIA requests by FOIA's deadline for
3 issuing final determinations as to how it would respond to these requests.

4 18. The 20 business-days deadline for NMFS's final determination for Plaintiffs' Request was May
5 22, 2015. NMFS did not meet this deadline. Instead, NMFS requested a ten business-days extension
6 pursuant to 15 C.F.R. § 4.6(c), which extended the statutory deadline for NMFS's final determination to
7 June 8, 2015. NMFS did not meet this deadline either. Instead, NMFS has sent correspondence to
8 Plaintiffs indicating that NMFS's response to Plaintiffs' Request would be complete sometime after this
9 date.

10 **FIRST CLAIM FOR RELIEF**
11 **NMFS Violation of FOIA**
12 **5 U.S.C. §§ 552(a) and (b)**

13 **Request for Declaratory Relief and Injunction to Compel NMFS To Comply with FOIA**
14 **Deadlines**

15 19. Plaintiffs reassert and reallege paragraphs 1 through 18 above.

16 20. NMFS has violated 5 U.S.C. §§ 552(a)(6)(A) and (B) by failing to provide a final
17 determination concerning Plaintiffs' Request by the statutory deadline. 5 U.S.C. § 552(a)(6)(A)(i) is
18 plain: within 20 business days of the date that a FOIA request is received federal agencies must provide
19 a determination that (1) informs the requester as to the disposition of its request, *i.e.*, whether
20 documents will be provided or withheld and if the latter, why, and (2) that informs the requester of a
21 right to appeal any decision not to provide requested documents. Federal agencies at most can extend
22 this 20 business-days deadline by an additional 10 business days by informing the requester in writing
23 (1) that "unusual circumstances" necessitate such an extension and (2) when the agency will respond.
24 5 U.S.C. § 552(a)(6)(B)(i). NMFS invoked § 552(a)(6)(B)(i)'s unusual circumstances provision to
25 extend the statutory deadline for the final determination for Plaintiffs' Request to June 8, 2015.
26 However, NMFS did not provide a final determination by the statutory deadline.

27 **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs seek the following relief:

1 a. A declaratory judgment pursuant to 5 U.S.C. § 552 that NMFS violated FOIA by failing to
2 provide a final determination for Plaintiffs' Request in accordance with FOIA's statutory deadline.

3 b. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) ordering NMFS to: 1) immediately provide
4 a final determination for Plaintiffs' pending Request and immediately produce all non-exempt,
5 responsive documents; 2) provide final determinations for Plaintiffs' future FOIA requests within the
6 statutory deadlines; and 3) produce all non-exempt documents responsive to Plaintiffs' future FOIA
7 requests within 30 business days of NMFS's final determination, including those responsive documents
8 in NMFS's possession which originated with a different federal agency.

9 c. An award of attorneys fees and costs to the Plaintiffs pursuant to 5 U.S.C. § 504(a), and/or 5
10 U.S.C. § 552(a)(4)(E); and

11 d. Such other and further relief as this Court deems just and proper.

12 **DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

13 Based on Plaintiffs' knowledge to date, pursuant to Civil Local Rule 3-16, the undersigned
14 certifies that, as of this date, other than the named parties, there is no such interest to report.

15
16 Respectfully Submitted,

17 Dated: June 9, 2015

18
19 By: */s/ Patricia Weisselberg*

20 _____
21 Patricia Weisselberg
22 Counsel for Plaintiffs
23 Our Children's Earth Foundation and
24 Ecological Rights Foundation
25
26
27

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

| | |
|---|---|
| <p>I. (a) PLAINTIFFS Our Children's Earth Foundation, Ecological Rights Foundation</p> <p>(b) County of Residence of First Listed Plaintiff <u>San Francisco</u> <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys <i>(Firm Name, Address, and Telephone Number)</i> Christopher Sproul, Jodene Isaacs, Environmental Advocates, 5135 Anza Street, San Francisco, California 94121, (415) 533-3376; see attachment for additional attorneys of record</p> | <p>DEFENDANTS National Marine Fisheries Service, Secretary of Commerce Penny Pritzker, National Marine Fisheries Service West Coast Regional Administrator William Stelle</p> <p>County of Residence of First Listed Defendant _____ <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys <i>(If Known)</i></p> |
|---|---|

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|---|---|----------------------------|---|----------------------------|----------------------------|------------|------------|-----------------------|----------------------------|----------------------------|---|----------------------------|----------------------------|--------------------------|----------------------------|----------------------------|---|----------------------------|----------------------------|---|----------------------------|----------------------------|----------------|----------------------------|----------------------------|
| <p>II. BASIS OF JURISDICTION <i>(Place an "X" in One Box Only)</i></p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question <i>(U.S. Government Not a Party)</i></p> <p><input type="checkbox"/> 4 Diversity <i>(Indicate Citizenship of Parties in Item III)</i></p> | <p>III. CITIZENSHIP OF PRINCIPAL PARTIES <i>(Place an "X" in One Box for Plaintiff and One Box for Defendant)</i></p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table> | | PTF | DEF | | PTF | DEF | Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 | Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 | Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |
| | PTF | DEF | | PTF | DEF | | | | | | | | | | | | | | | | | | | | |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 | | | | | | | | | | | | | | | | | | | | |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 | | | | | | | | | | | | | | | | | | | | |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 | | | | | | | | | | | | | | | | | | | | |

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

| CONTRACT | TORTS | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES |
|---|--|---|--|---|
| <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise | <p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice | <p>PERSONAL INJURY</p> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other | <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 |
| | | | PROPERTY RIGHTS | |
| | | | <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark | <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision |
| | | | LABOR | |
| | | | <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act | |
| | | | SOCIAL SECURITY | |
| | | | <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) | <input type="checkbox"/> 950 Constitutionality of State Statutes |
| | | | FEDERAL TAX SUITS | |
| | | | <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 | |
| | | | IMMIGRATION | |
| | | | <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions | |
| | | | PRISONER PETITIONS | |
| | | | <p>Habeas Corpus:</p> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <p>Other:</p> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement | |

V. ORIGIN *(Place an "X" in One Box Only)*

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District *(specify)* 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity):*
 5 U.S.C. section 552

Brief description of cause:
 Freedom of Information Act violation

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY *(See instructions):*

JUDGE _____ DOCKET NUMBER _____

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)
(Place an "X" in One Box Only)

SAN FRANCISCO/OAKLAND SAN JOSE EUREKA

ADDITIONAL ATTORNEYS OF RECORD FOR PLAINTIFFS

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Jodene Isaacs (State Bar No. 226895)
2 Page Perry (State Bar No 246266)
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6 Email: page.perry@gmail.com

7 Attorneys for Plaintiff
KLAMATH RIVERKEEPER

8
9 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10 KLAMATH RIVERKEEPER,

11 Plaintiff,

12 v.

13 NATIONAL MARINE FISHERIES SERVICE,
14 PENNY PRITZER, as Secretary of Commerce,
15 WILLIAM STELLE, as Regional Administrator of
the National Marine Fisheries Service West Coast
Region,

16 Defendants.
17

Civil Case No.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

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1 Klamath Riverkeeper (“KRK”) alleges as follows:

2 **INTRODUCTION**

3 1. Plaintiff Klamath Riverkeeper (“Plaintiff”) brings this action under the Freedom of
4 Information Act ("FOIA"), which allows an aggrieved party to seek relief when documents are
5 unlawfully withheld, and authorizes a reviewing court to enjoin the agency from withholding
6 records and to order the production of any agency records improperly withheld from the
7 complainant. 5 U.S.C. § 552(a)(4)(B). Plaintiff seeks declaratory and injunctive relief for FOIA
8 violations by the National Marine Fisheries Service ("NMFS") (Defendant). At issue in this case
9 are three FOIA requests to NMFS seeking documents related to NMFS's regulatory oversight of:
10 (1) the Voluntary Drought Initiative in the Shasta River Watershed; (2) water diversions from the
11 Shasta River or its tributaries; and (3) “Safe Harbor Agreements” between NMFS and property
12 owners in the Shasta River Watershed. Plaintiff alleges that Defendant failed to provide final
13 determinations concerning requested documents within statutory time limits and failed to promptly
14 release documents that are responsive to Plaintiff’s FOIA requests. In addition, Plaintiff alleges
15 that NMFS set improper cut-off dates for the agencies searches for documents responsive to
16 Plaintiff's FOIA requests and failed to perform legally adequate searches for documents in its
17 possession that are responsive to Plaintiff's FOIA requests.

18 **JURISDICTION**

19 2. This Court has subject matter jurisdiction under 5 U.S.C. section 552(a)(4)(B), which
20 allows an aggrieved party to seek relief when documents are unlawfully withheld, and authorizes a
21 reviewing court to enjoin the agency from withholding records and to order the production of any
22 agency records improperly withheld from the complainant.

23 3. This Court has personal jurisdiction over NMFS and the named parties, all of which are
24 agencies or officials of the federal government and operating within the United States.

25 **VENUE**

26 4. Venue in the United States District for the Northern District of California is proper under
27 5 U.S.C. section 552(a)(4)(B) because the complainants have their principal place of business in
28 the Northern District, and many of the records sought by complainants are most likely situated in

1 the NMFS office located at 777 Sonoma Avenue, Santa Rosa, California--which is located within
2 the Northern District.

3 **INTRADISTRICT ASSIGNMENT**

4 5. Intradistrict assignment of this matter to the San Francisco Division of the Court is
5 appropriate pursuant to Civil Local Rule 3-2(e) because the Plaintiff resides in Siskiyou County,
6 with its counsel in San Francisco County and many of the documents sought by Plaintiff's FOIA
7 claims are likely located in Sonoma County.

8 **THE PARTIES**

9 6. Klamath Riverkeeper ("KRK") is a non-profit corporation based in Somes Bar, California
10 dedicated to protecting the environment, including the Shasta River Watershed.

11 7. Defendant NMFS, a branch of the National Oceanic and Atmospheric Administration, a
12 division of the Department of Commerce, is the agency of the United States Government
13 responsible for administering and implementing the ESA for anadromous fisheries and generally is
14 responsible for the stewardship of the nation's living marine resources and their habitat.

15 8. Defendant Penny Pritzker, Secretary of Commerce, is sued in her official capacity only.
16 If ordered by the Court, Ms. Pritzker has the authority and ability to remedy the harm inflicted by
17 NMFS's actions.

18 9. Defendant William Stelle, Regional Administrator of NMFS West Coast Region is sued
19 in his official capacity only. If ordered by the Court, Mr. Stelle has the authority and ability to
20 remedy the harm inflicted by NMFS's actions.

21 **STATUTORY BACKGROUND**

22 10. The Freedom of Information Act requires that an agency, upon any request for records,
23 shall make the records available promptly. 5 U.S.C. § 552(a)(3)(A). An agency shall make a
24 determination whether to comply with a request within twenty (20) business days after the receipt
25 of the request and shall immediately notify the party making the request of such determination, the
26 reasons for the determination, and the party's right to appeal. 5 U.S.C. § 552(a)(6)(A)(i). In
27 unusual circumstances, the agency may extend the time for the determination, for no more than ten
28 (10) days, by written notice to the party, specifying the reasons for the extension and the date on

1 which the determination is expected to be sent. 5 U.S.C. § 552(a)(6)(B)(i). Alternatively, if the
2 agency cannot make a determination within the time limits, it can notify the requesting party and
3 allow that party an opportunity to limit the scope of the request so that the agency may respond
4 within the time limits or an alternative time frame. 5 U.S.C. § 552(a)(6)(B)(ii).

5 11. Federal agencies are under a duty to conduct a reasonable search for records responsive
6 to a party's request using methods that can be reasonably expected to produce the information
7 requested to the extent they exist. 5 U.S.C. § 522(a)(3)(C).

8 12. FOIA requires that an agency disclose records to any person except where the documents
9 fall under a specifically enumerated exemption. 5 U.S.C. § 552(b). When an agency decides to
10 withhold records under a claim of exemption it must notify the person making such request of such
11 determination and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i). Government agencies bear the
12 burden of proof to show that any withheld documents are exempt from the duty to disclose. 5
13 U.S.C. § 522(a)(4)(B).

14 13. A party may appeal to the head of the agency any adverse determination. 5 U.S.C. §
15 552(a)(6)(A)(i). An agency shall make a determination with respect to any appeal within twenty
16 (20) business days after the receipt of such appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

17 14. If an agency does not respond within the FOIA time limits, a party will be deemed to
18 have exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

19 **FACTUAL BACKGROUND**

20 15. In keeping with their organizational purposes, Plaintiff has sent NMFS a series of FOIA
21 requests seeking up-to-date information about NMFS's exercise of regulatory oversight of: (1) the
22 Voluntary Drought Initiative in the Shasta River watershed; (2) water diversions from the Shasta
23 River or its tributaries and their impacts on the watershed and fish; and (3) "Safe Harbor
24 Agreements" between NMFS and property owners in the Shasta River watershed.

25 16. As a public interest environmental organization, Plaintiff remains concerned that despite
26 years of documentation that drought initiatives, water diversions and safe harbor agreements in the
27 Shasta River watershed are harmful to Southern Oregon/Northern California coho salmon
28 (SONCC salmon), NMFS has done little to require the relevant parties in the Shasta River

1 watershed to change their ways. Plaintiff sent their FOIA requests to learn more about what
2 individuals and entities in the watershed could do to curb its harms to the watershed and to
3 SONCC salmon and what NMFS was doing or planning to do to exercise its regulatory authority
4 in a fashion that would halt these harms. Plaintiff has intended to use this information to advocate
5 publicly for greater NMFS involvement in addressing these environmental harms and to otherwise
6 advocate for actions to preserve the Shasta River watershed, including the SONCC salmon. For
7 these purposes, it has remained critically necessary for Plaintiff to timely receive current
8 information in NMFS's possession about these topics. Without current information, Plaintiff is
9 hampered, possibly even entirely thwarted, in its efforts to serve as an effective public interest
10 watchdog over NMFS regulation of Shasta River watershed and SONCC salmon harming
11 activities and infrastructure.

12 17. The three FOIA requests at issue in the present case were sent on April 29, 2015.

13 **April 29, 2015 FOIA Request #1**

14 18. On April 29, 2015 Plaintiff sent a FOIA request, also known as "FOIA Request DOC-
15 NOAA -2015-001217" ("April 29 FOIA Request 1") to NMFS's West Coast Region, requesting 12
16 categories of documents: four categories of documents relating to the development, subsequent
17 modification, and/or publication of memorandum of understanding (hereinafter, "Shasta River
18 MOUs") under NMFS's Voluntary Drought Initiative between NMFS and any property owners
19 and/or public agencies in the Shasta River watershed; four categories of documents relating to
20 various aspects of the "Drought Agreement" published on the NMFS internet home page; three
21 categories of documents relating to the effects on, the status of, and/or the unauthorized take of
22 Southern Oregon/Northern California coast coho salmon (SONCCC salmon); and one request
23 relating to the cutoff date used by NMFS in its search, the identity of NMFS staff who performed
24 the search, and documents reflecting instructions given to those searching for documents.

25 19. Plaintiff further requested that if NMFS decided to invoke a FOIA exemption to withhold
26 all or part of a responsive document that NMFS's explanation for withholding the document
27 include basic factual material about each withheld item, including the originator, date, length,
28 general subject matter, and location of each item. Plaintiff also requested that NMFS provide

1 explanations and justifications for withholding documents, including the identification of the
2 category within the governing statutory provision under which the document was withheld and a
3 full explanation of how each exemption fit the withheld material.

4 **April 29, 2015 FOIA Request 2**

5 20. On April 29, 2015, Plaintiff sent another FOIA request, also known as “FOIA Request
6 DOC-NOAA -2015-001218” (the “April 29 FOIA Request 2”) to NMFS's West Coast Region with
7 four additional requests seeking documents reflecting the status and condition of the SONCC
8 salmon population as well as any evaluation or analysis of whether activities such as water
9 diversions or maintaining structures in the river in the Shasta River watershed were violating state
10 or federal Endangered Species Act and causing the unauthorized take of SONCC salmon. Plaintiff
11 also requested information regarding the cutoff date used by NMFS in performing the search, the
12 identity of the NMFS staff responsible for the search, and any documents reflecting instructions
13 given to those searching for documents.

14 21. Plaintiff also requested that if NMFS decided to invoke a FOIA exemption to withhold all
15 or part of a responsive document that NMFS's explanation for withholding the document include
16 basic factual material about each withheld item, including the originator, date, length, general
17 subject matter, and location of each item. Plaintiff also requested that NMFS provide explanations
18 and justifications for withholding including the identification of the category within the governing
19 statutory provision under which the document was withheld and a full explanation of how each
20 exemption fits the withheld material.

21 **April 29, 2015 FOIA Request 3**

22 22. Finally, on April 29, 2015, Plaintiff submitted a third FOIA request, also known as
23 “FOIA Request DOC-NOAA -2015-001219” (the “April 29 FOIA Request 3”) to NMFS's West
24 Coast Region with five additional requests seeking documents concerning the development of, the
25 modification to, as well as the implementation, monitoring and/or compliance with all “Safe
26 Harbor” Agreements between NMFS and property owners in the Shasta River watershed. In
27 addition, Plaintiff sought documents relating to efforts by NMFS to publicize the availability of
28 such “Safe Harbor” agreements to the appropriate parties. Finally, Plaintiff also requested

1 information regarding the cutoff date used by NMFS in performing the search, the identity of the
2 NMFS staff responsible for the search, and any documents reflecting instructions given to those
3 searching for documents.

4 23. Plaintiff also requested that if NMFS decided to invoke a FOIA exemption to withhold all
5 or part of a responsive document that NMFS's explanation for withholding the document include
6 basic factual material about each withheld item, including the originator, date, length, general
7 subject matter, and location of each item. Plaintiff also requested that NMFS provide explanations
8 and justifications for withholding including the identification of the category within the governing
9 statutory provision under which the document was withheld and a full explanation of how each
10 exemption fits the withheld material.

11 24. The 20 working day deadline for NMFS to provide its determination concerning the April
12 29 FOIA Requests 1-3 was May 28, 2015. On May 7, 2015, NMFS sent 3 separate letters
13 acknowledging receipt of the April 29 FOIA Request 1-3 requests. Shortly thereafter, Anne
14 Butterfield, identified as "Freedom of Information Act (FOIA) Support, IBSS Corporation, NOAA
15 Fisheries West Coast Region, U.S. Department of Commerce," requested a conference call with
16 Plaintiff and subject matter expert Jim Simondet of NMFS, to discuss the details of the requests
17 and ask for clarification of some of the categories of documents requested.

18 25. On May 18, 2015, Plaintiff participated in a conference call with Anne Butterfield and
19 Jim Simondet of NOAA to discuss the three FOIA requests submitted on April 29, 2015. As a
20 result of the conference call, NMFS issued three additional emails summarizing the next steps for
21 each request.

22 26. For the April 29 FOIA Request 1 (2015-001217), NMFS responded with a link to
23 documents that were prepared in response to a very similar FOIA Request in 2014 (2014-
24 001598) related to the documents requested for items #1 - #8 of that April 29 FOIA Request 1
25 (2015-001217). Defendant stated that their subject matter experts had determined that there are no
26 additional responsive documents and that all responsive documents were released through that
27 prior FOIA Request (2014-001598). As for the documents requested for items # 9, # 10 and # 11,
28 NMFS found that this portion of the request was duplicative to the documents requested for #1 , #

1 2 and # 3 of the April 29 FOIA Request 2 (2015-001218) and asked Plaintiff to concur. Lastly,
2 Defendant found that item # 12 of the request was asking for documents that were/will be
3 produced after the cut-off date for the request. Defendant offered to provide further information
4 related to the cutoff date policy shortly thereafter. However, instead, on June 4, 2015, Defendant
5 sent their purported "Final Action Letter." Instead of providing the promised further information in
6 relation to item #12 as promised, Defendant indicated that they would be "unable to locate any
7 documents responsive to item #12" because it was asking for documents that were "created outside
8 the temporal scope of the request." Plaintiff believes this is an incorrect application of FOIA and
9 that Defendant has not responded to their request. Thus, Defendant failed to meet the statutory
10 deadline for the April 29 FOIA Request 1.

11 27. In response to the April 29 FOIA Request 2 (2015-001218), on May 28, 2015, Defendant
12 sent Plaintiff an extension letter reciting the clarified scope of item #3, then, citing unusual
13 circumstances, asked for more time to complete the response, and estimated a June 24, 2015
14 completion date. The statutory 30 working day deadline for NMFS's final determination for the
15 April 29 FOIA Request 2 was June 11, 2015. Thus, NMFS did not meet the statutory deadline for
16 the April 29 FOIA Request 2 determination,

17 28. In response to the April 29 FOIA Request 3 (2015-001219), on May 28, 2015, Defendant
18 sent Plaintiff an extension letter, citing unusual circumstances and asking for more time to
19 complete the response. Defendant estimated a June 12, 2015 completion date. However, on June 9,
20 2015, Defendant sent an email stating that they had only partially collected the requested
21 documents and that they would not be able to meet their estimated deadline. Defendant then gave a
22 new estimated deadline of July 9, 2015. The statutory 30 working day deadline for NMFS's final
23 determination for the April 29 FOIA Request 3 was June 11, 2015. However, NMFS did not meet
24 the statutory or its own estimated deadline.

25 **FIRST CLAIM FOR RELIEF**
26 **NMFS Violation of FOIA**
27 **5 U.S.C. §§ 552(a) and (b)**

28 **Request for Declaratory Relief and Injunction To Compel NMFS To Respond to Plaintiff's
FOIA Requests within Statutory Deadlines, Produce Requested Records and Adequately
Explain the Withholding of Records**

1 29. Plaintiff reasserts and realleges paragraphs 1 through 28 above.

2 30. NMFS has violated 5 U.S.C. §§ 552(a)(6)(A) and (B) by failing to provide final
3 determinations concerning Plaintiff's three April 29, 2015 FOIA requests within the statutory
4 deadlines. 5 U.S.C. § 552(a)(6)(A)(i) is plain: within 20 working days of the date that a request is
5 made federal agencies must provide a determination that (1) informs the requester as to the
6 disposition of its request, *i.e.*, whether documents will be provided or withheld and if the latter,
7 why, and (2) that informs the requester of a right to appeal any decision not to provide requested
8 documents. NMFS failed to respond to the April 29 FOIA Request 1 within the 20 working day
9 statutory deadline. NMFS thus has violated FOIA's statutory deadlines for responding to these
10 FOIA requests. Plaintiff has constructively exhausted their administrative remedies given NMFS's
11 failure to provide its final determinations for the April 29 FOIA Request 1 within FOIA's statutory
12 time limits. 5 U.S.C. § 552(a)(6)(C)(i).

13 31. Federal agencies at most can extend this 20 working day deadline by an additional 10
14 working days by informing the requester in writing (1) that "unusual circumstances" necessitate
15 such an extension and (2) when the agency will respond. 5 U.S.C. § 552(a)(6)(B)(i). NMFS
16 invoked § 552(a)(6)(B)(i)'s unusual circumstances provision to extend the statutory deadline for
17 the April 29 FOIA Request 2 final determination to June 24, 2015 and the statutory deadline for
18 the April 29, 2015 FOIA Request 3 final determination to June 12, 2015. However, the 30 day
19 statutory deadline for these two requests would actually be June 11, 2015. Nonetheless, NMFS
20 failed to provide their final determinations for the April 29 FOIA Requests 2 and 3 by either of
21 these statutory deadlines. NMFS thus has violated FOIA's statutory deadlines for responding to
22 these FOIA requests. Plaintiff has constructively exhausted their administrative remedies given
23 NMFS's failure to provide its final determinations for the April 29 FOIA Requests 2 and 3 within
24 FOIA's statutory time limits. 5 U.S.C. § 552(a)(6)(C)(i).

25 32. NMFS has violated FOIA by failing to "promptly" produce all documents responsive to
26 the April 29 FOIA Requests not subject to a lawful FOIA exemption. 5 U.S.C. § 552(a)(3)(A).
27 More than XX weeks have passed since the statutory deadline for NMFS's final determination for
28 these FOIA Request and NMFS has failed to produce the large majority of documents responsive

1 to the April 29 FOIA Requests 1 through 3.

2 **SECOND CLAIM FOR RELIEF**

3 **NMFS Violation of FOIA**
4 **5 U.S.C. §§ 552(a)(3)(C)**

5 **Request for Declaratory Relief and Injunction to Compel NMFS to Perform a**
6 **Reasonable Search and Produce Requested Records**

7 33. Plaintiff reasserts and realleges paragraphs 1 through 32 above.

8 34. On information and belief based on extensive information available to Plaintiff
9 concerning NMFS's policies, Plaintiff alleges that NMFS has violated 5 U.S.C. § 552(a)(3)(C) by
10 failing to conduct a reasonable, legally adequate search for records responsive to the April 29
11 FOIA Requests 1 through 3. Plaintiff allege that NMFS has set improper cut-off dates for its
12 searches for documents responsive to the FOIA Requests and has failed to search all locations and
13 record systems where responsive documents are likely to be found.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff seeks the following relief:

16 a. A declaratory judgment pursuant to 5 U.S.C. § 552 that Federal Defendants violated
17 FOIA by: failing to provide final determinations for the April 29 FOIA Requests 1, 2, and 3 in
18 accordance with the statutory deadlines and failing to promptly produce documents responsive to
19 the April 29 FOIA Requests 1, 2, and 3.

20 b. A declaratory judgment pursuant to 5 U.S.C. § 552 that NMFS violated FOIA by:
21 failing to perform adequate, reasonable searches for documents responsive to the April 29 FOIA
22 Requests 1, 2, and 3 and setting improper cut-off dates for the searches for documents responsive
23 to the April 29 FOIA Requests 1, 2, and 3.

24 c. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) ordering Federal Defendants to:
25 immediately produce all documents in their possession responsive to the April 29 FOIA Requests
26 1, 2, and 3, and immediately provide Plaintiff with a detailed, legally adequate explanation for the
27 withholding of documents or portions of documents responsive to the April 29 FOIA Requests 1,
28 2, and 3.

d. An injunction pursuant to 5 U.S.C. section 552(a)(4)(B) ordering NMFS to cease its

1 practice of setting improper search cut-off dates and illegally delaying production of documents
2 responsive to Plaintiff's FOIA requests.

3 g. An award of attorneys' fees and costs to the Plaintiff pursuant to 5 U.S.C. § 504(a),
4 and/or 5 U.S.C. § 552(a)(4)(E); and

5 h. Such other and further relief as this Court deems just and proper.

6 **DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

7 Based on Plaintiff's knowledge to date, pursuant to Civil Local Rule 3-16, the
8 undersigned certifies that, as of this date, other than the named parties, there is no such interest to
9 report.

10

11 Dated: June 12, 2015

ENVIRONMENTAL ADVOCATES

12

Christopher a. sproul

13

Christopher Sproul, Attorney for Plaintiff
KLAMATH RIVERKEEPER

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
 KLAMATH RIVERKEEPER

(b) County of Residence of First Listed Plaintiff Siskiyou
 (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
 Christopher Sproul, Jodene Isaacs, Page Perry
 ENVIRONMENTAL ADVOCATES
 5135 Anza Street
 San Francisco, CA 94121 (415) 533-3376

DEFENDANTS
 NATIONAL MARINE FISHERIES SERVICE, PENNY PRITZER, as Secretary of Commerce, WILLIAM STELLE, as Regional Administrator of the National Marine Fisheries Service West Coast Region

County of Residence of First Listed Defendant _____
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known) _____

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

2 U.S. Government Defendant

3 Federal Question (U.S. Government Not a Party)

4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

| | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

| CONTRACT | TORTS | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES | |
|---|--|--|---|---|---|
| <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise | PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice | PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions | <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 | <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes |
| REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property | CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities Employment <input type="checkbox"/> 446 Amer. w/Disabilities Other <input type="checkbox"/> 448 Education | PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement | | | |

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from Another District (specify)

6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
5 U.S.C. § 552(a)(3)(A) – Freedom of Information Act

Brief description of cause:
Failure of agency to meet statutory deadlines under FOIA

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)
 (Place an "X" in One Box Only)

SAN FRANCISCO/OAKLAND SAN JOSE EUREKA

DATE: 6/12/2015

SIGNATURE OF ATTORNEY OF RECORD: Chris Spal

Case 4:15-cv-02670-JSW Document 1-1 Filed 06/12/15 Page 2 of 2
INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

1 David A. Bahr (Oregon Bar No. 90199)
2 Bahr Law Offices, P.C.
3 1035 1/2 Monroe Street
4 Eugene, OR 97402
5 (541) 556-6439
6 davebahr@mindspring.com
7 (Application for admission *pro hac vice* pending)

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9 Greenfire Law
10 1202 Oregon Street
11 Berkeley, CA 94702
12 (828) 424-2005
13 rdoughty@greenfirelaw.com

14 *Plaintiff's Counsel*

15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN FRANCISCO DIVISION**

18 **ALAN STEIN,**

19 Plaintiff,

20 *vs.*

21 **UNITED STATES DEPARTMENT OF COM-**
22 **MERCE,**

23 Defendant.

Case No. 3:15-cv-3510

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Freedom of Information Act
Administrative Procedure Act

Mr. Alan Stein ("Plaintiff"), alleges as follows:

INTRODUCTION

1. This action is premised upon, and consequent to, violations of both the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et. seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et. seq.* It challenges the unlawful failure of the Defendant, the Department of Commerce ("DOC" or "Department") and its components the National Oceanic and Atmospheric Administration ("NOAA"),

1 and the Office of Inspector General (“OIG”), to respond to Plaintiff’s FOIA requests and appeals in the
2 manner and within the time required by FOIA. Between October 12, 2012 and February 23, 2015 Plain-
3 tiff Alan Stein submitted a total of 12 FOIA requests to NOAA and the DOC’s OIG and which are the
4 subject of this Complaint. Although the DOC has disclosed certain documents responsive to Plaintiff’s
5 requests, it has unnecessarily, unreasonably, and unlawfully failed to provide final decisions regarding
6 additional records responsive to Stein’s requests. Moreover, DOC is unlawfully withholding information
7 responsive to Plaintiff’s FOIA requests that does not fall within the scope of FOIA’s exemptions to
8 mandatory disclosure.
9

10 **2.** The purpose of the FOIA is “to establish a general philosophy of full agency disclosure unless
11 information is exempted under clearly delineated statutory language.” S.Rep. No. 813, 89th Cong., 1st
12 Sess., 3 (1965). The FOIA therefore requires federal agencies to disclose records to any person upon re-
13 quest unless the information falls within one of nine narrow disclosure exemptions listed in the Act. *See*
14 5 U.S.C. § 552(a)(3)(A), (b). Except in unusual circumstances, federal agencies generally must deter-
15 mine within twenty business days whether requested records are exempt from withholding and, if they
16 are not, the agency must “promptly disclose” the records to the requester. 5 U.S.C. §§ 552(a)(6)(A)(i);
17 *id.* at (a)(3)(A), (a)(6)(C)(i).
18

19 **3.** Prompt access to the requested information is crucial to the Plaintiff because it is directly rele-
20 vant to his ability to effectively engage in, and provide public oversight of, NOAA’s investigation and
21 eventual prosecution of a United States Senate Aide who played a large role in moving federal fishery
22 management from purely conservation toward privatization of the resource which has in some areas of
23 the country (and would have in others) sharply reduced the number of fishing vessels and canneries.
24 While the Aide was sentenced to jail and fined, a controversy remains unresolved as to the role of NO-
25 AA administrators in not pursuing one of the several of the original complaints in 2007 and proceeding
26 with a full scale investigation in 2009 only after the DOC’s Office of Inspector General and the Federal
27
28

1 Bureau of Investigation were alerted to the lack of NOAA's progress. Basic questions remain about
2 what individuals in the agency knew of the Aide's illegal fishing violations and when they knew it. Ac-
3 cordingly, Plaintiff Stein submitted his FOIA requests to NOAA and the DOC OIG, which are the sub-
4 ject of this Complaint. As NOAA continues to have a central role in federal fishery management, it is
5 imperative that these documents be released quickly and efficiently.
6

7 **4.** Plaintiff recognizes the realities of DOC's workload and has been more than willing to give the
8 Agency additional time to make the required determinations and to disclose requested records in this and
9 many other matters. But in this case DOC has missed almost every applicable deadline while showing
10 little sign that it will ever actually disclose the requested records to Plaintiff on a timeline that will allow
11 him to use them to provide meaningful public oversight of the Agency's handling of fraud, misconduct
12 and subterfuge within NOAA.
13

14 **5.** Defendant is unlawfully withholding public disclosure of information sought by Plaintiff, infor-
15 mation to which he is entitled and for which no valid disclosure exemption applies. Defendant violated
16 the statutory mandates and deadlines imposed by FOIA through its failure to provide final determina-
17 tions resolving Plaintiff's FOIA requests and appeals within the time and manner required by law. Addi-
18 tionally, Defendant has unlawfully withheld certain information responsive to Plaintiff's requests by ap-
19 plying FOIA's disclosure exemptions in an overly broad manner not supported by the Act's clear lan-
20 guage. Accordingly, Plaintiff seeks declaratory relief establishing that Defendant has violated the FOIA
21 and APA. Plaintiff also seeks injunctive relief directing Defendant to promptly provide Plaintiff with the
22 requested material.
23

24 **JURISDICTION, VENUE, INTRADISTRICT ASSIGNMENT, AND BASIS FOR RELIEF**

25 **6.** This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §
26 1331 because this action arises under the FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C.
27 § 2201, *et seq.*
28

1 7. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for
2 FOIA cases in this district because Mr. Stein resides in Mendocino, California, which is located in this
3 judicial district and division. Assignment is proper in this division for the same reason. L.R. 3-2(d)

4 8. Declaratory relief is appropriate under 28 U.S.C. § 2201.

5 9. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).
6

7 **PARTIES**

8 10. Alan Stein was a commercial fisherman and homesteader in Alaska. He was an activist who was
9 the main force behind *Zieske v Butz*, 406 F.Supp. 258 (D.Alaska 1975) and *Stein v Barton*, 740 F. Supp.
10 743 (D. Alaska, 1990). In 1976, he testified before both chambers of Congress considering passage of
11 the National Forest Management Act. He was the leading voice in Alaska for buffer strips along salmon
12 streams. As founder and Executive Director of the Salmon Bay Protective Association, he united Alaska
13 commercial fishermen and salmon canneries to get buffer strip language made into law. He has appeared
14 on TV and radio programs and published in the National Fisherman, the Fisherman News, and other
15 fisheries related outlets. Mr. Stein submitted these FOIA requests to discover how NOAA botched its
16 investigation into the leading fisheries aide in the US Senate who was eventually incarcerated. He hopes
17 new conflict of interest procedures and checks and balances will arise from his efforts to flesh out how
18 the Agency allowed a serial fisheries violator rise to appointed positions on a federal fisheries councils
19 which allocated billions of dollars worth of resources without being detected. He is working on a time
20 sensitive book addressing these issues. Time is of the essence in this case.
21
22

23 11. Defendant United States Department of Commerce, is an agency of the executive branch of the
24 United States government, it is in possession and control of the records sought by Plaintiff, and as such,
25 it is subject to the FOIA pursuant to 5 U.S.C. § 552(f). The National Oceanic and Atmospheric Admin-
26 istration and the Office of Inspector General are components of the DOC.
27
28

STATUTORY BACKGROUND

1
2 **12.** The FOIA imposes strict and rigorous deadlines on federal agencies. The Act requires a federal
3 agency that receives a FOIA request to determine whether the requested records are exempt from disclo-
4 sure under 5 U.S.C. § 552(b) and to communicate that determination to the requester within twenty
5 business days. 5 U.S.C. § 552(a)(6)(A)(i). If the agency determines the requested records are exempt
6 from public disclosure, the agency must also communicate to the requester that they have a right to ap-
7 peal that determination. *Id.* If the agency determines the records are not exempt from public disclosure,
8 the agency is required to make the requested records “promptly available” to the requester. 5 U.S.C.
9 § 552(a)(3)(A), (a)(6)(C)(i).

10
11 **13.** Congress has set forth the circumstances in which federal agencies may obtain more time to
12 make the determination required by 5 U.S.C. § 552(a)(6)(A)(i). In two very limited circumstances the
13 agency may toll the twenty business-day deadline for making that determination. The first provides for
14 up to a ten-day tolling period to allow an agency to seek information from a requester. 5 U.S.C. §
15 552(a)(6)(A)(ii). Additionally, the agency may extend the twenty business-day deadline for making that
16 determination for an additional ten business days by providing a written notice to the requester that sets
17 forth the “unusual circumstances” that justify the deadline extension and the date on which the agency
18 expects to make the determination. 5 U.S.C. § 552(a)(6)–(B)(ii). The statute includes a specific defini-
19 tion of the term “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B)(iii). And when the agency notifies a
20 requester of unusual circumstances and the need for additional time, the agency’s written notification
21 “shall provide the person an opportunity to limit the scope of the request so that it may be processed
22 within that time limit or an opportunity to arrange with the agency an alternative time frame for pro-
23 cessing the request or a modified request.” 5 U.S.C. § 552(a)(6)(B)(ii). Moreover, an agency asserting
24 that unusual circumstances prevent its compliance with FOIA’s deadlines “shall make available its
25
26
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1 FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the
2 agency.” *Id.*

3 **14.** Unless an agency subject to the FOIA establishes a different timeline for disclosing responsive
4 records by providing sufficient written notice of unusual circumstances, the FOIA’s mandate to make
5 public records “promptly available” to a requester requires federal agencies to provide responsive rec-
6 ords to a requester within or shortly after the twenty-day timeframe set forth in 5 U.S.C.

7 § 552(a)(6)(A)(i).

8 **15.** A U.S. District Court has jurisdiction “to enjoin the agency from withholding agency records and
9 to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. §
10 552(a)(4)(B). If the government can show that “exceptional circumstances” exist and that the agency is
11 exercising due diligence in responding to the request, the court may retain jurisdiction and allow the
12 agency additional time to complete its review of the records. 5 U.S.C. § 552(a)(6)(C)(i). Notably, the
13 term “exceptional circumstances” does *not* include a delay that results from a predictable agency work-
14 load of FOIA requests, unless the agency demonstrates reasonable progress in reducing its backlog of
15 pending requests. 5 U.S.C. § 552(a)(6)(C)(ii).

16 **16.** Agency action under the FOIA is also subject to judicial review under the APA. *Oregon Natural*
17 *Desert Ass’n. v. Gutierrez*, 409 F.Supp.2d 1237, 1248 (D.Or. 2006) (finding that violation of the FOIA’s
18 decision deadline constitutes APA violation for an agency action that is not in accordance with the law),
19 *affirmed in part, reversed on other grounds, Oregon Natural Desert Ass’n v. Locke*, 572 F.3d 610 (9th
20 Cir. 2009). Under the judicial review provisions of the APA, district courts are authorized to compel
21 agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1). District courts must also
22 set aside any agency action found to be arbitrary, capricious, an abuse of discretion, not in accordance
23 with law, or made without observation of required procedures. 5 U.S.C. § 706(2).
24
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STATEMENT OF OPERATIVE FACTS

Regarding FOIA Request DOC NOAA 2013-138/Appeal DOC OS 2014-567

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3 **17.** Via email, on October 18, 2012, Plaintiff requested documents from NOAA concerning illegal
4 conduct engaged in by Senator Lisa Murkowski's former staffer Arne Fuglvog.

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6 **18.** On November 9, 2012, NOAA split the request into two parts, assigning tracking numbers DOC
7 NOAA 2013-138 and DOC NOAA 2013-139 (addressed below), respectively.

8 **19.** The FOIA requires an agency to issue a final determination resolving a FOIA request within
9 twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(i).

10 **20.** Defendant failed to issue a final determination within 20 business days from receipt of Plaintiff's
11 FOIA Request DOC NOAA 2013-138 as required by 5 U.S.C. § 552(a)(6)(A)(i).

12 **21.** By letter dated January 24, 2014, NOAA denied FOIA Request DOC NOAA 2013-138 in its en-
13 tirety asserting that FOIA's Exemption 7(A) prevented disclosure of responsive information.

14
15 **22.** On February 21, 2014, Plaintiff timely appealed NOAA's decision regarding FOIA Request
16 DOC NOAA 2013-138. The appeal was assigned tracking number DOC OS 2014-567.

17 **23.** The FOIA requires an agency to issue a final determination resolving a FOIA appeal within
18 twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(ii).

19 **24.** Defendant failed to issue a final decision on Plaintiff's FOIA Appeal DOC OS 2014-567 within
20 20 business days from receipt of Plaintiff's February 21, 2014 FOIA appeal as required by 5 U.S.C. §
21 552(a)(6)(A)(ii).

22
23 **25.** On April 4, 2014, September 3, 2014, May 13, 2015, and June 11, 2015, Plaintiff notified the
24 Defendant that it had violated FOIA's 20 business day appeal decision deadline, 5 U.S.C § 552(a)-
25 (6)(A)(ii), for FOIA Appeal DOC OS 2014-567 and further requested an estimated completion date for
26 same.
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1 **26.** Defendant failed to provide a written notice to the Plaintiff asserting that “unusual circumstanc-
2 es” prevented it from compliance with FOIA’s decision deadlines for Request DOC NOAA 2013-138 or
3 Appeal DOC OS 2014-567 and providing a date on which the Agency expected to make a determina-
4 tion. 5 U.S.C. § 552(a)(6)(B)(ii).

5 **27.** None of FOIA’s nine exemptions to mandatory disclosure apply to the information currently be-
6 ing withheld by the NOAA that is responsive to Plaintiff’s FOIA Request DOC NOAA 2013-138.
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8 **28.** As of the date this action was filed, the deadline for Defendant to issue a final determination on
9 Plaintiff’s pending FOIA Appeal DOC OS 2014-567 has passed.

10 **29.** As of the date this action was filed, the DOC had not issued a final determination on Plaintiff’s
11 FOIA Appeal DOC OS 2014-567.
12

13 **30.** As of the date this action was filed, Defendant has not informed Plaintiff of an estimated comple-
14 tion date for FOIA Appeal DOC OS 2014-567 currently pending with the Agency.

15 **31.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
16 this claim.

17 **32.** Plaintiff’s claims presented herein are not insubstantial within the meaning of 5 U.S.C. §
18 552(a)(4)(E)(ii)(II).
19

20 **Regarding FOIA Request DOC NOAA 2013-139/Appeal DOC OS 2014-443**

21 **33.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
22 herein.

23 **34.** Via email, on October 18, 2012, Plaintiff requested documents from NOAA concerning NOAA
24 illegal conduct engaged in by Senator Lisa Murkowski's former staffer Arne Fuglvg.

25 **35.** On November 9, 2012, NOAA split the request into two parts, assigning tracking numbers DOC
26 NOAA 2013-138 (addressed above) and DOC NOAA 2013-139, respectively.
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1 **36.** Defendant failed to issue a final determination within 20 business days from receipt of Plaintiff's
2 FOIA Request DOC NOAA 2013-139 as required by 5 U.S.C. § 552(a)(6)(A)(i).

3 **37.** On January 8, 2013, February 13, 2013 and May 28, 2013, Plaintiff notified the Defendant that it
4 had violated FOIA's 20 business day decision deadline, 5 U.S.C § 552(a)(6)(A)(i), regarding FOIA Re-
5 quest DOC NOAA 2013-139 and further requested an estimated completion date for same.

6 **38.** On December 24, 2013, NOAA denied FOIA Request DOC NOAA 2013-139 in part, releasing
7 1,271 pages in whole or in part while asserting that FOIA's exemptions 3, 4, 5, 6, 7(C), and 7(E) pre-
8 vented disclosure of some responsive information.

9 **39.** On January 22, 2014, Plaintiff timely appealed NOAA's decision regarding FOIA Request DOC
10 NOAA 2013-139. The appeal was assigned tracking number DOC OS 2014-443.

11 **40.** Defendant failed to issue a final decision on Plaintiff's January 22, 2014 appeal (DOC OS 2014-
12 443) within 20 business days from receipt FOIA request as required by 5 U.S.C. § 552(a)(6)(A)(ii).

13 **41.** On February 23, 2014, March 12, 2014, April 4, 2014, September 14, 2014, May 13, 2015, and
14 June 11, 2015, Plaintiff notified the Defendant that it had violated FOIA's 20 business day appeal deci-
15 sion deadline for Appeal DOC OS 2014-443, 5 U.S.C § 552(a)(6)(A)(ii), and further requested an esti-
16 mated completion date for same.

17 **42.** Defendant failed to provide a written notice to the Plaintiff asserting that "unusual circumstanc-
18 es" prevented it from compliance with FOIA's decision deadlines for Request DOC NOAA 2013-139 or
19 Appeal DOC OS 2014-443 and providing a date on which the Agency expected to make the determina-
20 tion. 5 U.S.C. § 552(a)(6)(B)(ii).

21 **43.** None of FOIA's nine exemptions to mandatory disclosure apply to the information currently be-
22 ing withheld by the NOAA that is responsive to Plaintiff's FOIA Request DOC NOAA 2013-139.

23 **44.** As of the date this action was filed, the deadline for Defendant to issue a final determination on
24 Plaintiff's pending FOIA Appeal DOC OS 2014-443 has passed.

1 **45.** As of the date this action was filed, Defendant has not provided a final determination on Plain-
2 tiff's FOIA Appeal DOC OS 2014-443 pending with the Agency.

3 **46.** As of the date this action was filed, Defendant has not informed Plaintiff of an estimated comple-
4 tion date for FOIA Appeal DOC OS 2014-443 currently pending with the Agency.

5 **47.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
6 this claim.

7 **48.** Plaintiff's claims presented herein are not insubstantial within the meaning of 5 U.S.C. §
8 552(a)(4)(E)(ii)(II).
9

10 **Regarding FOIA Request DOC NOAA 2015-144/Appeal DOC OS 2015-898**

11 **49.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
12 herein.

13 **50.** Via email, on September 16, 2014, Plaintiff requested documents from NOAA seeking from
14 NOAA records which indicate who in NOAA or National Marine Fisheries Service ("NMFS") ac-
15 cessed 1) the Justware and/or 2) Law Enforcement Accessible Data Base for investigations, allegations,
16 and citations concerning Arne Fuglvog or Freddie Hankins or Fuglvog's fishing vessel, Kamilar.

17 **51.** On October 21, 2014, NOAA assigned the request tracking number DOC NOAA 2015-144 and
18 issued a formal acknowledgement letter on October 24, 2014.

19 **52.** On November 14, 2014, Plaintiff notified the Defendant that it had violated FOIA's 20 business
20 day decision deadline regarding Request DOC NOAA 2015-144, 5 U.S.C § 552(a)(6)(A)(i), and further
21 requested an estimated completion date for same.
22

23 **53.** By letter dated November 20, 2014, Defendant informed Plaintiff that it was asserting that "unu-
24 usual circumstances" prevented it from compliance with FOIA's decision deadline and extended to De-
25 cember 3, 2014 the deadline by which the Agency expected to make a final determination regarding Re-
26 quest DOC NOAA 2015-144. 5 U.S.C. § 552(a)(6)(B)(ii). The December 3, 2014 date selected by De-
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1 defendant was far beyond the ten-day extension allowed by FOIA in limited circumstances. 5 U.S.C §
2 552(a)(6)(B)(i).

3 **54.** However, Defendant failed to issue a final determination of Plaintiff's FOIA Request DOC NO-
4 AA 2015-144 by December 3, 2014.

5 **55.** On January 7, 2015, January 20, 2015, February 13, 2015, and March 2, 2015, Plaintiff notified
6 the Defendant that it had violated FOIA's decision deadline regarding Request DOC NOAA 2015-144,
7 5 U.S.C § 552(a)(6)(A)(i), and further requested an estimated completion date for same.

8 **56.** By letter dated January 23, 2015, Defendant issued an interim decision that denied Request DOC
9 NOAA 2015-144 in part, releasing 14 pages in whole or in part while asserting that FOIA's exemption 6
10 prevented disclosure of some responsive information.

11 **57.** By letter dated March 2, 2015, NOAA issued a final decision that denied Request DOC NOAA
12 2015-144 in part, releasing 850 pages in whole or in part while asserting that FOIA's exemptions 3, 4, 5,
13 6, 7(C), 7(E) prevented disclosure of some responsive information.

14 **58.** Via email, on March 12, 2015, Plaintiff timely appealed NOAA's decision. The appeal was as-
15 signed tracking number DOC OS 2015-898.

16 **59.** Defendant failed to issue a final decision on Plaintiff's appeal within 20 business days from re-
17 ceipt of Plaintiff's FOIA Appeal No. DOC OS 2015-898 as required by 5 U.S.C. § 552(a)(6)(A)(ii).

18 **60.** Defendant failed to provide a written notice to the Plaintiff asserting that "unusual circumstanc-
19 es" prevented it from compliance with FOIA's appeal decision deadline for appeal DOC OS 2015-898
20 and providing a date on which the Agency expected to make the determination. 5 U.S.C.

21 § 552(a)(6)(B)(ii). Moreover, Defendant has not explained why it did not comply with the December 3,
22 2014, decision deadline for Request DOC NOAA 2015-144 that it unilaterally imposed.
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1 **61.** On May 13, 2015 and June 11, 2015, Plaintiff notified the Defendant that it had violated FOIA's
2 20 business day appeal decision deadline for Appeal No. DOC OS 2015-898, 5 U.S.C § 552(a)(6)(A)(ii),
3 and further requested an estimated completion date for same.

4 **62.** None of FOIA's nine exemptions to mandatory disclosure apply to the information currently be-
5 ing withheld by the NOAA that is responsive to Plaintiff's FOIA Request DOC NOAA 2015-144.
6

7 **63.** As of the date this action was filed, the deadline for Defendant to issue a final determination on
8 Plaintiff's pending FOIA Appeal No. DOC OS 2015-898 has passed.

9 **64.** As of the date this action was filed, Defendant has not provided a final determination on Plain-
10 tiff's FOIA Appeal No. DOC OS 2015-898 pending with the Agency.

11 **65.** As of the date this action was filed, Defendant has not informed Plaintiff of an estimated comple-
12 tion date for FOIA Appeal No. DOC OS 2015-898 currently pending with the Agency.
13

14 **66.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
15 this claim.

16 **67.** Plaintiff's claims presented herein are not insubstantial within the meaning of 5 U.S.C. §
17 552(a)(4)(E)(ii)(II).

18 **Regarding FOIA Request DOC NOAA 2015-595**

19 **68.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
20 herein.
21

22 **69.** Using Defendant's online portal "FOIAonline," on January 27, 2015, Plaintiff requested from
23 NOAA "all records concerning NOAA Administrator Dr. Jane Lubchenco's schedule from January 1
24 2009 to March 1, 2013." Defendant assigned the request tracking number DOC NOAA 2015-595.

25 **70.** Defendant failed to issue a final determination within 20 business days from receipt of Plaintiff's
26 FOIA Request DOC NOAA 2015-595 as required by 5 U.S.C. § 552(a)(6)(A)(i).
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1 **71.** On April 7, 2015, April 14, 2015, April 23, 2015, April 30, 2015, and June 11, 2015, Plaintiff
2 notified the Defendant that it had violated FOIA’s 20 business day decision deadline for Request DOC
3 NOAA 2015-595, 5 U.S.C § 552(a)(6)(A)(i), and further requested an estimated completion date for
4 same.

5 **72.** Defendant failed to provide a written notice to the Plaintiff asserting that “unusual circumstanc-
6 es” prevented it from compliance with FOIA’s decision deadline for Request DOC NOAA 2015-595
7 and providing a date on which the Agency expected to make the determination. 5 U.S.C. §
8 552(a)(6)(B)(ii).

9 **73.** None of FOIA’s nine exemptions to mandatory disclosure apply to the information currently be-
10 ing withheld by the NOAA that is responsive to Plaintiff’s FOIA Request DOC NOAA 2015-595.
11

12 **74.** As of the date this action was filed, the deadline for Defendant to issue a final determination on
13 Plaintiff’s pending FOIA Request DOC NOAA 2015-595 has passed.
14

15 **75.** As of the date this action was filed, Defendant had not issued a final determination of Plaintiff’s
16 FOIA Request DOC NOAA 2015-595.

17 **76.** As of the date this action was filed, the NOAA has not informed Plaintiff of an estimated com-
18 pletion date for FOIA Request DOC NOAA 2015-595 currently pending with the Agency.

19 **77.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
20 this claim.
21

22 **78.** Plaintiff’s claims presented herein are not insubstantial within the meaning of 5 U.S.C. §
23 552(a)(4)(E)(ii)(II).

24 **Regarding FOIA Request DOC NOAA 2015-596/Appeal of FOIA Request NOAA 2015-596¹**

25 **79.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
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28 ¹ As noted below, Defendant did not issue a tracking number for this appeal.

1 herein.

2 **80.** Using Defendant’s online portal “FOIAonline,” on January 27, 2015, Plaintiff requested from
3 NOAA “all records or logs documenting visitors to NOAA's headquarters at 1401 Constitution Avenue
4 NW in Washington DC from January 1, 2009 to March 1, 2013.” Defendant assigned the request track-
5 ing number DOC NOAA 2015-596.
6

7 **81.** Defendant failed to issue a final determination within 20 business days from receipt of Plaintiff’s
8 FOIA Request DOC NOAA 2015-596 as required by 5 U.S.C. § 552(a)(6)(A)(i).

9 **82.** On April 7, 2015, April 14, April 23, 2015 and April 30, 2015, Plaintiff notified the Defendant
10 that it had violated FOIA’s 20 business day decision deadline regarding Request DOC NOAA 2015-596,
11 5 U.S.C § 552(a)(6)(A)(i), and further requested an estimated completion date for same.
12

13 **83.** By letter dated April 30, 2015, Defendant issued a final decision on FOIA Request DOC NOAA
14 2015-596. Defendant asserted that it could not locate any records responsive to the request.

15 **84.** Via email attachment, on May 22, 2015, Plaintiff submitted a timely appeal of Defendant’s fail-
16 ure to locate any records responsive to FOIA Request DOC NOAA 2015-595.

17 **85.** On June 11, 2015, Plaintiff reminded Defendant of FOIA’s 20 business day appeal decision
18 deadline for the appeal of FOIA Request DOC NOAA 2015-595, 5 U.S.C § 552(a)(6)(A)(ii), and further
19 requested an estimated completion date for same.
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21 **86.** Defendant failed to issue a final decision on Plaintiff’s appeal within 20 business days from re-
22 ceipt of Plaintiff’s FOIA appeal of FOIA request DOC NOAA 2015-596 as required by 5 U.S.C. §
23 552(a)(6)(A)(ii).

24 **87.** Defendant failed to provide a written notice to the Plaintiff asserting that “unusual circumstanc-
25 es” prevented it from compliance with FOIA’s decision deadlines for Request DOC NOAA 2015-596,
26 or the appeal of same, and providing a date on which the Agency expected to make the determination. 5
27 U.S.C. § 552(a)(6)(B)(ii).
28

1 **88.** Pursuant to 5 U.S.C. § 552(a)(7)(A), Defendant is required to assign an individualized tracking
2 number to any request or appeal that requires more than ten days to complete.

3 **89.** As of the date this action was filed, Defendant has failed to assign an individualized tracking
4 number for the appeal of FOIA Request DOC NOAA 2015-596.

5 **90.** None of FOIA's nine exemptions to mandatory disclosure apply to the information currently be-
6 ing withheld by the NOAA that is responsive to Plaintiff's FOIA Request DOC NOAA 2015-596.

7 **91.** As of the date this action was filed, the deadline for Defendant to issue a final determination on
8 Plaintiff's pending FOIA appeal for Request DOC NOAA 2015-596 has passed.

9 **92.** As of the date this action was filed, Defendant has not provided a final determination on Plain-
10 tiff's FOIA appeal for Request DOC NOAA 2015-596 pending with the Agency.

11 **93.** As of the date this action was filed, Defendant has not informed Plaintiff of an estimated comple-
12 tion date for the appeal of FOIA Request DOC NOAA 2015-596 currently pending with the Agency.

13 **94.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
14 this claim.

15 **95.** Plaintiff's claims presented herein are not insubstantial within the meaning of 5 U.S.C. §
16 552(a)(4)(E)(ii)(II).

17 **Regarding FOIA Request DOC NOAA 2015-597**

18 **96.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
19 herein.

20 **97.** Using Defendant's online portal "FOIAonline," on January 27, 2015, Plaintiff requested from
21 NOAA "correspondence logs from NOAA to Congress and from Congress to NOAA identifying specif-
22 ic pieces of correspondence by control number and congressional office" from January 1, 2009, through
23 March 1, 2013. Defendant assigned the request tracking number DOC NOAA 2015-597.
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1 **98.** Defendant failed to issue a final determination within 20 business days from receipt of Plaintiff's
2 FOIA Request DOC NOAA 2015-597 as required by 5 U.S.C. § 552(a)(6)(A)(i).

3 **99.** On February 14, 2015, Defendant released to Plaintiff 550 pages of documents assembled in re-
4 sponse to a previous third-party FOIA request that it suggested were responsive to FOIA Request DOC
5 NOAA 2015-597. However, Plaintiff informed Defendant that the documents did not satisfy FOIA Re-
6 quest DOC NOAA 2015-597 and requested that the Agency continue its search.

7 **100.** On April 7, 2015, April 14, 2015, April 23, 2015, April 30, 2015, and June 11, 2015, Plaintiff
8 notified the Defendant that it had violated FOIA's 20 business day decision deadline regarding Request
9 DOC NOAA 2015-597, 5 U.S.C § 552(a)(6)(A)(i), and further requested an estimated completion date
10 for same.

11 **101.** Defendant failed to provide a written notice to the Plaintiff asserting that "unusual circumstanc-
12 es" prevented it from compliance with FOIA's decision deadline for Request DOC NOAA 2015-597
13 and providing a date on which the Agency expected to make the determination. 5 U.S.C.
14 § 552(a)(6)(B)(ii).

15 **102.** None of FOIA's nine exemptions to mandatory disclosure apply to the information currently be-
16 ing withheld by the NOAA that is responsive to Plaintiff's FOIA Request DOC NOAA 2015-597.

17 **103.** As of the date this action was filed, the deadline for Defendant to issue a final determination on
18 Plaintiff's pending FOIA Request DOC NOAA 2015-597 has passed.

19 **104.** As of the date this action was filed, Defendant had not issued a final determination of Plaintiff's
20 FOIA Request DOC NOAA 2015-597.

21 **105.** As of the date this action was filed, the NOAA has not informed Plaintiff of an estimated com-
22 pletion date for FOIA Request DOC NOAA 2015-597 currently pending with the Agency.

23 **106.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
24 this claim.
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1 **107.** Plaintiff's claims presented herein are not insubstantial within the meaning of 5 U.S.C. §
2 552(a)(4)(E)(ii)(II).

3 **Regarding FOIA Request DOC NOAA 2015-606**

4 **108.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
5 herein.

6 **109.** Using Defendant's online portal "FOIAonline," on January 29, 2015, Plaintiff requested from
7 NOAA "daily scheduling records concerning NOAA Principal Deputy Under Secretary for oceans and
8 atmosphere, Monica Medina's Esq. schedule from January 1 2009 until her resignation." Defendant as-
9 signed the request tracking number DOC NOAA 2015-606.

10 **110.** Defendant failed to issue a final determination within 20 business days from receipt of Plaintiff's
11 FOIA Request DOC NOAA 2015-606 as required by 5 U.S.C. § 552(a)(6)(A)(i).

12 **111.** On April 7, 2015, April 14, 2015, April 23, 2015, April 30, 2015, and June 11, 2015, Plaintiff
13 notified the Defendant that it had violated FOIA's 20 business day decision deadline, 5 U.S.C §
14 552(a)(6)(A)(i), and further requested an estimated completion date for Request DOC NOAA 2015-606.

15 **112.** Defendant failed to provide a written notice to the Plaintiff asserting that "unusual circumstanc-
16 es" prevented it from compliance with FOIA's decision deadline for Request DOC NOAA 2015-606
17 and providing a date on which the Agency expected to make the determination. 5 U.S.C. §
18 552(a)(6)(B)(ii).

19 **113.** None of FOIA's nine exemptions to mandatory disclosure apply to the information currently be-
20 ing withheld by the NOAA that is responsive to Plaintiff's FOIA Request DOC NOAA 2015-606.

21 **114.** As of the date this action was filed, the deadline for Defendant to issue a final determination on
22 Plaintiff's pending FOIA Request DOC NOAA 2015-606 has passed.

23 **115.** As of the date this action was filed, Defendant had not issued a final determination of Plaintiff's
24 FOIA Request DOC NOAA 2015-606.
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1 **116.** As of the date this action was filed, the NOAA has not informed Plaintiff of an estimated com-
2 pletion date for FOIA Request DOC NOAA 2015-606 currently pending with the Agency.

3 **117.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
4 this claim.

5 **118.** Plaintiff's claims presented herein are not insubstantial within the meaning of 5 U.S.C. §
6 552(a)(4)(E)(ii)(II).
7

8 **Regarding FOIA Request DOC NOAA 2015-693**

9 **119.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
10 herein.

11 **120.** Using Defendant's online portal "FOIAonline," on February 16, 2015, Plaintiff requested from
12 NOAA "the correspondence log concerning all communications sent from and to Monica Medina's Esq.
13 who was both an advisor and latter NOAA Principal Deputy Under Secretary for Oceans and Atmos-
14 phere. The time period the request covers is from January 1, 2009 until her resignation." Defendant as-
15 signed the request tracking number DOC NOAA 2015-693.
16

17 **121.** Defendant failed to issue a final determination within 20 business days from receipt of Plaintiff's
18 FOIA Request DOC NOAA 2015-693 as required by 5 U.S.C. § 552(a)(6)(A)(i).

19 **122.** On April 7, 2015, April 14, 2015, April 23, 2015, April 30, 2015, and June 11, 2015, Plaintiff
20 notified the Defendant that it had violated FOIA's 20 business day decision deadline, 5 U.S.C §
21 552(a)(6)(A)(i), and further requested an estimated completion date for Request DOC NOAA 2015-693.
22

23 **123.** Defendant failed to provide a written notice to the Plaintiff asserting that "unusual circumstanc-
24 es" prevented it from compliance with FOIA's decision deadline for request DOC NOAA 2015-693 and
25 providing a date on which the Agency expected to make the determination. 5 U.S.C. § 552(a)(6)(B)(ii).

26 **124.** None of FOIA's nine exemptions to mandatory disclosure apply to the information currently be-
27 ing withheld by the NOAA that is responsive to Plaintiff's FOIA Request DOC NOAA 2015-693.
28

1 **125.** As of the date this action was filed, the deadline for Defendant to issue a final determination on
2 Plaintiff's pending FOIA Request DOC NOAA 2015-693 has passed.

3 **126.** As of the date this action was filed, Defendant had not issued a final determination of Plaintiff's
4 FOIA Request DOC NOAA 2015-693.

5 **127.** As of the date this action was filed, the NOAA has not informed Plaintiff of an estimated com-
6 pletion date for FOIA Request DOC NOAA 2015-693 currently pending with the Agency.
7

8 **128.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
9 this claim.

10 **129.** Plaintiff's claims presented herein are not insubstantial within the meaning of 5 U.S.C. §
11 552(a)(4)(E)(ii)(II).
12

13 **Regarding FOIA Request DOC NOAA 2015-694**

14 **130.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
15 herein.

16 **131.** Using Defendant's online portal "FOIAonline," on February 16, 2015, Plaintiff requested from
17 NOAA "correspondence log concerning NOAA Administrator Dr. Jane Lubchenco from January 1 2009
18 to March 1, 2013." Defendant assigned the request tracking number DOC NOAA 2015-694.

19 **132.** Defendant failed to issue a final determination within 20 business days from receipt of Plaintiff's
20 FOIA Request DOC NOAA 2015-694 as required by 5 U.S.C. § 552(a)(6)(A)(i).
21

22 **133.** On April 7, 2015, April 14, 2015, April 23, 2015, April 30, 2015, and June 11, 2015, Plaintiff
23 notified the Defendant that it had violated FOIA's 20 business day decision deadline, 5 U.S.C.
24 § 552(a)(6)(A)(i), and further requested an estimated completion date for Request DOC NOAA 2015-
25 694.
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1 **134.** Defendant failed to provide a written notice to the Plaintiff asserting that “unusual circumstanc-
2 es” prevented it from compliance with FOIA’s decision deadline for request DOC NOAA 2015-694 and
3 providing a date on which the Agency expected to make the determination. 5 U.S.C. § 552(a)(6)(B)(ii).

4 **135.** None of FOIA’s nine exemptions to mandatory disclosure apply to the information currently be-
5 ing withheld by the NOAA that is responsive to Plaintiff’s FOIA Request DOC NOAA 2015-694.

6 **136.** As of the date this action was filed, the deadline for Defendant to issue a final determination on
7 Plaintiff’s pending FOIA Request DOC NOAA 2015-694 has passed.

8 **137.** As of the date this action was filed, Defendant had not issued a final determination of Plaintiff’s
9 FOIA Request DOC NOAA 2015-694.

10 **138.** As of the date this action was filed, the NOAA has not informed Plaintiff of an estimated com-
11 pletion date for FOIA Request DOC NOAA 2015-694 currently pending with the Agency.

12 **139.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
13 this claim.

14 **140.** Plaintiff’s claims presented herein are not insubstantial within the meaning of 5 U.S.C.
15 § 552(a)(4)(E)(ii)(II).

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18 **Regarding FOIA Request DOC NOAA 2015-747**

19 **141.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
20 herein.

21 **142.** Using Defendant’s online portal “FOIAonline,” on February 20, 2015, Plaintiff requested from
22 NOAA a copy of “the FOIA number NOAA 2010-00343 that was provided to Paul Muniz of counsel
23 Burns and Levinson LLP concerning all documents related to shredding or deleting of documents con-
24 ducted by NOAA's Office of Law Enforcement by Dale Jones, while his office was under investigation
25 by the Office of the Inspector General.” Defendant assigned the request tracking number DOC NOAA
26 2015-747.
27
28

1 **143.** Defendant failed to issue a final determination within 20 business days from receipt of Plaintiff's
2 FOIA Request DOC NOAA 2015-747 as required by 5 U.S.C. § 552(a)(6)(A)(i).

3 **144.** On April 14, 2015, April 23, 2015, April 30, 2015, and June 11, 2015, Plaintiff notified the De-
4 fendant that it had violated FOIA's 20 business day decision deadline, 5 U.S.C § 552(a)(6)(A)(i), and
5 further requested an estimated completion date for Request DOC NOAA 2015-747.
6

7 **145.** Defendant failed to provide a written notice to the Plaintiff asserting that "unusual circumstanc-
8 es" prevented it from compliance with FOIA's decision deadline for request DOC NOAA 2015-747 and
9 providing a date on which the Agency expected to make the determination. 5 U.S.C. § 552(a)(6)(B)(ii).

10 **146.** None of FOIA's nine exemptions to mandatory disclosure apply to the information currently be-
11 ing withheld by the NOAA that is responsive to Plaintiff's FOIA Request DOC NOAA 2015-747.
12

13 **147.** As of the date this action was filed, the deadline for Defendant to issue a final determination on
14 Plaintiff's pending FOIA Request DOC NOAA 2015-747 has passed.

15 **148.** As of the date this action was filed, Defendant had not issued a final determination of Plaintiff's
16 FOIA Request DOC NOAA 2015-747.

17 **149.** On Monday July 27, 2015, Plaintiff received a telephone message from Defendant's staff sug-
18 gesting that Defendant "will try" to provide Plaintiff with documents responsive to FOIA request DOC
19 NOAA 2015-747 by Friday, July 31, 2015.
20

21 **150.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
22 this claim.

23 **151.** Plaintiff's claims presented herein are not insubstantial within the meaning of 5 U.S.C. §
24 552(a)(4)(E)(ii)(II).

25 **Regarding FOIA Request DOC OIG 2015-716/Appeal DOC OIG 2015-1077**

26 **152.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
27 herein.
28

1 **153.** Using Defendant’s online portal “FOIAonline,” on February 19, 2015, Plaintiff requested from
2 the OIG:

- 3 • the DOC's OIG report findings, prepared in response to findings/allegations of docu-
4 ment shredding conducted by NOAA's Office of Law Enforcement and Dale Jones, For-
5 mer Director of the Office of Law Enforcement, while his office was simultaneously un-
6 der investigation by the Inspector General and
- 7 • any documents that the OIG collected or recovered (and a description of such records)
8 while preparing the above OIG report cited that mention records concerning Arne Fu-
9 glvog of any kind that were shredded by [named employees] or other staff members in
10 NOAA and any documents showing that persons in NOAA, including certain named em-
11 ployees, were notified of the shredding of the documents.

OIG assigned the request tracking number DOC OIG 2015-716.

11 **154.** At the very latest, based on the February 19, 2015 date of Plaintiff’s FOIA request, the deadline
12 for issuing a final determination of FOIA Request DOC OIG 2015-716 elapsed on March 19, 2015.

13 **155.** By letter dated March 27, 2015, OIG issued a final decision claiming that FOIA’s Exemption
14 7(C) allowed it to deny the request by refusing to acknowledge the existence of any record responsive to
15 FOIA Request DOC OIG 2015-716 on the ground that such disclosure could reasonably be expected to
16 constitute an unwarranted invasion the personnel privacy of anyone named therein.

17 **156.** Via email, on April 14, 2015, Plaintiff timely appealed OIG’s decision. The appeal was assigned
18 tracking number OIG 2015-1077. Plaintiff challenged the adequacy of OIG’s search and application of
19 FOIA’s Exemption 7(C) to refuse to admit or deny the existence of records responsive to FOIA Request
20 DOC OIG 2015-716.

21 **157.** By letter dated May 8, 2015, OIG issued a final decision partially granting and partially denying
22 on FOIA Appeal OIG 2015-1077. Consequently, eight pages responsive to FOIA Request DOC OIG
23 2015-716 were released in whole or in part.

24 **158.** None of FOIA’s nine exemptions to mandatory disclosure apply to the information currently be-
25 ing withheld by the NOAA that is responsive to Plaintiff’s FOIA Request DOC OIG 2015-716.
26
27
28

1 **159.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
2 this claim.

3 **160.** Plaintiff's claims presented herein are not insubstantial within the meaning of 5 U.S.C. §
4 552(a)(4)(E)(ii)(II).
5

6 **Regarding FOIA Request DOC OIG 2015-753/Appeal DOC OIG 2015-1316**

7 **161.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
8 herein.

9 **162.** Using Defendant's online portal "FOIAonline," on February 23 2015, Plaintiff requested from
10 the OIG:

11 all documents in any format for any a) investigation(s), b) report(s), c) finding(s), d)
12 memo(s), and e) communications or record of communications, created or written by 1)
13 Daniel Coney (who was in the Denver OIG Field Office) and 2) other staff in the De-
14 partment of Commerce's Office of the Inspector General. SEE THE ATTACHMENT
15 FOR THE FULL FOIA If any of the documents (a-e) are discovered, I also request the
16 Administration File on each of them. Subject Matter of Documents Described: The OIG
17 documents (a-e) above that I request reflect, relate, arise from, or have to do with OIG
18 evaluating, examining, and probing the conduct, events, and developments (occurring any
19 time between 2002 and 2013) for the following assumed as true fact patterns about how
20 NOAA handled what became Arne Fuglvog Scandal.

21 **163.** By letter dated February 26, 2015, 2015, OIG assigned the request tracking number DOC OIG
22 2015-753.

23 **164.** At the very latest, based on the February 23, 2015 date of Plaintiff's FOIA request, the deadline
24 for issuing a final determination of FOIA Request DOC OIG 2015-753 elapsed on March 23, 2015.

25 **165.** By letter dated April 28, 2015, OIG issued a final decision partially granting and partially deny-
26 ing FOIA Request DOC OIG 2015-753. OIG indicated that it had located 59 pages of information re-
27 sponsive to Plaintiff's request but was releasing only 17 pages in their entirety. An additional 39 pages
28 were released with some material redacted based on FOIA's Exemptions 6 and 7(C). Finally, OIG with-
held three pages in their entirety asserting that FOIA's Exemption 5 allowed the withholding.

1 **166.** Via email, on May 22, 2015, Plaintiff timely appealed OIG's decision. The appeal was assigned
2 tracking number OIG 2015-1316. Plaintiff challenged the adequacy of OIG's search and application of
3 FOIA's Exemptions 5, 6 and 7(C) to FOIA Request DOC OIG 2015-753.

4 **167.** By letter dated July 10, 2015, OIG issued a final decision partially granting and partially denying
5 on FOIA Appeal OIG 2015-1316. Consequently, six pages responsive to FOIA Request DOC OIG
6 2015-753 were released in whole or in part.

7 **168.** None of FOIA's nine exemptions to mandatory disclosure apply to the information currently be-
8 ing withheld by the NOAA that is responsive to Plaintiff's FOIA Request DOC OIG 2015-753.

9 **169.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
10 this claim.

11 **170.** Plaintiff's claims presented herein are not insubstantial within the meaning of 5 U.S.C.
12 § 552(a)(4)(E)(ii)(II).

13 **171.** Plaintiff has fully exhausted all administrative remedies required by FOIA. 5 U.S.C.
14 §§ 552(a)(6)(A), (a)(6)(C) (2015).

15
16
17 **CAUSES OF ACTION**
18 **COUNT I**
19 **VIOLATION OF THE FREEDOM OF INFORMATION ACT-**
20 **CONSTRUCTIVE DENIAL/ UNLAWFUL WITHHOLDING**

21 **172.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
22 herein.

23 **173.** Plaintiff has a statutory right to the records he seeks, and there is no legal basis for Defendant
24 DOC to assert that any of FOIA's nine disclosure exemptions apply to the information sought in this ac-
25 tion. *See* 5 U.S.C. §§ 552(b)(1)-(9).

26 **174.** Defendant DOC violated Plaintiff's rights in this regard by failing to comply with FOIA's deci-
27 sion deadlines and thus constructively withholding information responsive to Plaintiff's FOIA requests.

1 **175.** Based on the nature of Plaintiff's professional activities, he will undoubtedly continue to employ
2 FOIA's provisions in information requests to Defendant DOC in the foreseeable future.

3 **176.** Plaintiff's professional activities will be adversely affected if Defendant DOC is allowed to con-
4 tinue violating FOIA's disclosure provisions as it has in this case.

5 **177.** Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, De-
6 fendant DOC will continue to violate the rights of Plaintiff to receive public records under the FOIA.

7 **178.** Plaintiff is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant
8 to FOIA. 5 U.S.C. § 552(a)(4)(E).

9
10 **COUNT II**
11 **VIOLATION OF THE FREEDOM OF INFORMATION ACT:**
12 **UNLAWFUL APPLICATION OF DISCLOSURE EXEMPTIONS**

13 **179.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
14 herein.

15 **180.** Plaintiff has a statutory right to the records he seeks, and there is no legal basis for Defendant
16 DOC to assert that any of FOIA's nine disclosure exemptions apply. *See* 5 U.S.C. § 552(b)(1)-(9).

17 **181.** Defendant DOC violated Plaintiff's rights in this regard by unlawfully withholding information
18 responsive to Plaintiff's FOIA requests, including but not limited to requests and appeals numbered:

19 (a) FOIA Request DOC NOAA 2013-138/Appeal DOC OS 2014-567

20 (b) FOIA Request DOC NOAA 2013-139/Appeal DOC OS 2014-443

21 (c) FOIA Request DOC NOAA 2015-144/Appeal DOC OS 2015-898

22 (d) FOIA Request DOC NOAA 2015-596/ (unnumbered) Appeal of FOIA Request NOAA
23 2015-596

24 (e) FOIA Request DOC OIG 2015-716/Appeal DOC OIG 2015-1077

25 (f) FOIA Request DOC OIG 2015-753/Appeal DOC OIG 2015-1316
26

27 based on the improper and overly broad application of FOIA's exemptions to mandatory information
28

1 disclosure.

2 **182.** Based on the nature of Plaintiff's professional activities, he will undoubtedly continue to employ
3 FOIA's provisions in information requests to Defendant DOC in the foreseeable future.

4 **183.** Plaintiff's professional activities will be adversely affected if Defendant DOC is allowed to con-
5 tinue violating FOIA's disclosure provisions as it has in this case.

6 **184.** Plaintiff has a statutory right to the records he seeks, and there is no legal basis for Defendant
7 DOC to assert that any of FOIA's nine disclosure exemptions apply. *See* 5 U.S.C. § 552(b)(1)-(9).

8 **185.** Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, De-
9 fendant DOC will continue to violate the rights of Plaintiff to receive public records under the FOIA.

10 **186.** Plaintiff is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant
11 to FOIA. 5 U.S.C. § 552(a)(4)(E).

12
13
14 **COUNT III**
15 **VIOLATION OF THE FREEDOM OF INFORMATION ACT:**
16 **DECISION DEADLINE VIOLATION**

17 **187.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
18 herein.

19 **188.** Plaintiff has a statutory right to have Defendant DOC process his FOIA requests in a manner that
20 complies with FOIA. Plaintiff's rights in this regard were violated when the Defendant DOC repeatedly
21 and unlawfully delayed its response to his information requests and appeals beyond the determination
22 deadlines imposed by the FOIA. 5 U.S.C. §§ 552(a)(6)(A)(i), (ii).

23 **189.** Defendant DOC is unlawfully withholding public disclosure of information sought by Plaintiff,
24 information to which he is entitled and for which no valid disclosure exemption applies.

25 **190.** Based on the nature of Plaintiff's professional activities, he will undoubtedly continue to employ
26 FOIA's provisions in information requests to Defendant DOC in the foreseeable future.

1 **191.** Plaintiff's professional activities will be adversely affected if Defendant DOC is allowed to con-
2 tinue violating FOIA's decision deadlines as it has in this case.

3 **192.** Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, De-
4 fendant DOC will continue to violate the rights of Plaintiff to receive public records under the FOIA.

5 **193.** Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5
6 U.S.C. § 552(a)(4)(E).
7

8 **COUNT IV**
9 **VIOLATION OF THE FREEDOM OF INFORMATION ACT:**
10 **FAILURE TO COMPLY WITH 5 U.S.C. § 552(a)(7)(B)(ii) (Estimated Completion Date)**

11 **194.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
12 herein.

13 **195.** Pursuant to 5 U.S.C. § 552(a)(7)(B)(ii), "Each agency shall . . . establish a phone line or Internet
14 service that provides information about the status of a request to the person making the request . . . in-
15 cluding . . . an estimated date on which the agency will complete action on the request."

16 **196.** Plaintiff asked DOC numerous times for estimated dates of completion for his pending FOIA
17 requests and appeals. In so doing, Plaintiff invoked 5 U.S.C. § 552(a)(7)(B)(ii).

18 **197.** Defendant DOC has repeatedly failed to provide estimated dates of completion for Plaintiff's
19 FOIA requests and appeals at issue in this case.

20 **198.** Upon information and belief, DOC's failure to provide specific estimated dates of completion for
21 Plaintiff's FOIA requests and appeals represents an ongoing policy, practice, or standard operating pro-
22 cedure ("SOP").

23 **199.** A policy, practice, or SOP of refusing to provide estimated dates of completion to requesters is in
24 violation of FOIA. Such a practice constitutes outrageous conduct for purposes of the broad equitable
25 powers provided by FOIA to the Court. Such a policy is arbitrary, capricious, an abuse of discretion, or
26 otherwise contrary to law.
27
28

1 **200.** Based on the nature of Plaintiff's professional activities, he will undoubtedly continue to employ
2 FOIA's provisions in information requests to Defendant DOC in the foreseeable future.

3 **201.** Plaintiff's professional activities will be adversely affected if Defendant DOC is allowed to con-
4 tinue violating FOIA's requirement to provide estimated completion dates as it has in this case.

5 **202.** Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, De-
6 fendant DOC will continue to violate the rights of Plaintiff to receive public records under the FOIA.

7 **203.** Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5
8 U.S.C. § 552(a)(4)(E).

9
10 **COUNT V**
11 **VIOLATION OF THE FREEDOM OF INFORMATION ACT:**
12 **INADEQUATE SEARCH**

13 **204.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
14 herein.

15 **205.** Plaintiff has a statutory right to have Defendant DOC process his FOIA requests in a manner
16 which complies with FOIA. Plaintiff's rights in this regard were violated when the Defendant DOC un-
17 lawfully failed to undertake a search reasonably calculated to locate records responsive to Plaintiff's in-
18 formation requests including but not limited to FOIA requests and appeals numbered:

19 (a) FOIA Request DOC NOAA 2013-138/Appeal DOC OS 2014-567

20 (b) FOIA Request DOC NOAA 2013-139/Appeal DOC OS 2014-443

21 (c) FOIA Request DOC NOAA 2015-144/Appeal DOC OS 2015-898

22 (d) FOIA Request DOC NOAA 2015-596/ (unnumbered) Appeal of FOIA Request NOAA
23 2015-596

24 (e) FOIA Request DOC OIG 2015-716/Appeal DOC OIG 2015-1077

25 (f) FOIA Request DOC OIG 2015-753/Appeal DOC OIG 2015-1316

26 **206.** Defendant DOC is unlawfully withholding public disclosure of information sought by Plaintiff,
27
28

1 information to which he is entitled and for which no valid disclosure exemption applies.

2 **207.** Based on the nature of Plaintiff's professional activities, he will undoubtedly continue to employ
3 FOIA's provisions in information requests to Defendant DOC in the foreseeable future.

4 **208.** Plaintiff's professional activities will be adversely affected if Defendant DOC is allowed to con-
5 tinue violating FOIA by performing inadequate information searches as it has in this case.

6 **209.** Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, De-
7 fendant DOC will continue to violate the rights of Plaintiff to receive public records under the FOIA.

8 **210.** Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA.
9 5 U.S.C. § 552(a)(4)(E).

10
11 **COUNT VI**
12 **VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT**

13 **211.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
14 herein.

15 **212.** Defendant DOC has failed to act in an official capacity under color of legal authority by failing
16 to comply with the mandates of FOIA consequent to its failure and refusal to: (1) provide to Plaintiff
17 documents responsive to his information requests and appeals that are not within the scope of any of
18 FOIA's disclosure exemptions; (2) issue a timely final determination of Plaintiff's administrative re-
19 quests and appeals; (3) provide Plaintiff with the estimated completion dates of those requests and ap-
20 peals, and; (4) undertake a search reasonably calculated to locate records responsive to certain of Plain-
21 tiff's FOIA requests and appeals.

22 **213.** Defendant DOC has unlawfully withheld agency action by failing to comply with the mandates
23 of FOIA consequent to its failure and refusal to: (1) provide to Plaintiff documents responsive to his in-
24 formation requests and appeals that are not within the scope of any of FOIA's disclosure exemptions; (2)
25 issue a timely final determination of Plaintiff's administrative requests and appeals; (3) provide Plaintiff
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1 with the estimated completion dates of those requests and appeals, and; (4) undertake a search reasona-
2 bly calculated to locate records responsive to certain of Plaintiff's FOIA requests and appeals.

3 **214.** Plaintiff has been adversely affected and aggrieved by the Defendant DOC's failure to comply
4 with the mandates of FOIA. Defendant's failure and refusal to: (1) provide to Plaintiff documents re-
5 sponsive to his information requests and appeals that are not within the scope of any of FOIA's disclo-
6 sure exemptions; (2) issue a timely final determination of Plaintiff's administrative requests and appeals;
7 (3) provide Plaintiff with the estimated completion dates of those requests and appeals, and; (4) under-
8 take a search reasonably calculated to locate records responsive to certain of Plaintiff's FOIA requests
9 and appeals as alleged above to have injured Plaintiff's interests in public oversight of governmental op-
10 erations and constitute a violation of Defendant DOC's statutory duties under the APA.

11
12 **215.** Plaintiff has suffered a legal wrong as a result of the Defendant DOC' failure to comply with the
13 mandates of FOIA. Defendant DOC's failure and refusal to: (1) provide to Plaintiff documents respon-
14 sive to his information requests and appeals that are not within the scope of any of FOIA's disclosure
15 exemption; (2) issue a timely final determination on Plaintiff's administrative requests and appeals; (3)
16 provide Plaintiff with the estimated completion dates of those requests and appeals, and; (4) undertake a
17 search reasonably calculated to locate records responsive to certain of Plaintiff's FOIA requests and ap-
18 peals as alleged above to have injured Plaintiff's interests in public oversight of governmental operations
19 and constitute a violation of Defendant DOC's statutory duties under the APA.

20
21 **216.** Defendant DOC's failure and refusal to: provide to Plaintiff documents responsive to his infor-
22 mation requests and appeals that are not within the scope of any of FOIA's disclosure exemptions, and;
23 (2) issue a timely final determination on Plaintiff's administrative requests and appeals; (3) provide
24 Plaintiff with the estimated completion dates of those requests and appeals, and; (4) undertake a search
25 reasonably calculated to locate records responsive to certain of Plaintiff's FOIA requests and appeals as
26 alleged above, constitutes agency action unlawfully withheld and unreasonably delayed and is therefore
27
28

1 actionable pursuant to the APA, 5 U.S.C. § 706(1).

2 **217.** Alternatively, Defendant DOC's failure and refusal to: (1) provide to Plaintiff documents re-
3 sponsive to its information requests and appeals that are not within the scope of any of FOIA's disclo-
4 sure exemptions, and; (2) issue a timely final determination on Plaintiff's administrative requests and
5 appeals; (3) provide Plaintiff with the estimated completion dates of those requests and appeals, and; (4)
6 undertake a search reasonably calculated to locate records responsive to certain of Plaintiff's FOIA re-
7 quests and appeals as alleged above, is in violation of FOIA's statutory mandates and is therefore arbi-
8 trary, capricious, or an abuse of discretion and not in accordance with law and is therefore actionable
9 pursuant to the APA, 5 U.S.C. § 706(2).

10 **218.** Plaintiff has no adequate remedy at law to redress the violations noted above.

11 **219.** Plaintiff is entitled to judicial review under the Administrative Procedure Act 5 U.S.C. §§ 702,
12 706.

13 **220.** Plaintiff is entitled to costs of disbursements and costs of litigation, including reasonable attorney
14 and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C.S. § 2412.

15
16
17 **REQUEST FOR RELIEF**

18 WHEREFORE, Plaintiff prays that this Court:

19 **1.** Order Defendant to promptly provide Plaintiff all of the information sought in this ac-
20 tion and to immediately disclose the requested documents.

21 **2.** Declare Defendant's failure to disclose the documents requested by Plaintiff to be un-
22 lawful under the FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), as well as agency action unlawfully withheld and
23 unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in
24 accordance with law, 5 U.S.C. § 706(2).

25 **3.** Declare Defendant's failure to timely make a determination on Plaintiff's information
26 requests and appeals to be unlawful under the FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i) and (ii), as well as
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1 agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capri-
2 cious, an abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(2).

3 4. Declare Defendant’s failure to provide Plaintiff with the estimated completion dates of
4 his requests and appeals, to be unlawful under the FOIA, 5 U.S.C. § 552(a)(7)(B)(i), as well as agency
5 action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an
6 abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(2);

7 8. 5. Declare Defendant’s failure to undertake a search reasonably calculated to locate records
9 responsive to certain of Plaintiff’s FOIA requests and appeals as alleged above to be unlawful under the
10 FOIA, 5 U.S.C. § 552(a)(6)(A)(i), as well as agency action unlawfully withheld and unreasonably de-
11 layed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in accordance with
12 law, 5 U.S.C. § 706(2);

13 6. Award Plaintiff his costs and reasonable attorney fees pursuant to 5 U.S.C. §
14 552(a)(4)(E) and 28 U.S.C. § 2412.

15 7. Grant such other and further relief as the Court may deem just and proper.

16 Respectfully submitted for the Court’s consideration, this 30th day of July, 2015.

17
18 s/ David Bahr
19 David Bahr (Oregon Bar No. 901990)
20 Bahr Law Offices, P.C.
21 1035 ½ Monroe Street
22 Eugene, OR 97402
23 (541) 556-6439
24 davebahr@mindspring.com
25 (Application for admission *pro hac vice* pending)

17 s/ Rachel S. Doughty
18 Rachel S. Doughty (California Bar. No. 255904)
19 Greenfire Law
20 1202 Oregon Street
21 Berkeley, CA 94702
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14 *Plaintiff's Counsel*

15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN FRANCISCO DIVISION**

18 **ALAN STEIN,**
19 Plaintiff,
20 vs.

21 **UNITED STATES DEPARTMENT OF COM-**
22 **MERCE,**
23 Defendant.

Case No. 3:15-cv-3510

CERTIFICATION OF NO INTERESTED ENTITIES OR PERSONS

24 Pursuant to Civil L.R. 3-15, the undersigned certifies that as of this date, other than the named
25 parties, there is no such interest to report.
26
27
28

1 Respectfully submitted for the Court's consideration, this 30th day of July, 2015.
2

3 s/ Rachel S. Doughty
4 Rachel S. Doughty (California Bar. No. 255904)
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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Alan Stein

(b) County of Residence of First Listed Plaintiff Mendocino
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Rachel S. Doughty, 1202 Oregon Street, Berkeley, CA 94702, ph. # (828) 424-2005

DEFENDANTS

The United States Department of Commerce.

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

2 U.S. Government Defendant

3 Federal Question (U.S. Government Not a Party)

4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff, and One Box for Defendant)

| | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

| CONTRACT | TORTS | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES | |
|---|---|--|---|---|---|
| <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise | PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input checked="" type="checkbox"/> 362 Personal Injury - Medical Malpractice | PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions | <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 | <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat-TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes |

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
The Freedom of Information Act, 5 U.S.C. § 552; The Administrative Procedure Act, 5 U.S.C. § 701.

Brief description of cause:
Failure to respond to information request submitted in manner required by FOIA and APA

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: 07/01/2015 SIGNATURE OF ATTORNEY OF RECORD: s/Rachel S. Doughty

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)
 (Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA

Rec'd in LEO on
FOIA Summons
1/13
1-31-17

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Citizens for Responsibility and Ethics in Washing

Plaintiff

v.

Department of Commerce

Defendant

Civil Action No. 17-cv-00135

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

Department of Commerce
1401 Constitution Ave., N.W.
Washington, D.C. 20230

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Adam J. Rappaport
Citizens for Responsibility and Ethics in Washington
455 Massachusetts Ave., N.W., Sixth Floor
Washington, D.C. 20001

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: 01/25/2017

Jacqueline M. Francis

Signature of Clerk or Deputy Clerk

Digitally signed by Jacqueline M. Francis
DN: cn=Jacqueline M. Francis, o=United States District Court for
the District of Columbia, ou,
email=jacqueline_m_francois@d.uscourts.gov, c=US
Date: 2017.01.25 08:48:11 -0500

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|------------------|
| CITIZENS FOR RESPONSIBILITY AND |) | |
| ETHICS IN WASHINGTON |) | |
| 455 Massachusetts Ave., N.W., Sixth Floor |) | |
| Washington, D.C. 20001 |) | |
| |) | Civil Action No. |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| U.S. DEPARTMENT OF COMMERCE |) | |
| 1401 Constitution Avenue, N.W. |) | |
| Washington, D.C. 20230, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, for injunctive, declaratory, and other appropriate relief. Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) challenges the failure of the National Oceanic and Atmospheric Administration (“NOAA”), a component agency of the U.S. Department of Commerce (“DOC”) to disclose to CREW records related to questionnaires submitted to NOAA by representatives of President-elect Donald Trump’s transition team.

2. This case seeks declaratory relief that DOC is in violation of the FOIA, 5. U.S.C. § 552(a)(6)(E)(i), by failing to provide CREW with all responsive records, and injunctive relief ordering the defendant DOC and its component agency NOAA to process and release to CREW immediately the requested records in their entirety.

Jurisdiction and Venue

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331, and 28 U.S.C. §§ 2201(a) and 2202. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

4. Plaintiff CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the tax code. CREW is committed to protecting the rights of citizens to be informed about the activities of government officials and agencies, and to ensuring the integrity of government officials and agencies. CREW seeks to empower citizens to have an influential voice in government decisions and in the governmental decision-making process through the dissemination of information about public officials and their actions. To advance its mission, CREW uses a combination of research, litigation, and advocacy. As part of its research, CREW uses government records made available to it under the FOIA.

5. Defendant DOC is an agency within the meaning of 5 U.S.C. § 552(f) and 5 U.S.C. § 701. NOAA is a component agency within DOC. DOC is the federal agency with possession and control of the requested records and is responsible for fulfilling plaintiff's FOIA requests.

FACTUAL BACKGROUND

6. In early December 2016, news outlets reported that President-elect Donald J. Trump's transition team had sent an extensive questionnaire to the Department of Energy that included a request for the names of all agency employees or contractors who have attended conferences related to climate change policy as well as e-mails and documents associated with

the conferences. Coral Davenport, Climate Change Conversations are Targeted in Questionnaire, *New York Times*, Dec. 9, 2016, available at <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html>.

7. The questionnaire raised concerns about potential retaliation against Department of Energy staff by the incoming administration. Brakkton Booker, Trump Questionnaire Raises Concerns About Retaliation Against Energy Department Staff, *NPR*, Dec. 10, 2016, available at <http://www.npr.org/sections/thetwo-way/2016/12/10/505105258/trump-questionnaire-raises-concerns-about-retaliation-against-energy-department>. The Department of Energy declined to provide individual names to transition team while acknowledging that some of the questions “left many in our workforce unsettled.” Joe Davidson, Energy Dept. Rejects Trump’s Request to Name Climate-Change Workers, Who Remain Worried, *Washington Post*, Dec. 13, 2016, available at https://www.washingtonpost.com/news/powerpost/wp/2016/12/13/energy-dept-rejects-trumps-request-to-name-climate-change-workers-who-remain-worried/?utm_term=.9f1b05b29d6f.

8. It is unknown if President-elect Trump’s transition team sent similar questionnaires to other departments and agencies, including NOAA, seeking the names of employees or contractors worked on climate change policy and/or documents and correspondence related to climate change.

Plaintiff’s FOIA Request and Request for Expedited Processing

9. By letter dated on December 16, 2016 and delivered by the FOIAonline system, plaintiff requested under the FOIA copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump’s transition team, including representatives of

Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

10. On that same day, NOAA acknowledged receiving the request.

11. By form letter dated January 4, 2017, NOAA granted CREW's request for a fee waiver.

12. To date, NOAA has not otherwise responded to CREW request.

13. NOAA has not provided CREW with a determination on its request, including an identification of what documents the agency plans to release, what documents the agency plans to withhold, and why – the determination the FOIA requires agencies to make of non-expedited requests with 20 business days of receiving a FOIA request.

14. Because NOAA has failed to make a determination under the FOIA on CREW's request, CREW has now exhausted all applicable administrative remedies.

PLAINTIFF'S CLAIMS FOR RELIEF

CLAIM ONE

(Wrongful Withholding Of Non-Exempt Records)

15. Plaintiff repeats and re-alleges paragraphs 1-15.

16. Plaintiff properly asked for records within the custody and control of DOC and its component agency NOAA.

17. Defendant DOC and its component agency NOAA wrongfully withheld agency records requested by plaintiff by failing to comply with the statutory time limit for making a determination on non-expedited FOIA requests, and by withholding from disclosure records responsive to plaintiff's FOIA request.

18. Therefore, by failing to release the records as plaintiff specifically requested, defendant violated the FOIA.

19. Plaintiff is therefore entitled to injunctive and declaratory relief with respect to the expedited processing and disclosure of the requested records.

Requested Relief

WHEREFORE, plaintiff respectfully requests that this Court:

- (1) Order defendant DOC and its component agency NOAA to complete the processing of plaintiff's December 16, 2016 FOIA request and disclose all non-exempt documents immediately to plaintiff;
- (2) Issue a declaration that plaintiff is entitled to expedited processing and disclosure of the requested records;
- (3) Provide for expeditious proceedings in this action;
- (4) Retain jurisdiction of this action to ensure no agency records are wrongfully withheld;
- (5) Award plaintiff its cost and reasonable attorneys' fees in this action; and
- (6) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,



Adam J. Rappaport
arappaport@citizensforethics.org
(D.C. Bar No. 479866)

Stuart C. McPhail
smcphail@citizensforethics.org
(D.C. Bar No. 1032529)

Citizens for Responsibility and Ethics
in Washington

455 Massachusetts Ave. N.W., Sixth Floor
Washington, D.C. 20001

Phone: (202) 408-5565

Facsimile: (202) 588-5020

January 20, 2017

Attorneys for Plaintiff

CIVIL COVER SHEET

JS-44 (Rev. 7/16 DC)

| <p>I. (a) PLAINTIFFS Citizens for Responsibility and Ethics in Washington</p> <p>(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>11001</u> (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Adam J. Rappaport, Stuart C. McPhail Citizens for Responsibility and Ethics in Washington 455 Massachusetts Ave., N.W., Washington, D.C. 20001 202-408-5565</p> | <p>DEFENDANTS Department of Commerce</p> <p>COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT <u>11001</u> (IN U.S. PLAINTIFF CASES ONLY) <small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small></p> <p>ATTORNEYS (IF KNOWN)</p> | | | | | | | | | | | | | | | | | | | | | | | | |
|---|--|-------------------------|---|-------------------------|-------------------------|-----|-----|-----------------------|-------------------------|-------------------------|---|-------------------------|-------------------------|--------------------------|-------------------------|-------------------------|---|-------------------------|-------------------------|---|-------------------------|-------------------------|----------------|-------------------------|-------------------------|
| <p>II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)</p> <p><input type="radio"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="radio"/> 2 U.S. Government Defendant</p> <p><input type="radio"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)</p> | <p>III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) FOR DIVERSITY CASES ONLY!</p> <table style="width:100%; border-collapse: collapse;"> <thead> <tr> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table> | | PTF | DFT | | PTF | DFT | Citizen of this State | <input type="radio"/> 1 | <input type="radio"/> 1 | Incorporated or Principal Place of Business in This State | <input type="radio"/> 4 | <input type="radio"/> 4 | Citizen of Another State | <input type="radio"/> 2 | <input type="radio"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="radio"/> 5 | <input type="radio"/> 5 | Citizen or Subject of a Foreign Country | <input type="radio"/> 3 | <input type="radio"/> 3 | Foreign Nation | <input type="radio"/> 6 | <input type="radio"/> 6 |
| | PTF | DFT | | PTF | DFT | | | | | | | | | | | | | | | | | | | | |
| Citizen of this State | <input type="radio"/> 1 | <input type="radio"/> 1 | Incorporated or Principal Place of Business in This State | <input type="radio"/> 4 | <input type="radio"/> 4 | | | | | | | | | | | | | | | | | | | | |
| Citizen of Another State | <input type="radio"/> 2 | <input type="radio"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="radio"/> 5 | <input type="radio"/> 5 | | | | | | | | | | | | | | | | | | | | |
| Citizen or Subject of a Foreign Country | <input type="radio"/> 3 | <input type="radio"/> 3 | Foreign Nation | <input type="radio"/> 6 | <input type="radio"/> 6 | | | | | | | | | | | | | | | | | | | | |

IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

| | | | |
|--|---|---|---|
| <p><input type="radio"/> A. Antitrust</p> <p><input type="checkbox"/> 410 Antitrust</p> | <p><input type="radio"/> B. Personal Injury/Malpractice</p> <p><input type="checkbox"/> 310 Airplane</p> <p><input type="checkbox"/> 315 Airplane Product Liability</p> <p><input type="checkbox"/> 320 Assault, Libel & Slander</p> <p><input type="checkbox"/> 330 Federal Employers Liability</p> <p><input type="checkbox"/> 340 Marine</p> <p><input type="checkbox"/> 345 Marine Product Liability</p> <p><input type="checkbox"/> 350 Motor Vehicle</p> <p><input type="checkbox"/> 355 Motor Vehicle Product Liability</p> <p><input type="checkbox"/> 360 Other Personal Injury</p> <p><input type="checkbox"/> 362 Medical Malpractice</p> <p><input type="checkbox"/> 365 Product Liability</p> <p><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability</p> <p><input type="checkbox"/> 368 Asbestos Product Liability</p> | <p><input type="radio"/> C. Administrative Agency Review</p> <p><input type="checkbox"/> 151 Medicare Act</p> <p><u>Social Security</u></p> <p><input type="checkbox"/> 861 HIA (1395ff)</p> <p><input type="checkbox"/> 862 Black Lung (923)</p> <p><input type="checkbox"/> 863 DIWC/DIWW (405(g))</p> <p><input type="checkbox"/> 864 SSID Title XVI</p> <p><input type="checkbox"/> 865 RSI (405(g))</p> <p><u>Other Statutes</u></p> <p><input type="checkbox"/> 891 Agricultural Acts</p> <p><input type="checkbox"/> 893 Environmental Matters</p> <p><input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)</p> | <p><input type="radio"/> D. Temporary Restraining Order/Preliminary Injunction</p> <p>Any nature of suit from any category may be selected for this category of case assignment.</p> <p>*(If Antitrust, then A governs)*</p> |
|--|---|---|---|

| | | | |
|---|---|--|--|
| <p><input type="radio"/> E. General Civil (Other)</p> <p><u>Real Property</u></p> <p><input type="checkbox"/> 210 Land Condemnation</p> <p><input type="checkbox"/> 220 Foreclosure</p> <p><input type="checkbox"/> 230 Rent, Lease & Ejectment</p> <p><input type="checkbox"/> 240 Torts to Land</p> <p><input type="checkbox"/> 245 Tort Product Liability</p> <p><input type="checkbox"/> 290 All Other Real Property</p> <p><u>Personal Property</u></p> <p><input type="checkbox"/> 370 Other Fraud</p> <p><input type="checkbox"/> 371 Truth in Lending</p> <p><input type="checkbox"/> 380 Other Personal Property Damage</p> <p><input type="checkbox"/> 385 Property Damage Product Liability</p> | <p style="text-align: center;">OR</p> <p><input type="radio"/> F. Pro Se General Civil</p> <p><u>Bankruptcy</u></p> <p><input type="checkbox"/> 422 Appeal 27 USC 158</p> <p><input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p><u>Prisoner Petitions</u></p> <p><input type="checkbox"/> 535 Death Penalty</p> <p><input type="checkbox"/> 540 Mandamus & Other</p> <p><input type="checkbox"/> 550 Civil Rights</p> <p><input type="checkbox"/> 555 Prison Conditions</p> <p><input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement</p> <p><u>Property Rights</u></p> <p><input type="checkbox"/> 820 Copyrights</p> <p><input type="checkbox"/> 830 Patent</p> <p><input type="checkbox"/> 840 Trademark</p> <p><u>Federal Tax Suits</u></p> <p><input type="checkbox"/> 870 Taxes (US plaintiff or defendant)</p> <p><input type="checkbox"/> 871 IRS-Third Party 26 USC 7609</p> | <p><u>Forfeiture/Penalty</u></p> <p><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881</p> <p><input type="checkbox"/> 690 Other</p> <p><u>Other Statutes</u></p> <p><input type="checkbox"/> 375 False Claims Act</p> <p><input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))</p> <p><input type="checkbox"/> 400 State Reapportionment</p> <p><input type="checkbox"/> 430 Banks & Banking</p> <p><input type="checkbox"/> 450 Commerce/ICC Rates/etc.</p> <p><input type="checkbox"/> 460 Deportation</p> <p><input type="checkbox"/> 462 Naturalization Application</p> <p><input type="checkbox"/> 465 Other Immigration Actions</p> | <p><input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization</p> <p><input type="checkbox"/> 480 Consumer Credit</p> <p><input type="checkbox"/> 490 Cable/Satellite TV</p> <p><input type="checkbox"/> 850 Securities/Commodities/Exchange</p> <p><input type="checkbox"/> 896 Arbitration</p> <p><input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision</p> <p><input type="checkbox"/> 950 Constitutionality of State Statutes</p> <p><input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)</p> |
|---|---|--|--|

| | | | |
|--|--|---|--|
| <input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee | <input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)* | <input checked="" type="radio"/> I. FOIA/Privacy Act <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)* | <input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans) |
| <input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act | <input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education | <input type="radio"/> M. Contract <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise | <input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act) |

V. ORIGIN
 1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multi-district Litigation
 7 Appeal to District Judge from Mag. Judge
 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 5 U.S.C. Section 552 - DOC has failed to produce records in response to plaintiff's FOIA request.

| | | | |
|-------------------------------------|--|---|--|
| VII. REQUESTED IN COMPLAINT | CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/> | DEMAND \$ _____ | JURY DEMAND: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> |
| VIII. RELATED CASE(S) IF ANY | (See instruction) | YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> | If yes, please complete related case form |

| | |
|-----------------|---------------------------------|
| DATE: 1/20/2017 | SIGNATURE OF ATTORNEY OF RECORD |
|-----------------|---------------------------------|

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case
- VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT
for the
District of Colorado

FRIENDS OF ANIMALS, a New York non-profit corporation, and
SEA SHEPHERD LEGAL, a Washington non-profit corporation
Plaintiff(s)
v.

Civil Action No. 16-3007

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, an agency of the United States
Defendant(s)

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

Bob Troyer
United States Attorney
1225 17th Street
Suit 700
Denver, CO 80202

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Michael Harris
Wildlife Law Program
Friends of Animals
7500 E. Arapahoe Road, Suite 385
Centennial, CO 80112

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 16-3007

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
FRIENDS OF ANIMALS, a New York non-profit corporation, and SEA SHEPHERD LEGAL, a Washington non-profit corporation
(b) County of Residence of First Listed Plaintiff Arapahoe County
(c) Attorneys (Firm Name, Address, and Telephone Number)
Michael Harris
Friends of Animals, Wildlife Law Program
7500 E. Arapahoe Rd., Suite 385, Centennial, CO 80112; Tel: (720) 949-7791

DEFENDANTS
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, an agency of the United States
County of Residence of First Listed Defendant District of Columbia
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT
PERSONAL INJURY
REAL PROPERTY
TORTS
PRISONER PETITIONS
FORFEITURE/PENALTY
LABOR
IMMIGRATION
BANKRUPTCY
SOCIAL SECURITY
TAX SUITS
OTHER STATUTES

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
5 U.S.C 552- Failure to respond to request under the Freedom of Information Act
Brief description of cause: AP Docket

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMANDS
CHECK YES only if demanded in complaint.
JURY DEMAND: Yes No

DATE: 12/08/2016
SIGNATURE OF ATTORNEY OF RECORD: /s/ Michael Ray Harris

FOR OFFICE USE ONLY
RECEIPT #
AMOUNT
APPLYING IFP
JUDGE
MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows.

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment noting, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.**

Example:

U.S. Civil Statute: 47 USC 553

Brief Description:

Unauthorized reception of cable service

Or:

"AP Docket"

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

Date and Attorney Signature. Date and sign the civil cover sheet.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

FRIENDS OF ANIMALS, and
SEA SHEPHERD LEGAL;

Plaintiffs,

v.

NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
an agency of the United States,

Defendant.

Civ. No. 16-3007

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF
(FREEDOM OF INFORMATION ACT)**

INTRODUCTION

1. This action is brought to remedy violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et. seq.* Specifically, it challenges the failure of the National Oceanic and Atmospheric Administration (“Federal Defendant”) to provide a final determination, including all responsive documents, within the time required by FOIA in regard to Plaintiffs Friends of Animals’ and Sea Shepherd Legal’s (“Plaintiffs”) April 14, 2016 request for information (“Request”).

2. In the Request, Plaintiffs asked for all documents in Federal Defendant’s possession related to pending or final approvals under the Marine Mammal Protection Act, National Environmental Policy Act and the Endangered Species Act for anthropogenic activities affecting the Cook Inlet beluga whale. Plaintiffs also sought all documents related to biological analyses and threats to the Cook Inlet beluga whale. *See* Exhibit A.

3. As of the date on this Complaint, Federal Defendant has not made a final determination regarding the release of documents, nor has Federal Defendant provided a timeline or other plan for compliance with the requirements of FOIA to indicate when or whether the Request will be fully satisfied.

4. Federal Defendant is unlawfully withholding public disclosure of information that Plaintiffs are entitled to receive under FOIA. By failing to make either a timely determination or timely and complete releases after the initial tranche of documents, Federal Defendant failed to comply with the statutory mandates and deadlines imposed by FOIA.

5. Accordingly, Plaintiffs seek declaratory relief establishing that Federal Defendant has violated FOIA. Plaintiffs also seek injunctive relief directing Federal Defendant to make a determination on the Request, provide a timeline for the release of the remaining documents, and promptly provide the requested material free of cost.

6. Plaintiffs bring this lawsuit to obtain timely disclosure of critical information related to authorized takes, and to pending authorizations of requested takes, of hundreds of Cook Inlet beluga whales from multiple and geographically overlapping oil and gas projects in the Cook Inlet. Given the significant potential impact upon the rapidly diminishing population of Cook Inlet beluga whales and the strong public interest in disclosure of information that may directly assist Plaintiffs' ongoing efforts to protect this population, Plaintiffs seek expeditious treatment of their Complaint pursuant to 28 U.S.C. § 1657.

JURISDICTION AND VENUE

7. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question). This Court may grant the declaratory relief under 28 U.S.C. §§ 2201, *et seq.* (Declaratory Judgment Act) and injunctive relief under 5 U.S.C. § 552(a)(4)(B) (FOIA). An actual, justiciable controversy exists within the meaning of the Declaratory Judgment Act between Plaintiffs and Federal Defendant. The Court has jurisdiction, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

8. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district as the district in which a plaintiff resides. Friends of Animals maintains a principle office here in Colorado. Venue is also proper under 28 U.S.C. § 1391(b) because the defendant is subject to personal jurisdiction in this federal district.

PARTIES

9. Friends of Animals is a nonprofit international advocacy organization with nearly 200,000 members, incorporated in the state of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues as well as the organization's progress in addressing these issues through its magazine called *ActionLine*, its website, and other reports. Friends of Animals has published articles and information advocating for the protection of wild species so that they can live unfettered in their natural habitats.

10. In 2013, Friends of Animals created a federal wildlife law program. The program established its principle office in Centennial, Colorado. The office consists of four full-time employees and one part-time employee. Through this office, Friends of Animals submitted the Request at issue in this action.

11. Sea Shepherd Legal is a nonprofit public interest law organization dedicated to its mission to end the destruction of habitat and slaughter of wildlife in the world's oceans in order to conserve and protect ecosystems and species. In furtherance of that mission, Sea Shepherd Legal has been involved in protecting marine life throughout the world. Sea Shepherd Legal uses public outreach and education to advocate for and motivate the creation of greater protections for cetaceans and other marine life.

12. The interests of Plaintiffs and their members are harmed by Federal Defendant's failure to release the requested documents in a timely manner, which prevents Plaintiffs

from obtaining, analyzing, disseminating and using the requested information to advance Plaintiffs' missions of ensuring the protection of marine wildlife and, in particular here, the Cook Inlet beluga whale.

13. Federal Defendant is an agency within the meaning of 5 U.S.C. § 552(f)(1). Federal Defendant is responsible for fulfilling Plaintiffs' Request and complying with all federal laws.

STATUTORY BACKGROUND

14. Congress enacted FOIA to ensure public access to U.S. government records. FOIA carries a presumption of disclosure. *Dep't of State v Ray*, 502 U.S. 164 (1991). Upon receipt of a written request that "reasonably describes" the records sought and complies with "published rules . . . and procedures to be followed," agencies of the United States government are required to "promptly" disclose their records, unless they can be lawfully withheld from disclosure under one of nine specific exemptions in FOIA. 5 U.S.C. § 552(a)(3)(A). The burden is on the government—not the requestor or public—to justify why particular information may be withheld. *Ray*, 502 U.S. at 164.

15. FOIA requires agencies to "determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination." *Id.* at § 552(a)(6)(A)(i).

16. On determination by an agency to comply with the request, the records shall be made "promptly available." *Id.* at § 552(a)(6)(C).

17. In "unusual circumstances," an agency may extend the time limits for up to 10 working days by providing written notice to the requester setting forth the unusual circumstance(s) and the date on which the determination is expected to be dispatched. *Id.* at § 552(a)(6)(B).

18. In some limited circumstances, FOIA allows an agency to seek an extension potentially beyond 10 days. Specifically, FOIA requires an agency to provide written notification to the requester: (1) offering an opportunity to limit the scope of the request so that it may be processed within the 20 work-day limit, or (2) offering an opportunity to arrange with the agency an “alternative time frame” for processing the request. *Id.* at § 552(a)(6)(B)(ii). If the agency elects this option, it must make its FOIA Public Liaison available to the requester to assist in any disputes with the agency. *Id.*

19. If the agency fails to make a determination on a document request within 20 work-days, or within the limited additional time permitted upon proper notification of “unusual circumstances,” the requester is deemed to have constructively exhausted administrative remedies and may seek judicial review. *Id.* at § 552(a)(6)(C). *Oglesby v. Dep’t of Army*, 920 F.2d 57(D.C. Cir 1990), *Nurse v. Sec’y of the Air Force*, 231 F. Supp. 2d 323, 328 (D.D.C. 2002) (“The FOIA is considered a unique statute because it recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines.”)

20. FOIA requires that the agency “shall make the records promptly available to any person” and may not defer release of responsive documents indefinitely. *Id.* at § 552(a)(3)(A). Failure to issue a determination and to complete the release of documents in a timely fashion is a violation of FOIA even if the initial response and releases may have been prompt. *Munger, Tolles, Olsen v. Dept. of Army*, 58 F. Supp. 3d 1050 (C.D. Cal 2014). *See also Fiduccia v. U.S. Dep’t of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999)(“Congress gave agencies 20 days, not years, to decide whether to comply with requests and notify the requesters”); *Long v. IRS*, 693 F.2d 907, 910 (9th Cir. 1982) (“[U]nreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses.”).

FACTUAL BACKGROUND

21. On April 12, 2016, Plaintiffs submitted the Request under FOIA to Federal Defendant reasonably describing all documents of which Plaintiffs sought disclosure.

22. On April 21, 2016, Federal Defendant provided written notification confirming receipt of the Request and disclosing that the Request had been assigned for processing on April 14, 2016.

23. In the confirmation, Federal Defendant did not request any additional information needed to clarify the Request. Federal Defendant did request a Scope Conference with Friends of Animals.

24. On April 29, 2016, Federal Defendant and Friends of Animals conducted the Scope Conference. During this conference, Federal Defendant did not request any additional information needed to clarify the Request but asked Plaintiffs to prioritize the individual document categories identified in the Request. Friends of Animals instructed Federal Defendant to proceed with the original FOIA request, but agreed to send a letter outlining the priorities of the original FOIA request.

25. On May 10, 2016, Friends of Animals submitted a letter to Federal Defendant outlining the top priorities of the original FOIA request. In that letter, Friends of Animals stated as follows: "As discussed on the April 29, 2016 conference call, Friends of Animals has not changed or altered the original request, nor are we waiving under [sic] rights under FOIA. We provide the following priorities merely to assist the agency in processing our request."

26. On May 16, 2016, Federal Defendant confirmed receipt of Friends of Animals' May 10 letter outlining the top priorities of the original FOIA request and indicated the need for a 10-day extension due to "unusual circumstances." Federal Defendant further stated that the first interim release of records could be anticipated on May 25, 2016.

27. The 20 work-day time limit for providing a determination on the Request commenced on April 14 and, thus, expired on May 12, 2016.

28. Federal Defendant made two interim releases of documents. The first release was dated June 9, 2016. The second was dated July 26, 2016 (but not received until August 29, 2016).

29. Since August 29, 2016, no further documents have been released.

30. Since August 29, 2016, Federal Defendant has not provided any timeline for the release of any remaining documents.

31. As of the date of this complaint, Plaintiffs have not received a final determination on their Request.

32. Plaintiffs believe and allege that Federal Defendant is unlawfully withholding public disclosure of information sought by Plaintiffs, information to which they are entitled to receive promptly, and for which Federal Defendant has not provided a valid disclosure exemption.

33. Federal Defendant has offered no reasonable explanation for its delay, and it has failed to estimate when it will finally be able to comply with its obligations under FOIA.

34. Since Federal Defendant has neither produced responsive documents nor provided an appealable final determination, Plaintiffs have constructively exhausted their administrative remedies with respect to the requested documents.

CLAIM FOR RELIEF
Violation of Freedom of Information Act
Failure to Respond with a Determination

35. Plaintiffs herein incorporate all allegations contained in the proceeding paragraphs.

36. FOIA provides that any person may obtain those agency records that are not subject to the FOIA disclosure exemptions promptly. 5 U.S.C. § 552 (a)(3)(A).

37. Plaintiffs properly requested records within the control of Federal Defendant.

38. Federal Defendant failed to provide Plaintiffs with a final determination as to whether Federal Defendant has any non-exempt records responsive to the Request and whether it intended to release such records within the required timeframe. *Id.* § 552(a)(6)(A)(i) and § 552(a)(6)(B).

39. Federal Defendant failed to properly invoke and comply with FOIA's provision allowing a 10 working day extension for "unusual circumstances." *Id.* at § 552(a)(6)(B)(i).

40. Federal Defendant failed to properly invoke and comply with FOIA's provision permitting an extension of potentially greater than 10 working days by offering Plaintiffs an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *Id.* at § 552(a)(6)(B)(ii).

41. Federal Defendant has failed to promptly make available responsive documents without unreasonable delay.

42. Federal Defendant's failures to comply with FOIA are subject to judicial review under 5 U.S.C. § 552 (a)(4)(B). Federal Defendant's failure to issue a determination within the statutory deadlines violates 5 U.S.C. § 552 (a)(3)(A).

43. Accordingly, Plaintiffs are entitled to injunctive and declaratory relief with respect to a determination on the Request.

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court enter judgment providing the following relief:

1. Declare that Federal Defendant violated FOIA by failing to (1) make a determination on Plaintiffs' Request and (2) make records responsive to Plaintiffs' Request available within the statutory deadlines.
2. Order Federal Defendant to (1) provide Plaintiffs with a final determination and (2) process and release all records responsive to the Request at no cost to Plaintiffs within 10 days from the date of such order;

3. Retain jurisdiction of this action to ensure the processing of the Request, and to ensure that no agency records are wrongfully withheld;
4. Award Plaintiffs costs, including reasonable attorney fees and litigation costs in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
5. Grant Plaintiffs any other relief that the Court deems just and proper.

Dated: December 08, 2016

Respectfully Submitted,

/s/ Michael Harris
Michael Ray Harris
Director, Wildlife Law Program
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Attorney for Plaintiff Friends of Animals

/s/ Brett Sommermeyer
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Seattle, WA 98102
brett@seashepherdlegal.org

Attorney for Plaintiff Sea Shepherd Legal

EXHIBIT A

~~EXPLOITERS~~
FRIENDS
of ANIMALS

April 12, 2016

Submitted Via U.S Certified Mail and FOIAonline

National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910

Re: FOIA Request for Records Relating to Incidental Harassment Authorizations
Issued for Activities Impacting Cook Inlet Beluga Whales in Federal Waters
Administered by the National Oceanic and Atmospheric Administration

Dear FOIA Officer:

I am writing on behalf of Friends of Animals, Sea Shepherd Legal, and the Turtle Island Restoration Network (collectively, the "Requesters"). Pursuant to 43 C.F.R. Part 2, and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Requesters seek the disclosure of all documents¹ in the categories listed below regarding the harassment of the distinct population segment of Cook Inlet beluga whales in waters managed by the National Oceanic and Atmospheric Administration ("NOAA"). Unless otherwise specified, Requesters seek all documents for the time period starting January 26th, 2007 and ending April 11, 2016. Requesters also request a full waiver of all search and duplication fees.

¹ The terms "document(s)" and "records" are used in the broadest sense contemplated by Federal Rule of Civil Procedure 34. It means all written, transcribed, recorded or graphic matters, however produced or reproduced. This definition includes, but is not limited to, any and all original copies or drafts of any and all of the following: records; notes; nonconforming copies that contain deletions, insertions, corrections, handwritten notes or comment summaries; memoranda; schedules; contracts; binders; work papers; logs; diaries; work sheets; files; letters; correspondence; summaries of memoranda; reports or memoranda of telephone conversations or records of personal conversations or interviews; handwritten notes; telephone logs; facsimiles; summaries; invoices; promissory notes; contracts; loan agreements; vouchers; billing statements; tape recordings or transcripts of tape recordings; photographs; videotapes; computerized output or data bases; electronic files; computer disks; computer CDs; electronic mail transmittals; data and all other writings; calculations; and figures or symbols of any kind which, in any manner mentioned, relate to the subjects of the specific requests contained below. This request includes all documents that have ever been within your custody or control, including all inter and intra agency documents, whether they exist in agency working, investigative, retired, electronic mail, or other files currently or at any other time.

A. FOIA Request.

Over the course of several years, NOAA has issued multiple Letters of Authorization (“LoA”) and Incidental Harassment Authorizations (“IHA”) for Level B takes of Cook Inlet beluga whales under the Marine Mammal Protection Act (“MMPA”) incidental to anthropogenic activities in Cook Inlet. Under the MMPA, Level B takes have “the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, feeding, or sheltering.” 16 U.S.C. § 1362(18).

Please provide the following documents in your possession, whether received, created, and/or distributed by NOAA:

- (1) All documents regarding the status of any pending anthropogenic activities in the Cook Inlet area for which IHAs or LoAs have been requested for takes of Cook Inlet belugas;
- (2) All documents regarding the final IHAs or LoAs issued for anthropogenic activities in Cook Inlet, including all documents supporting a “negligible” impact finding pursuant to the MMPA;
- (3) All documents, including research or commentary, not currently available to the public concerning the specific effects of anthropogenic noise or cumulative effects of Level B takes on the Cook Inlet beluga population;
- (4) All documents regarding the cumulative or synergistic effects of Level B takes of Cook Inlet beluga whales resulting from anthropogenic development activities over the past ten years (2007-2016);
- (5) All documents regarding Level A² takes of Cook Inlet belugas resulting from anthropogenic activities;
- (6) All documents regarding the status of NOAA’s preparation of the programmatic EA and EIS analyzing takes of marine mammals of Cook Inlet incidental to anthropogenic activities and all records of anticipated new agency actions or research pertaining to Cook Inlet belugas;
- (7) All documents regarding the preparation of the final recovery plan for Cook Inlet belugas under the federal Endangered Species Act (“ESA”);
- (8) All documents regarding any limiting factors analysis completed or in progress for Cook Inlet belugas;
- (9) All documents regarding any prioritization of threats to Cook Inlet belugas;
- (10) All documents of any accounting(s) of anthropogenic activities in the Cook Inlet that may result in the taking of a beluga whale;

² As defined as having “the potential to injure a marine mammal or marine mammal stock in the wild.” 16 U.S.C. § 1362(18)(A)(i).

- (11) All documents regarding any population monitoring for Cook Inlet belugas planned or in progress for 2016;
- (12) All documents regarding any population monitoring for Cook Inlet belugas conducted within the last three years, including any population surveys (or similar activities) in proposed project areas conducted by the applicant(s) for an IHA or LoA;
- (13) All documents regarding any formal or informal consultations involving Cook Inlet belugas under Section 7 of the ESA.

The items specifically requested are not meant to be exclusive of any other documents that, although not specially requested, have a reasonable relationship to the subject matter of this request.

For purposes of this request, "anthropogenic activities" are defined to encompass any activity wholly or substantially relating to vessel or aircraft noise (if vessel or aircraft movements are products of an anthropogenic project), ship traffic, including strikes, dredging, pile driving, explosions, demolition, sonar use, oil and gas exploration (including seismic operations, drilling, platform noise, airguns, multibeam echosounders, and sub-bottom profilers), shore construction, military testing activities (i.e. explosions, sonar), pipe and cable laying, water pollution and any other activities reasonably affiliated with anthropogenic projects.

The Supreme Court has stated that FOIA establishes a "strong presumption in favor of disclosure" of requested information, and that the burden is on the government to substantiate why information may not be released under the act's various exemptions. *Department of State v. Ray*, 502 U.S. 164, 173 (1991). Congress affirmed these tenets of FOIA in the Open Government Act of 2007, finding that "the Government [should] remain open and accessible to the American people" and always be based "not upon the need to know but upon the fundamental right to know." Public Law 110-175, 121 Stat. 2524, 2525 (Dec. 31, 2007) (internal citations omitted). President Obama has also directed that "[t]he presumption of disclosure should be applied to all decisions involving FOIA." 74 Fed. Reg. 4683 (Jan. 26, 2009). Please consider the foregoing before withholding any documents that are responsive to this request.

The Requesters anticipate that you will make the requested materials available within the statutorily prescribed period. We also request that you waive any applicable fees since disclosure meets the statutory standard for a fee waiver in that it is clearly "in the public interest because it 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).

B. Fee Waiver Request.

FOIA provides that "documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) 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). The legislative history of FOIA, as well as the case law interpreting the Act, indicates that the statute's fee waiver provision is to be liberally construed favoring the public interest. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)).

This request for information qualifies for a fee waiver under this standard and, accordingly, we request that all fees be waived. This request satisfies both statutory and regulatory requirements for granting a fee waiver. Below we explain how the request and the Requesters meet each of requirements for a fee waiver delineated in NOAA's FOIA regulations (under its parent agency, the Department of Commerce) 15 CFR § 4.11(k).

1. Disclosure of the Information Requested is in the Public Interest.

(i) *"The subject of the request: whether the subject of the requested records concerns the operations or activities of the Government."*

The requested records concern the operations and activities of NOAA, a federal agency. Specifically, they concern the operation of this federal agency, its management of federally protected Cook Inlet beluga whales, and its permitting decision-making process.

(ii) *"The informative value of the information to be disclosed: whether the disclosure is 'likely to contribute' to an understanding of Government operations or activities."*

(a) How the contents of the records are meaningfully informative;

The requested documents would have substantive, meaningfully informative value and would be likely to contribute to a better understanding of NOAA and its actions. The documents will illuminate in a clear and direct way the operations and activities of the federal government and the activities that it undertakes in regards to management of Cook Inlet beluga whales and the anthropogenic projects that affect them. Although Cook Inlet beluga whales have been in the public spotlight in recent years due to their dwindling numbers and Endangered Species Act listing in 2008, not much is definitively known about the Level B take, cumulative, and noise pollution impacts on Cook Inlet beluga whales from anthropogenic activities. The information requested concerns the operations of the agency responsible for approving activities that have the potential to seriously injure or even kill Cook Inlet

beluga whales and the details of NOAA's past and current permitting decisions and decision-making process in regards to these whales.

- (b) The logical connection between the content of the records and the operations or activities;

The release of the requested documents will significantly contribute to public understanding and oversight of the federal government's operations. For example, the records will help the public understand the status of current Cook Inlet projects, how often and to which activities the federal government authorizes Level B takes, how the government evaluates the significance of cumulative and noise impacts, and the process by which the government makes decisions that affect Cook Inlet beluga whales.

- (iii) *"The contribution to an understanding of the subject by the public likely to result from disclosure: whether disclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester."*

Friends of Animals:

Friends of Animals is a nonprofit, international animal advocacy organization incorporated in the state of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living, and domestic animals. The public impact of this disclosed information would be magnified through Friends of Animals' public engagement mechanisms. Friends of Animals has a proven track record of contributing to public understanding of issues surrounding animal advocacy and human-wildlife interactions.

Friends of Animals informs its members about animal advocacy issues, as well as the organization's progress in addressing such issues, through its quarterly magazine called *ActionLine*, its website, and other reports. Friends of Animals has published articles and information advocating for the protection of animals so that they can live unfettered in their natural habitat. In particular, Friends of Animals has a long-standing commitment to protecting animals imperiled due to human-caused activities. Friends of Animals regularly publicizes information about wildlife. Friends of Animals employs several experts who are able to quickly digest and circulate the information obtained from this request, including attorneys and media correspondents.

Friends of Animals plans to disseminate the requested information to Friends of Animals' members, members of other conservation organizations, and other interested members of the public through its website, its quarterly magazine,

and through outreach to other media outlets. By disseminating and distributing this information, Friends of Animals will significantly contribute to the public's understanding of how the government manages harassment of Cook Inlet beluga whales. Friends of Animals also informs its members about animal advocacy issues—including government management of birds, wild horses, and other wildlife—through lawsuits.

Friends of Animals staff has the ability to review, consolidate, and disseminate this information to the public. By consolidating and releasing the information, Friends of Animals will significantly enhance the public's understanding of how the government is currently operating. Additionally, the requested information will constitute a significant contribution to public understanding because it will allow Friends of Animals and the public to determine how the federal government's actions are impacting Cook Inlet beluga whales and whether the federal government has met its obligations under the National Environmental Policy Act, the Marine Mammal Protection Act, and Endangered Species Act.

Sea Shepherd Legal

Sea Shepherd Legal is an international, nonprofit, public interest environmental law firm with a mission to save marine wildlife and habitats by enforcing, strengthening, and developing protective laws, treaties, policies, and practices worldwide. Sea Shepherd Legal works on a range of matters from ensuring proper governmental agency action to developing innovative policy approaches, in order to encourage greater protections for marine wildlife and ecosystems. Public outreach is a key aspect of Sea Shepherd Legal's work.

Sea Shepherd Legal engages in public outreach in order to raise awareness about marine conservation facts, law, resources and tools. Through outreach and education, Sea Shepherd Legal promotes public understanding regarding the importance of biodiversity conservation and how members of the public can play an essential role in protecting marine wildlife and habitats.

Sea Shepherd Legal's general public outreach work involves the bi-weekly publication of a blog, disseminating information regarding marine wildlife protection through social media, and initiating calls to action through online campaign petitions. Related Sea Shepherd entities selectively disseminate these materials to more than one million followers.

The public has a right to know which wildlife species and habitats are at risk, the nature of such risk – including anthropogenic impacts, the role the government is required to play in assessing and mitigating risks, and the government's official response thereto. Through its extensive public outreach endeavors, Sea Shepherd

Legal will ensure that the public acquires this knowledge.

Turtle Island Restoration Network

Turtle Island Restoration Network (“TIRN”) is an international public interest non-profit with a strong track record of disseminating information from FOIA requests to its own membership, decision-makers, the media and the general public. TIRN is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to imperiled species, including marine species. TIRN has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA requests. As a long established advocacy organization, our informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally. Our informational publications continue to contribute information to public media outlets, as well. TIRN routinely disseminates such information through e-mail alerts and newsletters, which are sent to over 200,000 members and activists. In addition, we disseminate information through our websites, which receives over 100,000 page views per month. Furthermore, we bring such information to our partner organizations and to the media for dissemination to the membership of other organizations and the public at large. Information and our analyses of NMFS’s compliance with the MSA, the MMPA and the ESA will likely be disseminated through all of these means.

TIRN will publicize the results of any analysis of the data to inform the public about the policy choices and information regarding the management of anthropogenic impacts to the Cook Inlet Beluga Whale. This is certain to result in a significant increase in public understanding of government agency activity, especially NOAA’s approach to the conservation of marine species. In addition to informing the public about information relevant to policy and management, TIRN has a proven track record of enforcing environmental laws and publicizing agency compliance with the provisions of various environmental laws through information gained from FOIA requests like this one. TIRN intends to use the documents requested in this request in a similar manner, as appropriate.

- (iv) *“The significance of the contribution to public understanding: whether the disclosure is likely to contribute ‘significantly’ to public understanding of Government operations or activities.”*

Requesters seek the requested documents to increase their understanding, and subsequently contribute to public understanding, of how the federal government is managing activities that affect Cook Inlet beluga whales in Alaska. Many anthropogenic projects are approved by NOAA each year, many of them

granted Level B takes of marine mammals, and the government claims that these actions have a negligible effect on marine mammals. However, the public does not have access to all of the documents available to NOAA and thus cannot understand exactly how NOAA makes its non-negligible impact determinations during agency review of project applications. Additionally, the public cannot understand the justifications used by NOAA staff, its decision-making process, or how risks associated with permitting are assessed without more information about the operations of NOAA.

If the information is not disclosed to the Requesters, the public will remain uninformed about what activities the federal government conducts and authorizes. Disclosure, however, will permit the Requesters to disseminate information to the public, and it will increase transparency surrounding the federal government's activities. This is particularly important because NEPA grants the public a right to this information and a right to participate in federal decisions, such as commenting on proposed anthropogenic activities in Cook Inlet.

The information requested is not, to our knowledge, publicly available. The government may omit sending us requested records that are available in publicly accessible forums (e.g. Internet) or in published materials that are routinely available at public or university libraries. If the government chooses to omit such information, please provide the Requesters with adequate references and/or website links so that we may obtain these materials on our own. We would request that the government provide us with an index of such omitted documents, so that we may have reasonable certainty that we have access to the complete record regarding the management and protection of the Cook Inlet Beluga whales. However, we suspect that the majority of requested materials will not be available unless we receive them from the government in satisfaction of this FOIA request.

2. Disclosure of the Information is Not Primarily in the Commercial Interest of the Requester

When considering whether a request for a fee waiver meets the second prong of the fee waiver requirement, the agency is directed to consider: (1) "whether or not the requester has a commercial interest that would be furthered by the requested disclosure," and (2) "the primary interest in disclosure," i.e. whether the interest of the requester is primarily commercial or public.

None of the Requesters have a commercial, trade, or profit interest in the requested records. In fact, the Requesters do not have any commercial, trade, or profit interests.

Friends of Animals is a non-profit, international animal advocacy organization, incorporated in the state of New York since 1957. It serves the public interest by increasing the general public's awareness of animal advocacy issues and

by teaching how to end animal cruelty and exploitation around the world. Friends of Animals seeks to promote a respectful view of nonhuman, free-living and domestic animals. The Internal Revenue Service recognizes Friends of Animals as a 501(c)(3) tax-exempt organization (IRS Employer Identification#: 13-6018549). Friends of Animals' successful and well-orchestrated public education programs on animal advocacy issues and government operations merit granting a fee waiver for the requested records.

Sea Shepherd Legal was established in 2014 for the purpose of saving marine wildlife and habitats by enforcing, strengthening, and developing protective laws, treaties, policies, and practices worldwide. Sea Shepherd Legal works on a range of matters to ensure greater protections for marine wildlife and ecosystems, via the use of tools including litigation, policy development and public outreach. The IRS recognizes Sea Shepherd Legal as a public interest environmental law firm. Sea Shepherd Legal's EIN number is 47-2272507.

Turtle Island Restoration Network is a 501(c)(3) that has been working to protect marine wildlife, especially sea turtles, but also marine mammals and other endangered species, since the early 1980s. TIRN works through a combination of legal and advocacy strategies and grassroots organizing and education to strengthen protections worldwide. TIRN's EIN is 91-1818080.

CONCLUSION

Please produce the records regarding this FOIA request by electronic mail to wlp_admin@friendsofanimals.org or to the physical address listed below:

Friends of Animals, Wildlife Law Program
7500 E. Arapahoe Rd., Ste. 385
Centennial, CO 80112

Please produce the records on a rolling basis to the extent possible; at no point should the search for—or the deliberation concerning—certain records delay the production of others that the federal government has already retrieved and elected to produce.

Thank you for your attention to this request. If you have any questions about the requested documents or the requested fee waiver, please do not hesitate to contact me at 720-949-7791 or at wlp_admin@friendsofanimals.org.

Sincerely,



Kaylee Dolen, Administrative Assistant

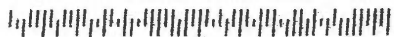
Friends of Animals, Wildlife Law Program
7500 E. Arapahoe Rd., Ste. 385
Centennial, CO 80112
720-949-7791
wlp_admin@friendsofanimals.org

RECEIVED

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U.S. DISTRICT COURT
DISTRICT OF COLORADO
CENTENNIAL

tarris
Law P
Animal
Apache Rd. Suite 385
A, CO 80112



MAIL



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MAILED DEC 09 2016
80112



6072399

RETURN RECEIPT
REQUESTED

T.D.

12/11/2016

Bob Troyer
United States Attorney
1225 17th Street
Suite 700
Denver, CO 80202

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

| | | |
|--|---|----------|
| FRIENDS OF ANIMALS, |) | |
| 777 Post Road, Suite 205 |) | |
| Darien, CT 06820; and |) | |
| |) | |
| WILDEARTH GUARDIANS, |) | CASE NO. |
| 2590 Walnut Street |) | |
| Denver, CO 80205 |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| WILBUR ROSS, in his official capacity as |) | |
| the Secretary of Commerce, U.S. |) | |
| Department of Commerce |) | |
| 1401 Constitution Ave., NW |) | |
| Washington, D.C. 20230; and |) | |
| |) | |
| NATIONAL OCEANIC AND |) | |
| ATMOSPHERIC ADMINISTRATION, an |) | |
| agency of the United States |) | |
| 1401 Constitution Avenue, NW |) | |
| Washington, DC 20230 |) | |
| |) | |
| Defendants. |) | |

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. Plaintiffs Friends of Animals and WildEarth Guardians bring this action to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et. seq.* Specifically, Plaintiffs challenge the failure of Defendants, Wilbur Ross, in his official capacity as the Secretary of Commerce and the National Oceanic and Atmospheric Administration (NOAA) to provide responsive documents within the time required under

FOIA regarding Plaintiffs' November 21, 2014 request for information (hereinafter "Request").

2. Plaintiffs requested all records considered by NOAA in determining that the queen conch (*Strombus gigas*) does not warrant listing under the Endangered Species Act (ESA).

3. Federal Defendants released interim responses on February 25, 2015; June 5, 2015; July 8, 2015; September 14, 2015; June 1, 2016; January 26, 2017; February 24, 2017; March 14, 2017; and March 21, 2017.¹

4. As of the date of this Complaint, Federal Defendants have not issued a final determination in response to Plaintiffs' Request.

5. Federal Defendants are unlawfully withholding public disclosure of information that Plaintiffs are entitled to receive under FOIA. Defendants failed to comply with the statutory mandates and deadlines imposed by FOIA by failing to provide a final determination resolving this Request within the time required by law. Accordingly, Plaintiffs seek declaratory relief establishing that Defendants have violated FOIA. Plaintiffs also seek injunctive relief directing Defendants to promptly provide the requested material free of cost.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question). This Court may grant the declaratory relief under 28 U.S.C. §§ 2201, *et seq.* (Declaratory Judgment Act) and injunctive relief under 5 U.S.C. § 552(a)(4)(B) (FOIA). An actual, justiciable controversy exists within the meaning of the Declaratory Judgment Act between Plaintiffs and Defendants. The Court has

¹ These reflect the dates that Plaintiffs first received responses via email. However, the June 1, 2016 release is dated May 11, 2016; the January 26, 2017 release is dated November 2, 2016; the February 24, 2017 release is dated February 1, 2017; the March 14, 2017 release is dated March 1, 2017; and the March 21, 2017 release is dated March 14, 2017.

jurisdiction, upon receipt of a complaint, “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

7. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district.

PARTIES

8. Plaintiff, Friends of Animals, is a not-for-profit international advocacy organization with nearly 200,000 members, incorporated in the state of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues as well as the organization’s progress in addressing these issues through its magazine called ActionLine, its website, and other reports. Friends of Animals has published articles and information advocating for the protection of wild species so that they can live unfettered in their natural habitats. Friends of Animals regularly submits request under FOIA to further its goals and mission.

9. Plaintiff, WildEarth Guardians (“Guardians”), is a not-for-profit conservation organization incorporated in the state of New Mexico since 1989, with offices in New Mexico, Arizona, Colorado, Montana, Oregon, California, and Wyoming. Guardians protects and restores the wildlife, wild places, wild rivers, and the health of the American West. Guardians advocates for imperiled species to receive the strong legal protections of the ESA. Through its “Wild Oceans” campaign, Guardians has launched an effort to list imperiled marine species under the ESA in order to stem the extinction crisis in the oceans brought on by human exploitation, habitat destruction, and climate change.

10. Defendant National Oceanic and Atmospheric Administration is an agency within the meaning of 5 U.S.C. § 552(f). NOAA is responsible for fulfilling Plaintiffs' Request and complying with all federal laws.

11. Defendant Ross Wilbur, in his official capacity as Secretary of Commerce, has ultimate responsibility for NOAA and ensuring the agency complies with federal law.

LEGAL FRAMEWORK

A. Freedom of Information Act.

12. Congress enacted FOIA to ensure public access to U.S. government records. FOIA carries a presumption of disclosure. The burden is on the government—not the public—to substantiate why information may not be released. Upon written request, agencies of the United States government are required to disclose their records, unless they can be lawfully withheld from disclosure under one of nine specific exemptions in FOIA.

13. FOIA requires agencies to “determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A).

14. On determination by an agency to comply with the request, the records shall be made “promptly available.” *Id.* at § 552(a)(6)(C).

15. In “unusual circumstances” an agency may extend the time limits for up to ten working days by providing written notice to the requester setting forth the unusual circumstance and the date on which the determination is expected to be dispatched. *Id.* at § 552(a)(6)(B). With respect to a request for which a written notice purports to apply the “unusual circumstances,” the agency must: (1) notify the requester if the request cannot be processed within the time limit specified in that clause, and (2) provide the requester an opportunity to limit the scope of the request so that it may be processed within that time

limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *Id.*

16. If the agency fails to complete its response to a request within twenty workdays, the requester is deemed to have constructively exhausted administrative remedies and may seek judicial review. 5 U.S.C. § 552 (a)(6)(C)(i).

17. Additionally, if the agency fails to comply with the statutory time limit it cannot assess search fees. 5 U.S.C. § 552(a)(4)(A)(viii).

FACTUAL BACKGROUND

18. Plaintiffs submitted its Request under FOIA to NOAA on November 21, 2014.

19. Plaintiffs requested “all records in [the agency’s] possession, whether received, created, and/or distributed by NMFS, that the agency considered in making the initial positive 90-day finding on the petition as well as the final not warranted 12-month finding with respect to the Queen conch.”

20. Friends of Animals received acknowledgment from NOAA confirming that the agency received the Request on November 25, 2014.

21. FOIA’s twenty-workday deadline for responding to Plaintiffs’ Request passed on December 24, 2014.

22. NOAA did not respond by December 24, 2014.

23. NOAA provided interim responses on February 25, 2015; June 5, 2015; July 8, 2015; September 14, 2015; May 11, 2016; January 26, 2017; February 24, 2017; March 14, 2017; and March 21, 2017.²

24. As of the date of this Complaint, NOAA has still not made a final determination in response to Plaintiffs’ FOIA Request.

² Some of the dates listed on the release did not match the date the agency sent the releases to Plaintiffs. *See supra* note 1.

25. NOAA has offered no reasonable explanation for its delay, and it has failed to provide a specific date for when it will finally be able to comply with its obligations under FOIA.

26. NOAA is unlawfully withholding public disclosure of information sought by Plaintiffs, information to which Plaintiffs are entitled to receive, and for which NOAA has not provided a valid disclosure exemption.

CAUSE OF ACTION
(Violation of Freedom of Information Act)

27. Plaintiffs herein incorporate all allegations contained in the proceeding paragraphs.

28. Plaintiffs properly requested records within the control of Defendants.

29. Defendants have failed to fully release the records Plaintiffs requested and failed to make any claims of statutory exemption regarding the requested records.

30. Accordingly, Plaintiffs are entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested.

PRAYER FOR RELIEF

Plaintiffs respectfully requests that the Court enter judgment providing the following relief:

1. Declare that Defendants violated the Freedom of Information Act by failing to lawfully satisfy, in full, Plaintiffs' Request under the Freedom of Information Act;
2. Order Defendants to process and release immediately all records responsive to Plaintiffs' Request at no cost to Plaintiffs;
3. Retain jurisdiction of this action to ensure the processing of Plaintiffs' Request, and to ensure that no agency records are wrongfully withheld;
4. Award Plaintiffs costs, including reasonable attorney fees and litigation costs in this action, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(E); and
5. Grant Plaintiffs any other relief that the Court deems just and proper.

Dated: March 29, 2017 Respectfully Submitted,

/s/ Jennifer Best
Jennifer Best (DC Bar # C00056)
Assistant Director, Wildlife Law Program
Friends of Animals
Western Region Office
7500 E. Arapahoe Road, Suite 385
Centennial, CO 80112
720-949-7791
jennifer@friendsofanimals.org

/s/ Michael Harris
Michael Ray Harris (DC Bar # C00049)
Director, Wildlife Law Program
Friends of Animals
7500 E. Arapahoe Road, Suite 385
Centennial, CO 80112
720-949-7791
michaelharris@friendsofanimals.org

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

| | | |
|--------------------------------|---|------------------|
| JUDICIAL WATCH, INC., |) | |
| 425 Third Street SW, Suite 800 |) | |
| Washington, DC 20024, |) | |
| |) | Civil Action No. |
| Plaintiff, |) | |
| v. |) | |
| |) | |
| UNITED STATES DEPARTMENT |) | |
| OF COMMERCE, |) | |
| 1401 Constitution Avenue, NW |) | |
| Washington, DC 20230, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

COMPLAINT

Plaintiff Judicial Watch, Inc. brings this action against Defendant U.S. Department of Commerce to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As grounds therefor, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff Judicial Watch, Inc. is a not-for-profit, educational organization incorporated under the laws of the District of Columbia and headquartered at 425 Third Street S.W., Suite 800, Washington, DC 20024. Plaintiff seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. As part of its mission, Plaintiff regularly requests records from federal agencies pursuant to FOIA. Plaintiff analyzes the

responses and disseminates its findings and the requested records to the American public to inform them about “what their government is up to.”

4. Defendant United States Department of Commerce is an agency of the United States Government and is headquartered at 1401 Constitution Avenue, NW, Washington, D.C. 20230. Defendant has possession, custody, and control of records to which Plaintiff seeks access.

STATEMENT OF FACTS

5. On October 30, 2015, Plaintiff submitted a FOIA request to the National Oceanographic and Atmospheric Administration, a component of Defendant, seeking access to:

1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA’s in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.
3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.
4. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to a subpoena issued for the aforementioned information by Congressman Lamar smith on October 13, 2015.

The time frame for the requested records is October 30, 2014 through October 30, 2015.

6. Plaintiff sent its request via U.S. Postal Service (“USPS”) Certified Mail, Receipt No. 70150640000798544253. USPS provided Plaintiff a Domestic Return Receipt signed showing that Defendant received the request by certified mail on November 3, 2015.

7. Defendant has failed to acknowledge Plaintiff’s request and has provided no information concerning the status of the request.

8. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), Defendant was required to determine whether to comply with Plaintiff’s request within twenty (20) working days after receipt of the request and to notify Plaintiff immediately of its determination, the reasons therefor, and the right to appeal any adverse determination. Accordingly, Defendant’s determination was due by November 23, 2015.

9. As of the date of this Complaint, Defendant has failed to: (i) determine whether to comply with Plaintiff’s request; (ii) notify Plaintiff of any such determination or the reasons therefor; (iii) advise Plaintiff of the right to appeal any adverse determination; or (iv) produce the requested records or otherwise demonstrate that the requested records are exempt from production.

10. Because Defendant has failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A), Plaintiff is deemed to have exhausted any and all administrative remedies with respect to its request, pursuant to 5 U.S.C. § 552(a)(6)(C).

COUNT 1
(Violation of FOIA, 5 U.S.C. § 552)

11. Plaintiff realleges paragraphs 1 through 10 as if fully stated herein.

12. Additionally, Defendant is violating FOIA by failing to search for and produce all records responsive to Plaintiff’s request that are not lawfully exempt from production.

13. Plaintiff is being irreparably harmed by reason of Defendant's violations of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply fully with FOIA.

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to search for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably calculated to uncover all records responsive to the request; (2) order Defendant to produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a *Vaughn* index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated: December 2, 2015

Respectfully submitted,

/s/ Lauren M. Burke
Lauren M. Burke
D.C. Bar No. 1028811
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, DC 20024
(202) 646-5172

Counsel for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

| | | |
|--------------------------------|---|------------------|
| JUDICIAL WATCH, INC., |) | |
| 425 Third Street SW, Suite 800 |) | |
| Washington, DC 20024, |) | |
| |) | |
| Plaintiff, |) | |
| |) | Civil Action No. |
| v. |) | |
| |) | |
| UNITED STATES DEPARTMENT |) | |
| OF COMMERCE, |) | |
| 1401 Constitution Avenue, NW |) | |
| Washington, DC 20230, |) | |
| |) | |
| Defendant. |) | |
| |) | |

COMPLAINT

Plaintiff Judicial Watch, Inc. brings this action against Defendant U.S. Department of Commerce to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As grounds therefor, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff Judicial Watch, Inc. is a not-for-profit, educational organization incorporated under the laws of the District of Columbia and headquartered at 425 Third Street SW, Suite 800, Washington, DC 20024. Plaintiff seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. As part of its mission, Plaintiff regularly requests records from federal agencies pursuant to FOIA. Plaintiff analyzes the

responses and disseminates its findings and the requested records to the American public to inform them about “what their government is up to.”

4. Defendant U.S. Department of Commerce is an agency of the United States Government. Defendant has possession, custody, and control of records to which Plaintiff seeks access. Defendant is headquartered at 1401 Constitution Avenue, NW, Washington, DC 20230.

STATEMENT OF FACTS

5. On February 6, 2017 Plaintiff submitted a FOIA request to the National Oceanic and Atmospheric Administration (“NOAA”), a component of Defendant, seeking the following:

Any and all records of communications between NOAA scientist Thomas Karl and Director of the Office of Science and Technology Policy John Holdren.

The timeframe of the request was identified as “January 20, 2009 through January 20, 2017.”

The request was submitted by certified mail.

6. According to U.S. Postal Service records, the request was received by NOAA on February 7, 2017.

7. NOAA confirmed that it received the request on February 8, 2017, assigning the request Tracking Number DOC-NOAA-2017-000580.

8. As of the date of this Complaint, Defendant has failed to: (i) produce the requested records or demonstrate that the requested records are lawfully exempt from production; (ii) notify Plaintiff of the scope of any responsive records Defendant intends to produce or withhold and the reasons for any withholdings; or (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

9. Plaintiff realleges paragraphs 1 through 8 as if fully stated herein.

10. Plaintiff is being irreparably harmed by reason of Defendant's violation of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with FOIA.

11. To trigger FOIA's administrative exhaustion requirement, Defendant was required to determine whether to comply with Plaintiff's request by March 9, 2017 at the latest. At a minimum, Defendant was required to: (i) gather and review the requested documents; (ii) determine and communicate to Plaintiff the scope of any responsive records Defendant intended to produce or withhold and the reasons for any withholdings; and (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination. *See, e.g., Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188-89 (D.C. Cir. 2013).

12. Because Defendant failed to determine whether to comply with Plaintiff's request within the time period required by FOIA, Plaintiff is deemed to have exhausted its administrative appeal remedies. 5 U.S.C. § 552(a)(6)(C)(i).

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request; (2) order Defendant to produce, by a date certain, any and all non-exempt records to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of

attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated: March 27, 2017

Respectfully submitted,

s/ Chris Fedeli

Chris Fedeli

D.C. Bar No. 472919

JUDICIAL WATCH, INC.

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

Counsel for Plaintiff

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Public Employees for Env'tl Responsibility

Plaintiff

v.

National Oceanic and Atmospheric Administration

Defendant

Civil Action No. 16-cv-1631 (CRC)

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

National Oceanic and Atmospheric Administration
1315 East-West Highway
Silver Spring, MD 20910

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Laura Dumais
Public Employees for Environmental Responsibility
962 Wayne Avenue, Suite 610
Silver Spring, MD 20910

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: 8/12/2016



/s/ Sherryl Horn

Signature of Clerk or Deputy Clerk

4. The FOIA requires federal agencies to respond to public requests for records, including files maintained electronically, to increase public understanding of the workings of government and to provide access to government information. FOIA reflects a “profound national commitment to ensuring an open Government” and agencies must “adopt a presumption in favor of disclosure.” Presidential Mem., 74 Fed. Reg. 4683 (Jan. 21, 2009).
5. The FOIA requires agencies to determine within 20 working days after the receipt of any FOIA request whether to comply with the request. 5 U.S.C. § 552(a)(6)(A)(i); 15 C.F.R. § 4.6(b). Agencies may extend this time period only in “unusual circumstances” but only for a maximum of ten additional working days. 5 U.S.C. § 552(a)(6)(B)(i); 15 C.F.R. § 903.1 (providing that the rules and procedures regarding access to NOAA records shall be those found at 14 C.F.R. Part 4); 15 C.F.R. § 4.6(d).
6. To date, Defendant has failed to produce any records in response to Plaintiff’s April 29, 2016 FOIA request, No. DOC-NOAA-2016-001080.
7. Defendant’s conduct is arbitrary and capricious and amounts to a denial of Plaintiff’s FOIA request. NOAA is frustrating Plaintiff’s efforts to educate the public about NMFS-OST’s efforts to replace human Fisheries Observers with electronic monitoring systems and whether such systems are effective.
8. Plaintiff constructively exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i), and now seeks an order from this Court requiring Defendant to immediately produce the records sought in Plaintiff’s FOIA request, as well as other appropriate relief, including attorneys’ fees and costs.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.
10. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
11. This Court is a proper venue under 5 U.S.C. § 552(a)(4)(B) (providing for venue in FOIA cases in the District of Columbia).
12. This Court has the authority to award reasonable costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E).

PARTIES

13. Plaintiff, PEER, is a non-profit public interest organization incorporated in Washington, D.C. and headquartered in Silver Spring, Maryland, with field offices in California, Colorado, Florida, Massachusetts, and Tennessee.
14. Among other public interest projects, PEER engages in advocacy, research, education, and litigation relating to the promotion of public understanding and debate concerning key current public policy issues. PEER focuses on the environment, including the regulation and remediation of toxic substances, public lands and natural resource management, public funding of environmental and natural resource agencies, and ethics in government. PEER educates and informs the public through news releases to the media, through its web site, www.peer.org, and through publication of the PEER newsletter.
15. Defendant, NOAA, is an agency of the United States as defined by 5 U.S.C. § 552(f)(1).

16. Defendant is charged with the duty to provide public access to records in its possession consistent with the requirements of the FOIA. Here, Defendant is denying Plaintiff access to its records in contravention of federal law.

STATEMENT OF FACTS

17. On April 29, 2016, PEER electronically submitted a FOIA request for information concerning NOAA's consideration of the possibility of replacing Fisheries Observers with video-camera electronic monitoring. Specifically, PEER requested, for the time period between April 1, 2014 and the present:
- a. All studies or analyses comparing the costs of electronic monitoring versus human fisheries observers conducted or obtained by NMFS;*
 - b. All studies or analyses comparing the effectiveness or quality of electronic monitoring versus human fisheries observers conducted or obtained by NMFS;*
 - c. Any directives that NMFS has issued concerning use of electronic monitoring rather than or in conjunction with human observers;*
 - d. Any material describing how and by whom the electronic monitoring would be reviewed by human monitors to interpret what was captured on camera;*
 - e. Records indicating how electronic monitoring data will be aggregated, summarized and made publicly accessible;*
 - f. Documents reflecting the safeguards that will be required to police against manipulating or disabling cameras; and*
 - g. All communications between representatives of the fishing industry and NMFS concerning electronic monitoring.*
18. PEER had made two similar requests in the past, in June 2013 and April 2014; both of which resulted in production of requested documents in full.
19. PEER received a confirmation of submission from FOIAonline with a tracking number: DOC-OS-2016-001080. On May 2, 2016, PEER received notification that its FOIA request was transferred to NOAA with a new tracking number of DOC-NOAA-2016-001080.

20. On May 12, 2016, in response to PEER's request for a full waiver of fees, NOAA's FOIA Officer emailed PEER requesting information justifying PEER's "qualifications to distribute the records to a reasonably broad segment of interested individuals" and how the requested records "would significantly increase their understanding of the subject."
21. NOAA's FOIA office did not request additional information justifying PEER's fee waiver request when PEER submitted similar statements of qualifications for its 2013 and 2014 requests. Nor has PEER ever, in its more than 23 year history, ever been denied a fee waiver on the basis that it was unable or unqualified to distribute the requested information to the general public.
22. PEER responded to the NOAA FOIA Officer the very next day, May 13, 2016 explaining how more than 550 journalists and reporters subscribe to receive news from PEER and providing a link to PEER's website showing 15 news articles generated in less than one week. PEER also explained that the requested records would help the public understand whether cost-effective electronic surveillance systems that meet both regulatory and scientific demands are anywhere near deployment, and understand how their tax dollars have been – and will likely in the future be – spent to automate observer functions.
23. On June 15, 2016, NOAA granted a fee waiver for PEER's FOIA request, claimed unusual circumstances under 15 C.F.R. 4.6(d)(2), invoked the maximum ten day extension, and stated that it "anticipate[d] completing [PEER's] request by July 16, 2016." The FOIA Officer did not request further information, and has not communicated with PEER since. The July 16 date came and went without the production of a single responsive document.
24. On July 20, 2016 – after the statutory period for production had expired – NOAA's NMFS Office of Science and Technology transmitted via email a request for clarification on one of

the seven items from Plaintiff's FOIA request, along with the statement, "Your request will not be processed until we hear from you." The letter gives no explanation as to why the other six items listed of Plaintiff's FOIA request – which required no clarification – were not scheduled for production. Additionally, the same item about which Defendant claimed a need for clarification was contained in both of PEER's prior FOIA requests on the topic, which Defendant previously fulfilled without requesting clarification.

25. Nonetheless, Plaintiff provided the requested clarification on the sole item the very next day on July 21, 2016.
26. NOAA never requested any further clarification on any item of Plaintiff's request or further contacted Plaintiff.
27. As of the date of this filing, 85 working days have passed since Plaintiff's April 29, 2016 request, exceeding the time allowed by 5 U.S.C. § 552(a)(6) and 15 C.F.R § 4.6(b).
28. Administrative remedies are deemed exhausted when an agency fails to comply with the applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i). Having fully exhausted its administrative remedies for its April 29, 2016 FOIA request, PEER now turns to this Court to enforce the remedies and public access to agency records guaranteed by the FOIA.

CAUSE OF ACTION

Violation of the Freedom of Information Act

29. Plaintiff incorporates the allegations in the preceding paragraphs.
30. Defendant's failure to disclose the records requested under Request No. DOC-NOAA-2016-001080 within the time frames mandated by statute is a constructive denial and wrongful withholding of records in violation of FOIA, 5 U.S.C. § 552, and the relevant agency regulations promulgated thereunder, 15 C.F.R. § 4.1 *et. seq.*

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

- i. Enter an order declaring that Defendant wrongfully withheld requested agency records;
- ii. Issue a permanent injunction directing Defendant to disclose to Plaintiff all wrongfully withheld records;
- iii. Maintain jurisdiction over this action until Defendant is in compliance with the FOIA, the Administrative Procedure Act, and every order of this Court;
- iv. Award Plaintiff attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- v. Grant such additional and further relief to which Plaintiff may be entitled.

Respectfully submitted on August 11, 2016,

/s/ Laura Dumais

Laura Dumais, DC Bar # 1024007
Public Employees for Environmental Responsibility
962 Wayne Ave, Suite 610
Silver Spring, MD 20910
(202) 265-7337

Counsel for Plaintiff

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Wednesday, April 5, 2017 2:55 PM
To: Lola Stith - NOAA Affiliate
Subject: Fwd: Request for Assistance: EPA FOIA Consultation Re Social Cost of Carbon
Attachments: Horner (Carbon Emails) Rqst.pdf; FOIA_SCC_NOAA_Review_Set_040517.pdf

Sorry--here they are attached.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

Confidentiality Notice: This e-mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

----- Forwarded message -----

From: Mroz, Jessica <mroz.jessica@epa.gov>
Date: Wed, Apr 5, 2017 at 2:13 PM
Subject: Request for Assistance: EPA FOIA Consultation Re Social Cost of Carbon
To: "mark.graff@noaa.gov" <mark.graff@noaa.gov>

Hello:

Attached is a FOIA request for records from EPA and a set of documents containing NOAA equities for your consultation.

I am seeking a point-of-contact to review the records and provide comments to me by April 20, 2017. Please let me know if I can provide you with any additional information to help process this request.

Thank you for your assistance.

Best,
Jessie

Jessica C. Mroz

Environmental Protection Specialist/ Presidential Management Fellow

U.S. Environmental Protection Agency

Office of Air and Radiation | Office of Air Policy and Program Support

Telephone: [\(202\) 564-1094](tel:2025641094)

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REQUEST UNDER THE FREEDOM OF INFORMATION ACT

September 22, 2015

U.S. Environmental Protection Agency
Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, D.C. 20460
Email: hq.foia@epa.gov

Re: Request for Certain Agency Records — Social Cost of Carbon Emails

To EPA Freedom of Information Officer,

On behalf of the Competitive Enterprise Institute (CEI), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days,¹ copies of **emails sent to or from Elizabeth Kopits or Alex Martens which a) contain, in the To or From, cc: and/or**

¹ See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion, *infra*.

bcc: fields, the Subject field, and/or the email body, any of the terms or parties: “SCC”, “social cost”, Maureen Cropper, Richard Newell, William Pizer and/or John Weyant², b) which were sent or received during 2015, through the date you process this request.

We request the entire thread in which any email responsive to the above description appears regardless if portions of the thread(s) pre-date 2015.

We agree to pay up to \$150.00 for responsive records in the event EPA denies our fee waiver request detailed, *infra*.

Relevant Background to this Request and the Public Interest

This request seeks certain EPA correspondence with or mentioning outside third parties and relevant to a panel established by the National Academies of Science — specifically, by its contract, research consulting firm the National Research Council — on Assessing Approaches to Updating the Social Cost of Carbon. The Social Cost of Carbon is a term for claims of the cumulative damage allegedly inflicted by an incremental ton of carbon dioxide emitted in a particular year (and only damage, not benefits of affordable energy or the social costs of carbon mitigation, although the economic and social costs of carbon mitigation likely and vastly exceed the social costs of carbon (dioxide)).

The SCC is a product of speculative climatology combined with speculative economics and is an unknown quantity, discernible in neither meteorological nor

² That is, an email is responsive if is to, from, copies *or* references any of the parties anywhere. This includes referencing a party, for example Maureen Cropper, in a To, From or cc:/bcc: field if her address (e.g., cropper@econ.umd.edu) appears therein, or the party’s name appears in any form, e.g., “Cropper, Maureen” or “Maureen Cropper”.

economic data. Regardless, government regulators have assigned a figure that appears to be designed to support a conclusion rather than reflect one. By fiddling with inputs in complex computer models, SCC analysts can obtain just about any result they desire. However interesting as an academic exercise, when used to guide policy, SCC has a political function of making fossil fuels look unaffordable no matter how cheap, and renewable energy — which remains uneconomic in most applications after as much as 125 years of competition (e.g., wind, solar) with more reliable sources of energy — appear to be a bargain at any price. (For example, PAGE model creator [Chris Hope](#) argues the discount rate should be 1%, which yields an SCC in 2010 of \$266, which implies that replacing existing coal generation with new solar photovoltaic is “economically efficient”).

Correspondence discussing this issue, including with and/or about outside parties tasked with evaluating the government’s assigned figure, is of public interest because regulators including EPA, and allies among other climate campaigners, desire ever-bigger SCC values to justify ever-more costly anti-carbon (dioxide) regulations. Further, if panelists selected for this *post facto* review of the government’s SCC have indicated their minds are already made up on the issue or on key elements of the analysis, this, too, is of great public interest in evaluating the utility of any panel conclusions.

Regardless, FOIA requests require no demonstration of wrongdoing, and the public interest prong of a FOIA response is the only aspect to which these factors are relevant; we address the public interest in the issue as relates to CEI’s request for fee waiver in detail, *infra*, and respectfully remind EPA that federal agencies acknowledge

CEI is a representative of the news media such that, at most, CEI can be charged the costs of copying these records (for electronic records, those costs should be *de minimis*).

EPA Must Err on the Side of Disclosure

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed’n of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the recent Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act... is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the President has directed that FOIA “be

administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.”

Request for Fee Waiver

This discussion through the top of page 20 is detailed as a result of our recent experience of federal agencies improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records to groups whose requests are, apparently, unwelcome, including and particularly CEI. This is also despite our history of regularly obtaining fee waivers. It is only relevant if EPA considers denying our fee waiver request.

Disclosure would substantially contribute to the public at large’s understanding of governmental operations or activities, on a matter of demonstrable public interest.

CEI’s principal request for waiver or reduction of all costs is pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any 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 government and is not primarily in the commercial interest of the requester”).

CEI does not seek these records for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as 501(c)3 educational organization. As such, requester also has no commercial interest possible in these records. If no commercial interest exists, an assessment of that non-existent interest is not required in any balancing test with the public’s interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010).

The public interest fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987). The Requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. “The legislative history of the fee waiver provision reveals that it was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,’ in particular those from journalists, scholars and nonprofit public interest groups.” *Better Government Ass’n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); S. COMM.

ON THE JUDICIARY, AMENDING the FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).³

“This is in keeping with the statute’s purpose, which is ‘to remove the roadblocks and technicalities which have been used by... agencies to deny waivers.’” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987) (quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy)).

Requester’s ability — as well as many nonprofit organizations, educational institutions and news media that will benefit from disclosure — to utilize FOIA depends on their ability to obtain fee waivers. For this reason, “Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the ‘public benefit’ test for FOIA fee waivers. This waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and

³ This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that “rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” *Better Gov’t v. State*. They therefore, like Requester, “routinely make FOIA requests that potentially would not be made absent a fee waiver provision”, requiring the court to consider the “Congressional determination that such constraints should not impede the access to information for appellants such as these.” *Id.*

requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as “toll gates” on the public access road to information.” *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986).

As the *Better Government* court also recognized, public interest groups employ FOIA for activities “essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” *Id.*

Congress enacted FOIA clearly intending that “fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.” *Ettlinger v. F.B.I.*, 596 F. Supp. 867, 872 (D. Mass. 1984), citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Id.* at 874.

Therefore, “insofar as... [agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood --

information.” *Better Gov’t v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that “‘chill’ the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage.” *Id.* As such, agency implementing regulations may not facially or in practice interpret FOIA’s fee waiver provision in a way creating a fee barrier for Requester.

Courts have noted FOIA’s legislative history to find that a fee waiver request is likely to pass muster “if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286 (9th Cir. 1987).

This information request meets that description, for reasons both obvious and specified.

1) The subject matter of the requested records specifically concerns identifiable operations or activities of the government. Potentially responsive records reflect EPA involvement with EPA on high-profile, highly controversial regulations as part of what is colloquially known as the administration’s “war on coal”, particularly its efforts to regulate greenhouse gases (GHGs) under the Clean Air Act,⁴ the costs and benefits (EPA’s domain) and how agencies are seemingly attempting to finesse

⁴ For a timeline of this rule making *see e.g.*, http://www.epa.gov/climatechange/Downloads/endangerment/EndangermentFinding_Timeline.pdf.

them having become one of the rules' more contentious aspects.⁵ Further, EPA's involvement in constructing the "social cost of carbon" figure has impacts on rules throughout the federal government, including but by no means limited to the Department of Energy.

Release of these records also directly relates to high-level promises by the President and the Attorney General to be "the most transparent administration in history."⁶ This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and study which prompted further media and public interest as well as congressional oversight (*see e.g.*, an internet search of "study Obama transparency").

The Department of Justice Freedom of Information Act Guide concedes that this threshold is easily met. There can be no question that it is met here and, for that potentially responsive records unquestionably reflect "identifiable operations or activities of the government" with a connection that is direct and clear, not remote.

2) Requester intends to broadly disseminate responsive information. As demonstrated herein requester has both the intent and the ability to convey any information obtained through this request to the public.

⁵ *See e.g.*, U.S. Chamber of Commerce and Institute for Energy Research on this at <https://www.uschamber.com/blog/epa-pumps-benefits-proposed-carbon-regulation> and <http://instituteforenergyresearch.org/analysis/epas-absurd-justifications-power-plant-regulations/>, respectively.

⁶ Jonathan Easley, *Obama says his is 'most transparent administration' ever*, THE HILL, Feb. 14, 2013, <http://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history>.

CEI regularly publishes works and are regularly cited in newspapers and trade and political publications, representing a practice of broadly disseminating public information obtained under FOIA, which practice requester intends to continue in the instant matter.⁷

⁷ Print examples include *e.g.*, Stephen Dinan, *Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle*, WASHINGTON TIMES, Apr. 30, 2011, at A1; Peter Foster, *More Good News for Keystone*, NATIONAL POST, Jan. 9, 2013, at 11; Juliet Eilperin, *EPA IG Audits Jackson's Private E-mail Account*, WASHINGTON POST, Dec. 19, 2013, at A6; James Gill, *From the Same Town, But Universes Apart*, NEW ORLEANS TIMES-PICAYUNE, Jan. 2, 2013, at B1; Kyle Smith, *Hide & Sneak*, NEW YORK POST, Jan. 6, 2013, at 23; Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, WASHINGTON TIMES, Apr. 9, 2013, at A4; Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, WASHINGTON TIMES, Apr. 2, 2013, at A1, Dinan, "Researcher: NASA hiding climate data", WASHINGTON TIMES, Dec. 3, 2009, at A1, Dawn Reeves, *EPA Emails Reveal Push To End State Air Group's Contract Over Conflict*, INSIDE EPA, Aug. 14, 2013; Dinan, [EPA's use of secret email addresses was widespread: report](#), WASHINGTON TIMES, Feb. 13, 2014. *See also*, Christopher C. Horner, *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012, <http://washingtonexaminer.com/epa-administrators-invent-excuses-to-avoid-transparency/article/2514301#.UL0aPYf7L9U>; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, <http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-Email-Scandal>; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013; *The FOIA coping response in climate scientists*, WATTS UP WITH THAT, Jan. 21, 2014; *Nothing to See Here! Shredding Parties and Hiding the Decline in Taxpayer-Funded Science*, WATTS UP WITH THAT, Feb. 17, 2014; *The Collusion of the Climate Crowd*, WASHINGTON EXAMINER, Jul. 6, 2012; *Obama Admin Hides Official IPCC Correspondence from FOIA Using Former Romney Adviser John Holdren*, BREITBART, Oct. 17, 2013; *Most Secretive Ever? Seeing Through 'Transparent' Obama's Tricks*, WASHINGTON EXAMINER, Nov. 3, 2011; *NOAA releases tranche of FOIA documents -- 2 years later*, WATTS UP WITH THAT (two-time "science blog of the year"), Aug. 21, 2012; *The roadmap less traveled*, WATTS UP WITH THAT, Dec. 18, 2012; *EPA Doc Dump: Heavily redacted emails of former chief released*, BREITBART, Feb. 22, 2013; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, *DOJ to release secret emails*, BREITBART, Jan. 16, 2013; *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012; *Chris Horner responds to the EPA statement today on the question of them running a black-ops program*, WATTS UP WITH THAT, Nov. 20, 2012; *FOIA and the coming US Carbon Tax via the US Treasury*, WATTS UP WITH THAT, Mar. 22, 2013; *Today is D-Day -- Delivery Day -- for Richard Windsor Emails*, WATTS UP WITH THAT, Jan. 14, 2013; *EPA Doubles Down on 'Richard Windsor' Stonewall*, WATTS UP WITH THAT, Jan. 15, 2013; *Treasury evasions on carbon tax email mock Obama's 'most transparent administration ever' claim*, WASHINGTON EXAMINER, Oct. 25, 2013.

3) **Disclosure is “likely to contribute” to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.** Requester intends to broadly disseminate responsive information. The requested records have an informative value and are “likely to contribute to an understanding of Federal government operations or activities,” just as did requester’s other FOIA requests of EPA, and just as with those requests this SCC issue is of significant and increasing public interest. An internet search for the social cost of carbon affirms that this is not subject to reasonable dispute.

However, **the Department of Justice’s Freedom of Information Act Guide makes it clear that, in the DoJ’s view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain.** It cannot be denied that, to the extent the requested information is available to any parties, this is information held only by EPA or EPA, is therefore clear that the requested records are “likely to contribute” to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

Thus, disclosure and dissemination of this information will facilitate meaningful public participation in the policy debate, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of your agency's dealings with interested parties outside the agency and interested -- but not formally involved -- employees who may nonetheless be having an

impact on the federal permitting process, state and local processes and/or activism on the issue.

4) The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. Requester has an established practice of utilizing FOIA to educate the public, lawmakers, and news media about the government’s operations and, in particular and as illustrated in detail above, have brought to light important information about policies grounded in energy and environmental policy. CEI intends to continue this effort in the context of and using records responsive to this request, as debate, analysis and publication continue on these regulations.

CEI is dedicated to and has a documented record of promoting the public interest, advocating sensible policies to protect human health and the environment, broadly disseminating public information, and routinely receiving fee waivers under FOIA.

With a demonstrated interest and record in the relevant policy debates and expertise in the subject of energy- and environment-related regulatory policies, CEI unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”

5) The disclosure will contribute “significantly” to public understanding of government operations or activities. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is “likely to contribute” to an understanding of specific government operations or activities.*

There is no publicly available information on the discussions this request seeks. Because there is no such information or any such analysis in existence, any increase in public understanding of this issue is a significant contribution to this increasingly important issue as regards the operation and function of government.

Because CEI has no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

Other Considerations

EPA must consider four conditions to determine whether a request is in the public interest and uses four factors in making that determination. We have addressed all factors, but add the following additional considerations relevant to factors 2 and 4.

Factor 2

FOIA requires the Requester to show that the disclosure is likely to contribute to an understanding of government operations or activities. Under this factor, agencies assess the “informative value” of the records and demands “an increase” in understanding. This factor 2 has a fatal logical defect. Agencies offer no authority for requiring an “increase” in understanding, nor does it provide a metric by which to measure an increase. And, agencies offer no criteria by which to determine under what conditions information that is in the records and is already somewhere in the public domain would be likely to contribute to public understanding.

Agencies typically argue that they evaluate Factor 2 (and all others) on a case by case basis. In doing so, it “must pour ‘some definitional content’ into a vague statutory term by ‘defining the criteria it is applying.’” *PDK Labs. v. United States DEA*, 438 F.3d

1184, 1194, (D.C. Cir. 2006)(citations omitted). “To refuse to define the criteria it is applying is equivalent to simply saying no without explanation.” *Id.* “A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush.”

Paralyzed Veterans of Am. V. D.C. Arena LP, 117 F.3d 579, 584 (D.C. Cir. 1997). Agency failure to pour any definitional content into the term “increase” does not even rise to the level of mush.

Despite the lack of any metric on what would constitute a sufficient increase in public understanding, the Requester meets the requirement because for the information we seek there is no public information. The information we seek will be used to increase the public’ understanding of a current EPA’s employee’s role in the EPA’s endangerment regulations. There is no public information available on this issue Any information on that would increase the public’s knowledge.

The public has no other means to secure information on these government operations other than through the Freedom of Information Act. Absent access to the public record, the public cannot learn about these governmental activities and operations.

Factor 4

Agencies requires the Requester to show how the disclosure is likely to contribute significantly to public understanding of government operations or activities.

Once again, we note that agencies have not provided any definitional content into the vague statutory term “significantly,” offering no criteria or metric by which to measure the significance of the contribution to public understanding CEI will provide.

Nevertheless, as previously explained, the public has no source of information on the issue. Any increase in public understanding of this issue is a significant contribution to this highly visible and politically important issue as regards the operation and function of government, especially at a time when agency transparency is (rightly) so controversial.

As such, requester has stated “with reasonable specificity that their request pertains to operations of the government,” that they intend to broadly disseminate responsive records. “[T]he informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

We note that federal agencies regularly waive requester CEI’s fees for substantial productions arising from requests expressing the same intention, even using the same

language as used in the instant request.⁸ This request is unlikely to yield substantial document production.

For all of these reasons, CEI's fees should be waived in the instant matter.

Alternately, CEI qualifies as a media organization for purposes of fee waiver

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event EPA/EPA refuses to waive our fees under the "significant public interest" test, which we would then appeal while requesting EPA proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) ("fees shall be limited to reasonable standard charges for document duplication when records are not

⁸ See, e.g., no fees required by other agencies for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language include: **DoI** OS-2012-00113, OS-2012-00124, OS-2012-00172, FWS-2012-00380, BLM-2014-00004, BLM-2012-016, BLM: EFTS 2012-00264, CASO 2012-00278, NVSO 2012-00277; **NOAA** 2013-001089, 2013-000297, 2013-000298, 2010-0199, and "Peterson-Stocker letter" FOIA (August 6, 2012 request, no tracking number assigned, records produced); **DoL** (689053, 689056, 691856 (all from 2012)); **FERC** 14-10; **DoE** HQ-2010-01442-F, 2010-00825-F, HQ-2011-01846, HQ-2012-00351-F, HQ-2014-00161-F, HQ-2010-0096-F, GO-09-060, GO-12-185, HQ-2012-00707-F; **NSF** (10-141); **OSTP** 12-21, 12-43, 12-45, 14-02.; **EPA** HQ-2013-000606, HQ-FOI-01087-12, HQ-2013-001343, R6-2013-00361, R6-2013-00362, R6-2013-00363, HQ-FOI-01312-10, R9-2013-007631, HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12, HQ-2014-006434. These latter examples involve EPA either waiving fees, not addressing the fee issue, or denying fee waiver but dropping that posture when requester sued.

sought for commercial use and the request is made by.... a representative of the news media...”).

However, we note that as documents (emails) are requested and available electronically, there are no copying costs.

Requester repeats by reference the discussion as to its publishing practices, reach and intentions to broadly disseminate, all in fulfillment of CEI’s mission, set forth *supra*.

Also, the federal government has already acknowledged that CEI qualifies as a media organization under FOIA.⁹

The key to “media” fee waiver is whether a group publishes, as CEI most surely does. *See supra*. In *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the D.C. Circuit wrote:

The relevant legislative history is simple to state: because one of the purposes of FIRA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: “It is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected.... If fact, *any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a ‘representative of the news media.’*”

Id. at 1385-86 (emphasis in original).

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact is determinative, the “*plan to act, in essence, as a publisher*, both in print and other media.” *EPIC v. DOD*, 241 F.Supp.2d at 10 (*emphases added*). “In short,

⁹ *See e.g.*, Treasury FOIA Nos. 2012-08-053, 2012-08-054.

the court of appeals in National Security Archive held that “[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.” *Id.* at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

For these reasons, CEI plainly qualifies as a “representative of the news media” under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public.

The information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with EPA/EPA activities in this controversial area, or as the Supreme Court once noted, what their government is up to.

For these reasons, requester qualifies as a “representative[] of the news media” under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See EPIC v. Dep’t of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, particularly after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep’t*

of Justice, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women’s Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format, so there should be no costs.

Conclusion

We expect EPA to release within the statutory period all responsive records and any segregable portions of responsive records containing properly exempt information, to disclose records possibly subject to exemptions to the maximum extent permitted by FOIA’s discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law’s clear intent, judicial precedent affirming this bias, and President Obama’s directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) (“The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears”).

We expect all aspects of this request including the search for responsive records be processed free from conflict of interest. We request EPA provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is

processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). EPA must at least inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires EPA to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013). *See also, Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, *e.g., CREW v. Fed. Election Comm'n*, 711 F.3d 180 (D.C. Cir. 2013).

If you have any questions please do not hesitate to contact me. I look forward to your timely response.

Sincerely,



Christopher C. Horner
Competitive Enterprise Institute
1899 L Street, NW, 12th Floor
Washington, D.C. 20036
202.262.4458 (M)
chorner@cei.org

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Thursday, April 6, 2017 5:04 PM
To: Beverly Smith - NOAA Federal
Cc: Samuel Dixon - NOAA Affiliate; Chua, Alvin; John Almeida - NOAA Federal; Bogomolny, Michael (Federal)
Subject: URGENT: Friends of Animals Interim Releases
Attachments: 2015-000295 9th Response Letter.FO.pdf

Hi Bev,

(b)(5) [Redacted]

[Redacted]

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) [Redacted] (C)

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UNITED STATES DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

NATIONAL MARINE FISHERIES SERVICE

Southeast Regional Office

263 13th Avenue South

St. Petersburg, Florida 33701-5505

<http://sero.nmfs.noaa.gov>

VIA FOIA ONLINE

MAR 14 2017

F/SER14:BJS

SER15-012

FOIA #DOC-NOAA-2015-000295

Jennifer Barnes
Staff Attorney
Friends of Animals
Western Region Office
7500 East Arapahoe Road, Suite 385
Centennial, Colorado 80112
jenniferbarnes@friendsofanimals.org

RE: Freedom of Information Act (FOIA) Request #DOC-NOAA-2015-00295

Dear Ms. Barnes:

This letter is in response to your FOIA request #DOC-NOAA-2015-000295 dated November 21, 2014, and received in our office on November 25, 2014. You specifically requested the following information:

- All records considered by the National Marine Fisheries Service (NMFS) in determining that the queen conch (*Strombus gigas*) does not warrant listing under the Endangered Species Act (ESA).
- Please provide all records in your possession, whether received, created, and/or distributed by NMFS, that the agency considered in making the initial positive 90-day finding on the petition, as well as the final not warranted 12-month finding with respect to the Queen conch.
- This request also includes any records received, created, and/or distributed by NMFS prior to receipt of the WildEarth Guardians listing petition, as well as any records received, created, and/or distributed by NMFS from the period between receipt of the WildEarth Guardians petition through the status review and ESA decision-making process up to the point that NMFS issued the final not warranted 12-month finding.
- Please include in your response the complete list of all references cited in the decision published at 79 *Fed. Reg.* 65628 (Nov. 5, 2014), as well as the peer reviews cited in that decision.
- This request does not include NMFS records that have been published online and made available to the public.

Request Scope Clarification and Modification

Pursuant to your telephone conversations with Stephania Bolden, Ph.D., Branch Chief, and Calusa Horn, Biologist, Southeast Region (SER) Protected Resources Division, and Beverly J.



Smith, Southeast Region FOIA Coordinator, you clarified and modified the scope of your request on December 5 and 10, 2014, as follows:

- 1) You seek the administrative record and e-mails on the listing petition decision. NMFS's administrative record, antecedent to litigation, is termed our program decision file that contains the records related to the decision on the petition.
- 2) You clarified that the portion of your request that states, "...any records received, created, and/or distributed by NMFS prior to the receipt of the WildEarth Guardians listing petition...." is for information that NMFS considered regarding the status of the species at the time of the petition.
- 3) You seek a list of references, as opposed to copies of the publications, cited in the decision. However, if the publications cited in the decision are not publicly available, you would like copies of those publications (December 10, 2014, clarification).
- 4) You seek copies of the peer reviews cited in the decision that includes communications with scientists and other groups when making the decision. This is further discussed below under Search - Key Groups of Individuals.
- 5) You expanded the scope to include a list of the records that are publicly available on line, and therefore, excluded from the response.

Search - Key Core Group of Record Custodians

During the conference call, we also discussed that certain NMFS's Southeast Region and Office of Protected Resources, and Southeast Fisheries Science Center staff will have records responsive to the request regarding the decision, including Extinction Risk Analysis group information, and NMFS's headquarters' offices will have records responsive to Convention on International Trade in Endangered Species (CITES) information: The list of key record custodians is as follows:

Southeast Region, Protected Resources Division:

David Bernhart, Assistant Regional Administrator
Robert Hoffman, Branch Chief, Sea Turtle Conservation
Stephania Bolden, Branch Chief, Species Conservation
Calusa Horn, Biologist, Species Conservation

Southeast Region, Sustainable Fisheries Division, Limited Access Privilege Programs/Data Management:

Andrew Strelcheck, Branch Chief
Nick Farmer, Fishery Biologist

Southeast Fisheries Science Center, Sustainable Fisheries Division:

Clay E. Porch, Director

NMFS Headquarters:

Office of Protected Resources:

Angela Somma, Chief, Endangered Species Division
Dwayne Meadows, Biologist/National Coordinator Species of Concern Program
Marta Nammack, National ESA Listing Coordinator

Office of International Affairs (CITES information):

Nancy K. Daves
Laura Faitel Cimo

You agreed to limit the search to the above-listed individuals, and acknowledged that you may make additional FOIA requests in the future, if you deem it necessary.

Modified Scope

On July 2, 2015, pursuant to your telephone call with Ms. Smith, you agreed to exclude 5 U.S.C. 552 (b)(6) information, which protects information that would cause a clearly unwarranted invasion of personal privacy, such as a personal telephone number or a personal home address.

We have provided the following interim responses to you:

- **3,640 pages and 3 Excels** were released in full on February 20, 2015.
- **4,162 pages** were released in full on June 4, 2015.
- **1,443 pages and 21 Excels** were released on July 8, 2015, with 1,442 pages and 21 Excels released in full and a portion of **one page** contained an exemption (b)(6) redaction.
- **12,605 pages and 9 Excels** were released on September 14, 2015.
- **1,210 pages and 12 Excels** were released in full on May 11, 2016.
- **1,016 pages** were released in full on January 26, 2017.
- **5,417 pages and 18 Excels** were released in full on February 01, 2017.
- **7,366 pages and 36 Excels** were released on March 1, 2017, with 7,348 pages and 36 Excels released in full and portions of **18 pages** contained exemption (b)(6) redactions.

This is a ninth interim response of **2,297 pages**, which are released in their entirety. The records are available to you via FOIAonline. Please note that NMFS does not consider discretionary release to be a waiver of FOIA exemptions.

Although we do not consider this to be a denial of your request, you have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within **30 calendar days** of the date of this response letter at the following address:

**Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230**

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to [202-482-2552](tel:202-482-2552), or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- A copy of the original request.
- Our response to your request.
- A statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- "Freedom of Information Act Appeal" must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

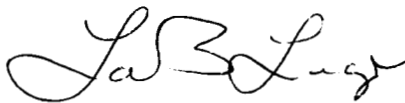
Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov

Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

We continue to review and process a voluminous amount of responsive materials. If you have questions regarding this correspondence, please contact Ms. Smith at Beverly.smith@noaa.gov or by phone at 727-551-5762, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,



Fax
A

Roy E. Crabtree, Ph.D.
Regional Administrator

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Thursday, April 6, 2017 4:29 PM
To: Bogomolny, Michael (Federal)
Cc: Chua, Alvin; John Almeida - NOAA Federal; Kimberly Katzenbarger - NOAA FEDERAL; Robert Swisher - NOAA Federal; Lola Stith - NOAA Affiliate
Subject: Friends of Animals (New Litigation)
Attachments: Friends of Animals Queen Conch_FOIA_Complaint_Filed.pdf; 2015-000295 9th Response Letter.FO.pdf; FOIA Request_Queenconch.pdf

Hi Bogo--

As you had asked during the meeting--(b)(5)

[Redacted]

[Redacted]

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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MAR 14 2017

F/SER14:BJS

SER15-012

FOIA #DOC-NOAA-2015-000295

Jennifer Barnes
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- A copy of the original request.
- Our response to your request.
- A statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- "Freedom of Information Act Appeal" must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

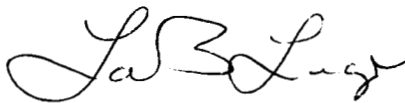
Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov

Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

We continue to review and process a voluminous amount of responsive materials. If you have questions regarding this correspondence, please contact Ms. Smith at Beverly.smith@noaa.gov or by phone at 727-551-5762, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,



Fax
A

Roy E. Crabtree, Ph.D.
Regional Administrator

November 21, 2014

Submitted via NOAA FOIA portal and U.S. Mail

National Oceanic and Atmospheric Administration
Public Reference Facility (SOU57650)
1305 East West Highway (SSMC4)
Room 7437
Silver Spring, MD 20910
Attn: FOIA Officer

Re: FOIA request for records relating to National Marine Fisheries Service's determination that ESA listing of Queen conch is not warranted in the *Federal Register* at 79 Fed. Reg. 65628 (Nov. 5, 2014)

Dear FOIA Officer:

On behalf of Friends of Animals ("FoA"), WildEarth Guardians ("Guardians"), and Defenders of Wildlife (collectively, the "requestors"), I hereby request pursuant to the Freedom of Information Act ("FOIA") all records considered by the National Marine Fisheries Service ("NMFS") in determining that the queen conch (*Strombus gigas*) does not warrant listing under the Endangered Species Act ("ESA"). I also request a full waiver of all search and duplication fees.

A. FOIA Request

NMFS published notice of its final agency action determining that ESA listing of Queen conch is not warranted in the *Federal Register* at 79 Fed. Reg. 65628 (Nov. 5, 2014). This "not warranted 12-month finding" pursuant to 16 U.S.C. § 1533(b)(3)(B) followed NMFS's positive 90-day finding pursuant to 16 U.S.C. § 1533(b)(3)(A), published in the *Federal Register* at 77 Fed. Reg. 51763 (Aug. 27, 2012), that the petition submitted by WildEarth Guardians to list the queen conch presented substantial scientific or commercial information indicating that the petitioned action may be warranted.

Please provide all records in your possession, whether received, created, and/or distributed by NMFS, that the agency considered in making the initial positive 90-day finding on the petition as well as the final not warranted 12-month finding with respect to the Queen conch. This request includes any documents, writings, materials, correspondence, emails, files, photos, maps or reports generated, received and/or issued by NMFS pursuant or relating to these agency actions. This request also includes any records received, created, and/or distributed by NMFS prior to receipt of the WildEarth Guardians listing petition as well as any records received, created, and/or distributed by NMFS from the period between receipt of the WildEarth Guardians petition through the status review and ESA decision-making process up to the point that NMFS issued the final not warranted 12-month finding. Please include in your response the

complete list of all references cited in the decision published at 79 Fed. Reg. 65628 (Nov. 5, 2014), as well as the peer reviews cited in that decision.

This request does not include NMFS records that have been published online and made available to the public at <http://www.nmfs.noaa.gov/pr/species/invertebrates/queenconch.htm>, www.federalregister.gov or www.regulations.gov. This request does, however, specifically include any relevant records that have not been published online at these sites and thereby made available to the public.

B. Fee Waiver Request

I request a full waiver of all search and duplication fees under the Freedom of Information Act, which provides in relevant part that:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) 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).

Congress specifically amended FOIA to ensure that the statute be “liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *accord Forest Guardians v. U.S. Dep’t of the Interior*, 416 F.3d 1173, 1177-78 (10th Cir. 2005); *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *Cnty. Legal Servs. v. U.S. Dep’t of Hous. and Urban Dev.*, 405 F. Supp. 2d 553, 555 (E.D. Pa. 2005). In so doing, Congress “explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals,” including nonprofit public interest groups. *Better Gov’t Ass’n v. Dep’t of State*, 780 F.2d 86, 94 (D.C. Cir. 1986). FOIA “should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver.” *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Idaho 2004).

Courts have interpreted the statutory fee waiver provision on the public interest in disclosure to establish a three-part test: (1) does the subject matter of the request concern the operations or activities of the government?; (2) will the requested information likely contribute to the public’s understanding of the government’s operations or activities?; and (3) is this contribution likely to be significant? *Forest Guardians*, 416 F.3d at 1178-82; *Cnty. Legal Servs.*, 405 F. Supp. 2d at 556.

NOAA’s regulations pertaining to the grant of fee waivers for FOIA requests are at 15 C.F.R. § 4.11(k), and state the four factors the agency considers in determining whether a request meets the public interest requirements and the two factors the agency considers in determining whether the request is not primarily in the commercial interest of the requestor. Because this request meets each of these factors, Friends of Animals, WildEarth Guardians and Defenders of Wildlife are each entitled to a full waiver of all search and duplication fees.

By law, NOAA may not assess any search fees if it fails to meet FOIA's mandatory time limits for responses. In 2007, Congress amended FOIA to provide that "[a]n agency shall not assess search fees . . . if the agency fails to comply with any time limit" of FOIA. 5 U.S.C. § 552(a)(4)(A)(viii). An agency is required to make a determination on a FOIA request, including a fee waiver request, within 20 working days of receiving the request. 5 U.S.C. § 552(a)(6)(A)(i). It is likewise required to rule on an appeal of any denial within 20 working days of receiving such an appeal. 5 U.S.C. § 552(a)(6)(A)(ii). *See Bensman v. Nat'l Park Serv.*, 806 F. Supp. 2d 31 (D.D.C. 2011).

1) The Requested Disclosure Is In the Public Interest and Is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the National Marine Fisheries Service with respect to its Decision-making under the Endangered Species Act as to the Queen conch

a. This request concerns the operations or activities of the National Marine Fisheries Service, a component of the National Oceanic and Atmospheric Administration within the U.S. Department of Commerce

NMFS is the federal agency charged with implementing the Endangered Species Act, 16 U.S.C. §§ 1531-44, with respect to marine species such as the Queen conch. Therefore, the request directly concerns operations of NMFS with respect to its not warranted 12-month ESA listing decision for the Queen conch, meeting the first factor in the four-part test of the public interest standard established by the agency's fee waiver regulation. *See* 15 C.F.R. § 4.11(k)(2)(i).

b. The requested records are likely to contribute to the public's understanding of the operations and activities of NMFS by meaningfully informing the public of how the agency has reached its final decision that ESA protections for the Queen conch are not warranted

The ESA specifies five factors that NMFS must consider in making its determination that a species warrants listing as endangered or threatened. 16 U.S.C. § 1533(a)(1). *See also* 50 C.F.R. Part 424 (regulations implementing 16 U.S.C. § 1533). A species, subspecies, or distinct population segment of a species may be listed on the basis of any or a combination of the five factors. 50 C.F.R. § 424.11(c). The ESA requires that NMFS make all decisions on whether to list species as endangered or threatened "solely on the basis of the best scientific and commercial data available to [it] after conducting a review of the status of the species and after taking into account those efforts, if any, being made" to protect such species. 16 U.S.C. § 1533(b). NMFS makes its determinations of whether a species warrants listing in part of its range in accordance with its policy on distinct population segments (61 Fed. Reg. 4722 (Feb. 7, 1996)).

This request seeks disclosure of records that NMFS created or considered in its analysis of the five listing factors and the best available scientific and commercial information available in making its final not warranted determination for Queen conch. The requested records are likely to contribute to the public's understanding of the statutory, regulatory, and scientific grounds for NMFS' decision not to propose listing this marine species.

Excluded from this request are those records that NMFS has already published online and made available to the public. Thus, the requested records, which the agency has not previously

disclosed to the public, will be meaningfully informative and will increase public understanding of how NMFS has implemented its statutory and regulatory obligations and how it has supported its application of the ESA five listing factors and DPS policy in making the final not warranted 12-month finding for the Queen conch. This request thus meets the second part of the four-part regulatory test under the public interest standard. *See* 15 C.F.R. § 4.11(k)(2)(ii).

c. Disclosure of the requested records will contribute to the understanding of a reasonably broad audience of people interested in marine conservation generally and Queen conch conservation in particular; Requestors have the expertise and ability to analyze and disseminate information from the requested records to a broad public audience

A broad audience of persons both in the United States and internationally are interested in the subject of marine species conservation generally and specifically in the issue of whether the Queen conch population is sustainable and/or warrants protection under laws like the ESA. There are hundreds of research papers on the Queen conch, with several researchers currently looking at the status of the Queen conch throughout its range.

All three of the requestor organizations have the institutional expertise to analyze the information contained in the requested records. For example, Guardians has a proven track record of contributing to public understanding of issues surrounding marine species and the Queen conch through the extensive media coverage they have received on administrative and legal initiatives they have undertaken. These initiatives were based, in part, on materials received from the Government and processed by Guardians. Guardians has on staff or available for consultation biologists, environmental lawyers, and policy analysts with experience in conservation issues, marine species, and data analysis. For example, it has a campaign to protect marine species under the ESA. The cornerstone of this campaign is the multi-species marine petition, which requests the listing of 81 marine species ranked “endangered” or “critically endangered” by the International Union for the Conservation of Nature. *See* http://www.wildearthguardians.org/site/DocServer/Multi_Species_Marine_Petition.pdf?docID=9702&AddInterest=1103. Their staff biologists and legal staff poured over extensive scientific documents in preparing this petition.

Indeed, Guardians also has the ability and intention to disseminate the information requested to the public and our approximately 35,000 members and e-activists. Therefore, the disclosure of the requested documents will contribute to the understanding of a reasonably broad audience of persons interested in the subject. The organization has a long history of acquiring, analyzing, and disseminating information and data regarding federal actions and policy. For example, Guardians has received extensive records from APHIS regarding the Wildlife Services program. It digested and analyzed the materials received and, using these and other materials, it developed a report to President Barack Obama and Congress called *War on Wildlife*.¹ In addition, it disseminated this report to members, via its on-line and paper newsletters, and to the public, via its website, and publicized the issue via the media. Guardians maintains a

¹ For full report see <http://wg.convio.net/site/DocServer/report-war-on-wildlife-june-09-lo-2.pdf?docID=242>

website, www.wildearthguardians.org, dedicated to providing information to the general public with access to past press releases, publications, television and video interview and audio clips. Guardians may also feature the information it receives from FOIA requests in monthly updates posted to its email listserve. Its listserve details Guardians' efforts, through litigation and other means, to protect air quality, climate, water, and endangered ecosystems. Since these efforts rely heavily on information we obtain through FOIA, a synopsis of this information is disseminated on a regular basis to over 23,000 recipients of its listserve and all visitors to its website. Its quarterly newsletter, *Wild at Heart*, is also distributed to all its members and is available at newsstands throughout the West. Finally, Guardians maintains a website, www.wildearthguardians.org, dedicated to providing information to the general public with access to past press releases, publications, television and video interview and audio clips. Guardians may also feature the information it receives from FOIA requests in monthly updates posted to its email listserve. Its listserve details Guardians' efforts, through litigation and other means, to protect air quality, climate, water, and endangered ecosystems. Since these efforts rely heavily on information it obtains through FOIA, a synopsis of this information is disseminated on a regular basis to over 23,000 recipients of its listserve and all visitors to its website. Its quarterly newsletter, *Wild at Heart*, is also distributed to all its members and is available at newsstands throughout the West.

Likewise, Defenders of Wildlife also has the ability and intention to disseminate the information contained in the requested records to the interested public. Defenders of Wildlife frequently communicates with its members, supporters, partner organizations, and the public on news and information relevant to marine species conservation. Defenders of Wildlife maintains and updates a section on its website on marine species (<http://www.defenders.org/marine/basic-facts>). More generally, Defenders of Wildlife has the ability to disseminate information obtained from the requested records in a variety of ways to its more than 1.1 million members and supporters as well as to its environmental allies and the interested public. Defenders of Wildlife actively communicates with its members and supporters and the interested public through direct mail and email campaigns; broadcasts action alerts notifying the public of opportunities to comment on agency proposals; publishes and frequently updates website pages (380,000+ visitors per month) and blog posts (16,000+ monthly readership) to educate the public on species-specific wildlife conservation issues; distributes a quarterly print magazine with a circulation of 320,000; communicates with partner organizations both nationally and internationally; maintains an active online presence through Facebook (288,000+ followers), Twitter (33,000+ followers), and YouTube (5800+ subscribers); distributes press releases directly to media contacts and through its website and RSS feed; and educates lawmakers and advocates for protective laws at the state and federal levels.

FoA also has the ability to widely analyze and distribute the requested records. FoA informs its members about animal advocacy issues as well as the organization's progress in addressing these issues through its magazine called Act'ionLine, its website, and other reports. FoA has published articles and information advocating for the protection of endangered species so that they can live unfettered in their natural habitat. FoA in particular has a long-standing commitment to protecting animals imperiled due to poaching, hunting, and other animal-exploitation markets. FoA has on staff or available for consultation biologists, environmental lawyers, and policy analysts with long-term experience in conservation issues and data analysis.

Once the requested information is obtained, FoA staff will analyze the data presented and will review and digest the documents. Then, FoA staff will disseminate the information to FoA's members, members of other conservation organizations, and other interested members of the public. FoA plans to use its website, its magazine, and its connection to other news media in order to significantly contribute to the public understanding of the Queen conch and NMFS's negative 12-month finding.

In short, these mechanisms for publicizing and distributing information received through FOIA requests demonstrate the requestors' intention to disseminate the information to the public with the goal of disclosing material that will inform, or has the potential to inform, the public. *See* 15 C.F.R. § 4.11(k)(iii); *see also Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) (finding an online newsletter and maintenance of a website sufficient to show how the requester will disseminate information); *Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203-04 (D.D.C. 2009) (finding public interest organization's "website [and] newsletter . . . are an adequate means of disseminating information," and noting the organization's "stature as [an] advocacy group . . . len[t] credence" to its dissemination argument).

d. This contribution to the public's understanding of NMFS's operations and activities in making a final "not warranted" 12-month finding for the Queen Conch will likely be significant

As stated above, NMFS made the first-ever positive ESA 90-day finding for the Queen conch when it determined to move forward with a status review based on the WildEarth Guardians petition. However, NMFS has not made public many of the records created for and/or cited in either its positive 90-day finding that initiated the status review or its final negative 12-month finding. Therefore, neither requestors nor the interested public currently has a full understanding of the reasoning and data that NMFS relied on to justify this decision. Thus, the public currently does not have the ability to evaluate the actions of the NMFS. Once the information is made available, it will be analyzed and presented to the public in a manner that will meaningfully enhance the public's understanding of this issue. We plan to use all of the above information dissemination strategies to significantly contribute to public understanding of the way NMFS evaluated the Queen conch under Section 4 of the ESA. Therefore, the public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, will be significantly enhanced by the disclosure of these documents. *See* 15 C.F.R. § 4.11(k)(iv).

2) The Requested Disclosure is Not Primarily in the Commercial Interest of any of the Requestors

The formal fee assessment/waiver guidelines established by the Office of Management and Budget state that:

The term "'commercial use' request" refers to a request from or on behalf of one who seeks information for a use or purpose that *furtheres the commercial, trade, or profit interests* of the requester or the person on whose behalf the request is made.

52 Fed. Reg. 10,012, 10,017-18 (Mar. 27, 1987) (emphasis added).

All three requestors are U.S. 501(c)(3) non-profit public interest membership organizations dedicated to the protection of all native animals and plants in their natural communities. None of the requestors have a commercial interest in the disclosure of the requested information, and they do not seek the requested information to further any commercial, trade, or profit interest. See 15 C.F.R. § 4.11(k)(3)(i). Therefore, the balancing test of 15 C.F.R. § 4.11(k)(3)(ii) is not applicable.

C. Conclusion

For the foregoing reasons, this FOIA request satisfies the statutory and regulatory requirements for a full waiver of all search and duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii) and 15 C.F.R. § 4.11(k).

Although we are willing to pay up to \$25.00 in reasonable search and/or duplication fees for document search time in excess of two hours and for duplication costs for responsive documents in excess of 100 pages, if this fee waiver request is denied, I request that you contact me to discuss the costs for search and/or duplication fees in excess of \$25.00 before fulfilling this FOIA request.

I also request that, should this FOIA request take longer than ten days to process, you notify me of the individualized tracking number that has been assigned to the request and information about how I may receive information on the status of my request via telephone or Internet, including the estimated date on which you will complete action on this request. 5 U.S.C. § 552(a)(7).

Please do not hesitate to contact me at the telephone number or email address below with any questions you may have on the scope of this FOIA request or on the justification for a full waiver of all search and duplication fees.

Sincerely,

Michael Harris

Michael Harris, Director
Wildlife Law Program
Friends of Animals

7500 E. Arapahoe Road, Suite 385
Centennial, Colorado 80112
michaelharris@friendsofanimals.org
720-949-7791

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

| | | |
|--|---|----------|
| FRIENDS OF ANIMALS, |) | |
| 777 Post Road, Suite 205 |) | |
| Darien, CT 06820; and |) | |
| |) | |
| WILDEARTH GUARDIANS, |) | CASE NO. |
| 2590 Walnut Street |) | |
| Denver, CO 80205 |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| WILBUR ROSS, in his official capacity as |) | |
| the Secretary of Commerce, U.S. |) | |
| Department of Commerce |) | |
| 1401 Constitution Ave., NW |) | |
| Washington, D.C. 20230; and |) | |
| |) | |
| NATIONAL OCEANIC AND |) | |
| ATMOSPHERIC ADMINISTRATION, an |) | |
| agency of the United States |) | |
| 1401 Constitution Avenue, NW |) | |
| Washington, DC 20230 |) | |
| |) | |
| Defendants. |) | |

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. Plaintiffs Friends of Animals and WildEarth Guardians bring this action to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et. seq.* Specifically, Plaintiffs challenge the failure of Defendants, Wilbur Ross, in his official capacity as the Secretary of Commerce and the National Oceanic and Atmospheric Administration (NOAA) to provide responsive documents within the time required under

FOIA regarding Plaintiffs' November 21, 2014 request for information (hereinafter "Request").

2. Plaintiffs requested all records considered by NOAA in determining that the queen conch (*Strombus gigas*) does not warrant listing under the Endangered Species Act (ESA).

3. Federal Defendants released interim responses on February 25, 2015; June 5, 2015; July 8, 2015; September 14, 2015; June 1, 2016; January 26, 2017; February 24, 2017; March 14, 2017; and March 21, 2017.¹

4. As of the date of this Complaint, Federal Defendants have not issued a final determination in response to Plaintiffs' Request.

5. Federal Defendants are unlawfully withholding public disclosure of information that Plaintiffs are entitled to receive under FOIA. Defendants failed to comply with the statutory mandates and deadlines imposed by FOIA by failing to provide a final determination resolving this Request within the time required by law. Accordingly, Plaintiffs seek declaratory relief establishing that Defendants have violated FOIA. Plaintiffs also seek injunctive relief directing Defendants to promptly provide the requested material free of cost.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question). This Court may grant the declaratory relief under 28 U.S.C. §§ 2201, *et seq.* (Declaratory Judgment Act) and injunctive relief under 5 U.S.C. § 552(a)(4)(B) (FOIA). An actual, justiciable controversy exists within the meaning of the Declaratory Judgment Act between Plaintiffs and Defendants. The Court has

¹ These reflect the dates that Plaintiffs first received responses via email. However, the June 1, 2016 release is dated May 11, 2016; the January 26, 2017 release is dated November 2, 2016; the February 24, 2017 release is dated February 1, 2017; the March 14, 2017 release is dated March 1, 2017; and the March 21, 2017 release is dated March 14, 2017.

jurisdiction, upon receipt of a complaint, “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

7. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district.

PARTIES

8. Plaintiff, Friends of Animals, is a not-for-profit international advocacy organization with nearly 200,000 members, incorporated in the state of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues as well as the organization’s progress in addressing these issues through its magazine called ActionLine, its website, and other reports. Friends of Animals has published articles and information advocating for the protection of wild species so that they can live unfettered in their natural habitats. Friends of Animals regularly submits request under FOIA to further its goals and mission.

9. Plaintiff, WildEarth Guardians (“Guardians”), is a not-for-profit conservation organization incorporated in the state of New Mexico since 1989, with offices in New Mexico, Arizona, Colorado, Montana, Oregon, California, and Wyoming. Guardians protects and restores the wildlife, wild places, wild rivers, and the health of the American West. Guardians advocates for imperiled species to receive the strong legal protections of the ESA. Through its “Wild Oceans” campaign, Guardians has launched an effort to list imperiled marine species under the ESA in order to stem the extinction crisis in the oceans brought on by human exploitation, habitat destruction, and climate change.

10. Defendant National Oceanic and Atmospheric Administration is an agency within the meaning of 5 U.S.C. § 552(f). NOAA is responsible for fulfilling Plaintiffs' Request and complying with all federal laws.

11. Defendant Ross Wilbur, in his official capacity as Secretary of Commerce, has ultimate responsibility for NOAA and ensuring the agency complies with federal law.

LEGAL FRAMEWORK

A. Freedom of Information Act.

12. Congress enacted FOIA to ensure public access to U.S. government records. FOIA carries a presumption of disclosure. The burden is on the government—not the public—to substantiate why information may not be released. Upon written request, agencies of the United States government are required to disclose their records, unless they can be lawfully withheld from disclosure under one of nine specific exemptions in FOIA.

13. FOIA requires agencies to “determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A).

14. On determination by an agency to comply with the request, the records shall be made “promptly available.” *Id.* at § 552(a)(6)(C).

15. In “unusual circumstances” an agency may extend the time limits for up to ten working days by providing written notice to the requester setting forth the unusual circumstance and the date on which the determination is expected to be dispatched. *Id.* at § 552(a)(6)(B). With respect to a request for which a written notice purports to apply the “unusual circumstances,” the agency must: (1) notify the requester if the request cannot be processed within the time limit specified in that clause, and (2) provide the requester an opportunity to limit the scope of the request so that it may be processed within that time

limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *Id.*

16. If the agency fails to complete its response to a request within twenty workdays, the requester is deemed to have constructively exhausted administrative remedies and may seek judicial review. 5 U.S.C. § 552 (a)(6)(C)(i).

17. Additionally, if the agency fails to comply with the statutory time limit it cannot assess search fees. 5 U.S.C. § 552(a)(4)(A)(viii).

FACTUAL BACKGROUND

18. Plaintiffs submitted its Request under FOIA to NOAA on November 21, 2014.

19. Plaintiffs requested “all records in [the agency’s] possession, whether received, created, and/or distributed by NMFS, that the agency considered in making the initial positive 90-day finding on the petition as well as the final not warranted 12-month finding with respect to the Queen conch.”

20. Friends of Animals received acknowledgment from NOAA confirming that the agency received the Request on November 25, 2014.

21. FOIA’s twenty-workday deadline for responding to Plaintiffs’ Request passed on December 24, 2014.

22. NOAA did not respond by December 24, 2014.

23. NOAA provided interim responses on February 25, 2015; June 5, 2015; July 8, 2015; September 14, 2015; May 11, 2016; January 26, 2017; February 24, 2017; March 14, 2017; and March 21, 2017.²

24. As of the date of this Complaint, NOAA has still not made a final determination in response to Plaintiffs’ FOIA Request.

² Some of the dates listed on the release did not match the date the agency sent the releases to Plaintiffs. *See supra* note 1.

25. NOAA has offered no reasonable explanation for its delay, and it has failed to provide a specific date for when it will finally be able to comply with its obligations under FOIA.

26. NOAA is unlawfully withholding public disclosure of information sought by Plaintiffs, information to which Plaintiffs are entitled to receive, and for which NOAA has not provided a valid disclosure exemption.

CAUSE OF ACTION
(Violation of Freedom of Information Act)

27. Plaintiffs herein incorporate all allegations contained in the proceeding paragraphs.

28. Plaintiffs properly requested records within the control of Defendants.

29. Defendants have failed to fully release the records Plaintiffs requested and failed to make any claims of statutory exemption regarding the requested records.

30. Accordingly, Plaintiffs are entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested.

PRAYER FOR RELIEF

Plaintiffs respectfully requests that the Court enter judgment providing the following relief:

1. Declare that Defendants violated the Freedom of Information Act by failing to lawfully satisfy, in full, Plaintiffs' Request under the Freedom of Information Act;
2. Order Defendants to process and release immediately all records responsive to Plaintiffs' Request at no cost to Plaintiffs;
3. Retain jurisdiction of this action to ensure the processing of Plaintiffs' Request, and to ensure that no agency records are wrongfully withheld;
4. Award Plaintiffs costs, including reasonable attorney fees and litigation costs in this action, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(E); and
5. Grant Plaintiffs any other relief that the Court deems just and proper.

Dated: March 29, 2017 Respectfully Submitted,

/s/ Jennifer Best
Jennifer Best (DC Bar # C00056)
Assistant Director, Wildlife Law Program
Friends of Animals
Western Region Office
7500 E. Arapahoe Road, Suite 385
Centennial, CO 80112
720-949-7791
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/s/ Michael Harris
Michael Ray Harris (DC Bar # C00049)
Director, Wildlife Law Program
Friends of Animals
7500 E. Arapahoe Road, Suite 385
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michaelharris@friendsofanimals.org

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Monday, April 10, 2017 9:00 AM
To: markhgraff@hotmail.com
Subject: Congressional
Attachments: 16-050371 incoming (1) 2015-001263.pdf

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
MINORITY (202) 225-5051
<http://oversight.house.gov>

June 16, 2016

The Honorable Penny Pritzker
Secretary
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, D.C. 20230

2016 JUN 16 PM 2:56
O S EXECUTIVE SECRETARIAT

Dear Madam Secretary:

The Freedom of Information Act (FOIA) requires agencies to report annually on the costs of processing FOIA requests. In FY 2015, the Department of Commerce reported \$15,219,439.24 in processing costs related to processing 2,163 requests.¹ The Department averaged more than \$7,000 in costs per request—fourth highest of 100 agencies that reported FOIA processing costs in Fiscal Year 2015.² The majority of the Department's FOIA costs derive from a single component agency—the National Oceanic and Atmospheric Administration (NOAA).

NOAA reported \$12,348,717.32 in processing costs for processing 498 requests in Fiscal Year 2015.³ NOAA's spending per request—nearly \$25,000—is uniquely high, within the Department and throughout the federal government. Within the Department, the next highest processing cost per request is at the Office of Secretary, which spends less than \$7,000 per request, or less than one third of NOAA's cost.⁴

Excessive processing costs get passed on to FOIA requesters through fees. NOAA charged one requester more than \$45,000 to process a request for eleven specific records.⁵ NOAA estimated \$427.20 in duplication costs and \$45,151.82 in search fees. NOAA's regulations limit fees to the actual cost of searching at a rate of the actual salary rate of the employee conducting the review, plus sixteen percent of the salary rate, costs of duplication, and, for commercial requesters, review.⁶ It is unclear from the fee estimate provided to the requester as to how many hours were estimated as needed to conduct the search.

¹ FOIA.gov, "FOIA Data," available at <https://www.foia.gov/data.html> (last accessed on June 8, 2016).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Letter from National Oceanic and Atmospheric Administration to Shankman Leone, P.A. (May 15, 2015).

⁶ 15 CFR 4.11.

The Honorable Penny Pritzker

June 16, 2016

Page 2

These unusually high costs and fees raise numerous questions. As the Committee with jurisdiction over FOIA, we are charged with conducting oversight of the costs associated with the government's FOIA operations. To help the Committee understand the problems at NOAA causing exorbitant processing costs, please provide the following documents and information as soon as possible, but not later than noon on June 30, 2016:

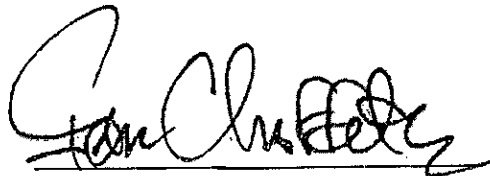
1. Documents sufficient to show how each component agency determines processing costs;
2. Documents sufficient to show how each component agency determines fee estimates; and
3. Documents sufficient to show changes in policies and procedures related to reporting processing costs over the last 10 years.

Please also provide a briefing to Committee staff on this matter no later than June 23, 2016.

The Committee on Oversight and Government Reform is the principal oversight committee of the U.S. House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X.

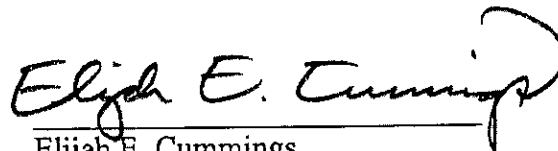
When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

Please contact Katy Rother of the Majority staff at (202) 225-5074 or Krista Boyd of the Minority staff at (202) 225-5051 if you have any questions regarding this request. Thank you for your prompt attention to this matter.



Jason Chaffetz
Chairman

Sincerely,



Elijah E. Cummings
Ranking Member

Enclosure

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,
CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE,
DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,
INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

Missouri Johnson, Marcellina (Federal)

From: Sauter, Sarah (Federal)
Sent: Thursday, June 16, 2016 1:20 PM
To: Missouri Johnson, Marcellina (Federal); Jones, Sarah (Federal)
Subject: incoming, please control
Attachments: 2016-06-16 JEC EEC to Pritzker-DOC - NOAA FOIA Costs due 6-30.pdf

From: Casey, Sharon [<mailto:Sharon.Casey@mail.house.gov>]
Sent: Thursday, June 16, 2016 1:19 PM
To: Sauter, Sarah (Federal) <ssauter@doc.gov>
Cc: Rother, Katy <Katy.Rother@mail.house.gov>; Bailey, Katie <Katie.Bailey@mail.house.gov>; Dockham, Andrew <Andrew.Dockham@mail.house.gov>
Subject: 2016-06-16 JEC EEC to Pritzker-DOC - NOAA FOIA Costs due 6-30

Attached please find a letter from Chairman Chaffetz and Ranking Member Cummings of the U.S. House of Representatives Committee on Oversight and Government Reform. Please note the letter requests a response by June 30, 2016.

Please acknowledge receipt of this letter.

Thank you,
Sharon Casey



Sharon Ryan Casey
Deputy Chief Clerk
Committee on Oversight and Government Reform
2157 Rayburn Building, Washington, DC 20515
202-593-8219 sharon.casey@mail.house.gov

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Monday, April 10, 2017 9:06 AM
To: markhgraff@hotmail.com
Subject: Fwd: February 2017 Monthly FOIA Report
Attachments: CoA v NOAA - Dismissal.pdf; CREW - stip of dismissal.pdf; CREW FAL no Records Response mhg.pdf; FOIA Monthly Status Report 02-28-2017.pdf; FOIA Monthly Status Report 02-28-2017.xlsx; OCE v. NMFS Court Order re Fees.pdf

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Thu, Mar 9, 2017 at 5:19 PM
Subject: February 2017 Monthly FOIA Report
To: Annie Thomson - NOAA Federal <annie.thomson@noaa.gov>, Trenika Tapscott <trenika.tapscott@noaa.gov>, Stephen Lipps - NOAA Federal <stephen.lipps@noaa.gov>, John Almeida - NOAA Federal <john.almeida@noaa.gov>, "Holmes, Colin" <cholmes@doc.gov>, Robert Moller - NOAA Federal <robert.moller@noaa.gov>, Scott Smullen - NOAA Federal <scott.smullen@noaa.gov>, Jeff Dillen - NOAA Federal <jeff.dillen@noaa.gov>, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>, Stephanie Altman - NOAA Federal <stephanie.altman@noaa.gov>, Jackie Roller - NOAA Federal <jackie.roller@noaa.gov>, Kimberly Katzenbarger - NOAA FEDERAL <kimberly.katzenbarger@noaa.gov>, Mike Devany - NOAA Federal <mike.devany@noaa.gov>, Kelly Quickle - NOAA Federal <kelly.quickle@noaa.gov>, Kelly Turner - NOAA Federal <kelly.turner@noaa.gov>, Zachary Goldstein - NOAA Federal <zachary.goldstein@noaa.gov>, Althea Lee - NOAA Federal <althea.lee@noaa.gov>, Denise Hamilton - NOAA Federal <Denise.Hamilton@noaa.gov>, Elizabeth McLanahan - NOAA Federal <elizabeth.mclanahan@noaa.gov>, Gerard Fox - NOAA Federal <Gerard.Fox@noaa.gov>, Jerome McNamara - NOAA Federal <Jerome.McNamara@noaa.gov>, Karen Robin - NOAA Federal <karen.robin@noaa.gov>, Lesa Jeanpierre - NOAA Federal <lesa.jeanpierre@noaa.gov>, Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov>, NMFS FOIA1 - NOAA Service Account <nmfs.foia1@noaa.gov>, OMAO FOIA <omao.foia@noaa.gov>, Tejuana Michael - NOAA Federal <Tejuana.Hickerson@noaa.gov>, James Crocker - NOAA Federal <james.m.crocker@noaa.gov>, Beverly Hernandez - NOAA Affiliate <beverly.hernandez@noaa.gov>, Mary Ann Whitmeyer - NOAA Federal <mary.ann.whitmeyer@noaa.gov>, Louise Milkman - NOAA Federal <louise.milkman@noaa.gov>, Shem Yusuf - NOAA Federal <shem.s.yusuf@noaa.gov>, _NOAA Assistant CIOs <assistant.cios@noaa.gov>, Gregory Raymond - NOAA Federal <gregory.raymond@noaa.gov>, Kathryn Kempton - NOAA Federal <kathryn.kempton@noaa.gov>, James LeDuc - NOAA Federal <james.leduc@noaa.gov>, Velna Bullock - NOAA Federal

<velna.l.bullock@noaa.gov>, Lanetta Gray - NOAA Federal <lanetta.gray@noaa.gov>, Corinne Brown - NOAA Federal <corinne.brown@noaa.gov>, Lisa Love - NOAA Federal <lisa.love@noaa.gov>, Karla Burch-White - NOAA Affiliate <karla.burch-white@noaa.gov>, Maria Williams - NOAA Federal <maria.williams@noaa.gov>, Douglas Perry - NOAA Federal <Douglas.A.Perry@noaa.gov>, Bruce Gibbs - NOAA Federal <Bruce.T.Gibbs@noaa.gov>, Roxie Allison-Holman - NOAA Federal <Roxie.Allison-Holman@noaa.gov>, Lindsey Averill - NOAA Affiliate <lindsey.p.averill@noaa.gov>, Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>, Benjamin Friedman - NOAA Federal <benjamin.friedman@noaa.gov>, "Cc: OCIO/OPPA" <ocio.ppa@noaa.gov>
Cc: Mark Graff - NOAA Federal <mark.graff@noaa.gov>, Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov>, Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Rodney Vieira - NOAA Federal <rod.vieira@noaa.gov>, Jolie Harrison - NOAA Federal <jolie.harrison@noaa.gov>, "Bogomolny, Michael (Federal)" <MBogomolny@doc.gov>

Good Afternoon,

The February 2017 Monthly FOIA Report is attached.

A few highlights from the report include:

- Year over year metrics show a clear processing shift toward consistent increased productivity and steady-state program metrics. As an example, in February 2017, NOAA brought its backlog down to just 64 requests, compared with 71 in February 2016, 133 in February 2015, and 173 in February 2014. What is more, the backlog has stayed within 30 requests of this current low figure of 64 for over 18 months now. However, we are concerned in the shift in the subject matter and complexity of non-NMFS FOIA requests. Several other Line Offices, such as NESDIS and NOS, are experiencing difficulty in processing the broad, complex FOIA requests covering topics such as climate change and PCBs in the Hudson River respectively. If this trend persists, the backlog will increase significantly, as FOIA staffing and processing tools are not concentrated in those historically low-FOIA Line Offices.
- NMFS has been largely influential in the reduction of the overall NOAA FOIA backlog, despite NMFS still currently receiving more than double the FOIA requests of any other Line Office. By comparison, at the beginning of September, 2015, NMFS had 82 open FOIA requests. At the beginning of February, that figure was only 16, representing an 80% reduction. NMFS has set the standard in processing consistency and closure times, and has been at the forefront of many recent NOAA accomplishments reported in the draft DOC Chief FOIA Officer's Report which will be submitted to the Attorney General.

Yesterday in the *CREW v. DOC* litigation, the Plaintiff filed a joint Stipulated Dismissal of their FOIA lawsuit (attached). Their original request sought questionnaires sent from the President Trump Transition Team. On Monday, NOAA FOIA outlined in a letter the parameters of our adequate search, which nonetheless failed to yield any responsive records (attached). The Plaintiff indicated to the Attorney for DOJ/Federal Programs the day after our letter that they were willing to dismiss the case. We appreciate the tremendous support from NOAA/GC, as well as DOC/GC. Michael Bogomolny at DOC/GC in particular was a significant advocate for NOAA in marshaling this case to conclusion through DOJ.

In the *Cause of Action v. NOAA* FOIA litigation, following NOAA's response to the Plaintiff's informal challenge to our search adequacy, the Plaintiff agreed to dismiss their case with prejudice, without fees, and the lawsuit was dismissed on February 22, 2017 (attached). That original request sought records about the appointment of New England Fishery Management Council members.

In the *Our Children's Earth v. NMFS* FOIA litigation, the Court granted the Plaintiff's request for Attorneys' fees in part (attached). However, the Court rejected the Plaintiff's valuation of their fees, which was over \$700,000, and asked the parties to submit a

Joint Supplemental Brief and Proposed Order on the amount of fees owed to the Plaintiff. The original request in that case sought records regarding NMFS' regulatory oversight of Stanford University's activities' impact on steelhead trout.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

| | |
|------------------------------------|-----------------------------------|
| _____) | |
| CAUSE OF ACTION INSTITUTE,) | |
|) | |
| Plaintiff,) | |
|) | |
| v.) | Civil Action No. 16-cv-2178 (EGS) |
|) | |
| NATIONAL OCEANIC AND ATMOSPHERIC) | |
| ADMINISTRATION,) | |
|) | |
| Defendant.) | |
| _____) | |

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), Plaintiff Cause of Action Institute and Defendant National Oceanic and Atmospheric Administration stipulate and agree to dismissal of this action, which pertains to FOIA request DOC-NOAA-2016-001453, with prejudice. Each party will bear its own costs, attorney fees, and expenses.

Date: February 22, 2017

Respectfully submitted,

/s/ Ryan P. Mulvey

Ryan P. Mulvey
D.C. Bar No. 1024362
Eric R. Bolinder
D.C. Bar No. 1028335

CHANNING D. PHILLIPS
D.C. Bar # 415793
U.S. Attorney for the District of Columbia

DANIEL VAN HORN
D.C. Bar # 924092
Chief, Civil Division

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Washington, D.C. 20006
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Facsimile: (202) 330-5842
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eric.bolinder@causeofaction.org

/s/ Wyneva Johnson
WYNEVA JOHNSON
D.C. Bar # 278515
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
Telephone: (202) 252-2518
E-mail: Wyneva.Johnson@usdoj.gov

Counsel for Plaintiff

Counsel for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---------------------------------|---|
| CITIZENS FOR RESPONSIBILITY AND |) |
| ETHICS IN WASHINGTON, |) |
| |) |
| Plaintiff, |) |
| |) |
| v. |) |
| |) |
| U.S. DEPARTMENT OF COMMERCE, |) |
| |) |
| Defendant. |) |
| |) |

Civil No. 1:17-cv-00135 (APM)

JOINT STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED AND AGREED by and between the parties, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), that the above-captioned action shall be dismissed with prejudice, each party to bear its own attorney fees and costs.

March 8, 2017

Respectfully submitted,

/s/ Anne L. Weismann
(D.C. Bar No. 298190)
Stuart C. McPhail
(D.C. Bar No. 1032529)
Citizens for Responsibility and
Ethics in Washington
455 Massachusetts Ave., N.W.
6th Floor
Washington, D.C. 20001
Phone: (202) 408-5565
Fax: (202) 588-5020
aweismann@citizensforethics.org

Attorneys for Plaintiff

CHAD A. READLER
Acting Assistant Attorney General, Civil Division

MARCIA BERMAN
Assistant Director, Federal Programs Branch

/s/ Dena M. Roth
Dena M. Roth (D.C Bar No. 1001184)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7107
Phone: (202) 514-5108
Fax: (202) 616-8470
Email: Dena.m.roth@usdoj.gov

Attorneys for Defendant



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

March 6, 2017

Adam J. Rappaport
Citizens for Responsibility and Ethics in Washington
455 Massachusetts Ave., NW 6th Floor
Washington, DC 20001

Re: FOIA Request DOC-NOAA-2017-000331

Dear Mr. Rappaport:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on December 16, 2016, in which you requested:

(C)opies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect..

On February 6, 2017, a search was conducted by the NOAA Acting Chief of Staff, who leads the NOAA Landing Team within the Office of the Undersecretary. The search included an electronic search of the email inbox and outbox of the Acting Chief of Staff using the connective search terms "Trump" & "Questionnaire" as well as "Transition" & "Questionnaire". This search did not locate any responsive records. This search was reasonably calculated to uncover relevant documents as any questionnaires submitted from President Trump's transition teams would have been received by the NOAA Acting Chief of Staff who leads the NOAA landing team.

Additionally, on February 6, 2017, a search was conducted by the undersigned NOAA FOIA Officer, within the Office of the Chief Information Officer. The search included an electronic search of the FOIA Officer's email inbox and outbox using the connective search terms "Trump" & "Questionnaire" as well as "Transition" & "Questionnaire". The search did not locate any responsive records. This search was reasonably calculated to uncover relevant documents as the NOAA FOIA Officer would have had oversight of any prior FOIA requests to NOAA where searches had located, or requesters had similarly sought, questionnaires submitted from President Trump's transition team.

Lastly, on Friday, February 10, 2017, a search was conducted by Diane Marston, who served as an administrative liaison between the Department of Commerce and members of the President-elect's transition team within the Office of the Deputy Assistant Secretary for Administration. The search included an electronic search of Ms. Marston's email inbox and outbox using the connective search terms "Trump" & "Questionnaire" as well as "Transition" & "Questionnaire". The search did not locate any responsive records. This search was reasonably calculated to uncover responsive records as any records submitted by the President-elect's transition team to the Department of Commerce would have been transmitted through, or been in the possession of, the Department administrative liaison for the transition team.

No additional locations exist where responsive records would be likely to be found that would not have been located by the searches already conducted.

If you have questions regarding this correspondence please contact Mark Graff at mark.graff@noaa.gov, or by phone at (301) 628-5658, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

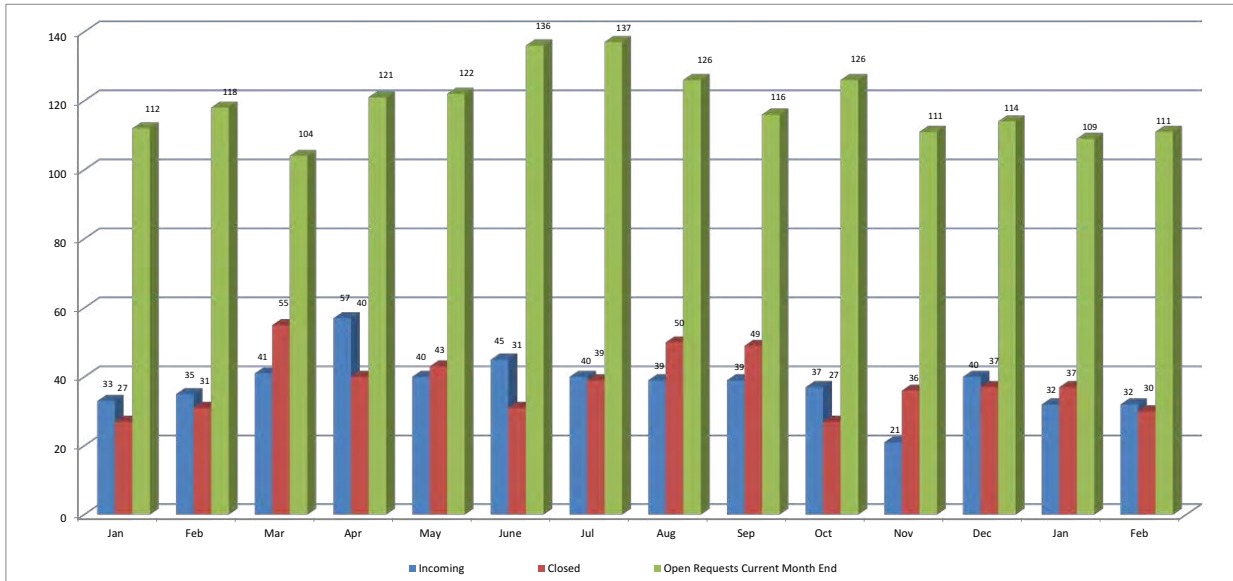
**GRAFF.MARK.HY
RUM.1514447892**

Digitally signed by
GRAFF.MARK.HYRUM.1514447892
DN: c=US, o=U.S. Government, ou=DoD,
ou=PKI, ou=OTHER,
cn=GRAFF.MARK.HYRUM.1514447892
Date: 2017.03.06 08:31:44 -05'00'

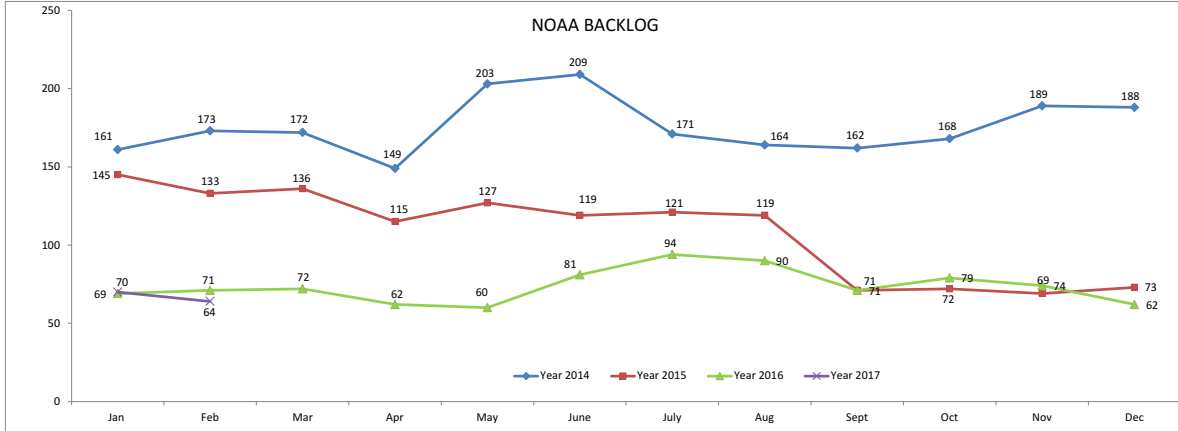
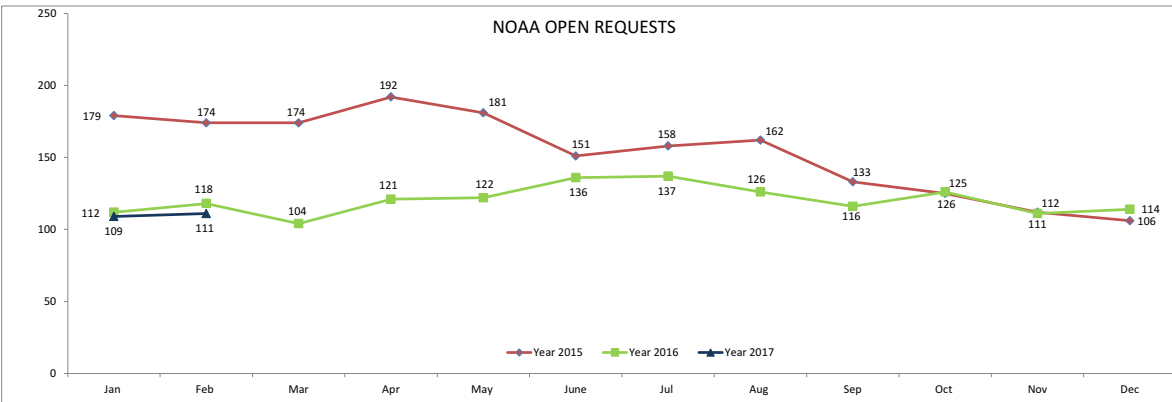
Mark H. Graff
FOIA Officer
National Oceanic and Atmospheric Administration

FOIA Monthly Status Report 02-28-2017

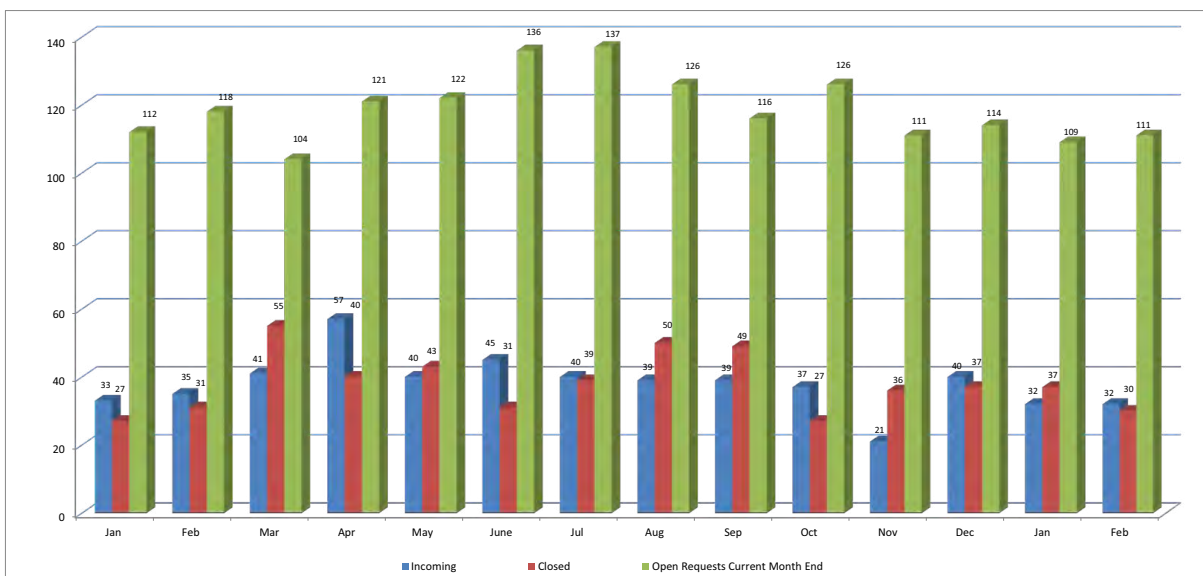
| Organization | Open Requests Previous Month End | Incoming Requests | Closed Requests | Open Requests Current Month End | Backlog 21-120 days | Backlog 121-364 days | Backlog 365 or more days | Total Backlog |
|--------------------|----------------------------------|-------------------|-----------------|---------------------------------|---------------------|----------------------|--------------------------|---------------|
| AGO | 7 | 1 | 3 | 5 | 4 | 3 | 1 | 8 |
| CAO | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| CFO | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| CIO | 1 | 1 | 0 | 2 | 0 | 0 | 0 | 0 |
| CIO/FOIA | 24 | 3 | 0 | 27 | 5 | 0 | 0 | 5 |
| GC | 3 | 0 | 0 | 3 | 0 | 0 | 0 | 0 |
| IA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| LA | 2 | 0 | 0 | 2 | 3 | 0 | 0 | 3 |
| NESDIS | 14 | 4 | 0 | 18 | 1 | 2 | 0 | 3 |
| NMFS | 16 | 12 | 20 | 8 | 11 | 13 | 2 | 26 |
| NOS | 21 | 6 | 5 | 22 | 8 | 1 | 1 | 10 |
| NWS | 10 | 3 | 1 | 12 | 4 | 1 | 0 | 5 |
| OAR | 3 | 0 | 0 | 3 | 1 | 0 | 0 | 1 |
| OMAO | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| OC | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| PPI | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| USAO | 2 | 1 | 0 | 3 | 1 | 0 | 0 | 1 |
| WFMO | 6 | 1 | 1 | 6 | 1 | 1 | 0 | 2 |
| NOAA Totals | 109 | 32 | 30 | 111 | 39 | 21 | 4 | 64 |

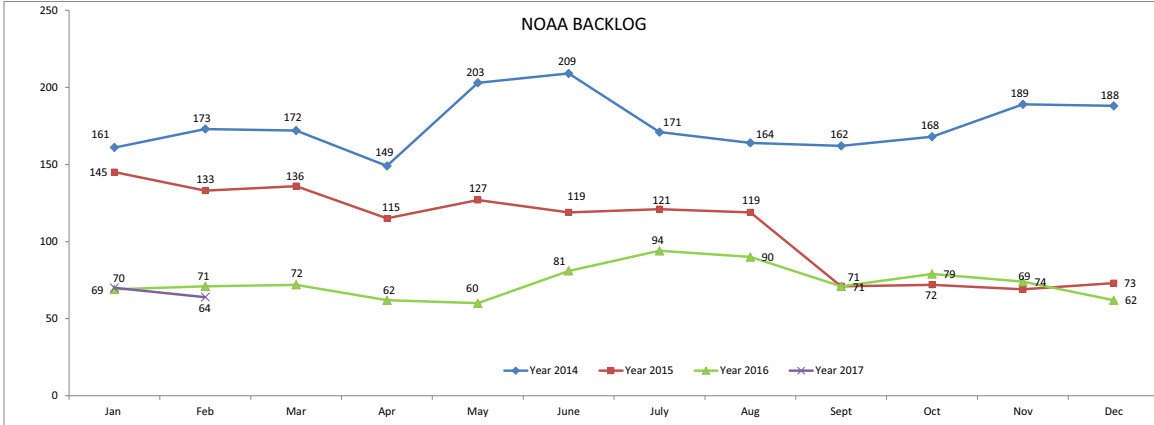
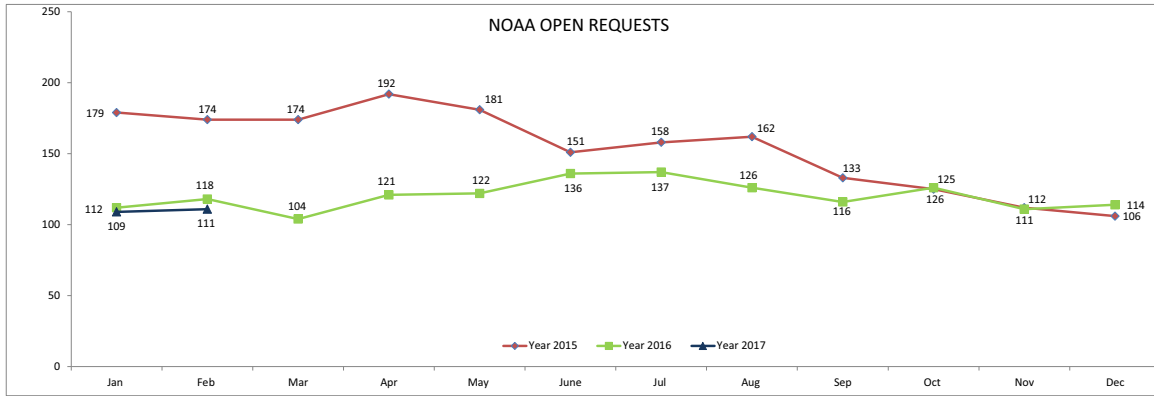


FOIA Monthly Status Report 02-28-2017



| Organization | Open Requests Previous Month End | Incoming Requests | Closed Requests | Open Requests Current Month End | Backlog 21-120 days | Backlog 121-364 days | Backlog 365 or more days | Total Backlog |
|--------------------|----------------------------------|-------------------|-----------------|---------------------------------|---------------------|----------------------|--------------------------|---------------|
| AGO | 7 | 1 | 3 | 5 | 4 | 3 | 1 | 8 |
| CAO | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| CFO | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| CIO | 1 | 1 | 0 | 2 | 0 | 0 | 0 | 0 |
| CIO/FOIA | 24 | 3 | 0 | 27 | 5 | 0 | 0 | 5 |
| GC | 3 | 0 | 0 | 3 | 0 | 0 | 0 | 0 |
| IA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| LA | 2 | 0 | 0 | 2 | 3 | 0 | 0 | 3 |
| NESDIS | 14 | 4 | 0 | 18 | 1 | 2 | 0 | 3 |
| NMFS | 16 | 12 | 20 | 8 | 11 | 13 | 2 | 26 |
| NOS | 21 | 6 | 5 | 22 | 8 | 1 | 1 | 10 |
| NWS | 10 | 3 | 1 | 12 | 4 | 1 | 0 | 5 |
| OAR | 3 | 0 | 0 | 3 | 1 | 0 | 0 | 1 |
| OMAO | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| OC | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| PPI | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| USAO | 2 | 1 | 0 | 3 | 1 | 0 | 0 | 1 |
| WFMO | 6 | 1 | 1 | 6 | 1 | 1 | 0 | 2 |
| NOAA Totals | 109 | 32 | 30 | 111 | 39 | 21 | 4 | 64 |





United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OUR CHILDREN’S EARTH
FOUNDATION, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, et al.,

Defendants.

Case No. [14-cv-01130-WHO](#)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
ATTORNEY’S FEES**

Re: Dkt. No. 82

Plaintiffs seek an award of \$723,202.74 in attorney’s fees and \$3,190.39 in costs for succeeding in part on their consolidated lawsuits filed under the Freedom of Information Act (FOIA) against the federal agency defendants. Dkt. 94. I conclude that plaintiffs are eligible and entitled to an award of attorney’s fees, but at a significantly reduced amount in light of requested hourly rates that are not adequately supported and unnecessary or excessive time billed.

BACKGROUND

Plaintiffs Our Children’s Earth Foundation and Ecological Rights Foundation are Bay Area non-profits dedicated to protecting the environment.¹ Plaintiffs sent a series of nine FOIA requests to National Marine Fisheries Service (NMFS) starting in May 2013. The requests concerned NMFS’s oversight of activities by Stanford University and the impact of those activities on the Central California Coast steelhead. Plaintiffs were concerned with Stanford University’s operation of Searsville Lake and Dam, which were built in 1892, and other related water diversions and infrastructure that Stanford uses to provide non-potable water for its campus. Plaintiffs believe that “Lake Water System” adversely affects the steelhead by reducing water

¹ See Declaration of Annaliese Beaman (Dkt. No. 83) ¶ 2. Plaintiffs are referred to collectively as OCE.

1 flows in San Francisquito Creek and its tributaries and cutting the steelhead off from access to
 2 upstream spawning habitat. *See* Judge Conti’s March 30, 2015 Order [Dkt. No. 59] at 3-4.
 3 Plaintiffs attempted to enjoin Stanford’s activities in a separate lawsuit, *Our Children’s Earth*
 4 *Foundation v. Stanford Univ.*, No. 13-cv-00402-JSW (N.D. Cal.).²

5 In response to what OCE contends were deficient responses to its first four FOIA requests,
 6 plaintiffs filed their first lawsuit (*OCE I*) in April 2014. In that lawsuit, OCE challenged whether
 7 NMFS’s responses to plaintiffs’ FOIA requests were adequate, whether NMFS had a pattern and
 8 practice of tardy and incomplete responses, and whether FWS failed to meet its internal deadline
 9 to respond to NMFS.³ Plaintiffs filed their second lawsuit (*OCE II*) in September 2014, based on
 10 the tardy or otherwise deficient responses to their second set of FOIA Requests (FOIA requests 5 -
 11 8). In *OCE II* plaintiffs alleged that NMFS failed to adequately respond to their additional FOIA
 12 requests, and reiterated their argument that NMFS had a pattern and practice of tardy and
 13 incomplete responses to FOIA requests.⁴ The lawsuits were related by Judge Conti.⁵

14 In *OCE I*, the parties moved for summary judgment. Plaintiffs argued that: (1) NMFS
 15 failed to adequately describe its searches or conducted an inadequate search and withheld
 16 documents without sufficient justification; (ii) they were entitled to a declaratory judgment that
 17 NMFS violated FOIA’s deadlines in responding to their four requests and in three related internal
 18 appeals, and FWS violated FOIA’s deadlines in responding to a referral of documents from
 19 NMFS; and (iii) the alleged violations of the FOIA are a part of a pattern and practice of non-

20 _____
 21 ² The government contends that plaintiffs’ first FOIA request was filed “as discovery” for the
 22 Stanford lawsuit. *Oppo*. 6.

23 ³ A second defendant in *OCE I*, Fisheries and Wildlife Service (FWS) was alleged to have failed
 24 to respond to NMFS’s request that FWS review and release under the FOIA portions of FWS’s
 25 documents that NMFS had in its possession.

26 ⁴ The Army Corps of Engineers (Corps) was also named as a defendant in *OCE II*, as having failed
 27 to appropriately respond to plaintiffs’ FOIA requests.

28 ⁵ Plaintiffs filed a third lawsuit (*OCE III*) in June 2015, which was also related to 14-1130. In
OCE III, plaintiffs asserted that NMFS had failed to provide a timely final decision in response to
 OCE’s ninth FOIA request (from April 2015) regarding more “up-to-date information” on the
 same subject matter. Judge Conti, on plaintiffs’ request and without opposition from NMFS,
 dismissed *OCE III* as “prudentially moot.” October 2015 SJ Order at 17-18. Plaintiffs are not
 seeking fees or costs related to that lawsuit. *Mot.* 4, n.1.

1 compliance with the FOIA's mandates, so the Court should enjoin NMFS and order it to comply
2 with its FOIA obligations. March 30, 2015 Order at 6-7. The government opposed those
3 arguments.

4 In an Order dated March 30, 2015 [Dkt. No. 59, Case No. 14-1130], Judge Conti: (i) ruled
5 that NMFS failed to conduct adequate searches in response to OCE's first and third FOIA
6 requests;⁶ (ii) held in abeyance the determination as to whether NMFS adequately invoked FOIA
7 Exemption (b)(6) to withhold names and contact information from responsive documents pending
8 further supplementation of the factual record by NMFS (concerning the privacy concerns that
9 would be implicated by release of that information); (iii) affirmed in part the withholding of some
10 attorney-client documents, but concluded that NMFS had not met its burden to explain why
11 certain portions of documents did not contain segregable and releasable information or why one
12 specific document was withheld as attorney-client privileged and, therefore, held in abeyance the
13 determination as to NMFS's withholding of those documents was appropriate; and (iv) granted
14 plaintiffs' request for a declaratory judgment that NMFS failed to comply with the statutorily
15 mandated response and appeal deadlines with respect to the four FOIA requests at issue. *Id.* at 8-
16 26.⁷ Judge Conti denied plaintiffs' motion and granted defendants' motion regarding
17 withholdings, redactions, and timeliness. *Id.* at 28.⁸

18 NMFS then provided additional information to the Court concerning its withholdings and
19 redactions, and plaintiffs submitted responses regarding the same.⁹ In an Order dated July 20,

20 _____
21 ⁶ Judge Conti granted plaintiffs' motion on the adequacy of the search as to the first and third
22 FOIA requests, and granted defendants' motion as to the adequacy of the searches in response to
23 the second and fourth requests. *Id.* at 12.

24 ⁷ Judge Conti, however, expressly did not reach the question of whether plaintiffs had proven that
25 NMFS had a pattern and practice of untimely responses, because "[t]he pattern and practice and
26 cutoff date allegations are repeated, with a fuller evidentiary record, in cross-motions for
27 summary judgment pending in" *OCE II*, and the Judge intended to address them in a subsequent
28 order. *Id.* at 22.

⁸ Plaintiffs point out that in preparing its cross-motion for summary judgment in *OCE I*, NMFS
uncovered two additional responsive documents and disclosed them in full. *See* Declaration of
Gary Stern [Dkt. No. 41, 14-1130] ¶ 17.

⁹ As part of its supplemental briefing, NMFS decided to release two previously withheld in full
documents and to release three redacted documents that had previously been withheld in full. It

1 2015, Judge Conti addressed the issues remaining from *OCE I*, as well as the cross-motions filed
 2 in *OCE II*. Judge Conti characterized the remaining arguments made by plaintiffs as: (i) NMFS
 3 failed to adequately search for records responsive to two of its requests; (ii) NMFS improperly
 4 withheld or overly redacted responsive records under two FOIA exemptions; (iii) NMFS was
 5 defying Department of Commerce (of which NMFS is a part) regulations by cutting off their
 6 search for responsive records at the date the FOIA request is received rather than the date the
 7 search begins; and (iv) the request for a declaratory judgment that NMFS's and the Corps'
 8 responses to plaintiffs' requests were untimely, and grant declaratory and injunctive relief to
 9 remedy NMFS's alleged pattern and practice of FOIA violations. July 20, 2015 Order [Dkt. No.
 10 70, Case No. 14-1130] at 3-4. NMFS and the Corps cross-moved for summary judgment, arguing
 11 that their responses were adequate and declaratory and injunctive relief were unwarranted. *Id.* at
 12 4.¹⁰

13 As to the substance of the adequacy of NMFS's responses, Judge Conti found that: (i)
 14 NMFS had failed to provide sufficient information for the court to determine whether NMFS
 15 conducted an adequate search, ordered NMFS to supplement the factual record, and held in
 16 abeyance the issue of summary judgment on NMFS's search; (ii) NMFS had properly withheld
 17 draft biological opinions under FOIA Exemption (b)(5), but did not adequately justify its
 18 withholding or non-redaction of an email under (b)(5), and as such NMFS was required to
 19 supplement the factual record to justify its withholding and non-redaction, and the court held in
 20 abeyance summary judgment on the withholding of that document; and (iii) granted summary
 21 judgment to NMFS withholding under FOIA Exemption (b)(7) of names in a report. *Id.* 5-17.

22 As to the issue of untimely responses and pattern and practice of delay and improper cutoff
 23 dates, Judge Conti: (i) granted plaintiffs' request for declaratory relief that NMFS violated its
 24 statutory duties with respect to the timeliness of its responses and appeals, but declined to enter

25
 26 also stated it was conducting a supplemental search for documents responsive to OCE's first and
 27 third FOIA requests. Dkt. No. 60 at 4-5; *see also* Dkt. No. 59 at 19, 21.

28 ¹⁰ In its cross-motion pleadings in *OCE II*, NMFS decided "upon additional review" to release an
 additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1
 (14-4365) ¶ 5.

1 declaratory relief against the Corps; (ii) determined that further facts were needed to address
 2 plaintiffs' contention that NMFS was using an improper cutoff date when beginning its search for
 3 documents and ordered supplemental briefing; and (iii) ordered plaintiffs to submit supplemental
 4 briefing on the status of their pending FOIA requests as to the pattern and practice of delay claim.
 5 *Id.* at 17-25. Finally, as to plaintiffs' request for injunctive relief, the Judge ordered NMFS "to
 6 comply with FOIA and its deadlines, due to the Court's finding that the Fisheries Service has
 7 failed to do so previously and the potential that these offenses might continue. Yet the Court,
 8 having so ordered and having GRANTED declaratory relief, DENIES WITHOUT PREJUDICE
 9 further injunctive relief at this time," in part because of "the fact that Plaintiffs appear to be
 10 repeatedly making large requests in sufficiently rapid succession that the Fisheries Service is
 11 unable to complete its response to one request before receiving a second" and recognizing
 12 evidence of good faith and efforts on the part of NMFS to comply with its deadlines and
 13 significantly improve its future performance. *Id.* at 26-27. The Court held in abeyance the
 14 motions regarding NMFS's exemption claims, adequacy challenge, cutoff dates, and pattern and
 15 practice allegations pending the supplementation of the record. *Id.* at 29-30.¹¹

16 Following that round of supplementation, in an October 21, 2015 Order, Judge Conti
 17 addressed the remaining issues and ruled that: (i) NMFS's declarants had addressed the concerns
 18 over the adequacy of the search and granted NMFS summary judgment on that issue; (ii)
 19 determined that one record had been appropriately withheld under (b)(5) based on a supplemental
 20 *Vaughn* index and granted NMFS summary judgment on its withholdings under (b)(5); (iii) found
 21 that NMFS cured its showing of non-segregability of withheld information based on its
 22 supplemental *Vaughn* index, except as to one document,¹² and granted NMFS summary judgment
 23 on segregability as to all documents except that one; and (iv) granted summary judgment to NMFS

24 _____
 25 ¹¹ As part of its supplemental briefing, NMFS decided to release a redacted document that had
 26 been withheld in full. Dkt. No. 27 (14-4365) at 2. NMFS also explained its search cut-off policy
 27 (which OCE contends was "new"), requiring that if one or more subject-matter expert are required
 28 to search for documents, the date each expert starts his/her search establishes the cut-off date.
 Dkt. No. 27-4 (14-4365), ¶18(b).

¹² The Court ordered NMFS to produce the document at issue, or explain further why it should be
 withheld. October 21 2015 Order at 15. NMFS decided to produce the document.

1 based on additional information as to the cutoff dates used for searches. October 21, 2015 Order
2 [Dkt. No 72, 14-1130] at 4-17.

3 As to the pattern and practice of delay claim, Judge Conti reviewed the evidence and found
4 that NMFS was curing its processing and response problems and backlog, and therefore denied
5 injunctive relief. However, in light of the “unmistakable history” of untimeliness and delay, Judge
6 Conti granted declaratory relief to plaintiffs, concluding that: “(1) that the Fisheries Service has
7 previously been engaged in a pattern-and-practice of failure to meet FOIA deadlines; (2) that the
8 Fisheries Service has previously provided responses that were frequently and unreasonably
9 delayed; (3) that due to these delays the Fisheries Service effectively provided no ability to FOIA
10 requestors to anticipate when data might be provided; and (4) that due to these delays information
11 was often provided after a long enough period of time that the data could be out-of-date,
12 effectively negating its value and effectuating a complete denial of information.” *Id.* at 20-21. He
13 also granted “limited” injunctive relief to plaintiffs, requiring NMFS to provide any outstanding
14 production in response to certain of plaintiffs’ requests within 30 days. *Id.* at 21. Any further
15 injunctive relief was denied without prejudice, but he required NMFS to show cause as to how it
16 was curing its prior violations and intended to continue its response-time improvements going
17 forward. *Id.* at 22.

18 After the case was reassigned to me in November 2015, I addressed whether any issues
19 remained to be decided following Judge Conti’s October and November 2015 Orders as well as
20 the supplemental briefing filed by the parties regarding NMFS’s efforts to cure its past timeliness
21 violations and ensure those would not occur in the future. In an order dated January 20, 2016, I
22 determined that Judge Conti had resolved all pending issues, and concluded that the evidence
23 regarding NMFS’s substantial reduction of its FOIA-response backlog and the “technical,
24 administrative, and staffing improvements” NMFS had implemented to ensure timely processing
25 of FOIA requests on a forward-going basis meant that continuing injunctive relief was not
26 warranted. January 20, 2016 Order [Dkt. No. 75]. A stipulated judgment was entered on February
27 16, 2016. Plaintiffs now seek over \$700,000 in attorney’s fees for the hours they spent litigating
28 *OCE I* and *OCE II*, as well as costs. Defendants oppose plaintiffs’ entitlement to any fees, and

1 challenge the reasonableness of the amount sought.

2 LEGAL STANDARD

3 FOIA authorizes courts to “assess against the United States reasonable attorney fees and
4 other litigation costs reasonably incurred in any case under this section in which the complainant
5 has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E). This provision “has as its fundamental
6 purpose the facilitation of citizen access to the courts to vindicate the public’s statutory rights,” as
7 the fees and costs of bringing suit could otherwise “present a virtually insurmountable barrier
8 which [would] ba[r] the average person from forcing governmental compliance with the law.”
9 *Exner v. F.B.I.*, 443 F. Supp. 1349, 1352 (S.D. Cal. 1978).

10 A court may grant an award of attorney’s fees under 5 U.S.C. § 552(a)(4)(E) where the
11 plaintiff establishes that it is both eligible for and entitled to an award. *See Church of Scientology*
12 *of California v. U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983); *Rosenfeld v. U.S. Dep’t of*
13 *Justice*, 903 F. Supp. 2d 859, 865 (N.D. Cal. 2012). To be eligible for an award, the plaintiff must
14 show that “(1) the filing of the action could reasonably have been regarded as *necessary* to obtain
15 the information; and (2) the filing of the action had a *substantial causative* effect on the delivery
16 of the information.” *Church of Scientology*, 700 F.2d at 489 (emphasis in original).

17 If the court determines that the plaintiff is eligible for attorney’s fees, the court may then,
18 “in the exercise of its discretion, determine that [it] is *entitled* to an award of attorney’s fees.” *Id.*
19 at 492 (emphasis in original). In making this determination, courts consider “(1) the benefit to the
20 public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature
21 of the complainant’s interest in the records sought; and (4) whether the government’s withholding
22 of the records sought had a reasonable basis in law.” *Id.*; *accord Long v. U.S. I.R.S.*, 932 F.2d
23 1309, 1313 (9th Cir. 1991). “These four criteria are not exhaustive, however, and the court may
24 take into consideration whatever factors it deems relevant in determining whether an award of
25 attorney’s fees is appropriate.” *Long*, 932 F.2d at 1313 (internal quotation marks omitted). Once
26 eligibility is established, “[t]he decision to award attorney’s fees is left to the sound discretion of
27 the trial court.” *Church of Scientology*, 700 F.2d at 492.

DISCUSSION

I. WHETHER PLAINTIFFS SUBSTANTIALLY PREVAILED AND ARE ELIGIBLE FOR ATTORNEY’S FEES

The government does not contest that plaintiffs substantially prevailed in *OCE I*, but argues that plaintiffs were not successful in *OCE II*, and therefore are not eligible for fees for that portion of the litigation. As noted above, in his July and October 2015 orders, Judge Conti addressed the claims asserted in *OCE II* (as well as issues asserted in *OCE I*). In the July Order, Judge Conti granted plaintiffs’ request for a declaratory judgment that NMFS’s responses to plaintiffs’ FOIA requests 5-8 were untimely. July 2015 Order at 20-21. That by itself constitutes “success,” albeit on a discrete issue. *See Hajro v. United States Citizenship & Immigration Servs.*, 900 F. Supp. 2d 1034, 1045 (N.D. Cal. 2012) (prevailing on summary judgment and obtaining injunctive relief on claim that defendant’s responses were untimely constitutes substantial success), *reversed on other grounds by* 811 F.3d 1086, 1092 (9th Cir. 2016); *Or. Nat. Desert Ass’n v. Gutierrez*, 442 F. Supp. 2d 1096, 1098 (D. Or. 2006) (determination that agency failed to provide a timely response sufficient to create entitlement to fees), *aff’d in pertinent part, rev’d in part on other grounds by Or. Nat. Desert Ass’n v. Locke*, 572 F.3d 610 (9th Cir. 2009).

After initially finding that NMFS provided insufficient information in its declarations and *Vaughn* index to demonstrate the adequacy of some of its searches and withholdings, when NMFS provided supplemental briefing and declarations Judge Conti concluded that the searches were adequate and the withholdings justified (except as to one document under Exemption (b)(5), which NMFS decided to release). In addition, after receiving plaintiffs’ summary judgment motion and while preparing its cross-motion pleadings in *OCE II*, NMFS decided “upon additional review” to release an additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1 (14-4365) ¶ 5. Following the next round of supplemental briefing, NMFS decided to release in part yet another document that had been withheld. Dkt. No. 27 (14-4365) at 2. The evidentiary record supports plaintiffs’ contention that these documents were produced as a result of *OCE II*.¹³ Plaintiffs, therefore, prevailed, on another discrete portion of their litigation in

¹³ NMFS argues that its responses to Requests 5 through 8 were not produced as a result of the

United States District Court
Northern District of California

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1 securing these supplemental productions under a catalyst theory. *See, e.g., Dorsen v. United States*
 2 *SEC*, 15 F. Supp. 3d 112, 120 (D.D.C. 2014) (plaintiff prevailed where FOIA suit prompted
 3 additional or speedier release of documents); *Judicial Watch, Inc. v. United States DOJ*, 878 F.
 4 Supp. 2d 225, 232 (D.D.C. 2012) (catalyst theory satisfied where after a final agency response and
 5 commencement of lawsuit, additional documents were produced).

6 More importantly, in light of the “unmistakable history” of “unreasonable” untimeliness
 7 and delay, Judge Conti granted plaintiffs’ request for a declaratory judgment that NMFS failed to
 8 provide them with timely responses and had a past pattern and practice of untimely responses.
 9 That judgment, along with the limited injunctive relief (requiring NMFS to respond to plaintiffs’
 10 then-pending FOIA requests by a date certain), confers prevailing party status on plaintiffs as well.
 11 The government – in an attempt to avoid fees for *OCE II* – argues that plaintiffs did not secure any
 12 relief in *OCE II* beyond what they would have been entitled to given the claims asserted in *OCE I*.
 13 *Oppo*. 7-8. However, Judge Conti specifically held the pattern and practice claim in abeyance in
 14 *OCE I* to determine it on the more complete evidentiary record presented in *OCE II*. *OCE II*,
 15 therefore, was a necessary part to the Court’s eventual determination.

16 Similarly, the fact that further, more wide-spread injunctive relief was not granted in
 17 response to the allegations raised in both *OCE I* and *OCE II* in the October 2015 or January 2016
 18 Orders was due to the strong showing NMFS made on the steps the agency had taken and was
 19 continuing to take to extinguish its backlog and implement policies and practices to ensure timely
 20 responses in the future. The government spends much time in its brief and declarations attempting
 21 to show that the new policies and practices NMFS implemented in order to reduce the backlog
 22 discussed by Judge Conti and myself in the October 2015 and January 2016 Orders were not
 23 conceived in order to respond to, or spurred on by, plaintiffs’ litigation but were underway prior to
 24 the filing of *OCE I* and *OCE II*. *See, e.g., Oppo*. 9-10. Plaintiffs counter that argument by citing
 25 to notes and other documents produced by NMFS staff showing that efforts to reduce the backlog

26
 27 litigation, and cites testimony showing that NMFS began work processing and responding to these
 28 requests before the *OCE II* complaint was filed. *See Hornof Decl.* ¶ 7. NMFS also argues that the
 three FOIA requests subject to Judge Conti’s limited order of injunctive relief, were also being
 processed and responses “underway” before the October 21, 2015 Order. *Id.* ¶¶ 10-11.

1 were just being formulated in June 2015 and were implemented in part to avoid litigation, like the
2 suits at issue which were the only ones pending at the relevant time. *See, e.g.*, Reply 3-4.

3 However, in order to determine that plaintiffs are eligible for an award of attorney's fees, I
4 need not resolve this factual dispute. That plaintiffs secured additional documents from NMFS
5 after *OCE II* was filed and after NMFS took a closer look at its searches and withholdings and,
6 more importantly, secured another declaratory judgment recognizing that the agency failed to
7 provide timely responses, had engaged in a pattern and practice of tardy responses, and secured
8 limited injunctive relief as to then-pending but not sued upon FOIA requests, is success significant
9 enough to establish plaintiffs' eligibility for fees.¹⁴

10 In sum, plaintiffs were the prevailing parties on significant portions of both *OCE I* and
11 *OCE II* and are eligible for an award of attorney's fees and costs.¹⁵ The next step is to determine
12 if they are entitled to them.

13 **II. WHETHER PLAINTIFFS ARE ENTITLED TO ATTORNEY'S FEES**

14 The factors courts consider in determining whether a plaintiff is entitled to attorney's fees
15 include "(1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to
16 the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether
17 the government's withholding of the records sought had a reasonable basis in law." *Church of*

18 _____
19 ¹⁴ That said, the evidence on the whole indicates that NMFS took more concrete, specific, and
20 immediate steps following Judge Conti's Orders to extinguish its backlog and commit additional
21 resources to speeding up its response times than the agency might have taken but-for plaintiffs'
22 suits.

23 ¹⁵ Plaintiffs repeatedly imply that they were successful on their improper cut-off date challenges,
24 arguing that their lawsuits were the catalyst for NMFS's new cut-off date policy. Mot. at 8, 10.
25 The improper cut-off date issue was raised but not decided by Judge Conti in his March 30 Order,
26 because the issue was also raised but supported by a fuller factual record in the *OCE II* summary
27 judgment briefing that was pending. In his July Order, Judge Conti determined that, at most, a
28 factual dispute existed, and again held the issue in abeyance for supplemental responses. In his
October Order, Judge Conti found that plaintiffs had not established that NMFS used improper
cut-off dates, and instead granted summary judgment to NMFS on plaintiffs' improper search cut-
off date claim as to plaintiffs' *own* FOIA requests. October Order at 17. Later in the October
Order, Judge Conti recognized that the "NMFS West Coast Region appears to have an updated
process in place, using modern software, additional personnel, and policy changes (e.g., how the
cut-off date changes where there are multiple SMEs assigned) to speed up its process. *See* Supp.
Malabanian Decl. ¶¶ 15-18." *Id.* at 18. Judge Conti, however, never reached the issue of whether
these lawsuits were the catalyst for NMFS's new, updated, or clarified policy with respect to
search cut-off dates.

1 *Scientology*, 700 F.2d at 489. I will discuss each in turn.

2 **A. Benefit to the Public**

3 In considering the public benefit factor, courts consider “the degree of dissemination and
4 the likely public impact that might result from disclosure.” *Church of Scientology*, 700 F.2d at
5 493. The factor generally weighs in favor of an award where the information is broadly
6 disseminated to the public. *See, e.g., Electronic Frontier Foundation v. Office of Dir. of Nat.*
7 *Intelligence*, No. 07-cv-05278-SI, 2008 WL 2331959, at *3 (N.D. Cal. June 4, 2008) (finding that
8 the public benefit factor was satisfied where the plaintiff “immediately posted the requested
9 information on its website” and “created press releases for public access”). Even where the degree
10 of dissemination is limited, or where the level of public interest in the requested information itself
11 is minimal, the public benefit factor may still favor an award “as long as there is a public benefit
12 from the fact of . . . disclosure.” *O’Neill, Lysaght & Sun v. D.E.A.*, 951 F. Supp. 1413, 1423 (C.D.
13 Cal. 1996).

14 Courts in this circuit have found a public benefit favoring an award, despite an absence of
15 broad dissemination or a significant level of public interest in the requested information, where (1)
16 the case “establishe[d] that the government may not withhold certain information pursuant to a
17 particular FOIA exemption,” *Church of Scientology*, 700 F.2d at 493; (2) the plaintiffs were
18 environmental nonprofits whose purpose was “to oversee and enforce compliance with the [Clean
19 Air Act]” and the requested information was “being used to inform [the plaintiffs’] ongoing
20 oversight and enforcement efforts,” *The Sierra Club v. United States Env’tl. Prot. Agency*, 75 F.
21 Supp. 3d 1125, 1143-44 (N.D. Cal. 2014); and (3) the requested documents revealed a “long
22 history of abuse” by a paid DEA informant and “expos[ed] the implications of the government
23 dealing with untrustworthy paid informants.” *O’Neill*, 951 F. Supp. at 1423-24.

24 Plaintiffs argue that – just like the plaintiffs in *Sierra Club* – they “utilized the documents
25 to advance their efforts to promote compliance with environmental laws intended to broadly
26 benefit the public interest environmental protection. Specifically, they utilized the documents to
27 organize public support for measures designed to persuade Stanford and NMFS to do more to
28 protect a threatened fish species and to develop ESA citizen suits claims aiming to help the

1 survival and recovery of this threatened species.” Beaman Decl. ¶¶ 6-8; Mot. 15. Plaintiffs also
2 disseminated the information they secured to their members, the press, and the public through
3 messages, website postings, press releases, and interviews. Beaman Decl. ¶¶ 6-8.

4 As NMFS points out, it is unclear what role in that public outreach (if any) the information
5 actually secured by OCE as a direct result of the filing of these lawsuits or Judge Conti’s Orders
6 played. Beaman’s declaration is not specific on that point. *See, e.g., Cotton v. Heyman*, 63 F.3d
7 1115, 1120 (when evaluating the public benefit prong, the court must “evaluate the specific
8 documents at issue in the case at hand”). NMFS does not argue (or show by declaration) that the
9 information produced to OCE after the inception of the suits or Judge Conti’s Orders issued was
10 so ministerial or obscure that it could not have supported plaintiffs’ public interest and public
11 disclosure goals. The Beaman declaration, while not specifically focused on documents produced
12 as a result of this litigation, persuasively explains how the documents OCE received through its
13 FOIA requests and its litigation play a significant role in OCE’s mission to inform the public
14 about the activities of Stanford and the Central California Coast steelhead. Dkt. Nos. 83, 96.

15 In addition, this lawsuit effectively and publicly disclosed NMFS’s history of untimely
16 responses and significant backlog – as well as the steps NMFS was undertaking to cure those
17 issues. That shed important light about the agency’s non-compliance with its duty under FOIA, a
18 situation Judge Conti repeatedly referred to as “clear, undisputed, and troubling.” March 30, 2015
19 Order at 24; *see also* July 20, 2015 Order at 19 (“In short, even though the Fisheries Service does
20 not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did]’”). Finally,
21 plaintiffs secured a significant, contested legal ruling from Judge Conti: that FOIA allows both
22 declaratory judgment and injunctive relief as remedies for untimely responses. NMFS vigorously
23 argued that the only available remedy for a violation under FOIA was an order requiring
24 production of withheld documents; a position that was soundly rejected by Judge Conti. March
25 30, 2015 Order at 24-26; July 20, 2015 Order at 19-21.

26 On this record, plaintiffs have shown that this litigation – through the information released
27 and the legal principles established – conferred a significant benefit on the public.
28

B. Commercial Benefit to the Complainant/Nature of Plaintiffs' Interests

The second and third factors are “the commercial benefit to the complainant” and “the nature of the complainant’s interest in the records sought.” *Church of Scientology*, 700 F.2d at 492. Courts regularly consider these factors together. *See, e.g., id.* at 494; *Am. Small Bus. League v. U.S. Small Bus. Admin.*, No. 08-cv-00829-MHP, 2009 WL 1011632, at *3 (N.D. Cal. Apr. 15, 2009); *Electronic Frontier Foundation*, 2008 WL 2331959, at *3.

As a general matter, if a “commercial benefit will inure to the plaintiff from the information,” or if the plaintiff “intends to protect a private interest” through the FOIA litigation, then “an award of attorney’s fees is not recoverable.” *Church of Scientology*, 700 F.2d at 494. On the other hand, where the plaintiff “is indigent or a nonprofit public interest group, an award of attorney’s fees furthers the FOIA policy of expanding access to government information.” *Id.* The Ninth Circuit has instructed that, pursuant to the second and third factors, a court “should generally award fees if the complainant’s interest in the information sought was scholarly or journalistic or public-oriented,” but should not do so “if his interest was of a frivolous or purely commercial nature.” *Long*, 932 F.2d at 1316.

Plaintiffs argue that their non-profit status combined with the lack of any private commercial interest in the information they secured, strongly favors an award under these factors. *See* Beaman Decl. ¶¶ 1, 6-8. The government counters that contrary to plaintiffs’ current assertion that their goal in *OCE I* and *OCE II* was to force NMFS to provide more timely and fulsome responses to their and others’ FOIA requests, the real purpose of these lawsuits was to force NMFS to produce documents that plaintiffs could and did use in their suit against Stanford University. Declaration of Robin M. Wall [Dkt. No. 92-1], Ex. L (“Stanford Summary Judgment Papers,” noting that some of the FOIA production was used on a motion to compel and on a motion for summary judgment in the Stanford case). That purpose, according to the government, is a private one that does not make plaintiffs entitled to fees. *Oppo*. 11-13.

The cases relied on by NMFS considered private litigants who used FOIA to secure evidence in support of their private lawsuits. *See Hersh & Hersh v. U.S. Dept. of Health and Human Services*, No. 06-04234-PJH, 2008 U.S. Dist. LEXIS 110977, at *7 (N.D. Cal. July 9,

1 2008) (denying an award of attorney’s fees where “plaintiff undertook this FOIA request for
2 decidedly commercial purposes” when plaintiff was litigating private lawsuit against a defendant
3 regarding defective medical devices and plaintiff failed to secure disclosure of the “vast majority”
4 of documents it sought); *Ellis v. United States*, 941 F. Supp. 1068, 1078 (D. Utah 1996) (denying
5 fees where documents sought for assistance in private tort suit, because while documents produced
6 under FOIA created “some slight public benefit in bringing the government into compliance with
7 FOIA and providing information of general interest to the public, the disclosure of the records did
8 not add to the fund of information necessary to make important political choices”).¹⁶ They do not
9 address the situation here, where non-profit environmental advocacy organizations bring suit
10 under FOIA as part of their ongoing efforts to shed light on how an agency is (or is not) protecting
11 the environment, albeit with respect to a specific project.

12 Moreover, while plaintiffs were undoubtedly motivated in some part to secure documents
13 from NMFS in order to assist their litigation against Stanford, there was a significant and separate
14 public benefit sought and secured by plaintiffs – shedding light on the actions of NMFS (as
15 opposed to the actions of Stanford) in carrying out its agency duties and on its handling of
16 plaintiffs’ and others’ FOIA requests.¹⁷

17 These factors weigh in favor of plaintiffs’ entitlement to fees.
18
19

20 ¹⁶ I recognize that the court in *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1144 (N.D.
21 Cal. 2014) rejected an agency’s argument that a non-profit environmental group plaintiff had a
22 commercial interest in the FOIA litigation because they intended to bring environmental litigation,
in part because “Plaintiffs were not pursuing a separate private lawsuit against Luminant at the
time they initiated the FOIA request.” The court, therefore, did not directly reach the issue raised
here.

23 ¹⁷ NMFS’s other cases are inapposite, as they do not address whether use of documents secured
24 through FOIA in other litigation equals a “commercial” interest in the FOIA litigation, but stand
25 for the proposition that having a personal interest in the records sought does not increase the
26 access to those records under FOIA. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143
27 n.10 (1975) (“Sears’ rights under the Act are neither increased nor decreased by reason of the fact
28 that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the
average member of the public. The Act is fundamentally designed to inform the public about
agency action and not to benefit private litigants.”); *Shannahan v. IRS*, 672 F.3d 1142, 1151 (9th
Cir. 2012) (requestors’ interest in IRS documents about themselves to use in their civil tax suit
does not negate applicability of FOIA exemptions preventing disclosure).

C. Reasonable Basis in Law

The fourth factor is “whether the government’s withholding had a reasonable basis in law”; in other words, whether the government’s actions appeared to have “a colorable basis in law” or instead appeared to be carried out “merely to avoid embarrassment or to frustrate the requester.” *Church of Scientology*, 700 F.2d at 492, 492 n.6; *see also Rosenfeld*, 903 F. Supp. 2d at 870; *Am. Small Bus. League*, 2009 WL 1011632, at *4. This factor “is not dispositive” and can be outweighed where the other relevant factors favor an award. *Rosenfeld*, 903 F. Supp. 2d at 870 (internal quotation marks omitted); *see also O’Neill*, 951 F. Supp. at 1425 (noting that the reasonable basis in law factor “in particular should not be considered dispositive”). The burden is on the government to demonstrate that its withholding was reasonable. *Sierra Club*, 75 F. Supp. 3d at 1145.

Here, Judge Conti repeatedly found in no uncertain terms that NMFS failed to provide timely responses under FOIA. *See, e.g.*, March 30, 2015 Order at 24 (with respect to NMFS’s violation of FOIA deadlines “the record is clear, undisputed, and troubling In short, even though the Fisheries Service does not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did].’”); July 20, 2015 Order at 19 (“The records in both this and the related case show a clear and undisputed breach of this [FOIA response deadline] requirement.”); October 21, 2015 Order at 18-19 (“the Court has received showing [of] an unmistakable history that the Fisheries Service fails to meet its statutory deadlines under FOIA and causes Plaintiffs (and likely others similarly situated) to suffer unpredictable, unreasonable delays.”).¹⁸

Judge Conti also found that in litigating this case, NMFS repeatedly failed to explain with sufficient detail the adequacy of its searches and the reasons for its withholdings – thereby necessitating additional rounds of briefing by the parties and orders by the court.¹⁹ As such, I

¹⁸ Judge Conti’s repeated use of strong adjectives like “troubling” and “unreasonable” separates this case from those relied on by NMFS where fees were denied because delayed responses were caused by confusion or “bureaucratic difficulty” in handling requests. *Oppo*, at 14.

¹⁹ I recognize that Judge Conti ultimately found that NMFS had conducted adequate searches and appropriately withheld all documents except one. But those conclusions were reached only after multiple rounds of briefing and decision, necessitated by NMFS’s initially deficient declarations and *Vaughn* indexes.

1 conclude that neither NMFS's general responses to the FOIA requests nor its litigation position
2 before this Court had a reasonable basis in law.

3 In sum, plaintiffs are entitled to an award of attorney's fees. The next step is to determine
4 the amount owed.

5 **III. REASONABLE AMOUNT OF ATTORNEY'S FEES AND COSTS**

6 "[O]nce the court has determined that the plaintiff is both eligible for and entitled to
7 recover fees, the award must be given and the only room for discretion concerns the
8 reasonableness of the amount requested." *Long*, 932 F.2d at 1314. In making this determination,
9 the court must scrutinize the reasonableness of (i) the hourly rates and (ii) the number of hours
10 claimed. *Id.* at 1313-14. "If these two figures are reasonable, then there is a strong presumption
11 that their product, the lodestar figure, represents a reasonable award." *Id.* at 1314 (internal
12 quotation marks omitted). Nevertheless, a court "may authorize an upward or downward
13 adjustment from the lodestar figure if certain factors relating to the nature and difficulty of the
14 case overcome this strong presumption and indicate that such an adjustment is necessary." *Id.*

15 **A. Hourly Rate**

16 NMFS argues plaintiffs' hourly rates are excessively high, and that the Court should apply
17 the hourly rates set forth in the *Laffey* matrix plus locality adjustments, which would result in a
18 decrease of 22.9% in the requested lodestar. *Oppo.* at 20-22. As I recognized in
19 *Public.Resource.org v. United States Internal Revenue Serv.*, No. 13-CV-02789-WHO, 2015 WL
20 9987018, at *6 (N.D. Cal. Nov. 20, 2015), "[a]bsent some showing that the rates stated in the
21 matrix are in line with those prevailing in this community . . . I agree [that] that the matrix is not
22 persuasive evidence of the reasonableness of its requested rates." As in *Public.Resource.org*, I
23 will not bind plaintiffs to the *Laffey* matrix, especially as statutory fee awards from this District do
24 not establish that the *Laffey* matrix rates are in line with prevailing rates for statutory fee cases in
25 the Bay Area legal community. *See, e.g., Public.Resource.org* (awarding rates from \$205 for
26 paralegals up to \$645 for senior/lead counsel); *Sierra Club*, 75 F. Supp. 3d at 1152-53 (approving
27 hourly rates of \$350 to \$650 in FOIA action); *Rosenfeld*, 904 F. Supp. 2d at 1001, 1004
28 (approving hourly rates of \$460, \$550, and \$700 in FOIA action); *Hajro v. U.S. Citizenship &*

1 *Immigration Servs.*, 900 F. Supp. 2d 1034, 1054 (N.D. Cal. 2012) (approving hourly rates of \$450
2 to \$625 in FOIA action) *vacated and remanded on other grounds*, 2015 WL 6405473 (9th Cir.
3 Oct. 23, 2015); *see also Hiken v. Dep't of Def.*, 836 F.3d 1037, 1039 (9th Cir. 2016) (reversing
4 district court order awarding fees at matrix rate).

5 The rates sought by counsel in this case are, generally, higher than the rates approved in
6 other recent FOIA cases in this District. They are also, more importantly, significantly higher than
7 rates that were requested and approved by these *same* counsel in recent cases in this District for
8 environmental litigation. *See, e.g., OCE v. EPA*, 13-cv-02857 (Dkt. Nos. 82, 99) (awarding fees
9 from \$435 to \$655/hr for work through early 2015); *San Francisco Baykeeper v. West Bay*
10 *Sanitary Dist.*, No. 09-5676, 2011 WL 6012936 (N.D. Cal. Dec. 1, 2011) (approving \$585/hr for
11 Sproul). Plaintiffs argue this upward departure is warranted because in the past they have relied
12 on the *Laffey* matrix with locality adjustments, but recent cases confirm those rates under-
13 compensate them. *See, e.g., Declaration of Christopher Sproul* [Dkt. No. 88] ¶ 15; *Declaration of*
14 *Patricia Weisselberg* [Dkt. No. 86] ¶ 9.

15 Plaintiffs undertook a “market rate” analysis and seek compensation for that research from
16 *this* case. The analysis was performed primarily by billing attorney Christopher Hudak. Hudak
17 reviewed fee awards in a number of different types of cases from the Northern District, including
18 class action litigation (antitrust, wage and hour, consumer protection, and securities) as well as one
19 anti-SLAPP case and one FOIA case. *See, e.g., Declaration of Christopher Hudak* [Dkt. No. 84]
20 ¶¶ 11-32. The market rate analysis did not consider more than one FOIA case (despite there being
21 a number of cases on point) nor did it directly consider cases awarding statutory fees for
22 environmental litigation.²⁰

23 Plaintiffs have not demonstrated that the rates they seek here are reasonable for FOIA
24

25 ²⁰ The OCE attorneys did rely for “data points” on the Declaration of Richard M. Pearl from a
26 state court case, *Citizens Committee To Complete The Refuge, Inc. v. City of Newark*, Case No.
27 RG10530015, (CA Superior Ct. County of Alameda). The Pearl declaration focused on attorney’s
28 fees rates through 2014, and did review some statutory fee-shifting awards, as opposed to the class
action attorney’s fee awards focused on by the plaintiffs here. *See, e.g., Weisselberg Decl.* ¶¶ 11-
16; *Sproul Decl., Ex. 32; Hudak Decl.* ¶ 34.

1 litigation (or environmental fee-shifting litigation). They seek to downplay the fact that in cases
 2 from 2014 and 2015 *these same attorneys* requested significantly lower attorney’s fee rates. I do
 3 not believe the case law supports limiting plaintiffs to their prior requested rates, but I do believe
 4 that any *significant* upward departure should be justified, for example, by declarations explaining
 5 the increases in light of increased expenses from doing business and practicing in certain markets
 6 or other factors. I also do not find plaintiffs’ focus – as support for their requested hourly rates in
 7 these cases – on large scale, complex class action cases to be persuasive. That is not to say that
 8 FOIA cases cannot be complex. But the high rates awarded for complex class action cases can be
 9 explained in large part by the necessity in those cases for plaintiffs’ counsel to incur significant
 10 cost outlays (for experts, document review systems, travel, depositions, etc.) as well as attorney
 11 time (to review hundreds of thousands of documents, numerous depositions, etc.) which are not
 12 typically required in FOIA cases and were not required in these cases.

13 Accordingly, I find that the hourly rates plaintiffs request here are not adequately
 14 supported and are not reasonable. This conclusion is consistent with *Hiken v. Dep’t of Def.*, 836
 15 F.3d 1037, 1044–46 (9th Cir. 2016), where the Ninth Circuit confirmed that a “reasonable rate” is
 16 the rate prevailing “in the community” for “similar work” performed by attorneys of comparable
 17 skill and experience and based on record evidence of prevailing historical rates. I do not find that
 18 plaintiffs’ survey is based on the performance of “similar work” by attorneys of comparable skill
 19 and experience.

20 Plaintiffs shall recalculate their lodestar based on hourly rates that are consistent with the
 21 rates they requested in prior FOIA or environmental cases for the same time periods. For
 22 example, time spent on these cases in 2015 should be sought at the same rate previously sought
 23 and/or awarded by a court for time spent in 2015. For time in 2016 – as to which plaintiffs may
 24 have not had an hourly rate approved by another court – plaintiffs are entitled to a 10% increase
 25 over their 2015 approved-rates, absent specific justification supported by a declaration explaining
 26 why a particular attorney or paralegal should be granted a higher percentage increase.²¹

27 _____
 28 ²¹ For any biller in these cases who has not had a prior-court-submitted or approved billing rate, plaintiffs shall use a prior-court-approved billing rate for an attorney or paralegal of comparable

B. Hours Expended

NMFS also argues that the hours sought by plaintiffs cover time and tasks that were neither necessary nor reasonable for the prosecution of these suits and asks me to reduce the requested fee amount for the following:

- A \$188,381.47 reduction for plaintiffs’ work on the claims they lost;
- A \$26,686.22 reduction for work on pleadings and other papers that were never filed;
- A \$89,442.20 reduction for work performed at the administrative stage and review of documents produced;
- A reduction for work unrelated to *OCE I* and *OCE II*; and
- A 30 – 50% reduction generally for excessive, redundant, and unnecessary work.²²

1. Claims Lost

NMFS argues that plaintiffs are not entitled to \$188,381.47 in fees (calculated at the hourly rates that NMFS objects to) for “distinct” claims they lost: (i) claims against FWS and the Corps; (ii) claims regarding the adequacy of the searches in *OCE II* (based on a frivolous argument that NMFS’s declarant’s testimony was “hearsay”); (iii) unsuccessful challenges to NMFS’s withholdings; (iv) claims regarding actual and pattern and practice search cut-off dates; and (v) plaintiffs’ response to the October 21 2015 Order to Show Cause as to whether further injunctive relief was necessary.²³

With respect to the \$3,506.18 incurred with *OCE III*, plaintiffs admit they do not seek to recover for that time. So there is no longer a dispute as to that time/amount. The only other unsuccessful legal theory/claim NMFS “breaks out” time for is the \$23,032.40 plaintiffs charge

experience.

²² Plaintiffs explain that before submitting their request, most billers took 10% of the time billed “off the top” to account for any potential inefficiencies or redundancies in their work. Sproul Decl. ¶¶ 92, 97; Weisselberg Decl. ¶ 41; Isaacs Decl. ¶¶ 6-7; Costa Decl. ¶ 6; Hudak Decl. ¶ 35 (worked over 100 hours, but seeking payment for approximately 30 hours).

²³ NMFS breaks down the \$188,381.47 (or more accurately \$188,381.48) as follows: \$23,032.40 for 37.1 hours spent on the opposition to NMFS’s showing in response to Judge Conti’s OSC; \$161,842.90 as a 50% reduction from the \$323,685.79 plaintiffs billed for pleadings, summary judgment, supplemental briefing and the joint submission; and \$3,506.18 incurred with *OCE III*.

1 for 37.1 hours spent responding to NMFS’s showing in response to Judge Conti’s Order to Show
2 Cause. Oppo. 17. However, I find that that time was reasonable and necessary. Judge Conti’s
3 OSC raised significant questions regarding the steps NMFS was taking to address its FOIA
4 backlog, and NMFS filed a detailed response, supported by declarations. Plaintiffs filed a brief to
5 contest some of the assertions made by NMFS, but that pleading was helpful and relied on by me
6 in determining whether any live issues remained in the litigation, even though I denied plaintiffs’
7 request for further injunctive relief as to the backlog.

8 NMFS does not break out the time spent on the other “unsuccessful” issues because
9 plaintiffs’ billing records do not allow them to. NMFS instead argues the 595.6
10 hours/\$323,685.79 plaintiffs billed to pleadings for the summary judgment, supplemental briefing,
11 and the joint submission required by the October 2015 Order should be reduced by 50% to
12 account for plaintiffs’ other losing claims/theories. Oppo. 17-18; Wall Decl., Ex. B (Summary
13 Fee Analysis). I disagree.

14 As to claims against FWS and the Corps for their alleged part in causing repeated delays in
15 NMFS’s FOIA responses, while plaintiffs were not ultimately successful in their claims against
16 those entities, the claims made were part and parcel of the impermissible and excessive delay
17 claims against NMFS. This time is compensable.

18 As to claims regarding the adequacy of the searches in *OCE II* (based in part on the
19 argument that NMFS’s declarant’s testimony was hearsay), while plaintiffs eventually lost this
20 claim, Judge Conti forced NMFS to submit supplemental briefing explaining the adequacy of its
21 searches. NMFS’s initial explanations, therefore, were deficient and plaintiffs’ successfully
22 argued that deficiency to Judge Conti in their initial and supplemental briefing. This time is
23 compensable.

24 As to the unsuccessful challenges to NMFS’s withholdings, plaintiffs eventually lost all
25 but one of these claims. But in the process of the initial and supplemental rounds of briefing,
26 NMFS agreed to produce more documents and NMFS had to explain its actions in greater detail
27 due to deficiencies in their initial briefing and declarations. This time is compensable.

28 And as to the eventually unsuccessful claim regarding NMFS’s pattern and practice of

1 applying improper search cut-off dates, while plaintiffs did not secure an order from Judge Conti
2 finding that NMFS had an illegal pattern or practice, the record supports at least an inference that
3 during this litigation NMFS implemented a new or clarified policy. Even assuming it was simply
4 a clarified policy, that clarification produced a public benefit for future FOIA requestors. This
5 time is compensable.

6 **2. Pleadings and Papers Never Filed**

7 NMFS argues that plaintiffs should not be compensated for 49.1 hours/\$26,686.22 for
8 work on pleadings that were never filed, including draft amended complaints in *OCE I* and *OCE*
9 *II*, a motion for reconsideration, and a motion for relief. Wall Decl., Ex. G (Unfiled Papers).

10 In reply, Sproul explains: (i) the work done on the unfiled SAC in May 2014 in *OCE I* was
11 used on the motion for summary judgment in *OCE I* and is therefore compensable (Sproul Reply
12 Decl. ¶ 5); (ii) the 3.16 hours billed in February 2015 for a “motion for relief” was in fact work
13 done for the Notice Regarding Submitted Matter and Request For Ruling filed on March 2, 2015
14 (*id.* ¶ 6); (iii) 13.19 hours of work in October 2014 was for a pleading filed in *OCE II*, Dkt. 58 (*id.*
15 ¶ 7); (iv) 1.32 hours of time billed in May 2015, was cut from the request on plaintiffs’ Reply (and
16 not currently sought); and (iv) the remaining hours that were spent on the unfiled motion for
17 reconsideration in January 2016 are compensable because that unfiled motion was used as
18 leverage to get NMFS to agree to a form of judgment and produce additional documents. *Id.* ¶ 8.
19 Weisselberg also, on review, cut 0.56 of time from her entries challenged in Wall’s Ex. G, because
20 those entries represented work on what was to become *OCE III*. Weisselberg. Reply Decl. ¶ 11.

21 Considering the declarations, I find that all of the challenged time except the time spent on
22 the unfiled motion for reconsideration is compensable. Plaintiffs have adequately identified how
23 the time identified by NMFS was spent or used for pleadings actually filed in this action.
24 However, the time spent on the unfiled motion for reconsideration in January 2016 was created
25 voluntarily by plaintiffs and used for “leverage” but was never necessary or useful for any
26 contested decision made by me.

27 **3. Administrative Efforts**

28 NMFS wants a further reduction for 157.7 hours/\$89,442.20 that plaintiffs spent drafting

1 FOIA requests, working on the agency administrative appeals, and reviewing the documents
 2 produced. Wall Decl., Ex. I. Generally, “work performed during the pre-litigation administrative
 3 phase of a FOIA request is not recoverable under FOIA.” *Elec. Privacy Info. Ctr. v. United States*
 4 *Dep't of Homeland Sec.*, 811 F. Supp. 2d 216, 237 (D.D.C. 2011); *but see Public.Resource.org*,
 5 2015 WL 9987018, at *8 (allowing recovery for two time entries on letters seeking agency
 6 reconsideration “given the clear overlap in subject matter between the letter and this litigation, the
 7 letter’s explicit contemplation of a lawsuit, and the proximity in time between the letter and the
 8 filing of” the complaint).

9 In their Reply and supporting declarations, plaintiffs cut some of the contested time for
 10 work on the FOIA requests and administrative appeals, but kept the time spent on two specific
 11 FOIA requests in. As explained by lead counsel Sproul:

12 I and my co-counsel have been mindful that we are not entitled to
 13 recover for drafting all our FOIA requests and reviewing all the
 14 documents obtained for the purpose of learning the substantive
 15 content of those documents for the Plaintiffs’ citizen suit litigation
 16 against Stanford or larger public advocacy campaign related to
 17 Stanford and the San Francisquito Creek watershed. However, we
 18 have concluded that we may recover for time spent drafting FOIA
 19 requests specifically intended to garner information for use in this
 20 litigation and reviewing documents for such litigation purposes. I
 21 and my co-counsel have carefully segregated the time spent drafting
 22 FOIA requests reviewing documents such that we are seeking
 23 recovery only for the latter time. With respect to drafting FOIA
 24 requests, we are seeking to recover for time spent drafting (or
 25 appealing responses concerning) only two of the multiple FOIA
 26 requests at issue in this proceeding that Plaintiffs specifically used to
 27 gather information used as evidence against NMFS in this case:
 28 FOIA requests sent on April 3, 2014 and November 24, 2015. (the
 latter is Exhibit M to the Wall Declaration, (OCE I, Dkt. 92-1). The
 April 3, 2014 FOIA sought documents concerning the searches done
 by NMFS and the responses provided by NMFS to Plaintiffs in
 response to their FOIA requests with the aim of developing evidence
 that NMFS’s searches have not complied with FOIA. Plaintiffs’
 November 24, 2015 FOIA request sought documents with the
 specific intent of trying to garner evidence that Plaintiffs’ litigation
 had catalyzed NMFS to respond more promptly to Plaintiffs’ FOIA
 requests. The aim was to develop evidence in support of catalyst
 theory arguments for purposes of attorney fees recovery in
 settlement and, if necessary, a fees motion. Plaintiffs’ November 24,
 2015 FOIA Request sought documents related to NMFS’s assertions
 that it had instituted several FOIA reforms also with the specific
 intent of trying to garner evidence that Plaintiffs’ litigation had
 catalyzed NMFS to institute these reforms. Again, our aim was to
 develop evidence in support of catalyst theory arguments for

1 purposes of attorney fees recovery in settlement and, if necessary, a
 2 fees motion. As discussed in the Reply Declaration of Patricia
 3 Weisselberg, Plaintiffs have in fact used documents obtained in
 4 response to their FOIA requests as exhibits supporting the catalyst
 theory arguments they are advancing in their Fees Motion and
 plaintiffs agree to reduce some of their time spent on drafting the
 FOIA requests and the administrative appeals.

5 Sproul Reply Decl. ¶ 10.

6 Accordingly, Michael Costa cut 11.91 hours/\$6,148.98 for drafting FOIA requests and
 7 appeals, except for the work he did on the April 3, 2014 and November 24, 2015 FOIA requests
 8 that were aimed at gathering information for this lawsuit. Costa Reply Decl. ¶ 3. Jodene Isaacs
 9 cut 11.21 hours/\$5,599.40 for drafting FOIA requests and appeals. Isaacs Reply Decl. ¶ 2.
 10 Weisselberg cut 8.74 hours spent on FOIA appeals, included in Wall's Ex. I. Weisselberg Reply
 Decl. ¶ 13.

11 The bulk of the remaining time appears to be for document review conducted primarily by
 12 Costa and Isaacs. NMFS argues that document review is simply not compensable. *See, e.g.,*
 13 *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1149 (N.D. Cal. 2014) ("As Plaintiffs
 14 received, at least in part, the relief they sought when the EPA produced the documents, the time
 15 they expended reviewing the documents was is properly characterized as post-relief activity,
 16 separate from the litigation."); *Citizens for Responsibility & Ethics v. United States DOJ*, 825 F.
 17 Supp. 2d 226, 231 (D.D.C. 2011) ("Plaintiff would have had to expend this time had DOJ timely
 18 produced the documents without litigation; the cost of reviewing documents produced in response
 19 to a FOIA request is simply the price of making such a request.").

20 Plaintiffs respond that in this case, where the adequacy of NMFS's searches and
 21 withholdings were central claims, plaintiffs needed to spend significant amounts of time reviewing
 22 the documents to support those claims in litigation. That might be true – but plaintiffs'
 23 withholding claims were almost totally rejected (except for one document) and plaintiffs'
 24 inadequate search claims were likewise mostly unsuccessful (except for two narrow wins in *OCE*
 25 *I*). Plaintiffs also do not cite any case law allowing for recovery of time spent reviewing document
 26 productions where that review is necessary for a plaintiff to be able to challenge the adequacy of
 27 an agency's search or the propriety of withholdings.
 28

1 Based on the declarations, I find that the Costa time spent on the two identified FOIA
 2 requests is compensable, given the overlap in subject matter between requests and this litigation as
 3 well as the proximity in time between those requests and the filing of pleadings in this case. The
 4 time spent reviewing the documents produced is not compensable.

5 **4. Work Unrelated to *OCE I* and *OCE II***

6 NMFS argues that plaintiffs should not be compensated for 8.9 hours/\$4,461.23 billed by
 7 Sproul, Weisselberg, Isaacs, and Costa that it contends is unrelated to *OCE I* and *OCE II*,
 8 including litigation with Stanford and entries related to FWS and the Corps. Wall Decl., Ex. H
 9 (Unrelated Matters). In Reply, Weisselberg explains the relevance of her entries listed on Exhibit
 10 H to *OCE I* and *OCE II*. Weisselberg Reply Decl. ¶ 12. Sproul also addresses the 8.9 hours listed
 11 in Exhibit H, and other than two mistakes accounting for 0.35/hours (which were cut in the Reply)
 12 adequately explains that those hours billed were necessary for *OCE I* and *OCE II*. Sproul Reply
 13 Decl. ¶ 9; *see also* Costa Reply Decl. ¶ 16. This time is compensable.

14 NMFS also argues that plaintiffs have (perhaps inadvertently) claimed time for work on
 15 *OCE III*, despite their claim that they are not seeking that time. In its Opposition and supporting
 16 declaration, NMFS identified 5.9 hours/\$3,506.18 it contends was incurred on *OCE III*. *See* Wall
 17 Decl., Ex. D. As noted above, this time is not compensable.

18 **5. Reduction for Excessive or Redundant Work**

19 NMFS asks the Court to reduce by 30-50% any fee award to account for excessive,
 20 cumulative, and inefficient billing. *Oppo.* at 24. NMFS specifically challenges: (i) the 158 hours
 21 spent on the opening attorney's fees motion and declarations; (ii) 249 hours on summary judgment
 22 and supplemental briefing in *OCE I*; (iii) 263.8 hours on summary judgment and supplemental
 23 briefing in *OCE II*; (iv) 157.7 hours on the "administrative phase" including record review; and (v)
 24 the fact that five attorneys worked on the case, which NMFS contends is excessive given the
 25 nature of these cases and is demonstrated by the 173.7 hours/\$107,885.73 billed for telephone
 26 calls and email correspondence between counsel for "coordination" purposes. Wall Decl., Ex. F
 27 (Coordination Activities).

28 In their Reply declarations, two of the billing attorneys exercised "more" billing judgment

1 to cut hours in light of potential redundancy. *See* Costa Reply Decl. ¶ 4 (cutting 4.05
2 hours/\$2,136.38); Isaacs Reply Decl. ¶ 3 (cutting just over 14 hours/\$7,087.91). No other
3 reductions for excessive or redundant work appear to have been made, other than the 10%
4 “off the top” that each of the billing attorneys took off their time initially.

5 The time spent on the opening attorney’s fees motion and declarations is excessive and
6 unreasonable. In particular, plaintiffs should not be compensated for the time Hudak spent
7 (unsuccessfully as addressed above) surveying cases in order to determine what billing rates
8 should be used for plaintiffs in this fee motion. Moreover, the time spent in drafting the fee
9 motion – which itself does not raise any unique issues or issues of first impression – is excessive.
10 Plaintiffs purport to be experienced FOIA and environmental litigators; submission of fee petitions
11 is a regular part of that work. I recognize that reviewing the time records, exercising billing
12 judgment, and creating supporting declarations will take significant time in each case no matter
13 how experienced counsel is. But the time spent on the *brief* appears to be excessive in and of
14 itself. A 25% reduction in the time spent on the opening attorney’s fees motion is appropriate, as
15 is elimination of the time Hudak spent on his inapposite attorney’s fees survey.

16 As to time spent on the Reply brief and declarations (which NMFS did not have the
17 opportunity to attack), I conclude that the time spent on the brief itself it reasonable, but not the
18 time spent reviewing the time slips and submitting supplemental declarations, because much of
19 *that* time was spent accounting for errors pointed out by NMFS and then making additional
20 reductions for improper or otherwise redundant billing. Only 50% of the time spent on the
21 declarations in support of the Reply is compensable.

22 As to the 249 hours spent on summary judgment and supplemental briefing in *OCE I* as
23 well as the 263.8 hours spent on summary judgment and supplemental briefing in *OCE II*, I find
24 that the time is reasonable and compensable. The summary judgment briefing was extensive,
25 detailed and addressed a number of issues where there was little precedent. In these circumstances
26 I cannot say the time spent was unreasonable.

27 As to the 157.7 hours on the “administrative phase” including record review, as noted
28 above, plaintiffs have voluntarily cut all time on drafting the FOIA requests, except for time Costa

1 spent on two, and I have already found that time spent reviewing the documents produced is not
2 compensable.

3 Finally, as to the time spent on coordination between counsel, I find that 173.7 hours is
4 excessive. While this case was complex in the sense that there were a large number of FOIA
5 requests at issue, at least three lawsuits filed, and multiple rounds of summary judgment and
6 additional briefing required, the sheer number of attorneys involved – many of whom it appears
7 were involved in part because of the Stanford litigation – meant that there was an excessive
8 amount of “coordination.” A 25% reduction in the amount of time spent on coordination is
9 appropriate.

10 **C. Costs**

11 Plaintiffs seek \$3,190.39 in costs. Dkt. No. 94. NMFS does not oppose the amount of
12 costs, but argues instead that in light of the limited nature of plaintiffs’ success and the agency’s
13 good faith, costs are not warranted. Oppo. at 24-25. Having concluded that plaintiffs are
14 substantially prevailing and that the agency’s defenses were without a reasonable basis in law, an
15 award of costs is appropriate. Plaintiffs are awarded \$3,190.39 in costs.

16 **CONCLUSION**

17 For the foregoing reasons, plaintiffs will be awarded attorney’s fees, but at a significantly
18 reduced amount, and are awarded \$3,190.39 in costs.

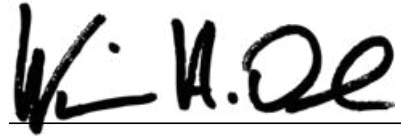
19 Within twenty days of the date of this Order, plaintiffs shall, after meeting and conferring
20 with defense counsel, submit a *joint* supplemental brief and proposed judgment containing a
21 revised request for attorney’s fees that excludes all of the time I have identified above as not being
22 compensable. The parties shall make all reasonable efforts to reach agreement on the time to be
23 included in light of the time that has been excluded by this Order. If the parties cannot agree, any
24 remaining disputes shall be explained in no more than two pages.

25 Plaintiffs must also recalculate their lodestar, using hourly rates that were approved for
26 them in past years and using a rate for 2016 that is no more than 10% above their 2015 rates,
27 unless otherwise justified. At the time the joint supplemental brief and proposed judgment is filed,
28 plaintiffs shall submit a declaration explaining and identifying: (i) the rates for each biller for each

1 year billed; (ii) the case(s) for which each biller's rates have been requested and approved; (iii) the
2 basis for the 2016 hourly rates sought; and (iv) the basis for any hourly rate sought for a biller who
3 has not had her or his time approved by a prior court order.

4 **IT IS SO ORDERED.**

5 Dated: March 1, 2017

6
7 

8 William H. Orrick
9 United States District Judge
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United States District Court
Northern District of California

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Monday, April 10, 2017 9:23 AM
To: markhgraff@hotmail.com
Subject: PTA
Attachments: 2017 NOAA8861 - Privacy Threshold Analysis_ Rev 2 mhg.pdf

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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**U.S. Department of Commerce
National Oceanic and Atmospheric Administration
National Weather Service**



**Privacy Threshold Analysis
for the
Aviation Weather Center (NOAA8861)**

**U.S. Department of Commerce Privacy Threshold Analysis
National Oceanic and Atmospheric Administration
National Weather Service/Aviation Weather Center (NOAA8861)**

Unique Project Identifier: NOAA8861

Introduction: This Privacy Threshold Analysis (PTA) is a questionnaire to assist with determining if a Privacy Impact Assessment (PIA) is necessary for this IT system. This PTA is primarily based from the Office of Management and Budget (OMB) privacy guidance and the Department of Commerce (DOC) IT security/privacy policy. If questions arise or further guidance is needed in order to complete this PTA, please contact your Bureau Chief Privacy Officer (BCPO).

Description of the information system and its purpose:

The Aviation Weather Center (AWC), located in Kansas City, MO, enhances aviation safety by issuing accurate warnings, forecasts and analyses of hazardous weather for aviation interests. The Center identifies existing or imminent weather hazards to aircraft in flight and creates warnings for transmission to the aviation community. The Center also originates operational forecasts of weather conditions predicted to affect domestic and international aviation interests during the next 24 hours. The AWC collaborates with universities, governmental research laboratories, Federal Aviation Administration facilities, international meteorological watch offices and other National Weather Service components to maintain a leading edge in aviation meteorology hazards training, operations and forecast technique development.

Warnings of flight hazards, such as turbulence, icing, low clouds and reduced visibility remain most critical for the protection of life and property over the United States from the earth's surface up to Flight Level (FL) 240. Above FL 240, the AWC provides warnings of dangerous wind shear, thunderstorms, turbulence, icing, and volcanic ash for the Northern Hemisphere from the middle of the Pacific Ocean eastward to the middle of the Atlantic Ocean. Additionally, above FL 240, the AWC forecasts jet stream cores, thunderstorms, turbulence and fronts for the Northern Hemisphere from the east coast of Asia eastward to the west coast of Europe and Africa. Through international agreement, the AWC also has responsibility to back up other World Area Forecast Centers with aviation products distributed through the World Area Forecast System.

The AWC supports requirements for products and services established by national and international agreements. The Center coordinates closely with the aviation community to identify new standards in support of Federal Aviation Administration (FAA) national requirements and International Civil Aviation Organization (ICAO) international requirements.

The E-Government Act of 2002 defines "information system" by reference to the definition section of Title 44 of the United States Code. The following is a summary of the definition: "Information system" means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information. See: 44. U.S.C. § 3502(8).

Questionnaire:

1. What is the status of this information system?

This is a new information system. *Continue to answer questions and complete certification.*

This is an existing information system with changes that create new privacy risks.
Complete chart below, continue to answer questions, and complete certification.

| Changes That Create New Privacy Risks (CTCNPR) | | | | | |
|---|--|------------------------|--|------------------------------------|--|
| a. Conversions | | d. Significant Merging | | g. New Interagency Uses | |
| b. Anonymous to Non-Anonymous | | e. New Public Access | | h. Internal Flow or Collection | |
| c. Significant System Management Changes | | f. Commercial Sources | | i. Alteration in Character of Data | |
| j. Other changes that create new privacy risks (specify): | | | | | |

This is an existing information system in which changes do not create new privacy risks. *Skip questions and complete certification.*

2. Is the IT system or its information used to support any activity which may raise privacy concerns?

NIST Special Publication 800-53 Revision 4, Appendix J, states "Organizations may also engage in activities that do not involve the collection and use of PII, but may nevertheless raise privacy concerns and associated risk. The privacy controls are equally applicable to those activities and can be used to analyze the privacy risk and mitigate such risk when necessary." Examples include, but are not limited to, audio recordings, video surveillance, building entry readers, and electronic purchase transactions.

Yes. *Please describe the activities which may raise privacy concerns.*

No

3. Does the IT system collect, maintain, or disseminate business identifiable information (BII)?

As per DOC Privacy Policy: "For the purpose of this policy, business identifiable information consists of (a) information that is defined in the Freedom of Information Act (FOIA) as "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." (5 U.S.C.552(b)(4)). This information is exempt from automatic release under the (b)(4) FOIA exemption. "Commercial" is not confined to records that reveal basic commercial operations" but includes any records [or information] in which the submitter has a commercial interest" and can include information submitted by a nonprofit entity, or (b) commercial or other information that, although it may not be exempt from release under FOIA, is exempt from disclosure by law (e.g., 13 U.S.C.)."

Yes, the IT system collects, maintains, or disseminates BII about: *(Check all that apply.)*

Companies

Other business entities

No, this IT system does not collect any BII.

4. Personally Identifiable Information

4a. Does the IT system collect, maintain, or disseminate personally identifiable information (PII)?

As per OMB 07-16, Footnote 1: "The term 'personally identifiable information' refers to information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc... alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc..."

Yes, the IT system collects, maintains, or disseminates PII about: *(Check all that apply.)*

- DOC employees
- Contractors working on behalf of DOC
- Members of the public

No, this IT system does not collect any PII.

If the answer is "yes" to question 4a, please respond to the following questions.

4b. Does the IT system collect, maintain, or disseminate PII other than user ID?

Yes, the IT system collects, maintains, or disseminates PII other than user ID.

No, the user ID is the only PII collected, maintained, or disseminated by the IT system.

4c. Will the purpose for which the PII is collected, stored, used, processed, disclosed, or disseminated (context of use) cause the assignment of a higher PII confidentiality impact level?

Examples of context of use include, but are not limited to, law enforcement investigations, administration of benefits, contagious disease treatments, etc.

Yes, the context of use will cause the assignment of a higher PII confidentiality impact level.

No, the context of use will not cause the assignment of a higher PII confidentiality impact level.

If any of the answers to questions 2, 3, 4b, and/or 4c are "Yes," a Privacy Impact Assessment (PIA) must be completed for the IT system. This PTA and the approved PIA must be a part of the IT system's Assessment and Authorization Package.

CERTIFICATION

X I certify the criteria implied by one or more of the questions above **apply** to the NOAA8861-Aviation Weather Center and as a consequence of this applicability, I will perform and document a PIA for this IT system.

_____ I certify the criteria implied by the questions above **do not apply** to the NOAA8861-Aviation Weather Center and as a consequence of this non-applicability, a PIA for this IT system is not necessary.

Name of Information System Security Officer (ISSO) or System Owner (SO): Christopher John Ortiz (AWC ISSO)

Signature of ISSO or SO: ORTIZ.CHRISTOPHER.J.1154749175
Digitally signed by ORTIZ.CHRISTOPHER.J.1154749175
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=ORTIZ.CHRISTOPHER.J.1154749175
Date: 2017.01.31 12:59:10 Date: _____

Name of Information Technology Security Officer (ITSO): Beckie Bolton (NWS ITSO)

Signature of ITSO: KOONGE.BECKIE.A.1408306880
Digitally signed by KOONGE.BECKIE.A.1408306880
Date: 2017.02.02 10:53:05 Date: _____

Name of Authorizing Official (AO): Dr. William M. Lapenta

Signature of AO: LAPENTA.WILLIAM.M.1370194030
Digitally signed by LAPENTA.WILLIAM.M.1370194030
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=LAPENTA.WILLIAM.M.1370194030
Date: 2017.02.06 06:38:45 -05' Date: _____

Name of Bureau Chief Privacy Officer (BCPO): Mark H. Graff (NOAA)

Signature of BCPO: GRAFF.MARK.HYRUM.1514447892
Digitally signed by GRAFF.MARK.HYRUM.1514447892
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=GRAFF.MARK.HYRUM.1514447892
Date: 2017.02.06 11:26:41 -05' Date: _____

From: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>
Sent: Tuesday, April 11, 2017 9:21 AM
To: Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate
Cc: Lorna Martin-Gross - N...
Subject: RE: FOIA 2017-000780, re: fisheries observers.
Attachments: DOC-NOAA-2017-000780_FEE ESTIMATE.docx

Mark/Lola,

Please see attached draft fee estimate letter (b)(5)

[REDACTED]. Please advise.

Thanks.

Arlyn

From: Arlyn Penaranda - NOAA Federal [mailto:arlyn.penaranda@noaa.gov]
Sent: Tuesday, April 11, 2017 8:43 AM
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Cc: Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>; Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>; Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>
Subject: RE: FOIA 2017-000780, re: fisheries observers.

Mark: (b)(5)

Please clarify. Thank you.

Arlyn

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Tuesday, April 11, 2017 8:14 AM
To: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>
Cc: Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>; Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>; Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>
Subject: Re: FOIA 2017-000780, re: fisheries observers.

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) [Redacted] (C)

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On Fri, Apr 7, 2017 at 8:45 AM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

(b)(5) [Redacted]
[Redacted]

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Thursday, April 06, 2017 5:34 PM
To: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>
Cc: Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>; Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>; Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>
Subject: Re: FOIA 2017-000780, re: fisheries observers.

Yours and my emails crossed (b)(5) [Redacted].

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:(301)628-5658) (O)
(b)(6) [Redacted] (C)

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On Thu, Apr 6, 2017 at 5:31 PM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

(b)(5) [REDACTED]

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Thursday, April 06, 2017 5:28 PM
To: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>
Cc: Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>; Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>; Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>
Subject: Re: FOIA 2017-000780, re: fisheries observers.

Hi Arlyn,

(b)(5) [REDACTED]

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) [REDACTED] (C)

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On Thu, Apr 6, 2017 at 12:46 PM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

Waiting for final guidance o (b)(5) [REDACTED].

From: Samuel Dixon [mailto:samuel.dixon@noaa.gov]

Sent: Thursday, April 06, 2017 12:42 PM

To: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>

Cc: Mark Graff - NOAA Federal <mark.graff@noaa.gov>; Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>; Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>

Subject: Re: FOIA 2017-000780, re: fisheries observers.

Oh nevermind, I see that he did respond.

Samuel Dixon

Contractor - IBSS Corp
NMFS Assistant FOIA Liaison
[\(301\) 427-8739](tel:(301)427-8739)
samuel.dixon@noaa.gov

On Thu, Apr 6, 2017 at 12:41 PM, Samuel Dixon <samuel.dixon@noaa.gov> wrote:

Arlyn,

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Please correct me if I'm wrong Mark.

Sam

Samuel Dixon

Contractor - IBSS Corp
NMFS Assistant FOIA Liaison

[\(301\) 427-8739](tel:3014278739)
samuel.dixon@noaa.gov

On Thu, Apr 6, 2017 at 12:14 PM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

Mark,

(b)(5)

Thanks,

Arlyn

From: Samuel Dixon [mailto:samuel.dixon@noaa.gov]

Sent: Thursday, April 06, 2017 11:43 AM

To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Cc: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>; Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>; Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>

Subject: Re: FOIA 2017-000780, re: fisheries observers.

Ok, thanks for that clarification.

Samuel Dixon

Contractor - IBSS Corp
NMFS Assistant FOIA Liaison
[\(301\) 427-8739](tel:3014278739)
samuel.dixon@noaa.gov

On Thu, Apr 6, 2017 at 11:40 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Hi Guys--

(b)(5)
[Redacted]

(b)(5)
[Redacted]

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) [Redacted] (C)

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On Thu, Apr 6, 2017 at 11:27 AM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

(b)(5)
[Redacted]

From: Samuel Dixon [mailto:samuel.dixon@noaa.gov]
Sent: Wednesday, April 05, 2017 5:47 PM
To: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>
Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>; Mark Graff - NOAA Federal <mark.graff@noaa.gov>; Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>
Subject: Re: FOIA 2017-000780, re: fisheries observers.

(b)(5) [REDACTED]

Sam

On Wed, Apr 5, 2017 at 5:45 PM Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

What about (b)(5) [REDACTED]?

From: Samuel Dixon [mailto:samuel.dixon@noaa.gov]
Sent: Wednesday, April 05, 2017 5:43 PM
To: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>
Cc: Mark Graff - NOAA Federal <mark.graff@noaa.gov>; Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>; Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>

Subject: Re: FOIA 2017-000780, re: fisheries observers.

Arlyn you shoul (b)(5) [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]?

Sam

Samuel Dixon

*Contractor - IBSS Corp
NMFS Assistant FOIA Liaison
(301) 427-8739
samuel.dixon@noaa.gov*

On Wed, Apr 5, 2017 at 5:19 PM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

Mark,

(b)(5)
[Redacted]

[Redacted] ?

Thanks.

Arlyn

From: Samuel Dixon [mailto:samuel.dixon@noaa.gov]
Sent: Wednesday, April 05, 2017 5:09 PM
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Cc: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>; Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>; Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>

Subject: Re: FOIA 2017-000780, re: fisheries observers.

(b)(5)
[Redacted] ?

Samuel Dixon

Contractor - IBSS Corp
NMFS Assistant FOIA Liaison
(301) 427-8739
samuel.dixon@noaa.gov

On Wed, Apr 5, 2017 at 5:05 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

(b)(5) [Redacted]
[Redacted]
[Redacted].

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) [Redacted] (C)

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On Wed, Apr 5, 2017 at 5:01 PM, Samuel Dixon <samuel.dixon@noaa.gov> wrote:

"Per M Graff: (b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]

[Redacted] ...

Samuel Dixon

Contractor - IBSS Corp
NMFS Assistant FOIA Liaison
[\(301\) 427-8739](tel:3014278739)
samuel.dixon@noaa.gov

On Wed, Apr 5, 2017 at 4:58 PM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

DOC-NOAA-2017-000780 (b)(5)

From: Arlyn Penaranda - NOAA Federal [mailto:arlyn.penaranda@noaa.gov]
Sent: Wednesday, April 05, 2017 4:04 PM
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>; Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>; Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>; Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>
Subject: FW: FOIA 2017-000780, re: fisheries observers.

(b)(5)

From: Arlyn Penaranda - NOAA Federal [mailto:arlyn.penaranda@noaa.gov]
Sent: Wednesday, April 05, 2017 4:00 PM
To: Susan Beresford - NOAA Federal <susan.s.beresford@noaa.gov>
Cc: Alisha <alisha.falberg@noaa.gov>; Bob <robert.j.hogan@noaa.gov>; Brian <brian.mctague@noaa.gov>; Cindy <cynthia.fenyk@noaa.gov>; Duane <duane.smith@noaa.gov>; Grace <grace.hwang@noaa.gov>; Joe H <joseph.heckwolf@noaa.gov>; Karen <karen.raine@noaa.gov>; Kate <kate.abbott@noaa.gov>; Keith <keith.hagg@noaa.gov>; Loren <loren.remsberg@noaa.gov>; Mark <mark.capone@noaa.gov>; Meggan <meggan.engelke-ros@noaa.gov>; Niel <niel.moeller@noaa.gov>; Paul <paul.ortiz@noaa.gov>; John <john.han@noaa.gov>; Charles Green <charles.green@noaa.gov>; Alexa <alexa.cole@noaa.gov>
Subject: Re: FOIA 2017-000780, re: fisheries observers.

Thank you Susie (b)(5)

R/

Arlyn

On Wed, Apr 5, 2017 at 3:51 PM, Susan Beresford - NOAA Federal
<susan.s.beresford@noaa.gov> wrote:

Arlyn,

As a follow-up to our e-mails on 3/27/17, (b)(5)

[REDACTED]

Please let me know if you have any questions or concerns. Thanks.

Susie.

--

Susan S. Beresford
Paralegal
Enforcement Section
NOAA Office of the General Counsel
U.S. Department of Commerce
1315 East-West Highway

SSMC3, Room 15829
Silver Spring, MD 20910
[\(301\) 427-8285](tel:3014278285) Office
[\(301\) 427-2211](tel:3014272211) Fax

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--

Arlyn Penaranda
Records Management Specialist
Office of Law Enforcement
NOAA, National Marine Fisheries Service
Office: [301-427-8256](tel:301-427-8256)
arlyn.penaranda@noaa.gov <arlyn.penaranda@noaa.gov>

--

Samuel Dixon

Contractor - IBSS Corp
NMFS Assistant FOIA Liaison
[\(301\) 427-8739](tel:301-427-8739)
samuel.dixon@noaa.gov

(b) (5)

(b) (5)

From: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>
Sent: Tuesday, April 11, 2017 11:55 AM
To: Mark Graff - NOAA Affiliate
Subject: March 2017 FOIA Monthly Report (DRAFT FOR YOUR REVIEW/APPROVAL)
Attachments: FOIA Monthly Status Report 03-31-2017.pdf; FOIA Monthly Status Report 03-31-2017.xlsx; Closed - 032017.xls; Incoming - 032017.xls; Backlog - 032017.xls

Hi Mark - Please find Excel/PDF copies of the monthly report attached for review/approval. I have also attached the supporting files as a reference for the data compiled in the monthly report.

Please let me know if you have questions.

--

Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6))
lola.m.stith@noaa.gov

| Tracking Number | Type | Requester | Submitted |
|----------------------|----------|----------------------------------|------------|
| DOC-NOAA-2017-000609 | Request | Brian Murphy | 02/03/2017 |
| DOC-NOAA-2017-000511 | Request | Bill Thomas | 01/19/2017 |
| DOC-NOAA-2017-000512 | Request | Bill Thomas | 01/19/2017 |
| DOC-NOAA-2017-000298 | Request | Charles Mouton | 11/30/2016 |
| DOC-NOAA-2017-000344 | Request | Bob Kucharuk | 12/19/2016 |
| DOC-NOAA-2016-001241 | Request | Shomari B. Wade | 05/18/2016 |
| DOC-NOAA-2015-001484 | Request | Richard Knudsen | 06/29/2015 |
| DOC-NOAA-2015-001485 | Request | Richard Knudsen | 06/29/2015 |
| DOC-NOAA-2015-001487 | Request | Richard Knudsen | 06/29/2015 |
| DOC-NOAA-2017-000169 | Request | MICHAEL PEPSON | 11/09/2016 |
| DOC-NOAA-2017-000613 | Request | Dan Vergano | 02/07/2017 |
| DOC-NOAA-2017-000579 | Request | Emily Yehle | 02/08/2017 |
| DOC-NOAA-2016-001094 | Request | Anthony Arguez | 05/02/2016 |
| DOC-NOAA-2016-000351 | Request | Bill Marshall | 10/30/2015 |
| DOC-NOAA-2017-000679 | Request | Jennifer A. Burnette | 02/23/2017 |
| DOC-NOAA-2017-000596 | Request | Adam Carlesco | 02/02/2017 |
| DOC-NOAA-2017-000304 | Request | Bryn Blomberg | 11/30/2016 |
| DOC-NOAA-2017-000615 | Request | Russ Rector | 02/07/2017 |
| DOC-NOAA-2017-000539 | Referral | Jamie Pang | 01/30/2017 |
| DOC-NOAA-2017-000342 | Request | Ryan P. Mulvey | 12/13/2016 |
| DOC-NOAA-2017-000170 | Request | MICHAEL PEPSON | 11/09/2016 |
| DOC-NOAA-2017-000195 | Request | Thomas Knudson | 11/17/2016 |
| DOC-NOAA-2016-001762 | Request | Thomas Knudson | 09/14/2016 |
| DOC-NOAA-2016-001833 | Request | Margaret Townsend | 09/29/2016 |
| DOC-NOAA-2016-001751 | Request | Thomas Knudson | 09/14/2016 |
| DOC-NOAA-2016-001763 | Request | Thomas Knudson | 09/14/2016 |
| DOC-NOAA-2016-001390 | Request | Jennie Frost | 07/05/2016 |
| DOC-NOAA-2016-001533 | Request | J W August | 07/27/2016 |
| DOC-NOAA-2016-001270 | Request | scott A. doyle | 06/08/2016 |
| DOC-NOAA-2016-001326 | Request | Thomas Knudson | 06/21/2016 |
| DOC-NOAA-2016-001299 | Request | Thomas Knudson | 06/15/2016 |
| DOC-NOAA-2016-000959 | Request | Office Administrator | 04/12/2016 |
| DOC-NOAA-2016-000423 | Request | Ryan P. Mulvey | 12/21/2015 |
| DOC-NOAA-2016-000807 | Request | Basil Scott | 03/16/2016 |
| DOC-NOAA-2015-001860 | Request | Delcianna Winders | 09/04/2015 |
| DOC-NOAA-2016-000603 | Request | Margaret Townsend | 02/10/2016 |
| DOC-NOAA-2016-000094 | Request | Josh Schopf | 10/14/2015 |
| DOC-NOAA-2014-001474 | Request | Eric Huber | 08/12/2014 |
| DOC-NOAA-2015-000295 | Request | Office Administrator | 11/21/2014 |
| DOC-NOAA-2015-000190 | Request | Miyo Sakashita | 11/02/2014 |
| DOC-NOAA-2017-000438 | Request | Claudia Lucio | 01/11/2017 |
| DOC-NOAA-2017-000299 | Request | Chris Hogan | 11/30/2016 |
| DOC-NOAA-2017-000204 | Request | Belinda Brannon | 11/21/2016 |
| DOC-NOAA-2016-001775 | Request | Ehsan Naranji | 09/19/2016 |
| DOC-NOAA-2016-001743 | Request | John Greenewald | 09/12/2016 |
| DOC-NOAA-2017-000414 | Request | Arnold & Porter Kaye Scholer LLP | 01/09/2017 |
| DOC-NOAA-2017-000535 | Request | John Ullom | 01/18/2017 |
| DOC-NOAA-2017-000384 | Request | Marshall Morales | 01/03/2017 |
| DOC-NOAA-2017-000659 | Request | Dan Fountain | 02/21/2017 |
| DOC-NOAA-2017-000639 | Request | Stanley Tromp | 02/10/2017 |
| DOC-NOAA-2017-000572 | Request | Karen MacDonald | 02/07/2017 |

| | | |
|----------------------|----------------------------|------------|
| DOC-NOAA-2017-000320 | Request Lauren Daniel | 12/12/2016 |
| DOC-NOAA-2016-001599 | Request Machelles R. Hall | 08/12/2016 |
| DOC-NOAA-2016-000192 | Request John Ferro | 11/03/2015 |
| DOC-NOAA-2015-000706 | Request Megan R. Wilson | 02/18/2015 |
| DOC-NOAA-2017-000364 | Request Peter J. Speicher | 12/23/2016 |
| DOC-NOAA-2017-000186 | Request Elizabeth Nowicki | 11/16/2016 |
| DOC-NOAA-2016-001403 | Request Ivria Fried | 07/07/2016 |
| DOC-NOAA-2017-000408 | Request Jeremy Singer-Vine | 01/06/2017 |
| DOC-NOAA-2017-000187 | Request Elizabeth Nowicki | 11/16/2016 |
| DOC-NOAA-2016-001346 | Request Tammy Murphy | 06/10/2016 |

| Assigned To | Due | Days Backlogged |
|-------------|------------|-----------------|
| AGO | 03/15/2017 | 19 |
| AGO | 03/01/2017 | 29 |
| AGO | 03/01/2017 | 29 |
| AGO | 01/13/2017 | 41 |
| AGO | 01/24/2017 | 54 |
| AGO | 06/30/2016 | 194 |
| AGO | 10/08/2015 | 376 |
| AGO | 10/08/2015 | 376 |
| AGO | 07/31/2015 | 424 |
| LA | 01/05/2017 | 66 |
| NESDIS | 03/29/2017 | 9 |
| NESDIS | 03/24/2017 | 12 |
| NESDIS | 07/20/2016 | 181 |
| NESDIS | 01/14/2016 | 311 |
| NMFS | 03/29/2017 | 9 |
| NMFS | 03/28/2017 | 10 |
| NMFS | 01/13/2017 | 13 |
| NMFS | 03/15/2017 | 19 |
| NMFS | 03/01/2017 | 29 |
| NMFS | 02/03/2017 | 36 |
| NMFS | 01/05/2017 | 66 |
| NMFS | 12/30/2016 | 69 |
| NMFS | 11/10/2016 | 102 |
| NMFS | 11/08/2016 | 104 |
| NMFS | 10/28/2016 | 111 |
| NMFS | 10/27/2016 | 112 |
| NMFS | 10/14/2016 | 131 |
| NMFS | 08/29/2016 | 153 |
| NMFS | 08/03/2016 | 171 |
| NMFS | 07/26/2016 | 177 |
| NMFS | 07/20/2016 | 181 |
| NMFS | 05/25/2016 | 212 |
| NMFS | 02/04/2016 | 213 |
| NMFS | 05/04/2016 | 221 |
| NMFS | 10/23/2015 | 225 |
| NMFS | 03/15/2016 | 263 |
| NMFS | 02/18/2016 | 297 |
| NMFS | 09/10/2014 | 390 |
| NMFS | 12/24/2014 | 567 |
| NMFS | 12/05/2014 | 580 |
| NOAA FOIA | 02/24/2017 | 32 |
| NOAA FOIA | 01/13/2017 | 60 |
| NOAA FOIA | 12/30/2016 | 62 |
| NOAA FOIA | 11/01/2016 | 109 |
| NOAA FOIA | 10/13/2016 | 122 |
| NOS | 03/07/2017 | 2 |
| NOS | 02/27/2017 | 3 |
| NOS | 02/24/2017 | 9 |
| NOS | 03/29/2017 | 9 |
| NOS | 03/21/2017 | 15 |
| NOS | 03/10/2017 | 22 |

| | | |
|------|------------|-----|
| NOS | 01/30/2017 | 44 |
| NOS | 09/29/2016 | 107 |
| NOS | 12/04/2015 | 338 |
| NOS | 10/13/2015 | 518 |
| NWS | 02/09/2017 | 42 |
| NWS | 12/15/2016 | 79 |
| NWS | 08/12/2016 | 164 |
| USEC | 02/21/2017 | 35 |
| WFMO | 12/15/2016 | 79 |
| WFMO | 08/31/2016 | 151 |

| Tracking Number | Type | Requester |
|----------------------|---------|-------------------------|
| DOC-NOAA-2017-000025 | Request | Rose Santos |
| DOC-NOAA-2017-000442 | Request | Kati Weis |
| DOC-NOAA-2017-000374 | Request | Tim Bergen |
| DOC-NOAA-2017-000528 | Request | Paul Muniz |
| DOC-NOAA-2017-000331 | Request | Adam J. Rappaport |
| DOC-NOAA-2017-000297 | Request | Patsy Tyler |
| DOC-NOAA-2017-000611 | Request | Mark Sperling |
| DOC-NOAA-2017-000638 | Request | Michael Ravnitzky |
| DOC-NOAA-2017-000335 | Request | Zeenat Mian |
| DOC-NOAA-2017-000332 | Request | Thomas Knudson |
| DOC-NOAA-2017-000307 | Request | Larry Geller |
| DOC-NOAA-2017-000113 | Request | Catherine Kilduff |
| DOC-NOAA-2016-001807 | Request | Rachel Silverstein |
| DOC-NOAA-2016-001215 | Request | Cassie Burdyslaw |
| DOC-NOAA-2016-001080 | Request | Jeff Ruch |
| DOC-NOAA-2017-000655 | Request | Zeenat Mian |
| DOC-NOAA-2017-000647 | Request | Judson Witham |
| DOC-NOAA-2017-000633 | Request | Nicole Daiker |
| DOC-NOAA-2017-000632 | Request | David Gotfredson |
| DOC-NOAA-2017-000577 | Request | Alexis M. Thomas |
| DOC-NOAA-2017-000612 | Request | Martha V. Mendoza |
| DOC-NOAA-2017-000550 | Request | Jennifer Smith Richards |
| DOC-NOAA-2017-000545 | Request | Benjamin Kleesattel |
| DOC-NOAA-2017-000605 | Request | Justin Hall |
| DOC-NOAA-2017-000536 | Request | Peter R. Ehrhardt |
| DOC-NOAA-2017-000473 | Request | David Hutt |
| DOC-NOAA-2017-000118 | Request | Michael L. Brown |
| DOC-NOAA-2016-001795 | Request | Michael L. Brown |
| DOC-NOAA-2016-001531 | Request | Stacy Hernandez |
| DOC-NOAA-2017-000589 | Request | Marshall Morales |
| DOC-NOAA-2017-000616 | Request | Leandra Gallego |
| DOC-NOAA-2017-000607 | Request | Brian Matthews |
| DOC-NOAA-2017-000533 | Request | Margaret Laketa |
| DOC-NOAA-2017-000534 | Request | Robert C. Stober |
| DOC-NOAA-2017-000439 | Request | Cody Elliott |
| DOC-NOAA-2017-000365 | Request | Peter J. Speicher |
| DOC-NOAA-2017-000601 | Request | Michael G. Zolfo |
| DOC-NOAA-2017-000573 | Request | Jason Plautz |
| DOC-NOAA-2017-000058 | Request | Christopher T. Clack |
| DOC-NOAA-2017-000034 | Request | Christopher T. Clack |
| DOC-NOAA-2017-000303 | Request | Richard Hirn |

| Requester Organization | Submitted | Received | Assigned To |
|--|------------|------------|-------------|
| FOIA GROUP INC | 10/06/2016 | 10/07/2016 | AGO |
| | 01/11/2017 | 01/12/2017 | AGO |
| McAllister & Quinn | 01/03/2017 | 01/03/2017 | AGO |
| Donovan Hatem LLP | 01/23/2017 | 01/23/2017 | GC |
| Citizens for Responsibility and Ethics in Washington | 12/16/2016 | 12/19/2016 | LA |
| | 11/30/2016 | 11/30/2016 | LA |
| Paul Hastings LLP | 02/06/2017 | 02/06/2017 | NESDIS |
| | 02/03/2017 | 02/03/2017 | NESDIS |
| | 12/18/2016 | 12/19/2016 | NMFS |
| Center for Investigative Reporting | 12/16/2016 | 12/19/2016 | NMFS |
| Disappeared News | 12/13/2016 | 12/14/2016 | NMFS |
| Center for Biological Diversity | 10/24/2016 | 10/24/2016 | NMFS |
| Miami Waterkeeper | 09/23/2016 | 09/23/2016 | NMFS |
| Turtle Island Restoration Network | 05/27/2016 | 05/31/2016 | NMFS |
| PEER | 04/29/2016 | 04/29/2016 | NMFS |
| | 02/21/2017 | 02/21/2017 | NMFS |
| | 02/17/2017 | 02/17/2017 | NMFS |
| | 02/15/2017 | 02/16/2017 | NMFS |
| KFMB CBS News 8 | 02/15/2017 | 02/16/2017 | NMFS |
| Animal Rights Hawaii | 02/08/2017 | 02/08/2017 | NMFS |
| Associated Press | 02/07/2017 | 02/07/2017 | NMFS |
| Chicago Tribune | 02/02/2017 | 02/02/2017 | NMFS |
| Frederick, Perales, Allmon, & Rockwell PC | 02/01/2017 | 02/01/2017 | NMFS |
| Langan Engineering | 02/01/2017 | 02/01/2017 | NMFS |
| Atty at Law | 01/30/2017 | 01/31/2017 | NMFS |
| Morris James LLP | 01/20/2017 | 01/23/2017 | NMFS |
| Waltzer, Wiygul & Garside LLC | 10/27/2016 | 10/28/2016 | NOS |
| Waltzer, Wiygul & Garside LLC | 09/22/2016 | 09/22/2016 | NOS |
| | 07/27/2016 | 07/27/2016 | NOS |
| Riddell Williams | 02/10/2017 | 02/10/2017 | NOS |
| Stetson University College of Law | 02/09/2017 | 02/09/2017 | NOS |
| | 02/02/2017 | 02/02/2017 | NOS |
| Davis Wright Tremain LLP | 01/27/2017 | 01/27/2017 | NOS |
| Hershoff, Lupino & Yagel, LLP | 01/27/2017 | 01/27/2017 | NOS |
| Adams Broadwell Joseph & Cardozo | 01/05/2017 | 01/05/2017 | NOS |
| | 12/23/2016 | 12/27/2016 | NWS |
| Doherty & Progar | 02/13/2017 | 02/13/2017 | NWS |
| National Journal | 02/07/2017 | 02/08/2017 | NWS |
| | 10/13/2016 | 10/13/2016 | OAR |
| | 10/11/2016 | 10/11/2016 | OAR |
| National Weather Service Employees | 11/30/2016 | 11/30/2016 | WMFO |

| Perfected? | Due | Closed Date | Status | Dispositions |
|------------|------------|-------------|--------|---------------------------------|
| Yes | 02/24/2017 | 03/15/2017 | Closed | Partial grant/partial denial |
| Yes | 02/24/2017 | 03/15/2017 | Closed | Partial grant/partial denial |
| Yes | 02/09/2017 | 03/31/2017 | Closed | Partial grant/partial denial |
| Yes | 02/27/2017 | 03/08/2017 | Closed | Fee-related reason |
| Yes | 01/24/2017 | 03/24/2017 | Closed | No records |
| Yes | 01/13/2017 | 03/29/2017 | Closed | Full grant |
| Yes | 03/15/2017 | 03/13/2017 | Closed | Full grant |
| Yes | 03/16/2017 | 03/31/2017 | Closed | Full grant |
| Yes | 01/24/2017 | 03/23/2017 | Closed | Partial grant/partial denial |
| Yes | 02/07/2017 | 03/06/2017 | Closed | Full grant |
| Yes | 01/17/2017 | 03/03/2017 | Closed | Full denial based on exemptions |
| Yes | 12/02/2016 | 03/03/2017 | Closed | Partial grant/partial denial |
| Yes | 11/08/2016 | 03/01/2017 | Closed | Partial grant/partial denial |
| Yes | 07/20/2016 | 03/20/2017 | Closed | Request withdrawn |
| Yes | 06/08/2016 | 03/20/2017 | Closed | Partial grant/partial denial |
| Yes | 03/29/2017 | 03/07/2017 | Closed | Duplicate request |
| Yes | 03/20/2017 | 03/21/2017 | Closed | No records |
| Yes | 03/21/2017 | 03/28/2017 | Closed | Full grant |
| Yes | 03/21/2017 | 03/21/2017 | Closed | Full grant |
| Yes | 03/10/2017 | 03/30/2017 | Closed | Full grant |
| Yes | 03/15/2017 | 03/13/2017 | Closed | Full denial based on exemptions |
| Yes | 03/10/2017 | 03/21/2017 | Closed | Full grant |
| Yes | 03/10/2017 | 03/13/2017 | Closed | No records |
| Yes | 03/15/2017 | 03/03/2017 | Closed | No records |
| Yes | 03/16/2017 | 03/10/2017 | Closed | Partial grant/partial denial |
| Yes | 03/15/2017 | 03/13/2017 | Closed | Partial grant/partial denial |
| Yes | 12/02/2016 | 03/14/2017 | Closed | Fee-related reason |
| Yes | 11/04/2016 | 03/14/2017 | Closed | Full grant |
| Yes | 08/29/2016 | 03/14/2017 | Closed | Fee-related reason |
| Yes | 03/14/2017 | 03/31/2017 | Closed | No records |
| Yes | 03/15/2017 | 03/31/2017 | Closed | No records |
| Yes | 03/15/2017 | 03/14/2017 | Closed | Full grant |
| Yes | 02/28/2017 | 03/14/2017 | Closed | Request withdrawn |
| Yes | 02/27/2017 | 03/31/2017 | Closed | No records |
| Yes | 02/21/2017 | 03/14/2017 | Closed | No records |
| Yes | 02/23/2017 | 03/03/2017 | Closed | Full grant |
| Yes | 03/14/2017 | 03/10/2017 | Closed | Full grant |
| Yes | 03/24/2017 | 03/22/2017 | Closed | No records |
| Yes | 11/25/2016 | 03/13/2017 | Closed | Fee-related reason |
| Yes | 11/09/2016 | 03/13/2017 | Closed | Fee-related reason |
| Yes | 01/13/2017 | 03/03/2017 | Closed | Full grant |

Detail

[Reference FGI# 16- 51025] Relevant to DOCEA133F16CN0144 we seek the Contract and all attachments including
I am requesting copies of public records pertaining to five NOAA grants awarded to the National Maritime Museum
I am requesting 2 documents with all their attachments under the Freedom of Information Act. I respectfully request
Please consider this to be a request pursuant to the Freedom of Information Act for all correspondence, including e
CREW requests copies of any questionnaires submitted to NOAA by any representative of President-elect Donald
I request that a copy of the following documents be provided to me: A copy of correspondence from Congressman
I hereby request full and complete disclosure of the database(s) held by the National Oceanic and Atmospheric Ad
I request a digital/electronic copy of the NOAA NESDIS document: Review and Clearance Procedures for Agreem
CONSOLIDATED REQUEST 12/22: All records: emails, minutes of meetings, presentations, documents, NOAA pr
A copy of all expense account reports, including receipts, for all NOAA/NMFS employees who attended the 8th Inte
All inspection reports filed by NOAA Fisheries observers on vessels in the Hawaii longlines fishing fleet from 2009
Please email me the reinitiation package for the U.S. WCPO purse seine fishery. I copied below part of the FR noti
Revised/Clarified Description: In response to your October 11, 2016, email requesting further detail on our Septem
Request for documentation regarding incursions of Mexican fishing vessels into the U.S. EEZ in the Gulf of Mexicc
1. All studies or analyses comparing the costs of electronic monitoring versus human fisheries observers conducte
I request to receive a copy of any letters produced by Office of NOAA General Counsel and signed by NOAA to be
I want the United States Government and It's Army Corp of Engineers, NOAA, EPA, US Coast Guard and Departm
I am requesting the inventory of cetaceans held in captivity today. Cetaceans that are alive today. Held at any mari
1) All MMIR notifications & verifications of transfer/transport related to mammals in the Navy's Marine Mamm
Requesting wild-capture permits issued to Miami Seaquarium between the years of 1985 and 1990. Wild-capture p
Aggregate totals of reports by fishery observers in the Hawaii Longline Observer Program related to vessel conditio
Please provide all records from the Marine Mammal Inventory for marine mammals both alive and deceased that v
Freedom of Information Act Request – Application No. SWG-2005-00522 – Correspondence with Revesser, LLC a
Langan Engineering, Environmental, Surveying and Landscape Architecture D.P.C. (Langan) is currently conductin
All documents in the possession or control of NOAA related or pertaining in any way to Charter Halibut Permit CHF
All records, including correspondence, related to or mentioning the sea vessel "Island Girl, II" or its capti
Any records relating to the Bay Long/Chenier Ronquille, Louisiana oil spill that was reported on or about Septembe
Any records relating to the Lake Grand Ecaille, Louisiana oil spill that was reported on or about July 25, 2016, by H
Pursuant to the Freedom of Information Act, this letter serves as a request for all documents relating to the May 19
We request a copy of the document produced by the Yakama Nation in February 2012 as a Preliminary Assessme
Obtaining copies of public records regarding any information you may have as to street drain run off into St. Peters
Map showing the triangulation and traverse stations of the United States Coasts and Geodetic Survey for Hoquiam
On behalf of Quendall Terminals, please accept this letter as a formal request pursuant to the Freedom of Informal
Request all records associated with the Reportable Marine Incident that occurred on 13MAR2015 involving the UT
We request that NOAA and the Monterey Bay National Marine Sanctuary make available public records regarding
I am requesting information on the candidates selected on the National Weather Service meteorologist vacancy NA
I would like access to any and all documents filed by the City of Wood Dale, Illinois, in their application and approv
I am requesting all emails between the address "john.bates@noaa.gov" and any email address with the
UPDATED DESCRIPTION 10/26/16: All emails (and attachments) that have been received by or sent by the follow
Emails (and attachments) that have been received by or sent by the following NOAA employees (over the course o
This is to request, pursuant to the Freedom of Information Act, a copy of any document that discloses the number

ng but not limited to the SOW/PWS

of the Gulf of Mexico from 2006 to 2009. Specifically, I am requesting any and all grant proposals submitted: 1. The Maritime Museum of Norwalk's 2016: ELG for Community Resilience to Extreme Weather Events emails and faxes, dated after January 1, 2014, between the Agency (including but not limited to NOAA Fisheries, Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President Pat Tiberi (OH-12) or his staff and the response to the correspondence. Please search for documents from the Administration ("NOAA"), National Centers for Environmental Information concerning Climate Change Events.

phone text messages and any other paperwork or means of information exchange where the name Zeenat Mian International Fisheries Observer and Monitoring Conference in San Diego this year. to the present date.

agency that said NMFS is developing the biological assessment. <https://s3.amazonaws.com/public-inspection/ber-23-foia>, a copy of the September 19, 2016, letter from Roy Crabtree to Eric Summa ("the Letter"), and from 2010 to present 1) From 2010 to the present: All documents and communications regarding interagency or obtained by NMFS; 2. All studies or analyses comparing the effectiveness or quality of electronic monitoring used in the TRO process concerning Zeenat Mian

Department of Interior to produce their Charts and Maps of this 1,500 acre DEAD ZONE that lays from WEST of the park, seaquarium, or aquarium in the United States. Wild caught cetaceans.

Animal Program covering the time period January 1, 2016 to present. 2) All MMIR dispositions (deaths, escape permits issued to Indianapolis Zoo between the years of 1985 and 1990. Wild-capture permits issued to zoos, labor, health and welfare by year over the past 10 years. Documents sufficient to show comments received were wild caught, captive born and/or imported between May 28, 2016, and the date of this request. I am and/or Craig Millard. This request is for all correspondence, emails and reports exchanged between (1) City of Yonkers a Phase I Environmental Assessment for 159 Alexander Street in Yonkers, New York. As part of the City of Yonkers permit No.4751C issued to Tom Floyd et al and Crooked Creek Guide and RV Park

Attorney, Kenneth Kaiss, from January 1, 2016 through the present. This request includes, but is not limited to, the release of 5, 2016, by Harvest Pipeline Company. Please construe this request to include information relevant to the release of ConocoPhillips Energy Company. Please construe this request to include information relevant both to the initial release of the 2015 rupture of Plains All American Pipeline's Line 901 in Santa Barbara County in your possession or control for natural resources damages in the Multnomah Channel and Lower Columbia River. The document includes information on the bay areas; in particular Treasure Island and Madeira Beach (if available). If possible, I would like to see information on the release of the 2015 rupture of Plains All American Pipeline's Line 901 in Santa Barbara County, Washington-Oregon. Diagram NL 10-5 Hoquiam.

Freedom of Information Act (FOIA) for copies of any documents relevant to the natural resource damages assessment referred to in the V LITTLE BULLY. A copy of the Captain of the Port Order 15-002 is attached. The undersigned attorney is representing the Monterey Peninsula Water Supply Project ("Project") proposed by California American Water ("CAW") under the application number W-16-AR-2016-0003. The vacancy was for a GS-1340-2/13 Warning Coordination Meteorologist position in Wood Dale, Illinois to be a "StormReady" city. I am interested in Wood Dale's application documents, Wood Dale's StormReady domain name "mail.house.gov" between the dates October 1, 2015 and January 31, 2016. I am requesting NOAA employees since April of 2016 to the present: 1. Melinda Marquis [Melinda.Marquis@noaa.gov] (last worked for NOAA in 2016); 1. Melinda Marquis [Melinda.marquis@noaa.gov], 2. Kevin Kelleher [Kevin.Kelleher@noaa.gov]. I am requesting a list of vacancies within each NOAA line office on or around November 1, 2016, and including the total number of vacancies.

[REDACTED]

mitted by the nonprofit to NOAA, including all supporting documents for those proposals (i.e. annual audits and Environmental Hazards application with all attachments. 2. The Museum of Science and Industry (Finance), and/or either Robert Roberge and/or Jesse Drinkwater concerning, referring and/or related to the President-Elect and the Office of the Vice President-Elect.

from January 2001 through present. I believe the correspondence are most likely to be held by your Office of Data, including the following dataset(s) : 1. Global Marine Data 2. Local Climatological Data 3. Normals Data

at Mian and a TRO/restraining order is mentioned from the period of 15th September 2016 until present.

www.federalregister.gov/2016-14967.pdf "NMFS also is developing a biological assessment for the U.S. Waters of Mexico which is the subject of the FOIA request, is attached for your reference. NOAA HQ staff & attorneys, and the conditions and seizures of Mexican fishing boats illegally fishing in U.S. waters in the Gulf of Mexico, including monitoring versus human fisheries observers conducted or obtained by NMFS; 3. Any directives that NMFS

of the Bridge and Sediment Basin and Wastes Delta at Fort Ticonderoga and the area 20+ Miles up the

species, releases) related to mammals in the Navy's Marine Mammal Program covering the time period January 1985 to National Aquarium between the years of 1985 and 1990. Wild-capture permits issued to Shedd Aquarium and recorded by observers in the Hawaii Longline Observer Program in summary form without identifying individuals seeking data for all available facilities.

Craig Millard and/or Reverser, LLC, and (2) the National Marine Fisheries Service Habitat Conservation Plan assessment, we are requesting records for the site. Please consider this a formal Freedom of Information Act

to, any records of communications with the Delaware Department of Natural Resources and Environmental Control both the initial clean up and response and to the Natural Resource Damage Assessment process for this spill. I prefer direct control. Requested documents include but are not limited to documents regarding NOAA's evaluations of the spill relates to the Portland Harbor Superfund site and purports to describe how hazardous releases from the spill to receive a breakdown of the contributions of things like car wash soap and litter to marine pollution over

mentioned in paragraph 116 (concerning Quendall Terminals, located at 4503 Lake Washington Boulevard in Seattle, WA) has been retained by SeaTow Islamorada. SeaTow Islamorada was contracted to provide services to the vessel ("licant") since the date of our last request on July 2, 2015. The Project includes a desalination facility, situated at Fairbanks Weather Forecast Office, Alaska. I am requesting: 1) Access to copies of the qualifications of the vessel Ready plan, and any communication between Wood Dale and NOAA or NWS. I also would like any documents

on] 2. Kevin Kelleher [Kevin.Kelleher@noaa.gov] 3. Jennifer Mahoney [Jennifer.Mahoney@noaa.gov] 4. Jennifer Mahoney [jennifer.mahoney@noaa.gov], that pertain to the following subjects; 1. The NEW program of vacancies; the number of employees on board; and the FY 16 authorized and appropriated levels;

[REDACTED]

ts, tax records), as well as any and all follow-up financial reports submitted by the National Maritime Museum's 2016: ELG for Community Resilience to Extreme Weather Events and Environmental Hazards apply the civil penalties for which they are jointly and severally liable and which are referenced in Attorney Heck

ce of Congressional Affairs, Office of Legislative Affairs, or the office of the Executive Secretariat and likely hourly 4. Normals Daily 5. Normals Monthly 6. Normals Annual/Seasonal 7. Precipitation 15 Minute 8. Pr

All records: emails, minutes of meetings, presentations, documents, NOAA phone text messages and

CPO purse seine fishery in anticipation of reinitiating ESA Section 7 consultation for one or more other SERO administrators, attorneys, and staff in both the SERO PRD and HCD divisions may have documenting case package reports from the USCG, records of incursions into the U.S. exclusive economic zone. US has issued concerning use of electronic monitoring rather than or in conjunction with human observer

Lake. It should be noted, adding BILLIONS of Gallons of Leachate and Chemical Laden Waters from Lake

January 1, 2016 to present. 3) All necropsy reports related to dead mammals in the Navy's Marine Mammal Program between the years of 1985 and 1990. Wild-capture permits issued to Disney Epcot between the years 1985 and 1990. Individuals or companies involved related to: _ Drinking water supply and quality _ Food supplies and quality

Division, at St. Petersburg, since October 27th, 2016. Of particular interest are materials related to Revlon Law (FOIL) request for information regarding buildings, construction, chemical spills, underground storage

tional Control (including its employees, attorneys and agents); the case package and any other information regarding the spill. Please also include any records that, prior to the date of the above-referenced spill, identified oil spill documents in native, digital form.

or assessments of the natural resources damages caused by the May 19, 2015 oil spill, internal and external assessments of the natural resources injured natural resources in the Multnomah Channel and Lower Columbia River. The documents cover the past decade.

North, Renton, WA ("Quendall Site") of the enclosed Proof of Claim of the United States of America regarding the LITTLE BULLY and its barge while grounded.

surface intake wells along the Monterey Bay coast, and discharge pipelines within the Monterey Bay National Marine Sanctuary; and anything in writing or electronic format that shows the qualifications of the selected candidate (i.e., resumes or correspondence regarding the approval of Wood Dale's application, certification, and any subsequent

Stanley Benjamin [Stan.Benjamin@noaa.gov] That pertains to the following subjects: 1. The reasons for the NEWS [National Energy with Weather Systems] project, 2. The future direction of the NEWS project, 3. Plans for the project and the number of reimbursable positions.

seum of the Gulf of Mexico to NOAA to show how the grant money was used. Further, if the nonprofit su
cation with all attachments.

Wolf's email below. For clarification, I am seeking any and all documents evidencing any effort whatsoe

ely tracked within a correspondence management system. I am specifically looking for correspondence
ecipitation Hourly 9. Weather Radar (Level II) 10. Weather Radar (Level III)

any other paperwork or means of information exchange pertaining to the email sent by Zeenat Mian title

species, as may be warranted, based on raw observer data recently obtained from the Pacific Islands Fc
ents responsive to this request. More detail can be found below. We are seeking: 1. Any and all dra
(including gear types used, quantity and type of species caught, records of seizures and fines, if any), a
s; 4. Any material describing how and by whom the electronic monitoring would be reviewed by human r

ake George, Champlain Canal, Gelns Falls Feeder Canal and the Hudson River ADDED Vastly Tox

Program covering the time period January 1, 2016 to present. 4) Current Marine Mammal Inventory of I
s of 1980 and 1985. In all cases, we request documentation of the acting veterinarian in each capture.
ly _ Toilet and cleaning facilities _ Bedbug and other insect infestations _ Drug use _ Weapons on board

asser, LLC's, pending application with the US Army Corps of Engineers, reference number SWQ-2005-0
rage tanks (USTs), monitoring wells, ground water sampling, asbestos abatement, radon, hazardous m

n received from the Delaware's Department of Natural Resources and Environmental Control from its bc
pipelines in the area of the Chenier Ronquille barrier island restoration project overseen by NOAA. I pre

ernal correspondence regarding that oil spill, and any documentation of impact to fisheries from that spi
:ument was likely received after its completion in February 2012.

America. This request includes but is not limited to a request for the habitat equivalency analysis (HEA)

tional Marine Sanctuary, among other components. We also request that NOAA waive fees for processi
the selected candidates resume with any PII information "stripped" per 5 U.S.C. & 552(
osequent changes or alterations that may have been made to the StormReady plan.

s behind the cancellation of the NEWS (National Energy with Weather System) project 2. The decisioi
s of the NEWS project after October 1, 2016, 4. CIRES employee Christopher T M Clack, 5. Budget infc

[REDACTED]

mitted any extensions, or sent back any of the grant funds, I would like copies of those documents, as
ver by the Agency to collect amounts owed to the government by Mr. Roberge and/or Mr. Drinkwater. TI
regarding policy, legislation, or regulations, recommendations for executive branch positions or appoint
d COMPLAINT MONK SEAL VOLUNTEERS ABUSIVE BEHAVIOUR. And All records: emails, minutes

rum Fisheries Agency (FFA), located in Honiara, Solomon Islands.”
fts of the Letter. 2. Communications within NOAA discussing the Corps’ “request for further clarificati
nd any summaries or descriptions of the scale, scope, location and timing of such incursions. 2) From 2
monitors to interpret what was captured on camera; 5. Records indicating how electronic monitoring data
ic Materials from General Electric, Hurcules Chemical, Finch Pruyn and Glens Falls Mills as well as the
iving mammals in the Navy's Marine Mammal Program.

d _ Working hours of crew _ Physical attacks of crew by captains _ Crew injuries _ Medical neglect _ Cr
0522. This project involves a possible canaled subdivision on Mustang Island, just south of Port Aransas
aterials, and any other documents that your department may have regarding the above-referenced prop
arding of Island Girl, II on December 4, 2016; and any determination made regarding Kenneth Kaiss.
fer documents in native, digital form, and you may deliver them to my email address.

II.

referenced in paragraph 116. In addition, please provide all information that documents the unreimburse
ing our request. Specifically, we seek any and all records related to NOAA’s and the Monterey Bay Natic
b)(6). 2) Access to copies of any information in writing or electronic format concerning reasons myself, F

n making process of the cancellation of NEWS 3. The NEWS (national energy with weather system) li
ormation on the Wind Boundary Layer [WBL] or Atmospheric Science for Renewable Energy [ASRE] and

[REDACTED]

well. For your reference, the recipient DUNS number is 360733732.

The Agency may redact all personal financial information.

ments, or support or opposition to federal funding for programs, projects, or companies.

of meetings, presentations, documents, NOAA phone text messages and any other paperwork or means

on" as referenced in the first sentence of the Letter. 3. Communications within NOAA discussing, from 2010 to the present, communications regarding interdiction events as described in 1 above, including correspondence will be aggregated, summarized and made publicly accessible; 6. Documents reflecting the safeguards

Imperial Chemical and Colorant and the Refractory and Lime Kilns / Cement Plants at Glens Falls, Fort

crew payment withheld _ Crew requests to go home denied _ Difference in treatment by nationality I would

s, Texas.

erty. The subject site is located in the town of Yonkers, Westchester County, New York and is located on

and past costs for natural resource damage assessment activities at the Quendall Site for the National Ocean

inal Marine Sanctuary's environmental review and authorization for the Project pursuant to the National Environmental Policy Act. Peter J. Speicher, was not selected for the position. Note that this information this information should be

licensing 4. The actors who made the decision to cancel NEWS 5. Any correspondence between the project and the project where the funds from the NEWS project were allocated. The documents include any correspondence between the project and the project

[REDACTED]

s of information exchange where both names Zeenat Mian and Karen Rohter (HMMA volunteer) are me

nulating, drafting or editing the Letter. ----- All communications
mmunications within NMFS, interagency communications and communications with the public regarding
s that will be required to police against manipulating or disabling cameras; 7. All communications betwee

Edward and from Curtis Falls and Chestertown International Paper Mills. The MIND BOGGLING Poison

d like to receive the information in electronic format.

n the eastern shore of the Hudson River. It is currently bound to the north by the Former BICC cables pr

ceanic Atmospheric Administration and the Department of Interior, as referenced in paragraph 118 of the

Environmental Policy Act ("NEPA"). This request includes any draft documents, internal memos, and coi
made available to me, as the requesting party, because of the precedent set forth in Core v. USPS, whi

re three staff members from NOAA enumerated above, but of particular interest are to/from specific sou
between the three staff members from NOAA enumerated above and CIRES administration members, f

[REDACTED]

ntioned. Period: 11 July 2016 until present. All records: emails, minutes of meetings, presentations, doc

; among 1) NOAA staff, and between 2) NOAA and Corps 3) NOAA and the Department of Justice perta
such incursions 3) From 2010 to the present, communications with the government of Mexico regarding
n representatives of the fishing industry and NMFS concerning electronic monitoring. This request cover
ing of the Water Shed BEFORE the GIANT MESS at Fort Ticonderoga certainly expanded and continue

roperty, to the east by Alexander Street followed by the MTA bus depot, to the south by the Sun Chemic

e attached Proof of Claim. Please forward copies of this information to me, along with your invoice for th
rrespondence, including emails, by and between NOAA, the Monterey Bay National Marine Sanctuary, th
ch found there is "no substantial invasion of privacy in information identifying successful federal jo

rces, Craig McLean [craig.mclean@noaa.gov], 2. Gary Matlock CEO [gary.c.matlock@noaa.gov] 6. C
or example, 1. Kristen Averyt [kristen.averyt@colorado.edu], 2. Waleed Abdalati [waleed.abdalati@color

[REDACTED]

uments, NOAA phone text messages and any other paperwork or means of information exchange wher

ining to the Clarification letter sent September 19th to the U
g such incursions or the impacts of such incursions, including the status of proposed initia
rs the time period between April 1, 2014 and the present. In addition, we do not seek any r

as to do so the 1,500 Acre DEAD ZONE / Sludge Mess that the Champlain Hudson Power Express desi

als West site, and to the west by the Hudson River. The site is identified on the Tax Map as Block 2615

e costs incurred in responding to this request, and I will see that you are promptly reimbur

re Applicant, and/or any federal or California state agency regarding the Project. This request excludes
b applicants."

Other NOAA correspondence that contain the matching description of or related to NEWS (National Ener
ado.edu], 3. Paula Robinson [paula.robinson@colorado.edu], 4. Kathleen Human [Kathleen.human@co



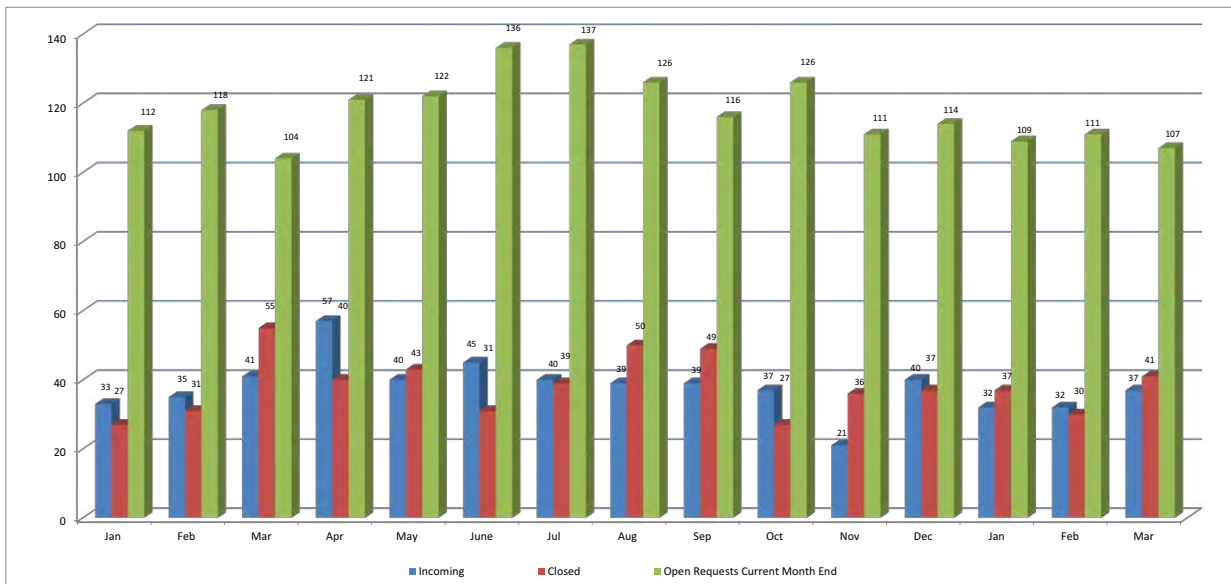
e both names Zeenat Mian and John Gelman are me

res to Jet and Cable Plow through.

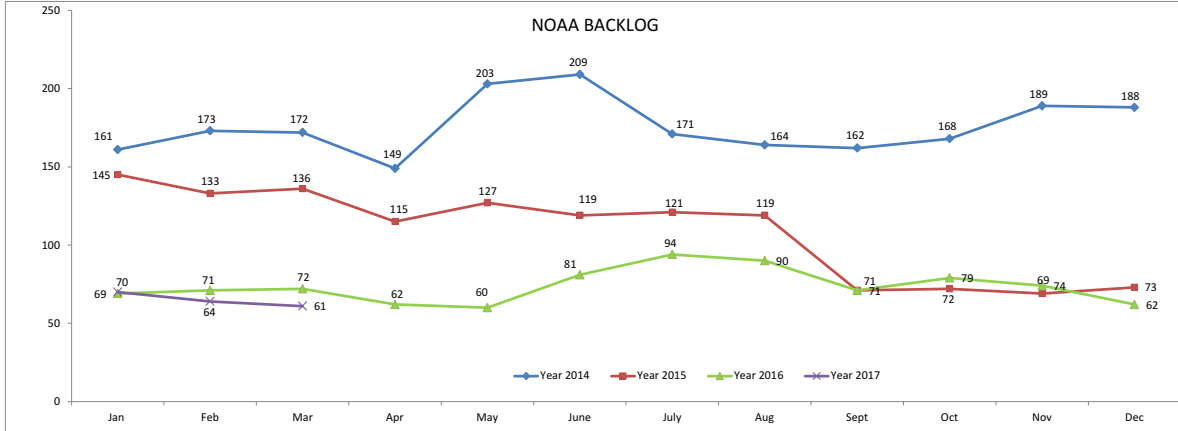
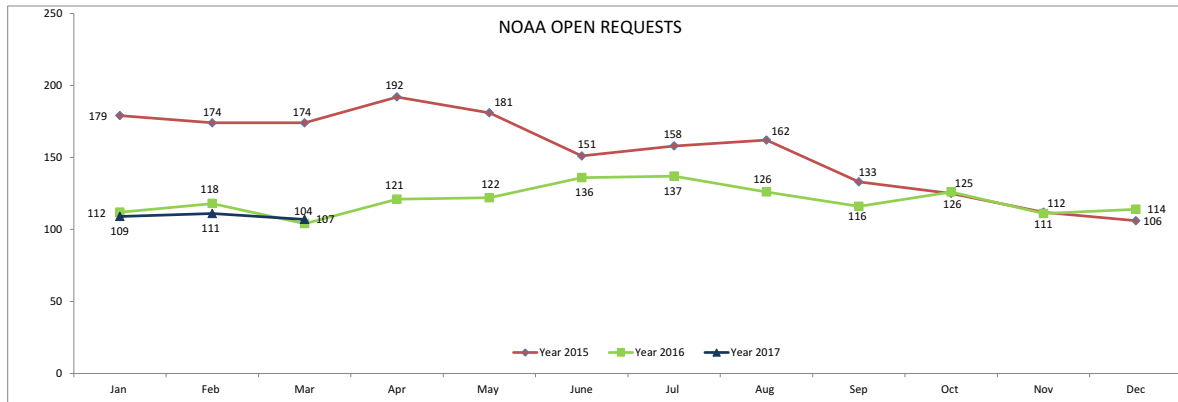
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lorado.edu].

FOIA Monthly Status Report 03-31-2017

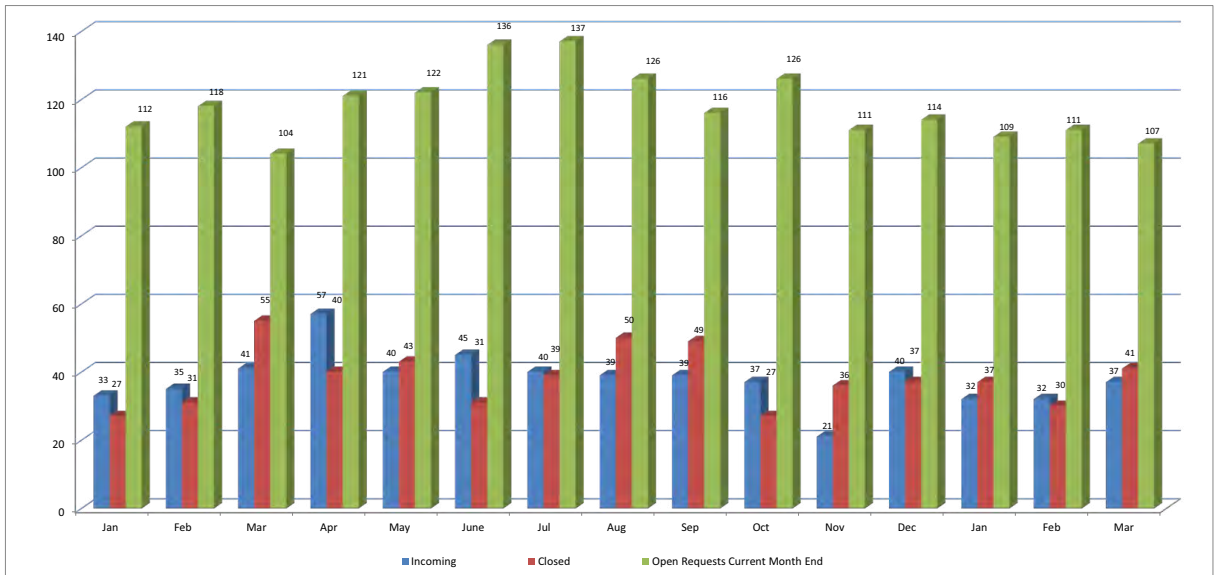
| Organization | Open Requests Previous Month End | Incoming Requests | Closed Requests | Open Requests Current Month End | Backlog 21-120 days | Backlog 121-364 days | Backlog 365 or more days | Total Backlog |
|--------------------|----------------------------------|-------------------|-----------------|---------------------------------|---------------------|----------------------|--------------------------|---------------|
| AGO | 5 | 1 | 3 | 3 | 5 | 1 | 3 | 9 |
| CAO | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| CFO | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| CIO | 2 | 0 | 0 | 2 | 0 | 0 | 0 | 0 |
| CIO/FOIA | 27 | 1 | 0 | 28 | 4 | 1 | 0 | 5 |
| GC | 3 | 0 | 1 | 2 | 0 | 0 | 0 | 0 |
| IA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| LA | 2 | 0 | 2 | 0 | 1 | 0 | 0 | 1 |
| NESDIS | 18 | 0 | 2 | 16 | 2 | 2 | 0 | 4 |
| NMFS | 8 | 18 | 18 | 8 | 12 | 11 | 3 | 26 |
| NOS | 22 | 0 | 9 | 13 | 8 | 2 | 0 | 10 |
| NWS | 12 | 2 | 3 | 11 | 2 | 1 | 0 | 3 |
| OAR | 3 | 0 | 2 | 1 | 0 | 0 | 0 | 0 |
| OMAO | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| OC | 0 | 3 | 0 | 3 | 0 | 0 | 0 | 0 |
| PPI | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| USAO | 3 | 4 | 0 | 7 | 1 | 0 | 0 | 1 |
| WFMO | 6 | 8 | 1 | 13 | 1 | 1 | 0 | 2 |
| NOAA Totals | 111 | 37 | 41 | 107 | 36 | 19 | 6 | 61 |

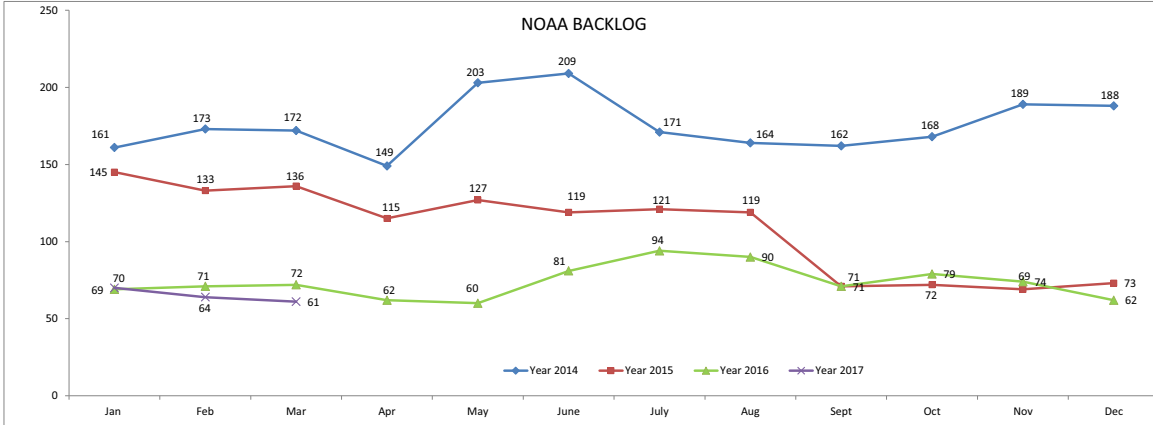
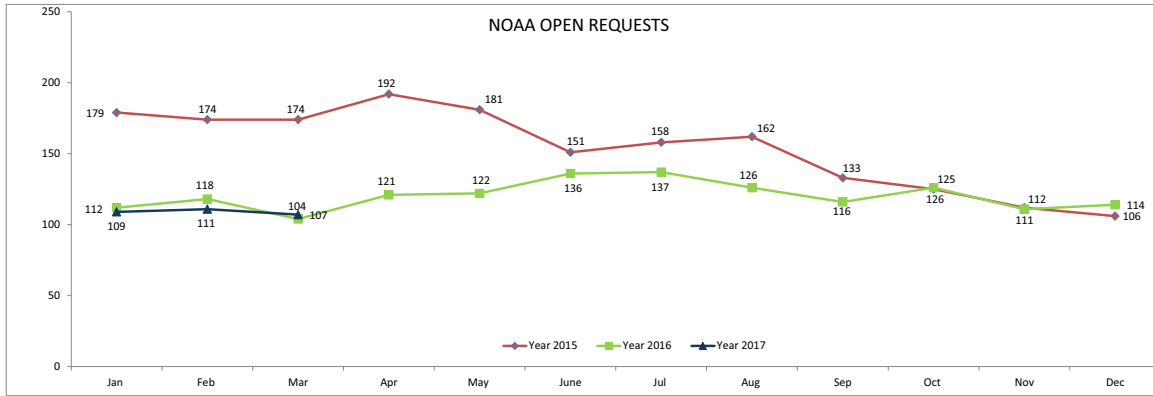


FOIA Monthly Status Report 03-31-2017



| Organization | Open Requests Previous Month End | Incoming Requests | Closed Requests | Open Requests Current Month End | Backlog 21-120 days | Backlog 121-364 days | Backlog 365 or more days | Total Backlog |
|--------------------|----------------------------------|-------------------|-----------------|---------------------------------|---------------------|----------------------|--------------------------|---------------|
| AGO | 5 | 1 | 3 | 3 | 5 | 1 | 3 | 9 |
| CAO | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| CFO | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| CIO | 2 | 0 | 0 | 2 | 0 | 0 | 0 | 0 |
| CIO/FOIA | 27 | 1 | 0 | 28 | 4 | 1 | 0 | 5 |
| GC | 3 | 0 | 1 | 2 | 0 | 0 | 0 | 0 |
| IA | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| LA | 2 | 0 | 2 | 0 | 1 | 0 | 0 | 1 |
| NESDIS | 18 | 0 | 2 | 16 | 2 | 2 | 0 | 4 |
| NMFS | 8 | 18 | 18 | 8 | 12 | 11 | 3 | 26 |
| NOS | 22 | 0 | 9 | 13 | 8 | 2 | 0 | 10 |
| NWS | 12 | 2 | 3 | 11 | 2 | 1 | 0 | 3 |
| OAR | 3 | 0 | 2 | 1 | 0 | 0 | 0 | 0 |
| OMAO | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| OC | 0 | 3 | 0 | 3 | 0 | 0 | 0 | 0 |
| PPI | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| USAO | 3 | 4 | 0 | 7 | 1 | 0 | 0 | 1 |
| WFMO | 6 | 8 | 1 | 13 | 1 | 1 | 0 | 2 |
| NOAA Totals | 111 | 37 | 41 | 107 | 36 | 19 | 6 | 61 |





| Tracking Number | Type | Requester |
|----------------------|---------|---------------------|
| DOC-NOAA-2017-000922 | Request | Megan M. Lucente |
| DOC-NOAA-2017-000921 | Request | John R. Leek |
| DOC-NOAA-2017-000993 | Request | Anna Crowder |
| DOC-NOAA-2017-000866 | Request | Stuart Pimm |
| DOC-NOAA-2017-000865 | Request | Zeenat Mian |
| DOC-NOAA-2017-000864 | Request | Nicholas P. Surgey |
| DOC-NOAA-2017-000863 | Request | Margaret Townsend |
| DOC-NOAA-2017-000851 | Request | Jared S. Goodman |
| DOC-NOAA-2017-000834 | Request | Shannon M. Cremeans |
| DOC-NOAA-2017-000811 | Request | Christopher Hudak |
| DOC-NOAA-2017-000785 | Request | Gary Macfarlane |
| DOC-NOAA-2017-000781 | Request | Olga Pristin |
| DOC-NOAA-2017-000780 | Request | Thomas Knudson |
| DOC-NOAA-2017-000784 | Request | Russ Rector |
| DOC-NOAA-2017-000925 | Request | bruce weyhrauch |
| DOC-NOAA-2017-000752 | Request | Sarah B. Brady |
| DOC-NOAA-2017-000744 | Request | Zeenat Mian |
| DOC-NOAA-2017-000737 | Request | Matthew Johnston |
| DOC-NOAA-2017-000701 | Request | Zeenat Mian |
| DOC-NOAA-2017-000881 | Request | Radu Munteanu |
| DOC-NOAA-2017-000790 | Request | Brian Gaffney |
| DOC-NOAA-2017-000768 | Request | Julio C. Gomez |
| DOC-NOAA-2017-000844 | Request | Benjamin Levitan |
| DOC-NOAA-2017-000843 | Request | Benjamin Levitan |
| DOC-NOAA-2017-000794 | Request | Jared E. Knicley |
| DOC-NOAA-2017-000846 | Request | Elizabeth N. Moran |
| DOC-NOAA-2017-000845 | Request | Elizabeth N. Moran |
| DOC-NOAA-2017-000753 | Request | David MacDonald |
| DOC-NOAA-2017-000708 | Request | Emily C. Atkin |
| DOC-NOAA-2017-000917 | Request | James Renaldi |
| DOC-NOAA-2017-000912 | Request | James Renaldi |
| DOC-NOAA-2017-000896 | Request | Sandi Podskoc |
| DOC-NOAA-2017-000885 | Request | Radu Munteanu |
| DOC-NOAA-2017-000884 | Request | Radu Munteanu |
| DOC-NOAA-2017-000883 | Request | Radu Munteanu |
| DOC-NOAA-2017-000882 | Request | Radu Munteanu |
| DOC-NOAA-2017-000880 | Request | Radu Munteanu |

Detail

Am requesting the following releasable or non-classified documents under the Freedom of Information (FOIA Act 5
This is to request any and all copies or references to, scientific papers or findings, observations by NOAA scientist:
All records regarding documented take (lethal or non-lethal) of threatened or endangered species associated with 1
All data and/or datasets, including but not limited to those set forth in the attached Excel spreadsheet, generated o
Under the Freedom of Information Act I would like to request the following: - Commencement/start and end date of
1. All data and/or datasets, including but not limited to those set forth in the attached Excel spreadsheet, generat
The Center requests from the U.S. Department of Commerce the following: 1. All data and/or datasets, including b
On behalf of People for the Ethical Treatment of Animals (PETA), and pursuant to the Freedom of Information Act,
I am writing to request copies of the application for import of (2) killer whales by Six Flags in 2001 Ref: Marine Man
1. Please provide any and all "documents" from December 6, 2016 to the present "related to" whether, any entities
Pursuant to the FOIA, Friends of the Clearwater requests all records, including but not limited to emails, phone log:
I would like to get an inventory on cetaceans at Mystic Aquarium (CT), all cetaceans that ever lived at Mystic, incl
For calendar year 2013: A.) Copies of all closed National Marine Fisheries Service law enforcement investigations
Please send me the latest mmir for the navy dolphin program just living and dead.
Please provide all documents referred to by Ms Buck below and include, with respect to the following (15,757 Units
Any and all requests for technical assistance for projects or initiatives that would impact the Atlantic sturgeon in the
Under the Freedom of Information Act I would like to request all documents and communications inter office (withir
This is a request under the Freedom of Information Act, 5 U.S.C. §552, et seq., and made pursuant to the inst
DESCRIPTION MODIFIED 3/9: Under the Freedom of Information Act I would like to request all documents and cc
FOIA REQUEST Dear FOIA Officer: As a candidate for the following position: Job title: Grants Management Speci
...all records from January 1, 2015 to the present discussing, documenting, memorializing, or otherwise concerning
Copies of all reports submitted to the Secretary of Commerce pursuant to 15 U.S.C. §330a, concerning "weat
1) a copy of all Agency records related to climate change, including any information that pertains to monitoring or a
Environmental Defense Fund ("EDF") respectfully requests records, as that term is defined at 5 U.S.C. § 552(f)(2)
Please produce records of the following types in NOAA's possession, custody or control: 1. All records setting forth
Copies of any and all records, documents, and communications, including but not limited to emails, regarding any ;
Copies of the Reports of Investigation for any and all informal or formal EEO complaints filed by, or on behalf of, TI
Any correspondence (including emails and attachments) between the Under Secretary of Commerce for Oceans a
Any and all communications between National Oceanic and Atmospheric Administration employees and President
All job titles and codes, organizational titles and codes, and bargaining unit codes for all current employees assign
All Job codes and job titles/descriptions, organizational codes and organizational descriptions/titles, bargaining unit
Department of Commerce National Oceanic and Atmospheric Administration To whomever it may concern: Pursue
FOIA REQUEST Dear FOIA Officer: As a candidate for the following position: Job title: Contract Specialist, GS-11(
FOIA REQUEST Dear FOIA Officer: As a candidate for the following position: Job title: Contract Specialist, GS-11(
FOIA REQUEST Dear FOIA Officer: As a candidate for the following position: Job title: Contract Specialist, GS-11(
FOIA REQUEST Dear FOIA Officer: As a candidate for the following position: Job title: Grants Management Speci
FOIA REQUEST Dear FOIA Officer: As a candidate for the following position: Job title: Grants Management Speci

Documentation: Task order: DOCST133016NC0630, Statement of Work or Performance Work Statement, T
book campaign heralded in <https://www.facebook.com/NOAAFisheriesWestCoast/photos/a.2181767382>
itions or other records regarding potential adjustments to Endangered Species Act take limits for the Sa
epartment agencies, departments, and/or components, see Attachment A (Datasets Spreadsheet); and
until present. - Last communications between Barbara and Robert Billand with NOAA.

: department agencies, departments, and/or components, see Attachment A (Datasets Spreadsheet); an
Department of Commerce (“Commerce Department”) and/or any Commerce department agencies, dep
port the orca Tilikum pursuant to the Marine Mammal Protection Act (MMPA), excepting correspondenc
documentation, inventories, necropsy reports, correspondence, etc. associated with the Application and
threatened or endangered anadromous fish in the Yuba River at, or in the vicinity of, Englebright Dam, N
Johnson Bar Salvage Sale (Nez Perce – Clearwater National Forests) since May 12, 2016, the date of th

of fisheries observers, assault of fisheries observers, interference with fisheries observers, coercion of fi

rd as H-3A-C-B-808,606,301 through 808,643,940 (3A Halibut IFQs), and 47,317 Units, designated as S
ict the Atlantic sturgeon in the Delaware River; NMFS/NOAA responses to requests for informal consult
R912-Nihoa-Sally is mentioned from June 28th 2016 until present.

ll times relevant to this inquiry was the owner and operator of the SEA QUEEN II, a commercial fishing v
pertaining to the email titled "FORMAL COMPLAINT: HARASSED yet again by HMMA volunteer&
announcement number: SO-AGO-2016-0001 Series and Grade: GS-1109-09/12 and pursuant to the fec
for adoption of the "Operations and Workforce Analysis (OWA) Project: Charter for All Workstrea
is enacted) to the present.

ppear, or were modified, as of January 20, 2017 or any date thereafter. This request encompasses, but
e “Agency”). Specifically, EDF requests: 1) all directives and guidance to Agency scientific staff that relat
ocuments, or webpages from a NOAA website. 2. All records from January 20, 2017 through the preser
kins, to address, respond, and/or comply with the successful finding of discrimination in the EEO compl
7, 11-54-00066, 10-54- 00811, 10-54-00339, and 08-54-00092. Copies of any and all communications a
rail address ending in dfo-mpo.gc.ca Limit to documents from Jan 1, 2017 to present.

AA employees from transition officials. Please also include communications between NOAA employees i

National Weather Service.

: names, addresses, phone numbers, email addresses, grade and step (if applicable), and job titles of a
on Job announcement number: SO-AGO-2016-0013 Series and Grade: GS-1102-13 and pursuant to the
ation Job announcement number: SO-AGO-2016-0012 Series and Grade: GS-1102-13/14 and pursuan
istration Job announcement number: SO-AGO-2016-0014 Series and Grade: GS-1102-09/12 and purs
Administration Job announcement number: SO-AGO-2016-0002 Series and Grade: GS-1109-09/12 and
announcement number: SO-AGO-2016-0001 Series and Grade: GS-1109-09/12 and pursuant to the fec

[REDACTED]
Task order all mods, addendums, RFP for above Task Order, CPARS, Source Selection Decision Docur
99054.47917.187396671377061/957240687725985/?type=3&theater The NOAA Fisheries West C
vannah Harbor Expansion Project (excluding all records dated prior to September 24, 2013); • All comm
2. All data and/or datasets that have been removed and/or relocated from Commerce Department, and/

id 2. All data and/or datasets that have been removed and/or relocated from Commerce Department, an
artments, and/or components, see Attachment A (Datasets Spreadsheet); and 2. All data and/or dataset
e between the agency and PETA, the Animal Welfare Institute, and their representatives. This request is
Issued Permit. I am requesting both a copy of the Application for permit and the Issued permit, with all a
arrows 1 and 2 powerhouses, Daguerre Point Dam, and the Hallwood-Cordua Diversion including but r
ie court ordered preliminary injunction in the civil case over the Forest Service's Johnson Bar Fire Salva

sheries observers and hostile work environments for fisheries observers. B.) All attachments, photos ar

;-SE-C-B-131,225,801 through 131,272,117 (Sablefish IFQs)) all transfer documents related to these IF
ation for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River; Any and all

essel. As such, I hereby request that you provide me with the following information: 1. The names and
quot; sent by Zeenat Mian. Period 11th January 2017 until present. I request to receive a copy of any le
leral Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of: -For the succe
n Core Teams" a copy of which is attached.

is not limited to, web pages, databases, and any records accessible through the Agency's websites via
te to public communication about scientific research or findings; 2) all questionnaires or other solicitation
it instructing NOAA staff within the Office of Communications to remove specific information, documents
aint filed by Thomas Smith (EEO Appeal No. 0120130553, Agency No. 54-2009-00092).
nd documentation, drafted, sent, received, and/or maintained by the EEO Counselor(s) for any and all E

that cite instructions from Trump transition team officials. REQUESTER INDICATED SHE IS WILLING

ll employees in the US Department of Commerce, National Oceanic and Atmospheric Administration off
e federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of: -For the si
it to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of: -For
uant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of: -
pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copie
leral Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of: -For the succe

[REDACTED]
ment, Business Clearance Memorandum, and Technical Memorandum, if any. Would appreciate that the Coast office should have all the needed references in one place in electronic form.

communications or other records regarding potential re-initiation of ESA consultation with the Army Corps of Engineers or Commerce Department agency, department, or components websites/webpages, since January 20, 2009.

and/or Commerce Department agency, department, or components websites/webpages, since January 20, 2009. This request includes, but is not limited to, memoranda, reports, notes, letters, emails, and other correspondence. Associated documentation for both.

not limited to any and all "documents" in the possession of NMFS' Office of Law Enforcement. 2. Any and all records associated with above investigations.

and video associated with above investigations.

Records and any Consent and Acknowledgement in conjunction with the transfer of quota, all transfer documents, and requests for formal consultation for projects or initiatives that would impact the Atlantic sturgeon in the Chesapeake Bay.

Contact information of all observers assigned to the SEA QUEEN II in August 1, 2009 - June 1, 2010 through letters produced by Office of NOAA General Counsel and signed by NOAA to be used in the TRO process. For the successful candidate selected for hire, their resume submitted in application, education and experience history.

hyperlink or other means, including web pages linking to climate and air quality information on White House website, or information sent to Agency scientific staff that relate to (i) past, current, or prospective public comments, or webpages from any NOAA website. In this request, the term "records" means anything denoted by the request.

Records: EEO complaints filed by, or on behalf of, Thomas Smith, against the Agency, including, but not limited to, records of the Agency.

TO SCOPE THE REQUEST TO INCLUDE COMMUNICATIONS AFTER THE ELECTION THAT FIT THE REQUEST.

ices in Alabama.

For the successful candidate selected for hire, their resume submitted in application, education and experience history. For the successful candidate selected for hire, their resume submitted in application, education and experience history. For the successful candidate selected for hire, their resume submitted in application, education and experience history. For the successful candidate selected for hire, their resume submitted in application, education and experience history.

[REDACTED]
e information be placed on a CD and mailed to me or sent via e-mail.

engineers for the Savannah Harbor Expansion Project (excluding all records dated prior to September 2017. A search for records pursuant to this request should therefore include but is not limited to data in :

l, 2017.

nt agency, department, or components websites/webpages, since January 20, 2017.

d all "documents" "related to" Daguerre Point Dam fish ladder closures, ladder blockages, debris remove

ents by Mr. Ben Gross in October 2014, all notifications to Jurene Museth from NOAA Fisheries, Alaska Delaware River; NMFS/NOAA responses to requests for formal consultation for projects or initiatives that

ugh the National Marine Fisheries Service Observer Program; 2. Any and all reports or information give s concerning Zeenat Mian.

y and starting salary upon hire in the position. -Copies of all correspondence, emails, memos and meeti

use or other federal agency websites; and 2) correspondence related to the content of the Agency's wet unication of scientific research or findings, and (ii) attendance at or participation in past, current, or pros the use of that word or its singular form in the text of FOIA and includes correspondence, memoranda, r

Agency Nos. 54-2015-00137, 54-2014-00137, 54-2013-00264, 54-2012-01971, 54-2012-01801, 54- 20

E SCOPE OF THE ORIGINAL REQUEST THAT WENT THROUGH NOAA'S ACTING CHIEF OF STAF

istory and starting salary upon hire in the position. -Copies of all correspondence, emails, memos and r
eance history and starting salary upon hire in the position. -Copies of all correspondence, emails, memos
erience history and starting salary upon hire in the position. -Copies of all correspondence, emails, men
d experience history and starting salary upon hire in the position. -Copies of all correspondence, emails,
y and starting salary upon hire in the position. -Copies of all correspondence, emails, memos and meeti

[REDACTED]

4, 2013).
all forms, including raw data, data sets, spreadsheets, etc.

al from the ladders, and dredging of sediment above Daguerre Point Dam from May 1, 2016 to the prese

Region, Restricted Access Management that the transfer, and all other notes correspondence or docur
would impact the Atlantic sturgeon in the Delaware River; Biological opinions issued by NMFS/NOAA fo
an by observers assigned to the SEA QUEEN II in August 1, 2009 - June 1, 2010 to the National Marine
ng notes regarding the position and recruitment, including all rating and ranking of candidates and notes

sites, including prospective future changes to such content, sent or received by any political appointee
pective public events; and 3) all correspondence relating to FOIA that was sent or received by anyone w
otes, emails, text messages, notices, facsimiles, orders, filings, and other writings (handwritten, typed, i

11-02074, 54-2011-00267, 11-54-00066, 10-54-00811, 10-54-00339, and 08-54- 00092. This request in

F, TROY WILDS.

meeting notes regarding the position and recruitment, including all rating and ranking of candidates and r
and meeting notes regarding the position and recruitment, including all rating and ranking of candidates
ros and meeting notes regarding the position and recruitment, including all rating and ranking of candida
memos and meeting notes regarding the position and recruitment, including all rating and ranking of ca
ng notes regarding the position and recruitment, including all rating and ranking of candidates and notes

ent. 3. Any and all "documents" "related to" upstream migration delays at Daguerre Point Dam and the in

nents referring or related to these IFQs from January 1, 2016 to date.

r projects or initiatives that would impact the Atlantic sturgeon in the Delaware River; All reports receive

Fisheries Service Observer Program; and (UPDATED REQUEST ITEM - 3/21) 3. Any and all documer

s of selection panel members. -Copies of any notes/interview score sheets for interviews conducted. -Th

or member of the beachhead or transition team.

ho, since November 8, 2016, has served as a political appointee or member of the beachhead team or i
electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the

cludes any and all communications, including but not limited to emails, between the EEO Counselor(s) fi

otes of selection panel members. -Copies of any notes/interview score sheets for interviews conducted.

s and notes of selection panel members. -Copies of any notes/interview score sheets for interviews conc

ates and notes of selection panel members. -Copies of any notes/interview score sheets for interviews c

andidates and notes of selection panel members. -Copies of any notes/interview score sheets for intervie

s of selection panel members. -Copies of any notes/interview score sheets for interviews conducted. -Th

Impacts of those migration delays on threatened or endangered anadromous fish in the Yuba River from I

and by NMFS of Atlantic sturgeon takes, kills, or injuries within the Delaware River system; and Any and all documents, including but not limited to reports, email communications, memos, forms, notes, photos, and letters. The number of applications received for the position -The number of candidates interviewed for the position

transition team. For all elements of this request, EDF respectfully seeks records produced, modified, or in the custody of NOAA Headquarters.

for the aforementioned EEO complaints and any responsible management official named in that informal

. -The number of applications received for the position -The number of candidates interviewed for the position conducted. -The number of applications received for the position -The number of candidates interviewed for the position conducted. -The number of applications received for the position -The number of candidates interviewed for the position -The number of applications received for the position -The number of candidates interviewed for the position

November 1, 2016 to the present. 4. Any and all "documents" "related to" high flows spillin

I NMFS/NOAA comments on environmental assessment

; relating to or generated by observers in connection their assignment to the SEA QUEEN II betwe

n. -The rating and ranking for all the 'Best Qualified' and 'Well Qualified' candidates. -Veteran's pref

transmitted since November 8, 2016 that exist as of

I EEO complaint.

osition. -The rating and ranking for all the 'Best Qualified' and 'Well Qualified' candidates. -Vetera
the position. -The rating and ranking for all the 'Best Qualified' and 'Well Qualified' candidates. -
for the position. -The rating and ranking for all the 'Best Qualified' and 'Well Qualified' candidates
awed for the position. -The rating and ranking for all the 'Best Qualified' and 'Well Qualified' candidates
n. -The rating and ranking for all the 'Best Qualified' and 'Well Qualified' candidates. -Veteran's pref



From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Tuesday, April 11, 2017 3:19 PM
To: Lola Stith - NOAA Affiliate
Subject: Re: ACTION REQUIRED: Task for DOC-OS-2017-000861 (Review/Signature Needed)
Attachments: NOAA RESPONSE_2017-000861 Fee Est - All Other Requester 4-3-2017 mhg.pdf

Done--thanks

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Tue, Apr 11, 2017 at 2:54 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Mark - Please find the fee estimate tasker for the subject DOC FOIA attached.

Please sign/return to me. Let me know if you have questions.

Thanks!

--

Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6))
lola.m.stith@noaa.gov



April 4, 2017

MEMORANDUM FOR: Bobbie Parsons, IOS
Pamela Moulder, ESA
Stephen Kong, EDA
Victor Powers, ITA
Catherine Fletcher, NIST
Stacy Cheney, NTIA
Jennifer Piel, OIG
Laura Main, OIG
Wayne Curry, Cen
Dondi Staunton, BEA
Jennifer Kuo, BIS
Josephine Arnold, MBDA
Wayne Strickland, NTIS
Mark H. Graff, NOAA
Ricou Heaton, PTO

FROM: Michael, Toland, Ph.D.
Deputy Chief FOIA Officer
Office of Privacy and Open Government

SUBJECT: Fee Estimate for FOIA Tracking No. DOC-OS-2017-000861

The Department has received the attached Freedom of Information Act (FOIA) request from Josh Loewenstein. The FOIA requester is in the "All Other Requesters" category. The chargeable services for "All Other Requesters" are search and duplication.

Please provide the search, and duplication estimate with respect to the responsive documents located within your office. **DO NOT SEARCH YET.** Rather, we need an **ESTIMATE** from you as to how many pages you may locate for this request. **This is only a good faith estimate; you should not search in order to come up with the estimate.** Also, a search need not actually find documents in order to be chargeable, so long as, at the outset, there is a reasonable likelihood that there may be responsive documents, and the search is conducted with due diligence.

Please provide the following estimates:
Please fill in the following information and return this sheet to: Harriette Boyd, FOIA Specialist, Office of Privacy and Open Government, Room 52010 HCHB, hboyd1@doc.gov by C.O.B. April 10, 2017.

Computer Search

Total **estimated** cost for duplication in electronic version (cost of disc or CD). ____ 0 ____
Total **estimated** hours of time to provide electronic version. ____ 2 ____
Total **estimated** dollar amount for time to provide electronic version. ____ \$50 ____

Manual Search

Total **estimated** number of pages of documents. ____ 0 ____
Total **estimated** hours for search. ____ 2 ____
Total **estimated** dollar amount for search. ____ \$50 ____

This information is needed to compute a final estimated cost.

GRAFF.MARK.HYRUM.1514447892

Digitally signed by GRAFF.MARK.HYRUM.1514447892
DN: cn=US, ou=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=GRAFF.MARK.HYRUM.1514447892
Date: 2017.04.11 15:18:25 -0400

Signature/Date

Attachment

NOAA ____
Bureau

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Wednesday, April 12, 2017 2:20 PM
To: Ruth Ann Lowery - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Rod Vieira
Subject: Re: DOC-NOAA-2016-000841
Attachments: APFOIA-NOAA-ClimateChangeCommunications.pdf (1).pdf

Understood--although I have to say, we've been very spoiled to have your hand at the wheel. It's been a pleasure working on these with you. (b)(5)

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

We might want to discuss it on the call today. Let me know if you have any thoughts.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Wed, Apr 12, 2017 at 2:06 PM, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov> wrote:

Thanks, Mark (b)(5)

[Redacted]

[Redacted]

[Redacted]

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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On Wed, Apr 12, 2017 at 2:01 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Hi Ruth Ann,

As you may remember (b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED] ?

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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Seth Borenstein
Science Writer
The Associated Press
1100 13th St. N.W., Suite 700
Washington, DC 20005-4076
sborenstein@ap.org
202-641-9454

Robert Swisher, Mark Graff, Andre Sivels
FOIA officers,
National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3) Room 9719
Silver Spring, Maryland 20910

March 30, 2017 (sent via email)

Dear sirs,

It's Seth Borenstein, national science writer for the Associated Press, the worldwide wire service. Pursuant to the federal Freedom of Information Act, 5 U.S.C. 552, I request access to and copies of the following materials:

- From Jan. 20, 2017 to March 29, 2017, all correspondence, emails, phone call transcripts, text messages, power point presentations, meeting minutes and files instructing staff, scientists, public affairs officers on the description, vocabulary or otherwise about the following words/issues: climate change, global warming, greenhouse gases, carbon dioxide or Paris Agreement.
- All instructions, emails, correspondence, report from senior NOAA officials and/or political appointees at the Department of Commerce to NOAA staff since Jan. 20, 2017 about reports, data, scientific reports, public information about the following words/issues: climate change, global warming, greenhouse gases, carbon dioxide or Paris Agreement.

As a news media representative I am only required to pay for the direct cost of duplication after the first 100 pages. As a news media representative, I ask you to please waive any applicable fees. In the following eight paragraphs I will underscore my reasons in response to your guidelines on fee requests. I understand that is a separate process than my FOIA request. So I ask that you initiate both processes simultaneously. In other words, please start processing the FOIA request itself as you are doing the fee-waiver request. In the event that you disallow my fee-waiver request, I pledge to pay the price of the FOIA request up to \$200. Please notify me upon passing the \$100 and \$150 thresholds and reaching the \$200 limit if this is before a decision on fee-waiver request of if my fee-waiver is denied, however unwarranted that event may be. This paragraph should serve to authorize you to begin to accrue such charges, pending a decision on the fee-waiver request.

Through this FOIA request I am gathering vital information on the activities of the taxpayer-funded NOAA that is important to the public's understanding of how its federal oceans and atmospheric agency spends public money and whether it is doing so in compliance with federal laws.

Now, let me specifically address the six hurdles used by the FOIA for fee-waiver determination by the U.S. Environmental Protection Agency and other federal agencies.

1. The subject matter of the requested records must specifically concern identifiable operations or activities of the government. This is about what scientists say is one of the most pressing issues of our time: climate change. And it is about a taxpayer funded agency's treatment of this issue, which affects the lives, health, safety and finances of taxpayers.
2. The disclosure should be "likely to contribute" to an understanding of government operations or activities. This is about what scientists say is one of the most pressing issues of our time: climate change. And it is about the agency decides to tackle said issue, which affects the lives, health, safety and finances of

taxpayers.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the requester or a narrow segment of interested persons. The public at large wants to and needs to know about what its government is doing about climate change and how it is instructing its workers. The Associated Press, a non profit consortium, is the world's largest news gathering agency and is geared toward news for general interests, not narrow ones.
4. The disclosure must contribute "significantly" to the public understanding of government operations. As said above, this is about what scientists say is one of the most pressing issues of our time: climate change. NOAA is one of the major agencies monitoring and dealing with this issue. And it is about a taxpayer funded agency's treatment of this issue, which affects the lives, health, safety and finances of taxpayers. who runs NOAA and in what capacity is significant who pay for and benefit from NOAA's proper operations.
5. The disclosure will not serve any commercial interest of me as an individual. My company does not sell newspapers individually. My company, The Associated Press, is a not-for-profit wire service (see the .org at the end of my e-mail) that is a consortium of members. Even the AP members will not likely sell a single newspaper more because of the disclosure. This is just a matter of a not-for-profit wire service fulfilling its public duty to ferret out the truth about the way government operates. In fact, the entire process will likely cost my company money because it involves my time.
6. The public interest in disclosure far outweighs commercial interest. First, as shown above there is massive amount of public interest. Second, as shown above, there is little if any commercial interest.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the Act and release all segregable portions of otherwise exempt material. I reserve the right to appeal.

As I am making this information as a daily journalist and this information is of timely value, please contact me by telephone, rather than by mail if you have questions regarding this request. My phone number is 202-641-9454. My e-mail is sborenstein@ap.org. I look forward to your reply within 20 business days, as the statute requires.

Thank you in advance for your assistance.

Sincerely,

[signed]
Seth Borenstein
Science Writer
The Associated Press

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Wednesday, April 12, 2017 3:51 PM
To: Glenn Tallia - NOAA Federal; Heather Book - NOAA Federal; Hillary Davidson; Kristen Gustafson - NOAA Federal; Matthew Womble - NOAA Affiliate; Rodney Vieira - NOAA Federal; Rose Stanley - NOAA Federal; Russell Vose - NOAA Federal; Ruth Ann Lowery - NOAA Federal; Tim Owen - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Robert Swisher - NOAA Federal; Dennis Morgan - NOAA Federal
Subject: Karl-related FOIA requests
Attachments: Karl-related requests extraction v. 5.xls

Hello Everyone,

Attached is the updated spreadsheet of the status of the requests for today's upcoming call. Please note the new Associated Press request seeking all instructions to staff, and correspondence from senior officials after January 20, 2017, that references climate change, global warming, greenhouse gases, carbon dioxide, or the Paris Agreement.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Wednesday, April 12, 2017 3:48 PM
To: Stephen Lipps - NOAA Federal; John Almeida - NOAA Federal; Holmes, Colin; Robert Moller - NOAA Federal; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal
Cc: Tom Taylor; Kimberly Katzenbarger - NOAA FEDERAL; Charles; Dennis Morgan - NOAA Federal; Stacey Nathanson - NOAA Federal; Robert Swisher - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lola Stith - NOAA Affiliate; Zachary Goldstein - NOAA Federal; Douglas Perry - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Jeri Dockett - NOAA Affiliate; Cc: OCIO/OPPA; Troy Wilds - NOAA Federal; Lawrence Charters - NOAA Federal; Allison Soussi-Tanani - NOAA Federal; Bogomolny, Michael (Federal)
Subject: Weekly FOIA Incoming and High Visibility Requests
Attachments: Weekly FOIA Incoming and High Visibility Requests 04.05.17 - 04.12.17.xls

Good Afternoon,

Attached please find this week's report.

Some of the significant requests on this list include a request from CNN seeking all communications or records involving the preservation of scientific data prior to January 20, 2017. (DOC-NOAA-2017-000952). Also, although not reflected on the attached spreadsheet, two requests were received from the Associated Press. One is seeking all records pertaining to the appointment of Erik Noble at NOAA. (DOC-NOAA-2017-001008). The other seeks all instructions to staff, and correspondence from senior officials after January 20, 2017, that references climate change, global warming, greenhouse gases, carbon dioxide, or the Paris Agreement. (DOC-NOAA-2017-001007).

Three referrals were also received by USACE. One was originally submitted by New Republic seeking records regarding Clean Water Act Section 404 permits filed for Trump National Doral Golf Club, Miami; Trump National Golf Club, Jupiter; and Trump International Golf Club, Palm Beach. (DOC-NOAA-2017-001020). Another referral from USACE, originally submitted by the DNC, sought correspondence with email accounts associated with the "@trumporg.com," "@donaldtrump.com," "@trumphotels.com," "@trumpwinery.com," "@trumphotelcollection.com" or "@maralagoclub.com" domain names.. (DOC-NOAA-2017-001017). Also, a request was referred from USACE which had been submitted by the Audubon of the Western Everglades seeking all permit application and Corps review documents including RAI's for a proposed project to build a boardwalk across a tidal lagoon on Ft. Myers Beach. (DOC-NOAA-2017-001022).

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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| Tracking Number | Type | Requester | Requester Organization |
|----------------------|--------------|-------------------|-----------------------------------|
| DOC-NOAA-2017-001014 | Request | Steven P. Gray | Law.Offices of Steven P. Gray |
| DOC-NOAA-2017-001017 | Referral | Lauren Dillon | DNC |
| DOC-NOAA-2017-001020 | Referral | Emily Atkin | New Republic |
| DOC-NOAA-2017-001022 | Referral | Brad Cornell | Audubon of the Western Everglades |
| DOC-NOAA-2017-001003 | Request | Amy Haddow | Cruise Line Agencies of Alaska |
| DOC-NOAA-2017-001004 | Request | CHRIS STEINS | Urban Insight |
| DOC-NOAA-2017-000994 | Request | Mariel Combs | Oceana |
| DOC-NOAA-2017-000986 | Request | Tristan R. Armer | HSCBPA |
| DOC-NOAA-2017-000965 | Request | Sandra K. Stewart | Global Science & Technology Inc. |
| DOC-NOAA-2017-000964 | Request | Sandra K. Stewart | Global Science & Technology Inc. |
| DOC-NOAA-2017-000963 | Request | Sandra K. Stewart | Global Science & Technology Inc. |
| DOC-NOAA-2017-000962 | Request | Sandra K. Stewart | Global Science & Technology Inc. |
| DOC-NOAA-2017-000961 | Request | Sandra K. Stewart | Global Science & Technology Inc. |
| DOC-NOAA-2017-000960 | Request | Sandra K. Stewart | Global Science & Technology Inc. |
| DOC-NOAA-2017-000956 | Consultation | David M. Hardy | US Dept of Justice FBI |
| DOC-NOAA-2017-000952 | Request | Greg Wallace | |
| DOC-NOAA-2017-000953 | Consultation | EPA | |
| DOC-NOAA-2017-000992 | Request | Joanna McCall | National Corporate Research, LTD |
| DOC-NOAA-2017-000944 | Request | Samuel K. Rebmann | |

Custom Report - 04/12/2017 03

| Submitted | Received | Assigned To | Case File Assigned To | Perfected? | Due |
|------------------|-----------------|---------------------|------------------------------|-------------------|------------|
| 04/12/2017 | 04/12/2017 | NOAA | NOAA | No | TBD |
| 04/12/2017 | 04/12/2017 | Beverly J. Smith | Beverly J. Smith | Yes | 05/10/2017 |
| 04/12/2017 | 04/12/2017 | Beverly J. Smith | Beverly J. Smith | Yes | 05/10/2017 |
| 04/12/2017 | 04/12/2017 | Beverly J. Smith | Beverly J. Smith | Yes | 05/10/2017 |
| 04/11/2017 | 04/11/2017 | NOAA | NOAA | No | TBD |
| 04/11/2017 | 04/11/2017 | NOAA | NOAA | No | TBD |
| 04/10/2017 | 04/11/2017 | Kehaupuaokal Kamaka | Kehaupuaokal Kamaka | Yes | 05/09/2017 |
| 04/10/2017 | 04/10/2017 | Beverly J. Smith | Beverly J. Smith | Yes | 05/09/2017 |
| 04/06/2017 | 04/06/2017 | AGO | AGO | Yes | 05/09/2017 |
| 04/06/2017 | 04/06/2017 | AGO | AGO | Yes | 05/09/2017 |
| 04/06/2017 | 04/06/2017 | AGO | AGO | Yes | 05/09/2017 |
| 04/06/2017 | 04/06/2017 | AGO | AGO | Yes | 05/09/2017 |
| 04/06/2017 | 04/06/2017 | AGO | AGO | Yes | 05/09/2017 |
| 04/06/2017 | 04/06/2017 | AGO | AGO | Yes | 05/09/2017 |
| 04/06/2017 | 04/06/2017 | NWS | NWS | No | 05/04/2017 |
| 04/05/2017 | 04/05/2017 | Maria S. Williams | Maria S. Williams | Yes | 05/09/2017 |
| 04/05/2017 | 04/05/2017 | OAR | OAR | No | 04/20/2017 |
| 04/05/2017 | 04/05/2017 | Beverly J. Smith | Beverly J. Smith | Yes | 05/08/2017 |
| 04/04/2017 | 04/05/2017 | Tawand Hodge Tonic | Tawand Hodge Tonic | Yes | 05/08/2017 |

Detail

Cody Barton; Case No. 3K0-15-205 CI. The purpose of this letter is to request a copy of all documents generated c
REFERRAL FROM USACE: Email correspondence between your department and email accounts associated with
REFERRAL FROM USACE: Any and all Clean Water Act Section 404 permits, and any documents related to the p
REFERRAL FROM USACE: All permit application and Corps review documents including RAI's for a proposed pro
We are requesting a copy of findings from a National Marine Fisheries Service investigation into the death of a fin v
Freedom of Information Act Request for Proposals for RFQ EA-133F-16-RQ-0522. I request that a copy of the proj
Oceana requests records created during at-sea monitoring pursuant to the observer program's monitoring requiren
1. All joint enforcement agreements between NOAA/NMFS and the states of Tx., La., Ms., Al., Fl.; 2. All contracts c
We are requesting information under the Freedom of Information Act for NOAA SciTech Contract DOCDG133E12
We are requesting information under the Freedom of Information Act for NOAA SciTech Contract DOCDG133E10
We are requesting information under the Freedom of Information Act for NOAA SciTech Contract DOCDG133E10
We are requesting information under the Freedom of Information Act for NOAA SciTech Contract DOCDG133E12
We are a requesting information under the Freedom of Information Act for NOAA SciTech Contract DOCDG133E1
We are requesting information under the Freedom of Information Act on NOAA SciTech Contract DOCDG133E12
(1) document from DOJ/FBI regarding FOIA request related to Soviet Scientist Yevgeny K. Fyodorov, (1910-1982)
Pursuant to the Federal Freedom of Information Act, 5 U.S.C. § 552 (the "Act"), Cable News Network, Inc. ("CNN")
Attached is a FOIA request for records from EPA and a set of documents containing NOAA equities for your consul
One copy of the January 20, 2017 letter submitted by National Marine Fisheries Serviceto the U.S. Anny Cotps of E
To Whom It May Concern: Pursuant to the Freedom of Information Act (FOIA) as Amended, I hereby quest copies

concerning an incident that took place on May 22, 2013, in Kodiak, Alaska concerning an incident that was the “@trumporg.com,” “@donaldtrump.com,” “@trumphotels.com,” “@trumpwinery.com,” “@trumphoto permit review process, filed for Trump National Doral Golf Club, Miami; Trump National Golf Club, Jupiter project to build a boardwalk across a tidal lagoon on Ft. Myers Beach: Applicants are Texas Holdem', LLC ; whale in Resurrection Bay on May 29, 2016, when it was struck by the Zaandam, a Holland America cruise proposals submitted for RFQ EA-133F-16-RQ-0522, NMFS Web Modernization, be provided to me. The contents for the Hawaii-based deep-set pelagic longline fishery and the shallow-set pelagic longline fishery. or agreements with private contractors that do the Marine Recreational Information Programs (MRIP), in CQ0021, Task Order DOCDG133E12CQ0021T0006, Atmospheric Science and Technology Application CQ0031, Task Order DOCT0008, Technical, Scientific, and Engineering Support for the Joint Polar Satellite CQ0033, Task Order DOCDG133E10Q0033T0003, Satellite Data Assimilation Science and Technology CQ0021, Task Order DOCDG133E12CQ0021T0003, Program Support and Outreach Activities. The original 2CQ0021, Task Order DOCDG133E12CQ0021T005, Science Algorithm Software Systems issued to IN CQ0020 Task Order Number DOCDG133E12CQ0020T0008 Sensor Science and Technology Application).

I request access to and copies of all records relating to relating to any communications or records involving litigation. I am seeking a point-of-contact to review the records and provide comments to me by April 20, 2016. Engineers as part of the Apalachicola-Chattahoochee-Flint River Basin Master Water Control Manual update of the following records: All Marine Mammal Inventory Reports for all available fiscal years; all requests

he F/V Laura.

of information act requests filed with your department and their responsive records mentioning Donald T
Vater Act Section 404 permits between Army Corp employees and representatives of Trump National Dc

r 2016 said the cruise company would not be penalized for the whale's death, and the ship's Master has
pany invested significant effort to submit a proposal as part of this RFQ. We were not awarded the cont

rials used to formulate a bid request or RFP for the contractors handling the MRIP, including but not limi
s issued by Thomas Fout, Branch Chief, Contracting Officer, Office of Acquisition and Grants, Silver Spr
nce is ending 12/20/2017.

to 07/31/2017. It was issued by Thomas Fout, Branch Chief, Contracting Officer, Office of Acquisition a
, Branch Chief, Contracting Officer, Office of Acquisitions and Grants, Silver Spring, MD 20910.

s Fout, Branch Chief, Contracting Officer, Office of Acquisition and Grants, Silver Spring MD 20910.

; F. Fout, Branch Chief, Contracting Officer, Office of Acquisition and Grants, Silver Spring, MD 20910

scope of this request will include a search of NESDIS/NCEI, as well as the Office of the Undersecretary.

ps of Engineers' Record of Decision for the ApalachicolaChattahoochee- Flint River Basin Master Water
i, public display, or enhancing the survival or recovery of a species or stock filed between January 1st, 1

Trump, the Trump Organization or any of the aforementioned individuals or entities.
Trump National Golf Club, Miami; Trump National Golf Club, Jupiter; and Trump International Golf Club, Palm Beach

asked us for a copy of the report on which that article was based. Kindly contact me for approval if fees
apply. This request is made to understand where our firm fell short in the contracting process.

related to the telephone survey operator and the dockside-intercept program; 4. All materials, programs, po
licies, and procedures, Silver Spring, MD 20910.

and Grants, Silver Spring, MD 20910

The search will be for any communications regarding the preservation of environmental scientific data t

Water Control Manual Update and Water Supply Storage Assessment for Alabama, Florida, and Georgia, dat
1997 and date of receipt of the requested information; all recommendations of non-releasability provided

1.

are higher than \$25 for this request, as I wasn't sure what number to use i

wer points, manuals or like materials used to train person

.hat originated betw

ed March 30, 2017. We request that you provide us with accurate copies or a complete and accurate ac
to the National Marine Fisheri

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Wednesday, April 12, 2017 4:25 PM
To: Bogomolny, Michael (Federal)
Subject: Fwd: Karl-related FOIA requests
Attachments: Karl-related requests extraction v. 5.xls

Hi Bogo--

I didn't realize you would be on the call--here is a copy of the spreadsheet I distributed before the call. Sorry to leave you off--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Wed, Apr 12, 2017 at 3:51 PM
Subject: Karl-related FOIA requests
To: Glenn Tallia - NOAA Federal <glenn.e.tallia@noaa.gov>, Heather Book - NOAA Federal <heather.book@noaa.gov>, Hillary Davidson <h davidson@doc.gov>, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>, Matthew Womble - NOAA Affiliate <matthew.womble@noaa.gov>, Rodney Vieira - NOAA Federal <rod.vieira@noaa.gov>, Rose Stanley - NOAA Federal <rose.stanley@noaa.gov>, Russell Vose - NOAA Federal <russell.vose@noaa.gov>, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>, Tim Owen - NOAA Federal <tim.owen@noaa.gov>
Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov>

Hello Everyone,

Attached is the updated spreadsheet of the status of the requests for today's upcoming call. Please note the new Associated Press request seeking all instructions to staff, and correspondence from senior officials after January 20, 2017, that references climate change, global warming, greenhouse gases, carbon dioxide, or the Paris Agreement.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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From: Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>
Sent: Wednesday, April 12, 2017 4:35 PM
To: Mark Graff - NOAA Federal
Cc: Rod Vieira
Subject: FW: Emailing - Opening Letter FOIA JudicialWatchvsUSDept of Commerce.pdf

Hi, Mark,

(b)(5)
[Redacted]

[Redacted] ?

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
(301)713-9671
Fax: (301) 713-0658

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From: Myers, Jordan (Federal) [mailto:jmyers@doc.gov]
Sent: Wednesday, April 12, 2017 4:20 PM
To: Lowery, Ruth Ann (Federal)
Subject: FW: Emailing - Opening Letter FOIA JudicialWatchvsUSDept of Commerce.pdf

Hi Ruth Ann,

(b)(5)
[Redacted]

Jordan

From: Grossman, Beth (Federal)
Sent: Wednesday, April 12, 2017 12:33 PM

To: Davidson, Hillary (Federal) <HDavidson@doc.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>
Subject: FW: Emailing - Opening Letter FOIA JudicialWatchvsUSDept of Commerce.pdf

fyi

From: McClelland, Michelle (Federal)
Sent: Wednesday, April 12, 2017 12:32 PM
To: DiGiacomo, Brian (Federal) <bDiGiaco@doc.gov>; Grossman, Beth (Federal) <bgrossman@doc.gov>
Subject: FW: Emailing - Opening Letter FOIA JudicialWatchvsUSDept of Commerce.pdf

See attached.

From: Sotillo, Tania (USADC) [<mailto:Tania.Sotillo@usdoj.gov>]
Sent: Wednesday, April 12, 2017 11:53 AM
To: McClelland, Michelle (Federal) <mMcClelland@doc.gov>
Cc: General Counsel <GeneralCounsel@doc.gov>
Subject: RE: Emailing - Opening Letter FOIA JudicialWatchvsUSDept of Commerce.pdf

For your review and response.

*Tania A. Sotillo,
Paralegal Specialist
US Attorney Office-DC - Civil Division
555 4th Street N.W.
Washington, DC 20530
202-252-2567(o)
(b)(6) (m)
202-252-2599 (f)
Email: taniasotillo@usa.doj.gov*

From: Sotillo, Tania (USADC)
Sent: Wednesday, April 12, 2017 11:39 AM
To: 'm.mcclelland@doc.gov' <m.mcclelland@doc.gov>
Cc: 'generalcounsel@doc.gov' <generalcounsel@doc.gov>
Subject: Emailing - Opening Letter FOIA JudicialWatchvsUSDept of Commerce.pdf

Please find the attached FOIA case.

*Tania Sotillo
Paralegal Specialist USAO-DC
202-252-2567 tel*

2017V00315

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.

Plaintiff

v.

U.S. DEPARTMENT OF COMMERCE

Defendant

Civil Action No. 17-541 (RBW)

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* U.S. ATTORNEY GENERAL
950 Pennsylvania Avenue, NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Chris Fedeli
425 Third Street, SW
Suite 800
Washington, DC 20024

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: 3/27/2017



/s/ Sherryl Horn

Signature of Clerk or Deputy Clerk



SB

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)
425 Third Street SW, Suite 800)
Washington, DC 20024,)

Plaintiff,)

Civil Action No.

v.)

UNITED STATES DEPARTMENT)
OF COMMERCE,)
1401 Constitution Avenue, NW)
Washington, DC 20230,)

Defendant.)

COMPLAINT

Plaintiff Judicial Watch, Inc. brings this action against Defendant U.S. Department of Commerce to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As grounds therefor, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff Judicial Watch, Inc. is a not-for-profit, educational organization incorporated under the laws of the District of Columbia and headquartered at 425 Third Street SW, Suite 800, Washington, DC 20024. Plaintiff seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. As part of its mission, Plaintiff regularly requests records from federal agencies pursuant to FOIA. Plaintiff analyzes the

responses and disseminates its findings and the requested records to the American public to inform them about “what their government is up to.”

4. Defendant U.S. Department of Commerce is an agency of the United States Government. Defendant has possession, custody, and control of records to which Plaintiff seeks access. Defendant is headquartered at 1401 Constitution Avenue, NW, Washington, DC 20230.

STATEMENT OF FACTS

5. On February 6, 2017 Plaintiff submitted a FOIA request to the National Oceanic and Atmospheric Administration (“NOAA”), a component of Defendant, seeking the following:

Any and all records of communications between NOAA scientist Thomas Karl and Director of the Office of Science and Technology Policy John Holdren.

The timeframe of the request was identified as “January 20, 2009 through January 20, 2017.”

The request was submitted by certified mail.

6. According to U.S. Postal Service records, the request was received by NOAA on February 7, 2017.

7. NOAA confirmed that it received the request on February 8, 2017, assigning the request Tracking Number DOC-NOAA-2017-000580.

8. As of the date of this Complaint, Defendant has failed to: (i) produce the requested records or demonstrate that the requested records are lawfully exempt from production; (ii) notify Plaintiff of the scope of any responsive records Defendant intends to produce or withhold and the reasons for any withholdings; or (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

9. Plaintiff realleges paragraphs 1 through 8 as if fully stated herein.

10. Plaintiff is being irreparably harmed by reason of Defendant's violation of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with FOIA.

11. To trigger FOIA's administrative exhaustion requirement, Defendant was required to determine whether to comply with Plaintiff's request by March 9, 2017 at the latest. At a minimum, Defendant was required to: (i) gather and review the requested documents; (ii) determine and communicate to Plaintiff the scope of any responsive records Defendant intended to produce or withhold and the reasons for any withholdings; and (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination. *See, e.g., Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188-89 (D.C. Cir. 2013).

12. Because Defendant failed to determine whether to comply with Plaintiff's request within the time period required by FOIA, Plaintiff is deemed to have exhausted its administrative appeal remedies. 5 U.S.C. § 552(a)(6)(C)(i).

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request; (2) order Defendant to produce, by a date certain, any and all non-exempt records to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of

attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated: March 27, 2017

Respectfully submitted,

s/ Chris Fedeli

Chris Fedeli

D.C. Bar No. 472919

JUDICIAL WATCH, INC.

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

Counsel for Plaintiff



U.S. Department of Justice

Channing D. Phillips
United States Attorney

District of Columbia

*Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530*

April 5, 2017

By First Class Mail and Email/Facsimile

Michelle McClelland
Acting General Counsel
Office of the General Counsel
U.S. Department of Commerce
14th and Constitution Avenue, N.W., Room 5870
Washington, D.C. 20230
m.mcclelland@doc.gov/generalcounsel@doc.gov
(202) 501-4695 Fax

Re: Judicial Watch Inc. vs. Department of Commerce
Civil Action No. 17-0541 (RBW)

Dear Ms. McClelland:

Attached is a copy of a Freedom of Information (FOIA) complaint received in this office on **March 31, 2017**. This case has been assigned to **Assistant United States Attorney Rhonda L. Campbell**, who can be reached at **(202) 252-2559**. Our Answer or dispositive motion is due on **April 17, 2017**. Please note that, in general, in addition to addressing the exemptions claimed for any documents or information withheld, the declaration should address the adequacy of the search for records, the segregability of information and the manner in which any referral of documents was made.

As of January 1, 2003, all new Civil cases filed in the U.S. District Court for the District of Columbia are a part of the Electronic Case Filing System. Accordingly, any materials, including but not limited to, declarations, exhibits, administrative records, and other documents to be filed with the District Court should be provided to the undersigned in electronic format, i.e., scanned and saved in PDF, as well as provided in hard copy.

If you are unable to provide a draft Answer or draft Vaughn index and supporting declaration within the time specified, you may call me so we can develop a reasonable timetable, keeping in mind the time limits imposed by statute and by the Court.

Very truly yours,

CHANNING D. PHILLIPS
United States Attorney

By: /s/
RHONDA L. CAMPBELL
Assistant U.S. Attorney
Judiciary Center Building
555 Fourth St., N.W.
Washington, D.C. 20530
Phone: (202) 252-2559
Fax: (202) 252-2599
RCampbell2@usdoj.gov

Enclosure

From: Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>
Sent: Wednesday, April 12, 2017 5:53 PM
To: Rod Vieira; Mark Graff - NOAA Federal
Subject: FW: Judicial Watch v. DOC, No. 17-0541 (D.D.C.)
Attachments: Supplemental Fee Waiver Justifications.pdf; Unusual Circumstance 10 Day Extension.pdf

fyi

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114 Silver Spring, MD 20910
(301)713-9671
Fax: (301) 713-0658

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-----Original Message-----

From: Bogomolny, Michael (Federal) [mailto:MBogomolny@doc.gov]
Sent: Wednesday, April 12, 2017 5:29 PM
To: Rhonda Campbell
Cc: Lowery, Ruth Ann (Federal)
Subject: Judicial Watch v. DOC, No. 17-0541 (D.D.C.)

Ms. Campbell,

(b)(5)
[Redacted text block]

Sincerely,
bogo

Michael Bogomolny
Acting Chief, Information Law Division
mbogomolny@doc.gov (202) 482-0703
United States Department of Commerce
Office of the General Counsel
Office of the Assistant General Counsel
for Employment, Litigation, and Information

This communication and/or any attachment may contain information that is privileged or confidential and is intended for the limited use of those identified herein. If you are not the intended recipient or believe that you may have received this communication in error, please reply to the sender indicating that fact and delete the copy you received. If you are not the intended recipient, you should not print, copy, retransmit, disseminate, or otherwise use the information.



Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Fwd: Additional Information Needed to Adjudicate your Fee Waiver Request - 2017-000580

1 message

FOIA Office - NOAA Service Account <foia@noaa.gov>
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Tue, Feb 21, 2017 at 2:41 PM

Mark H. Graff
FOIA Officer
National Oceanic and Atmospheric Administration
(301)-628-5658

----- Forwarded message -----

From: **Bill Marshall** <BMarshall@judicialwatch.org>
Date: Tue, Feb 21, 2017 at 2:22 PM
Subject: RE: Additional Information Needed to Adjudicate your Fee Waiver Request
To: "foia@noaa.gov" <foia@noaa.gov>
Cc: Lauren Burke <lburke@judicialwatch.org>, Paul Orfanedes <POrfanedes@judicialwatch.org>, Chris Farrell <CFarrell@judicialwatch.org>

Mr. Graff,

The basis for my request for records in the instant FOIA case was a media report that Dr. Thomas Karl had a "hotline to the White House" via a "longstanding relationship" between Dr. Karl and President Obama's "science czar" John Holdren. I would refer you to <http://www.dailymail.co.uk/sciencetech/article-4192182/World-leaders-duped-manipulated-global-warming-data.html>.

I believe that many Americans, most particularly Judicial Watch's audience, would find it interesting and newsworthy that a mid-level scientist within NOAA's science apparatus would have a "hotline" to the White House through his relationship to President Obama's chief scientist, Dr. Holdren. Moreover, based on the allegations of one of NOAA's former top scientists, Dr. John Bates, who alleged fraud at NOAA, and in particular, fraud used in the methodologies of a study whose lead author was Dr. Karl, which had a significant impact on US government climate policy, there is now keen public interest in the contents of any conversations between Drs. Karl and Holdren over the course of their relationship during the Obama administration.

As noted in the article, the timing of the Karl Study was highly suspect, with the newly inflated temperature data appearing shortly before US attendance at the 2015 Paris climate change conference, at which the Karl Study itself was reportedly a much-discussed topic. The Karl Study's timing suggests that the study was intended to influence policies decided at the conference, with the study's findings supporting the Obama administration's preferred position of US accession to the terms of the Paris climate accord.

If in fact the White House, through Dr. Holdren, was communicating with Dr. Karl about the findings of his seminal 2015 "pausebuster" study for the purpose of influencing the outcome of the study to favor President Obama's

climate change policy preferences, it begs the question of what other studies and research Dr. Holdren may have communicated to Dr. Karl about during the latter's tenure with the National Centers for Environmental Information; thus, my request for all of the pair's communications during the eight years of their mutual work in the Obama administration.

It is not unprecedented for government agencies to turn over lengthy time periods of communications, regardless of content and irrespective of subject matter. See for example *Judicial Watch, Inc. v. U.S. Department of State* (No. 1:15-cv-00684), in which four years' worth of emails – ALL emails – sent to or from former State Department deputy chief of staff, Huma Abedin, using a non-.gov email account, were ordered by the court to be released.

For the foregoing reasons, I believe that my request as written is both reasonable and in the public interest and, therefore, eligible for a waiver of duplication and processing fees.

Thank you for your continued assistance in this matter.

Respectfully,

William F. Marshall

Senior Investigator

Judicial Watch, Inc.

425 Third Street, SW

Suite 800

Washington, DC 20024

T: [202.646.5170](tel:202.646.5170)

M: [202.641.4981](tel:202.641.4981)

"Those who expect to reap the blessings of freedom must, like men, undergo the fatigue of supporting it." - Thomas Paine

"If you get to thinking you're a person of some influence, try ordering somebody else's dog around." - Will Rogers



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL ENVIRONMENTAL SATELLITE, DATA,
AND INFORMATION SERVICE

March 2, 2017

Mr. Bill Marshall
425 Third St., SW, Suite 800
Washington, DC 20024

Re: Request No. DOC-NOAA-2017-000580

Dear Mr. Marshall:

This letter is in response to your Freedom of Information Act (*FOIA*) request entered into FOIAonline on **February 9, 2017**. You requested “Any and all records of communication between NOAA scientist Thomas Karl and Director of the Office of Science and Technology Policy John Holdren. The time frame for the requested records is January 20, 2009 through January 20, 2017.”

Also, 15 C.F.R. 4.6(d) (2) allows an agency to extend the FOIA response deadline by ten business days for unusual circumstances. Due to the following *reasons: (i) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are the subject of a single request; and (ii) The need for consultation, which shall be conducted with all practicable speed, with another component or Federal agency having a substantial interest in the determination of the request* we are choosing to invoke this 10 day extension and anticipate completing your request by **March 14, 2017**.

If you have additional information clarifying your request, please contact me at maria.williams@noaa.gov or by phone at **202-308-4959**.

Sincerely,

Digitally signed by WILLIAMS.MARIA.STELLA.1042493429
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI,
ou=OTHER, cn=WILLIAMS.MARIA.STELLA.1042493429
Date: 2017.03.02 08:41:12 -05'00'

Maria S. Williams

FOIA Liaison

National Environmental Satellite, Data,
and Information Service



From: Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>
Sent: Friday, April 14, 2017 3:23 PM
To: Torczon, Andrea (Federal)
Cc: Nathanson Stacey; Jerenda Burroughs - NOAA Affiliate; Mark Graff - NOAA Federal
Subject: Draft Supplemental Release Letter in 605
Attachments: 2016-000605 Supplemental Final Response Ltr.for DOC cmt.docx

Hi, Andrea,

(b)(5)
[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Thanks so much,
Ruth Ann

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
(301)713-9671
Fax: (301) 713-0658

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><(((0>'. , , . ~ . , , >(((0> , , . ~ . , , >(((0>

(b) (5)

(b) (5)

(b) (5)

From: Karen Robin - NOAA Federal <karen.robins@noaa.gov>
Sent: Monday, April 17, 2017 1:51 PM
To: Mark Graff - NOAA Federal
Subject: DOC-NOAA-2017-000650 -- FAL for your sig
Attachments: Final response - 650.docx

Nevermind my Q below — I see the answer now (b)(5)

Thanks,
Karen

—
Karen Robin
FOIA Liaison
NOAA's Workforce Management Office
Silver Spring, MD • (301) 713-6361

From: Karen Robin - NOAA Federal [mailto:karen.robins@noaa.gov]
Sent: Monday, April 17, 2017 1:22 PM
To: Mark Graff - NOAA Federal
Subject: RE: Q about DOC-NOAA-2017-000650

(b)(5) ?

—
Karen Robin, writer-editor
NOAA Workforce Management Office
Silver Spring, MD • (301) 713-6361

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Monday, April 17, 2017 1:05 PM
To: Karen Robin - NOAA Federal
Subject: Re: Q about DOC-NOAA-2017-000650

(b)(5)

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Mon, Apr 17, 2017 at 12:18 PM, Karen Robin - NOAA Federal <karen.robin@noaa.gov> wrote:

Hi Mark,

(b)(5)

[Redacted]

[Redacted]

[Redacted] ?

Thanks,
Karen

Karen Robin
FOIA Liaison
NOAA's Workforce Management Office
Silver Spring, MD • [\(301\) 713-6361](tel:3017136361)

(b) (5)

From: Karen Robin - NOAA Federal <karen.robin@noaa.gov>
Sent: Tuesday, April 18, 2017 10:51 AM
To: Mark Graff - NOAA Federal
Subject: RE: Admin closeouts x2 (pls review)
Attachments: Admin closeout - 912.docx; Admin closeout - 917.docx

Hi Mark,
Please update me on this request for your guidance from yesterday.
I resend the attachments for your convenience.

Thanks,

Karen

—

Karen Robin

FOIA Liaison

NOAA's Workforce Management Office

Silver Spring, MD • (301) 713-6361

From: Karen Robin - NOAA Federal [mailto:karen.robin@noaa.gov]
Sent: Monday, April 17, 2017 1:19 PM
To: Mark Graff - NOAA Federal
Cc: Karen Robin - NOAA Federal
Subject: Admin closeouts x2 (pls review)

Hi Mark,

(b)(5) [Redacted]

[Redacted]

Thanks,

Karen

—

Karen Robin

FOIA Liaison

NOAA's Workforce Management Office

Silver Spring, MD • (301) 713-6361

(b) (5)

(b) (5)

From: Karen Robin - NOAA Federal <karen.robin@noaa.gov>
Sent: Tuesday, April 18, 2017 10:56 AM
To: Mark Graff - NOAA Federal
Subject: FW: DOC-NOAA-2017-000650 -- FAL for your sig
Attachments: Final response - 650.docx

Hi Mark,

(b)(5) [Redacted]
[Redacted]
[Redacted]

Thank you,
Karen

—
Karen Robin
FOIA Liaison
NOAA's Workforce Management Office
Silver Spring, MD • (301) 713-6361

From: Karen Robin - NOAA Federal [mailto:karen.robin@noaa.gov]
Sent: Monday, April 17, 2017 1:51 PM
To: Mark Graff - NOAA Federal
Subject: DOC-NOAA-2017-000650 -- FAL for your sig

Nevermind my Q below — I see the answer now.

(b)(5) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted] ?

Thanks,
Karen

—
Karen Robin
FOIA Liaison
NOAA's Workforce Management Office
Silver Spring, MD • (301) 713-6361

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Sent: Monday, April 17, 2017 1:22 PM
To: Mark Graff - NOAA Federal
Subject: RE: Q about DOC-NOAA-2017-000650

(b)(5) [redacted] ?

—
Karen Robin, writer-editor
NOAA Workforce Management Office
Silver Spring, MD • (301) 713-6361

From: Mark Graff - NOAA Federal [<mailto:mark.graff@noaa.gov>]
Sent: Monday, April 17, 2017 1:05 PM
To: Karen Robin - NOAA Federal
Subject: Re: Q about DOC-NOAA-2017-000650

(b)(5) [redacted]
[redacted]
[redacted].

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) [redacted] (C)

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On Mon, Apr 17, 2017 at 12:18 PM, Karen Robin - NOAA Federal <karen.robins@noaa.gov> wrote:

Hi Mark,

(b)(5) [redacted]

(b)(5) [redacted]
[redacted]
[redacted]

[redacted]

[redacted]
[redacted]
[redacted] ?

Thanks,
Karen

—

Karen Robin

FOIA Liaison

NOAA's Workforce Management Office

Silver Spring, MD • [\(301\) 713-6361](tel:3017136361)

(b) (5)

From: Beverly Smith - NOAA Federal <beverly.smith@noaa.gov>
Sent: Wednesday, April 19, 2017 8:34 AM
To: Bogomolny, Michael (Federal)
Cc: Graff, Mark (Federal); Swisher, Robert (Federal); Almeida, John (Federal); Grimes, Shepherd (Federal)
Subject: Re: FOIA REQUEST #DOC-NOAA-2015-000295 - Fwd: Queen Conch Litigation
Attachments: SER FOIA Coordinator notes re complaint.pdf

Thanks for the heads-up e-mail.

I have read the complaint and I have attached a version with my handwritten notes in the margin.

No reply is necessary.

Bev.

On Tue, Apr 18, 2017 at 6:21 PM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

(b)(5)

-bogo

From: Bogomolny, Michael (Federal)
Sent: Tuesday, April 18, 2017 4:41 PM
To: 'Mark Graff - NOAA Federal' <mark.graff@noaa.gov>; Smith, Beverly (Federal) <Beverly.Smith@noaa.gov>
Cc: Swisher, Robert (Federal) <Robert.Swisher@noaa.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>; Grimes, Shepherd (<Shepherd.Grimes@noaa.gov> <Shepherd.Grimes@noaa.gov>
Subject: RE: FOIA REQUEST #DOC-NOAA-2015-000295 - Fwd: Queen Conch Litigation

The AUSA assigned to the matter is Brian Field (b)(6). I haven't yet connected with him.

Sincerely,

bogo

From: Mark Graff - NOAA Federal [<mailto:mark.graff@noaa.gov>]
Sent: Tuesday, April 18, 2017 4:23 PM
To: Smith, Beverly (Federal) <Beverly.Smith@noaa.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Swisher, Robert (Federal) <Robert.Swisher@noaa.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>
Subject: Re: FOIA REQUEST #DOC-NOAA-2015-000295 - Fwd: Queen Conch Litigation

Hi Bev,

(b)(5)
[Redacted]
[Redacted]
[Redacted]. Thanks for
keeping me in the loop--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) [Redacted] (C)

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On Tue, Apr 18, 2017 at 3:18 PM, Beverly Smith - NOAA Federal <beverly.smith@noaa.gov> wrote:

Mark, as we discussed (b)(5)
[Redacted]
[Redacted]
[Redacted].

Bev.

----- Forwarded message -----

From: **Shepherd Grimes - NOAA Federal** <shepherd.grimes@noaa.gov>

Date: Tue, Apr 18, 2017 at 2:27 PM

Subject: Queen Conch Litigation

To: Roy Crabtree <Roy.Crabtree@noaa.gov>, Andy Strelcheck <Andy.Strelcheck@noaa.gov>

Cc: Michael Mclemore <Michael.Mclemore@noaa.gov>, Monica Smit-Brunello <Monica.Smit-Brunello@noaa.gov>, Iris Lowery - NOAA Federal <iris.lowery@noaa.gov>, Carolyn Sramek <Carolyn.Sramek@noaa.gov>, Beverly Smith <Beverly.Smith@noaa.gov>

As we are all likely aware, (b)(5) [Redacted]

(b)(5) [Redacted]

[Redacted]

(b)(5) [Redacted]

[Redacted]

(b)(5)

Thanks,

Shep

Shepherd R. Grimes

Attorney - Advisor

National Oceanic and Atmospheric Administration

Office of General Counsel, Southeast Section

263 13th Avenue South

Suite 177

St Petersburg, FL 33701

[\(727\) 551-5799](tel:(727)551-5799)

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--

Beverly J. Smith
FOIA Coordinator
Southeast Region
NOAA's National Marine Fisheries Service
[727-551-5762](tel:727-551-5762)

--

Beverly J. Smith
FOIA Coordinator
Southeast Region
NOAA's National Marine Fisheries Service
727-551-5762

(b) (5)

FOIA regarding Plaintiffs' November 21, 2014 request for information (hereinafter "Request").

X 2. Plaintiffs requested all records considered by NOAA in determining that the queen conch (*Strombus gigas*) does not warrant listing under the Endangered Species Act (ESA). *+ add kept in request.*

3. Federal Defendants released interim responses on February 25, 2015; June 5, 2015; July 8, 2015; September 14, 2015; June 1, 2016; January 26, 2017; February 24, 2017; March 14, 2017; and March 21, 2017.¹

4. As of the date of this Complaint, Federal Defendants have not issued a final determination in response to Plaintiffs' Request.

5. Federal Defendants are unlawfully withholding public disclosure of information that Plaintiffs are entitled to receive under FOIA. Defendants failed to comply with the statutory mandates and deadlines imposed by FOIA by failing to provide a final determination resolving this Request within the time required by law. Accordingly, Plaintiffs seek declaratory relief establishing that Defendants have violated FOIA. Plaintiffs also seek injunctive relief directing Defendants to promptly provide the requested material free of cost.

JURISDICTION AND VENUE

X 6. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question). This Court may grant the declaratory relief under 28 U.S.C. §§ 2201, *et seq.* (Declaratory Judgment Act) and injunctive relief under 5 U.S.C. § 552(a)(4)(B) (FOIA). An actual, justiciable controversy exists within the meaning of the Declaratory Judgment Act between Plaintiffs and Defendants. The Court has

¹ These reflect the dates that Plaintiffs first received responses via email. However, the June 1, 2016 release is dated May 11, 2016; the January 26, 2017 release is dated November 2, 2016; the February 24, 2017 release is dated February 1, 2017; the March 14, 2017 release is dated March 1, 2017; and the March 21, 2017 release is dated March 14, 2017.

*scope daylight
diff dates
appeal vms
from date of
ett.*

AMFS

*doesn't this
go away
if this is
correct
before lawsuit
was filed
if rule, resp
must, resp
appeal 1st*

*modified on 12/4/2015 + agreed to rolling responses. 1st FO 2nd 2/26/16
3rd 4th 5th dated 5/11/16
dated 11/2/2016
6th*

jurisdiction, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

7. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district.

✓ **PARTIES**

8. Plaintiff, Friends of Animals, is a not-for-profit international advocacy organization with nearly 200,000 members, incorporated in the state of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues as well as the organization's progress in addressing these issues through its magazine called ActionLine, its website, and other reports. Friends of Animals has published articles and information advocating for the protection of wild species so that they can live unfettered in their natural habitats. Friends of Animals regularly submits request under FOIA to further its goals and mission.

9. Plaintiff, WildEarth Guardians ("Guardians"), is a not-for-profit conservation organization incorporated in the state of New Mexico since 1989, with offices in New Mexico, Arizona, Colorado, Montana, Oregon, California, and Wyoming. Guardians protects and restores the wildlife, wild places, wild rivers, and the health of the American West. Guardians advocates for imperiled species to receive the strong legal protections of the ESA. Through its "Wild Oceans" campaign, Guardians has launched an effort to list imperiled marine species under the ESA in order to stem the extinction crisis in the oceans brought on by human exploitation, habitat destruction, and climate change.

10. Defendant National Oceanic and Atmospheric Administration is an agency within the meaning of 5 U.S.C. § 552(f). NOAA is responsible for fulfilling Plaintiffs' Request and complying with all federal laws.

11. Defendant Ross Wilbur, in his official capacity as Secretary of Commerce, has ultimate responsibility for NOAA and ensuring the agency complies with federal law.

✓ LEGAL FRAMEWORK

A. Freedom of Information Act.

12. Congress enacted FOIA to ensure public access to U.S. government records. FOIA carries a presumption of disclosure. The burden is on the government—not the public—to substantiate why information may not be released. Upon written request, agencies of the United States government are required to disclose their records, unless they can be lawfully withheld from disclosure under one of nine specific exemptions in FOIA.

13. FOIA requires agencies to “determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A).

14. On determination by an agency to comply with the request, the records shall be made “promptly available.” *Id.* at § 552(a)(6)(C).

15. In “unusual circumstances” an agency may extend the time limits for up to ten working days by providing written notice to the requester setting forth the unusual circumstance and the date on which the determination is expected to be dispatched. *Id.* at § 552(a)(6)(B). With respect to a request for which a written notice purports to apply the “unusual circumstances,” the agency must: (1) notify the requester if the request cannot be processed within the time limit specified in that clause, and (2) provide the requester an opportunity to limit the scope of the request so that it may be processed within that time

limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *Id.*

16. If the agency fails to complete its response to a request within twenty workdays, the requester is deemed to have constructively exhausted administrative remedies and may seek judicial review. 5 U.S.C. § 552 (a)(6)(C)(i)

counts jurisdiction Fed Rule 12(b)(6) for dismissal of claim

17. Additionally, if the agency fails to comply with the statutory time limit it cannot assess search fees. 5 U.S.C. § 552(a)(4)(A)(viii).

denial
this is important provision because it discusses exceptional B2R changed for rolling releases due to volume due diligence in ongoing releases.

FACTUAL BACKGROUND

18. Plaintiffs submitted its Request under FOIA to NOAA on November 21, 2014.

19. Plaintiffs requested "all records in ^{you} [the agency's] possession, whether received, created, and/or distributed by NMFS, that the agency considered in making the initial positive 90-day finding on the petition as well as the final not warranted 12-month finding with respect to the Queen conch."

20. Friends of Animals received acknowledgment from NOAA confirming that the agency received the Request on November 25, 2014.

perfected date
5 ER ack. on 1/28/2014
submitted FO - 11/21/2014

21. FOIA's twenty-workday deadline for responding to Plaintiffs' Request passed on December 24, 2014.

22. NOAA did not respond by December 24, 2014.

see amber email
1) on 12/31/14 granted extension to 1/15/2015
2) on 1/14/16 granted ext to 1/30/2015

23. NOAA provided interim responses on February 25, 2015; June 5, 2015; July 8, 2015; September 14, 2015; May 11, 2016; January 26, 2017; February 24, 2017; March 14, 2017; and March 21, 2017.²

FO date - sept via UB
FO 6/8 - UB
FO 7/9 - UB
FO 9/17
UB
FO 10/11
FO 1/26/16
FO 2/24/17
FO 3/14 no 1
Ltr 9/14
Ltr 3/21/17
Ltr 5/11
Ltr 11/21/2016
Ltr 2/1/2017
Ltr 3/1/2017
628
716
874
see, notes

24. As of the date of this Complaint, NOAA has still not made a final determination in response to Plaintiffs' FOIA Request.

² Some of the dates listed on the release did not match the date the agency sent the releases to Plaintiffs. See *supra* note 1.

recent
X 25. NOAA has offered no reasonable explanation for its delay, and it has failed to *These* provide a specific date for when it will finally be able to comply with its obligations under FOIA.

26. NOAA is unlawfully withholding public disclosure of information sought by Plaintiffs, information to which Plaintiffs are entitled to receive, and for which NOAA has not provided a valid disclosure exemption.

**CAUSE OF ACTION
(Violation of Freedom of Information Act)**

27. Plaintiffs herein incorporate all allegations contained in the proceeding paragraphs.

✓ 28. Plaintiffs properly requested records within the control of Defendants.

✓ 29. Defendants have failed to fully release the records Plaintiffs requested and failed to make any claims of statutory exemption regarding the requested records. *PRIFW held for final response*

30. Accordingly, Plaintiffs are entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested.

PRAYER FOR RELIEF

Plaintiffs respectfully requests that the Court enter judgment providing the following relief:

1. Declare that Defendants violated the Freedom of Information Act by failing to lawfully satisfy, in full, Plaintiffs' Request under the Freedom of Information Act;
2. Order Defendants to process and release immediately all records responsive to Plaintiffs' Request at no cost to Plaintiffs;
3. Retain jurisdiction of this action to ensure the processing of Plaintiffs' Request, and to ensure that no agency records are wrongfully withheld;
4. Award Plaintiffs costs, including reasonable attorney fees and litigation costs in this action, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(E); and
5. Grant Plaintiffs any other relief that the Court deems just and proper.

Dated: March 29, 2017 Respectfully Submitted,

/s/ Jennifer Best
Jennifer Best (DC Bar # CO0056)
Assistant Director, Wildlife Law Program
Friends of Animals
Western Region Office
7500 E. Arapahoe Road, Suite 385
Centennial, CO 80112
720-949-7791
jennifer@friendsofanimals.org

/s/ Michael Harris
Michael Ray Harris (DC Bar # CO0049)
Director, Wildlife Law Program
Friends of Animals
7500 E. Arapahoe Road, Suite 385
Centennial, CO 80112
720-949-7791
michaelharris@friendsofanimals.org

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Tuesday, April 18, 2017 11:14 AM
To: Karen Robin - NOAA Federal
Cc: Gregory Raymond - NOAA Federal; Lola Stith - NOAA Affiliate
Subject: Re: FW: DOC-NOAA-2017-000650 -- FAL for your sig
Attachments: Final response - 650 mhg.pdf

Hi Karen--

(b)(5)
[Redacted]

[Redacted]. Thanks Karen--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Tue, Apr 18, 2017 at 10:55 AM, Karen Robin - NOAA Federal <karen.robin@noaa.gov> wrote:

Hi Mark,

(b)(5)
[Redacted]

Thank you,
Karen

—

Karen Robin
FOIA Liaison

From: Karen Robin - NOAA Federal [mailto:karen.robin@noaa.gov]
Sent: Monday, April 17, 2017 1:51 PM
To: Mark Graff - NOAA Federal
Subject: DOC-NOAA-2017-000650 -- FAL for your sig

Nevermind my Q below — I see the answer now.

(b)(5) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Thanks,
Karen

—

Karen Robin
FOIA Liaison
NOAA's Workforce Management Office
Silver Spring, MD • [\(301\) 713-6361](tel:3017136361)

From: Karen Robin - NOAA Federal [mailto:karen.robin@noaa.gov]
Sent: Monday, April 17, 2017 1:22 PM

To: Mark Graff - NOAA Federal
Subject: RE: Q about DOC-NOAA-2017-000650

(b)(5) [REDACTED] ?

—
Karen Robin, writer-editor
NOAA Workforce Management Office
Silver Spring, MD • [\(301\) 713-6361](tel:3017136361)

From: Mark Graff - NOAA Federal [<mailto:mark.graff@noaa.gov>]
Sent: Monday, April 17, 2017 1:05 PM
To: Karen Robin - NOAA Federal
Subject: Re: Q about DOC-NOAA-2017-000650

(b)(5) [REDACTED]
[REDACTED]
[REDACTED].

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) [REDACTED] (C)

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On Mon, Apr 17, 2017 at 12:18 PM, Karen Robin - NOAA Federal <karen.robins@noaa.gov> wrote:

Hi Mark,

(b)(5)

[Redacted]

[Redacted]

[Redacted]

[Redacted] ?

Thanks,
Karen

—
Karen Robin
FOIA Liaison
NOAA's Workforce Management Office
Silver Spring, MD • [\(301\) 713-6361](tel:3017136361)



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
1315 East West Highway
Silver Spring, MD 20910

via FOIAonline & USPS

Mr. Shaun Williams
17015 N.E. 106th St
Redmond, WA 98052

RE: Freedom of Information Act Request DOC-NOAA-2017-000650

Dear Mr. Williams,

In response to your request under the Freedom of Information Act (FOIA) for records pertaining to whether Kenneth Joseph Roberts was assigned to the National Oceanic and Atmospheric Administration (NOAA) between 1969 and 1971, our search of our files failed to identify any documents that are responsive to your request. I regret we are unable to assist you.

Although no records were located during your search, you have the right to appeal a “no document found” response. An appeal must be received within 90 calendar days of the date of this letter. Your appeal may be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to 202-482-2552, or by FOIAonline, if you have an account, at <https://foiaonline.regulations.gov>. Or appeal by mail to:

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce, Office of General Counsel
14th and Constitution Avenue, N.W., Room 5875
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to 202-482-2552, or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the denial was in error.
- “Freedom of Information Act Appeal” must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
Email: ogis@nara.gov
Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence please contact Mark Graff at mark.graff@noaa.gov, or by phone at (301) 628-5658, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

GRAFF.MARK.HYR
UM.1514447892

Digitally signed by
GRAFF.MARK.HYRUM.1514447892
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI,
ou=OTHER,
cn=GRAFF.MARK.HYRUM.1514447892
Date: 2017.04.18 11:11:15 -0400

Mark Graff
NOAA FOIA Officer

From: Karen Robin - NOAA Federal <karen.robin@noaa.gov>
Sent: Wednesday, April 19, 2017 10:51 AM
To: Mark Graff - NOAA Federal
Subject: Clarification requests x2 (pls review)
Attachments: Clarification request - 912.docx; Clarification request - 917.docx

Hi Mark,
Based on your guidance yesterday (thanks, by the way, for keeping me on the straight and narrow) (b)(5) (b)(5)

(b)(5) ?

Yours very truly,
Karen
—

Karen Robin
FOIA Liaison
NOAA's Workforce Management Office
Silver Spring, MD • (301) 713-6361

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Tuesday, April 18, 2017 1:35 PM
To: Karen Robin - NOAA Federal
Subject: Re: Admin closeouts x2 (pls review)

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Tue, Apr 18, 2017 at 1:25 PM, Karen Robin - NOAA Federal <karen.robin@noaa.gov> wrote:

(b)(5) [Redacted]

[Redacted]

Karen Robin, writer-editor
NOAA Workforce Management Office
Silver Spring, MD • [\(301\) 713-6361](tel:3017136361)

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Tuesday, April 18, 2017 12:48 PM
To: Karen Robin - NOAA Federal
Subject: Re: Admin closeouts x2 (pls review)

(b)(5) [Redacted]

[Redacted]

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) [Redacted] (C)

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On Tue, Apr 18, 2017 at 11:44 AM, Karen Robin - NOAA Federal <karen.robin@noaa.gov> wrote:

Grrr. So much for simple.

(b)(5) [Redacted]

(b)(5) [Redacted]

[Redacted]

—

Karen Robin, writer-editor
NOAA Workforce Management Office
Silver Spring, MD • [\(301\) 713-6361](tel:3017136361)

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Tuesday, April 18, 2017 11:20 AM
To: Karen Robin - NOAA Federal
Subject: Re: Admin closeouts x2 (pls review)

(b)(5) [Redacted]

[Redacted]

[Redacted]

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) [Redacted] (C)

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On Tue, Apr 18, 2017 at 10:51 AM, Karen Robin - NOAA Federal <karen.robin@noaa.gov> wrote:

Hi Mark,

Please update me on this request for your guidance from yesterday.

I resend the attachments for your convenience.

Thanks,
Karen

Karen Robin

FOIA Liaison
NOAA's Workforce Management Office
Silver Spring, MD • [\(301\) 713-6361](tel:3017136361)

From: Karen Robin - NOAA Federal [mailto:karen.robin@noaa.gov]
Sent: Monday, April 17, 2017 1:19 PM
To: Mark Graff - NOAA Federal
Cc: Karen Robin - NOAA Federal
Subject: Admin closeouts x2 (pls review)

Hi Mark,

(b)(5)
[Redacted]

[Redacted]

Thanks,
Karen

Karen Robin

FOIA Liaison
NOAA's Workforce Management Office
Silver Spring, MD • [\(301\) 713-6361](tel:3017136361)

(b) (5)

(b) (5)

From: NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>
Sent: Wednesday, April 19, 2017 11:00 AM
To: aTorczon@doc.gov
Cc: Ruth Ann Lowery - NOAA Federal; Stacey Nathanson - NOAA Federal; Mark Graff - NOAA Federal; Peaches Hodge-Tonic - NOAA Federal
Subject: 16-000605 Appeal: FWS Referral Information Requested
Attachments: 16-000605 FWS Referral Letter signed.pdf; 605 FWS Full & Part Ref index.xlsx

Good Morning Andrea,

This email is in response to your voicemail to me earlier this morning.

Please see the attached documents:

- (b)(5) [REDACTED]
 - [REDACTED]
 - [REDACTED]

- [REDACTED]
 - [REDACTED]
 - [REDACTED]

Please let me know if you need additional information.

thx
Jerenda

--
NOAA / National Marine Fisheries Service
FREEDOM OF INFORMATION OFFICE (FOIA)
Office of Protected Resources
Tawand Tonic, acting PR FOIA Coordinator
Phone: 301 - 427 - 8482



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

November 10, 2016

HEADQUARTERS OFFICE
Carrie Hyde-Michaels, FWS FOIA Officer
U.S. Fish and Wildlife Service
5275 Leesburg Pike
MS:IRTM
Falls Church, VA 22041
Phone: 703-358-2291
Fax: 703-358-2251
FWS FOIA Officer at fwhq_foia@fws.gov

Re: FOIA Request# **DOC-NOAA-2016-000605**

Dear FOIA Officer:

Enclosed is a copy of a request for agency records under the Freedom of Information Act request 2016-000605, from Ms. Margaret E. Townsend on behalf of the Center for Biological Diversity addressed to NOAA's FOIA Officer requesting records relating to the National Marine Fisheries Service's (NMFS) and Fish and Wildlife Service's (FWS) joint "Significant Portion of Range Policy":

1. All records related to the Joint Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species." 79 Fed. Reg. 37,578 (July 1, 2014); 76 Fed. Reg. 76,987 (Dec. 9, 2011).
2. All records related to, concerning, and/or generated by or in connection with the Significant Portion of Its Range Team consisting of representatives from the U.S. Fish and Wildlife Service and NOAA Fisheries.

We understand FWS received a substantially similar request that you are currently processing.

Per a scope conversation we had with the requestor and ensuing emails on March 11, 2016, and March 14, 2016, we processed this request with the understanding that the requestor is only seeking documents that reflect development of the policy up through its signing, *i.e.*, the decision file. We also discussed with the requestor that our search would need to be conducted in light of the fact that NMFS had already compiled an administrative record for the policy, which has been filed in litigation regarding FWS' listing determination for the Gunnison sage grouse (D. Colorado). The requestor agreed that, for the period covered in that administrative record (June 21, 2010, through June 19, 2014), we would not need to conduct a new search for agency records, but could review those documents that had already been collected but that were either excluded from the administrative record per the NOAA 2012 Administrative Record Guidance or



provided to the plaintiffs after filing of the record. Because the requester indicated they were interested in also receiving documents dated “from around and just before the time that the 2010 white paper was written,” we conducted a new search for and collected documents going back to the start of the joint drafting team that developed the Policy, which was in October 2009. In doing this, we did not search for records of departed or deceased employees.

We have finished processing this request:

- We found **358 documents, totaling 1,249 pages** that include material that appears to have originated in their entirety from FWS or DOI, giving your agency the primary interest in the document. Though we believe the majority of these materials likely qualify for protection under (b)(5) due to their deliberative nature and/or the inclusion of attorney-client information, they are being referred to you for release determination.
 - Accordingly, per our governing regulations, 15 CFR § 4.5(b), we hereby refer the requester to FWS/DOI for further action related to these 358 documents. Enclosed are the referral document(s) with this letter. Please respond directly to the requester regarding these documents. Please send us a copy of your final transmittal letter.
- In addition, we identified **22 documents, totaling 55 pages**, that include portions that originated from FWS or DOI. We have partially redacted those records to shield as “other agency” those portions where FWS or DOI has the primary concern. We have applied partial redactions as appropriate to the NOAA-origin portions.
 - Accordingly, per our governing regulations, 15 CFR § 4.5(b), we are also referring the FWS/DOI portions of these 22 documents to you. We request that you make a determination on the FWS-origin text. You should respond directly to the requestor as to the FWS/DOI portions while maintaining protection of any NOAA portions that we have redacted on the basis of privilege.

We think going forward it would be beneficial to discuss and put in place an informal agreement between our two agencies addressing generally what kinds of communications should be released and which should be withheld in response to similar requests. For example, we are currently continuing to process another request from the Center for Biological Diversity seeking documents related to the similar joint deliberative processes leading to the recent policy on interpretation of ESA Section 4(b)(2) and the meaning of “destruction or adverse modification of critical habitat.” (Request No. 2016-000603). As you may be aware, the underlying deliberative process to develop the subject policies and regulations involved a joint drafting team of staff and attorneys from FWS, NMFS, DOI, and DOC that functioned as one large group. Having an agreement in place would avoid needing to refer records in the future where portions originated from FWS or DOI. Attorneys from the NOAA Office of General Counsel have been in communication with attorneys from the Office of the Solicitor to discuss this matter, and we look forward to expanding and continuing those conversations to ensure we can most efficiently process those records.

Also please find enclosed a copy of the final response letter that was sent to the requester from NMFS.

Thank you for your attention to this matter. Please do not hesitate to call me, Lamar Turner at 301-427-8492 or email to nmfs.hq.pr.foia@noaa.gov should you have any questions.

Sincerely,



Lamar N. Turner, FOIA Coordinator
Office of Protected Resources

Enclosures

Original FOIA Request

NMFS Final Response Letter dated & signed

FWS Referral Documents on CD

Ref & Part
Redacted

| DocID | FileName | Subject | DateSent | From |
|------------------------|--------------------------------|---|-----------------|------------------------|
| 0.7.743.10034 | | | 1/8/2010 12:01 | kelly_hornaday@fws.gov |
| 0.7.743.10036 | | Reminder: 2pm call w/ Gary and Michael Bean | 12/8/2009 9:43 | kelly_hornaday@fws.gov |
| 0.7.743.10037 | | RE: follow-up call today 1pm ET | 4/15/2010 12:45 | susan_jacobsen@fws.gov |
| 0.7.743.10037.1 | SPR pros and cons bcj comments | | | |

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|------------------------|------------------------------------|---|------------------|------------------------|
| 0.7.743.10038 | | no call today; plan on one for next week | 2/24/2010 10:16 | kelly_hornaday@fws.gov |
| 0.7.743.10038.1 | SPR work group notes 2-3-10 | | | |
| 0.7.743.10039 | | Re: call info | 10/19/2009 12:27 | kit_hershey@fws.gov |
| 0.7.743.10040 | | call reminder: 12:00 ET today | 11/24/2009 9:29 | kelly_hornaday@fws.gov |
| 0.7.743.10040.1 | SPR workgroupdraft agenda 11-24-09 | | | |
| 0.7.743.10041 | | Re: Call at 2pm eastern time this afternoon | 5/5/2010 9:42 | martin_miller@fws.gov |

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|------------------------|--------------|---|------------------|-----------------------------|
| 0.7.743.10042 | | new version | 12/1/2009 10:24 | kelly_hornaday@fws.gov |
| 0.7.743.10043 | | SPR case law | 11/9/2009 11:55 | benjamin.jesup@soil.doi.gov |
| 0.7.743.10043.1 | SPR case law | | | |
| 0.7.743.10044 | | Re: call notes posted and questions for group | 10/26/2009 15:25 | kit_hershey@fws.gov |
| 0.7.743.10045 | | Re: My horrible flow chart | 11/4/2009 13:48 | kelly_hornaday@fws.gov |

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|------------------------|---|----------------------------------|------------------|------------------------|
| 0.7.743.10046 | | new timelines - please review | 12/11/2009 11:31 | kelly_hornaday@fws.gov |
| 0.7.743.10046.1 | SPR Contingency plan timeline | | | |
| 0.7.743.10046.2 | Draft options white paper timeline | | | |
| 0.7.743.10047 | | The DPS SPR Alternative | 11/5/2009 19:58 | kit_hershey@fws.gov |
| 0.7.743.10047.1 | Significant portion of the range 11-5- 09 | | | |
| 0.7.743.10048 | | call notes, and To do"" | 1/14/2010 11:47 | kelly_hornaday@fws.gov |
| 0.7.743.10048.1 | SPR workgroup notes 1-13-10 | | | |

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|------------------------|--|--|-----------------|-------------------------|
| 0.7.743.10049 | | Proposed SPR definition jhogrefe 011510.docx | 1/15/2010 15:00 | jessica_hogrefe@fws.gov |
| 0.7.743.10049.1 | | Proposed SPR definition jhogrefe 011510 | | |
| 0.7.743.10050 | | Notes and follow-up | 2/4/2010 13:46 | kelly_hornaday@fws.gov |
| 0.7.743.10050.1 | | SPR work group notes 2-3-10 | | |
| 0.7.743.10051 | | Re: Notes and follow-up | 2/5/2010 12:01 | jessica_hogrefe@fws.gov |

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|-------------------------------|---|--|------------------------|--------------------------------|
| <p>0.7.743.10052</p> | | <p>Re: Fw: Rio Grande cutthroat trout brief</p> | <p>11/4/2009 12:58</p> | <p>kelly_hornaday@fws.gov</p> |
| <p>0.7.743.10053</p> | | <p>SPR stuff</p> | <p>12/8/2009 15:11</p> | <p>kit_hershey@fws.gov</p> |
| <p>0.7.743.10054</p> | | <p>Re: exec summary - review requested by COB 4/21</p> | <p>4/21/2010 12:40</p> | <p>ellen_vangelder@fws.gov</p> |
| <p>0.7.743.10054.1</p> | <p>Executive summary and recommendations 4-20-2010 - evg comments</p> | | | |

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|------------------------|---------------------------------------|--|-----------------|------------------------|
| 0.7.743.10055 | | Re: no call today | 5/5/2010 13:37 | susan_jacobsen@fws.gov |
| 0.7.743.10056 | | Re: compiled comments on proposed SPR contingency plan | 12/16/2009 7:21 | anne_hecht@fws.gov |
| 0.7.743.10057 | | Call at 2pm eastern time this afternoon | 4/19/2010 11:23 | kelly_hornaday@fws.gov |
| 0.7.743.10057.1 | Executive summary and recommendations | | | |

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|------------------------|---------------------------------------|---|------------------|-----------------------------|
| 0.7.743.10058 | | Reminder: call 1pm Tuesday w/ Gary & Michael Bean | 2/1/2010 15:22 | kelly_hornaday@f ws.gov |
| 0.7.743.10058.1 | SPR Team update 2- 1-2010 | | | |
| 0.7.743.10058.2 | scenarios | | | |
| 0.7.743.10059 | | Reminder-SPR call 3pm ET | 10/20/2009 12:47 | kelly_hornaday@f ws.gov |
| 0.7.743.10059.1 | SPR workgroup call agenda 10-20-09 | | | |
| 0.7.743.10060 | | SPR Team: DRAFT white paper introduction | 11/10/2009 16:40 | jessica_hogrefe@f ws.gov |
| 0.7.743.10060.1 | draft Intro purpose | | | |

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|------------------------|-----------------------------|---|------------------|------------------------|
| 0.7.743.10061 | | Re: Reminder: 2pm call w/ Gary and Michael Bean | 12/8/2009 12:15 | susan_jacobsen@fws.gov |
| 0.7.743.10062 | | call notes and a couple other docs | 3/19/2010 10:50 | kelly_hornaday@fws.gov |
| 0.7.743.10062.1 | SPR workgroup notes 3-17-10 | | | |
| 0.7.743.10062.2 | all DPSs 8-7-08 | | | |
| 0.7.743.10062.3 | scenarios | | | |
| 0.7.743.10063 | | for your review | 12/1/2009 8:57 | kelly_hornaday@fws.gov |
| 0.7.743.10064 | | notes from this week's call | 11/25/2009 11:54 | kelly_hornaday@fws.gov |

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|------------------------|------------------------------|---|------------------|------------------------|
| 0.7.743.10064.1 | SPR workgroup notes 11-24-09 | | | |
| 0.7.743.10065 | | revised SPR objcs | 10/28/2009 15:26 | susan_jacobsen@fws.gov |
| 0.7.743.10065.1 | SPR Team Objectives | | | |
| 0.7.743.10066 | | Re: briefing scheduled for this Wednesday | 6/21/2010 17:37 | susan_jacobsen@fws.gov |
| 0.7.743.10067 | | version w/ page and line numbers posted | 12/2/2009 16:08 | kelly_hornaday@fws.gov |
| 0.7.743.10068 | | call notes posted and questions for group | 10/26/2009 9:00 | kelly_hornaday@fws.gov |
| 0.7.743.10069 | | meeting poll for call week of Nov. 23 | 11/13/2009 16:43 | kelly_hornaday@fws.gov |

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|------------------------|-----------------------------------|-------------------------|-----------------|-------------------------|
| 0.7.743.10070 | | Re: Notes and follow-up | 2/5/2010 10:27 | jessica_hogrefe@fws.gov |
| 0.7.743.10071 | | for today's call | 11/4/2009 11:06 | kelly_hornaday@fws.gov |
| 0.7.743.10071.1 | SPR-alternative interpretations | | | |
| 0.7.743.10072 | | | 1/19/2010 7:37 | kelly_hornaday@fws.gov |
| 0.7.743.10072.1 | draft SPR options paper 1-15-10v2 | | | |
| 0.7.743.10072.2 | SPR flow chart v3 | | | |

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|------------------------|---|---|-----------------|-------------------------|
| 0.7.743.10073 | | Re: exec summary - review requested by COB 4/21 | 4/21/2010 15:26 | jessica_hogrefe@fws.gov |
| 0.7.743.10073.1 | Executive summary and recommendations 4-20-2010 jhogrefe comments | | | |
| 0.7.743.10074 | | Re: Reminder: call 1pm Tuesday w/ Gary & Michael Bean | 2/1/2010 22:25 | susan_jacobsen@fws.gov |
| 0.7.743.10074.1 | SPR Team update 2-1-2010 | | | |
| 0.7.743.10074.2 | scenarios | | | |

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|------------------------|-----------------------------------|--|-----------------|------------------------|
| 0.7.743.10074.3 | alternatives table 1-28-10 sj | | | |
| 0.7.743.10074.4 | SPR Team update 2-1-2010 sj | | | |
| 0.7.743.10076 | | Re: Are we having a SPR team call today? | 2/17/2010 14:01 | susan_jacobsen@fws.gov |
| 0.7.743.10077 | | follow-up call today 1pm ET | 4/15/2010 7:39 | kelly_hornaday@fws.gov |
| 0.7.743.10077.1 | Summary of recommendations-414-10 | | | |

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|------------------------|---|---|-----------------|---|
| 0.7.743.10078 | | RE: follow-up call today 1pm ET | 4/15/2010 12:30 | Jesup, Benjamin <benjamin.jesup@sol.doi.gov> |
| 0.7.743.10078.1 | SPR pros and cons bcj comments | | | |
| 0.7.743.10079 | | exec summary - review requested by COB 4/21 | 4/20/2010 16:40 | kelly_hornaday@fws.gov |
| 0.7.743.10079.1 | Executive summary and recommendations 4-20-2010 | | | |
| 0.7.743.10080 | | Re: follow-up from yesterday's call | 4/16/2010 14:53 | kelly_hornaday@fws.gov |
| 0.7.743.10080.1 | Executive summary and recommendations | | | |

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|------------------------|---|---|------------------|------------------------|
| 0.7.743.10081 | | notes from Nov 18 call | 11/20/2009 16:21 | kelly_hornaday@fws.gov |
| 0.7.743.10081.1 | SPR workgroup call notes 11-18-09 | | | |
| 0.7.743.10082 | | Re: call notes posted and questions for group | 10/27/2009 11:03 | kelly_hornaday@fws.gov |
| 0.7.743.10083 | | Re: exec summary - review requested by COB 4/21 | 4/21/2010 17:52 | susan_jacobsen@fws.gov |
| 0.7.743.10083.1 | Executive summary and recommendations 4-20-2010 | | | |
| 0.7.743.10083.2 | Executive summary and recommendations 4-21-2010 SJ comments | | | |

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|-------------------------------|--------------------------|--|------------------------|---|
| <p>0.7.743.10084</p> | | <p>Re: Call at 2pm eastern time this afternoon</p> | <p>5/5/2010 10:14</p> | <p>kelly_hornaday@fws.gov</p> |
| <p>0.7.743.10085</p> | | <p>SPR options table</p> | <p>1/15/2010 11:55</p> | <p>Jesup, Benjamin <benjamin.jesup@sol.doi.gov></p> |
| <p>0.7.743.10085.1</p> | <p>SPR options table</p> | | | |
| <p>0.7.743.10086</p> | | <p>briefing scheduled for this Wednesday</p> | <p>6/21/2010 7:19</p> | <p>kelly_hornaday@fws.gov</p> |

| | | | | |
|----------------------|--|---|-----------------|-------------------------|
| 0.7.743.10087 | | Re: Notes and follow-up | 2/4/2010 17:47 | jenifer_kohout@fws.gov |
| 0.7.743.10088 | | follow-up to today's call | 4/21/2010 15:57 | kelly_hornaday@fws.gov |
| 0.7.743.10090 | | Re: for your review | 12/1/2009 9:20 | ellen_vangelder@fws.gov |
| 0.7.743.10091 | | Re: version w/ page and line numbers posted | 12/2/2009 20:36 | susan_jacobsen@fws.gov |

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| 0.7.743.10092 | | My horrible flow chart | 11/4/2009 13:23 | benjamin.jesup@so l.doi.gov |
| 0.7.743.10092.1 | SPR flow chart | | | |
| 0.7.743.10093 | | Reminder: call today 2pm ET; briefing request | 1/27/2010 9:03 | kelly_hornaday@f ws.gov |
| 0.7.743.10093.1 | SPR workgroupdraft agenda 1-27-10 | | | |
| 0.7.743.10094 | | thanks! let's have our regular call tomorrow | 2/2/2010 15:03 | kelly_hornaday@f ws.gov |
| 0.7.743.10095 | | Re: Reminder: call today 2pm ET; briefing request | 1/28/2010 9:06 | kelly_hornaday@f ws.gov |

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| 0.7.743.10096 | | latest version of exec summary | 4/23/2010 16:14 | kelly_hornaday@f ws.gov |
| 0.7.743.10096.1 | Executive summary and recommendations 4- 23-2010 | | | |
| 0.7.743.10097 | | Reminder: call today 2pm ET | 12/2/2009 9:40 | kelly_hornaday@f ws.gov |
| 0.7.743.10097.1 | SPR workgroupdraft agenda 12-02-09 | | | |
| 0.7.743.10098 | | Re: call notes, and To do"" | 1/15/2010 18:12 | kit_hershey@fws.g ov |
| 0.7.743.10098.1 | alternatives table 1- 12-10 kit's edits | | | |

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| 0.7.743.10099 | | | 12/8/2009 8:38 | kelly_hornaday@fws.gov |
| 0.7.743.10100 | | Re: SPR options - a few thoughts | 12/7/2009 18:58 | susan_jacobsen@fws.gov |
| 0.7.743.10101 | | | 1/6/2010 12:23 | kelly_hornaday@fws.gov |
| 0.7.743.10101.1 | alternatives table | | | |
| 0.7.743.10102 | | Reminder: call at 2pm ET today - call info included | 10/28/2009 6:51 | kelly_hornaday@fws.gov |
| 0.7.743.10103 | | Reminder: call today 2pm ET | 1/6/2010 7:19 | kelly_hornaday@fws.gov |

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| 0.7.743.10104 | | revised outline | 11/4/2009 13:52 | kelly_hornaday@fws.gov |
| 0.7.743.10104.1 | SPR white paper - draft outline 11-04-09 | | | |
| 0.7.743.10105 | | Re: Reminder: SPR call today 2pm ET | 4/7/2010 16:00 | kelly_hornaday@fws.gov |
| 0.7.743.10106 | | Re: for your review | 12/1/2009 16:47 | ellen_vangelder@fws.gov |
| 0.7.743.10106.1 | Congressional intent3 | | | |

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| 0.7.743.10107 | | Re: SPR options - a few thoughts | 12/7/2009 19:16 | kit_hershey@fws.gov |
| 0.7.743.10108 | | setting up a call | 10/14/2009 9:49 | kelly_hornaday@fws.gov |
| 0.7.743.10109 | | draft outline for SPR white paper | 10/28/2009 12:04 | ellen_vangelder@fws.gov |
| 0.7.743.10109.1 | Draft Timeline for Draft White paper | | | |
| 0.7.743.10109.2 | SPR workgroupdraft agenda 10-28-09 | | | |
| 0.7.743.10109.3 | SPR white paper - draft outline 10-28-09 | | | |

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| <p>0.7.743.10110</p> | | <p>Re: Reminder: call today 2pm ET; briefing request</p> | <p>1/28/2010 1:18</p> | <p>susan_jacobsen@fws.gov</p> |
| <p>0.7.743.10110.1</p> | <p>SPR workgroupdraft agenda 1-27-10</p> | | | |
| <p>0.7.743.10111</p> | | <p>notes from yesterday's call</p> | <p>12/17/2009 10:46</p> | <p>kelly_hornaday@fws.gov</p> |
| <p>0.7.743.10111.1</p> | <p>SPR workgroup notes 12-16-09</p> | | | |
| <p>0.7.743.10112</p> | | <p>Are we having a SPR team call today?</p> | <p>2/17/2010 12:59</p> | <p>kit_hershey@fws.gov</p> |

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| <p>0.7.743.10113</p> | | <p>notes from yesterday's call and to do list</p> | <p>1/21/2010 9:58</p> | <p>kelly_hornaday@f ws.gov</p> |
| <p>0.7.743.10113.1</p> | <p>SPR workgroupdraft notes 1-20-10</p> | | | |
| <p>0.7.743.10114</p> | | <p>Re: Are we having a SPR team call today?</p> | <p>2/17/2010 13:29</p> | <p>ellen_vangelder@f ws.gov</p> |
| <p>0.7.743.10115</p> | | <p>Re: FW: follow-up call today 1pm ET</p> | <p>4/15/2010 12:58</p> | <p>Marta Nammack <marta.nammack@ noaa.gov></p> |
| <p>0.7.743.10125</p> | | <p>Re: Reminder: call today 2pm ET</p> | <p>1/18/2010 22:38</p> | <p>susan_jacobsen@f ws.gov</p> |

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| 0.7.743.10125.1 | alternatives table 1-18-10 SJ comments | | | |
| 0.7.743.10126 | | call info | 10/16/2009 14:31 | kelly_hornaday@fws.gov |
| 0.7.743.10127 | | Re: call notes posted and questions for group | 10/26/2009 14:11 | jenifer_kohout@fws.gov |
| 0.7.743.10128 | | Re: Call at 2pm eastern time this afternoon | 4/20/2010 12:40 | susan_jacobsen@fws.gov |
| 0.7.743.10128.1 | Executive summary and recommendations SJ comments | | | |
| 0.7.743.10129 | | Re: call notes posted and questions for group | 10/26/2009 11:49 | kit_hershey@fws.gov |

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| 0.7.743.10130 | | Re: call notes posted and questions for group | 10/26/2009 16:08 | jenifer_kohout@fw s.gov |
| 0.7.743.10131 | | Re: call info | 10/19/2009 10:03 | kelly_hornaday@f ws.gov |
| 0.7.743.10132 | | Re: notes from last week's call posted on sharepoint | 11/4/2009 10:23 | kelly_hornaday@f ws.gov |
| 0.7.743.10132.1 | SPR workgroup notes 10-28-09 | | | |
| 0.7.743.10133 | | Re: Reminder: call at 2pm ET today - call info included | 10/28/2009 12:14 | susan_jacobsen@f ws.gov |
| 0.7.743.10133.1 | SPR Team Objectives | | | |
| 0.7.743.10134 | | Re: call reminder: 12:00 ET today | 11/24/2009 9:30 | kelly_hornaday@f ws.gov |

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| 0.7.743.10134.1 | SPR Alternative 6_ 11-23-09 | | | |
| 0.7.743.10134.2 | alternative 3 analysis | | | |
| 0.7.743.10134.3 | Alternative 3 flowcharts - 11-24- 09 | | | |
| 0.7.743.10135 | | Reminder: call today 2pm ET | 1/13/2010 9:21 | kelly_hornaday@f ws.gov |
| 0.7.743.10135.1 | SPR workgroupdraft agenda 1-13-10 | | | |
| 0.7.743.10135.2 | alternatives table 1- 12-10 | | | |

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| 0.7.743.10137 | | Re: Call at 2pm eastern time this afternoon | 4/19/2010 13:48 | Philip Kline <pgeorgekline@yahoo.com> |
| 0.7.743.10138 | | Fwd: SPR options table | 9/11/2014 11:46 | Marta Nammack - NOAA Federal <marta.nammack@noaa.gov> |
| 0.7.743.10138.1 | SPR options table | | | |
| 0.7.743.10139 | | Fw: Rio Grande cutthroat trout brief | 11/4/2009 12:40 | benjamin.jesup@soil.doi.gov |
| 0.7.743.10139.1 | RGCT | | | |
| 0.7.743.10141 | | SPR: comments on Dec 15 memo | 12/21/2009 15:45 | jessica_hogrefe@fws.gov |

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| 0.7.743.10142 | | Re: Call at 2pm eastern time this afternoon | 4/19/2010 12:46 | Philip Kline <pgeorgekline@yahoo.com> |
| 0.7.743.10143 | | posted defining significance options | 12/7/2009 15:48 | kelly_hornaday@fws.gov |
| 0.7.743.10145 | | Re: call notes posted and questions for group | 10/27/2009 12:18 | jessica_hogrefe@fws.gov |
| 0.7.743.10146 | | new docs posted on MyUSGS | 12/3/2009 11:11 | kelly_hornaday@fws.gov |
| 0.7.743.10147 | | Re: exec summary - review requested by COB 4/21 | 4/21/2010 17:38 | seth_willey@fws.gov |
| 0.7.743.10147.1 | draft SPR options paper 3-24-10_SLW comments | | | |

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| 0.7.743.10148 | | Fw: setting up a call | 10/14/2009 10:34 | kelly_hornaday@fws.gov |
| 0.7.743.10149 | | draft agenda and draft timeline for today's call | 10/28/2009 9:49 | kelly_hornaday@fws.gov |
| 0.7.743.10149.1 | Draft Timeline for Draft White paper | | | |
| 0.7.743.10149.2 | SPR workgroupdraft agenda 10-28-09 | | | |
| 0.7.743.10150 | | SPR case law | 11/12/2009 17:52 | benjamin.jesup@soil.doi.gov |
| 0.7.743.10150.1 | SPR case law summary | | | |
| 0.7.743.10151 | | Fw: More discussion of interpreting SPR | 1/8/2010 9:29 | kelly_hornaday@fws.gov |

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| 0.7.743.10151.1 | spr further thoughts | | | |
| 0.7.743.10152 | | no call today | 5/5/2010 10:09 | kelly_hornaday@fws.gov |
| 0.7.743.10153 | | analysis framework revised | 11/18/2009 16:44 | kelly_hornaday@fws.gov |
| 0.7.743.10153.1 | alternative write-up outline 11-18-09 | | | |
| 0.7.743.10154 | | SPR team | 10/20/2009 17:33 | susan_jacobsen@fws.gov |
| 0.7.743.10155 | | RE: exec summary - review requested by COB 4/21 | 4/20/2010 18:23 | Jesup, Benjamin <benjamin.jesup@sol.doi.gov> |

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| 0.7.743.10155.1 | SPR executive summary bcj comments | | | |
| 0.7.743.10156 | | compiled comments on proposed SPR contingency plan | 12/15/2009 15:17 | kelly_hornaday@fws.gov |
| 0.7.743.10156.1 | SPR Team Review of Proposed SPR Contingency Plan | | | |
| 0.7.743.10157 | | Re: Call at 2pm eastern time this afternoon | 4/19/2010 13:39 | kelly_hornaday@fws.gov |
| 0.7.743.10158 | | no call today, and FYI - SPR M-opinion NOI | 3/10/2010 11:12 | kelly_hornaday@fws.gov |
| 0.7.743.10158.1 | NOI - SPR 20100218 | | | |

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| 0.7.743.10159 | | Re: version w/ page and line numbers posted | 12/7/2009 10:32 | susan_jacobsen@f ws.gov |
| 0.7.743.10159.1 | Comments draft SPR white paper SJ | | | |
| 0.7.743.10159.2 | draft SPR white paper 12-02-09 v2 Susan J comments | | | |
| 0.7.743.10159.3 | draft SPR white paper 12-02-09 v2 | | | |
| 0.7.743.10160 | | quick notes | 1/28/2010 15:05 | kelly_hornaday@f ws.gov |
| 0.7.743.10160.1 | alternatives table 1- 28-10 | | | |
| 0.7.743.10160.2 | Evaluating Objectives | | | |

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| 0.7.743.10160.3 | SPR flow chart v4 | | | |
| 0.7.743.10161 | | call today at 2pm | 11/18/2009 9:14 | kelly_hornaday@fws.gov |
| 0.7.743.10161.1 | SPR workgroupdraft agenda 11-18-09 | | | |
| 0.7.743.10161.2 | SPR workgroup notes 11-13-09 | | | |
| 0.7.743.10161.3 | alternative write-up outline | | | |
| 0.7.743.10162 | | Fw: draft of SPR white paper | 3/26/2010 9:00 | kelly_hornaday@fws.gov |
| 0.7.743.10162.1 | alternatives table 1-28-10_clean | | | |
| 0.7.743.10162.2 | SPR flow chart v4 | | | |

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| 0.7.743.10162.3 | all DPSs 8-7-08 | | | |
| 0.7.743.10162.4 | scenarios | | | |
| 0.7.743.10163 | | Re: version w/ page and line numbers posted | 12/3/2009 6:41 | kelly_hornaday@fws.gov |
| 0.7.743.10163.1 | draft SPR white paper 12-02-09 v2 | | | |
| 0.7.743.10164 | | Re: no call today, and FYI - SPR M- opinion NOI | 3/10/2010 11:19 | seth_willey@fws.gov |

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| 0.7.743.10164.1 | NOI - SPR 20100218 | | | |
| 0.7.743.10176 | | RE: [Fwd: notes] | 12/9/2009 14:04 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |
| 0.7.743.10177 | | Re: SPR call rescheduled for 2pm Friday | 11/12/2009 12:12 | susan_jacobsen@fws.gov |
| 0.7.743.10180 | | FYI - Judge Molloy's Comments at Wolf Oral Arg re SPOIR"" | 6/16/2010 14:07 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |
| 0.7.743.10181 | | RE: today's call cancelled | 3/3/2010 16:36 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |
| 0.7.743.10182 | | Re: can we have 2 calls next week? | 12/4/2009 14:58 | kelly_hornaday@fws.gov |
| 0.7.743.10183 | | Re: for this afternoon | 2/2/2010 11:11 | kelly_hornaday@fws.gov |

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| 0.7.743.10187 | | Re: Reminder: call TODAY at 2pm | 11/4/2009 11:14 | kelly_hornaday@fws.gov |
| 0.7.743.10190 | | Fw: can we have 2 calls next week? | 12/4/2009 9:56 | kelly_hornaday@fws.gov |
| 0.7.743.10191 | | call notes and questions | 12/10/2009 14:56 | kelly_hornaday@fws.gov |
| 0.7.743.10191.1 | SPR workgroup notes 12-09-09 | | | |
| 0.7.743.10192 | | RE: call notes and questions | 12/11/2009 12:41 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |

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| 0.7.743.10194 | | Reminder: call TODAY at 2pm | 11/4/2009 9:54 | kelly_hornaday@fws.gov |
| 0.7.743.10194.1 | SPR workgroupdraft agenda 11-04-09 | | | |
| 0.7.743.10195 | | Re: SPR call reminder and question about rescheduling | 11/12/2009 8:47 | kelly_hornaday@fws.gov |
| 0.7.743.10195.1 | SPR-alternative interpretations-revised 11-12-09 | | | |
| 0.7.743.10196 | | RE: notes and revised outline posted | 11/12/2009 8:31 | benjamin.jesup@soil.doi.gov |
| 0.7.743.10197 | | RE: SPR contingency plan | 12/8/2009 13:45 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |
| 0.7.743.10200 | | Re: Fw: reminder: call today 2pm ET | 12/9/2009 12:20 | jessica_hogrefe@fws.gov |

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| 0.7.743.10200.1 | spr plan 120909 JLH comments | | | |
| 0.7.743.10202 | | RE: new call in info | 11/13/2009 11:15 | susan_jacobsen@fws.gov |
| 0.7.743.10203 | | Reminder: call today 2pm ET | 2/3/2010 8:26 | kelly_hornaday@fws.gov |
| 0.7.743.10203.1 | SPR workgroupdraft agenda 2-3-10 | | | |
| 0.7.743.10204 | | RE: Call Tuesday 2pm w/ Gary Frazer and Michael Bean | 12/7/2009 15:12 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |

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| 0.7.743.10206 | | Re: for this afternoon | 2/2/2010 12:42 | anne_hecht@fws.gov |
| 0.7.743.10207 | | Reminder: call today 2pm ET | 1/20/2010 8:01 | kelly_hornaday@fws.gov |
| 0.7.743.10207.1 | SPR workgroupdraft agenda 1-20-10 | | | |
| 0.7.743.10208 | | for today's call | 12/16/2009 11:52 | kelly_hornaday@fws.gov |
| 0.7.743.10208.1 | SPR flow chart v2 | | | |
| 0.7.743.10209 | | Re: new call in info | 11/13/2009 9:15 | jessica_hogrefe@fws.gov |

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| 0.7.743.10209.1 | SPR workgroupdraft agenda 11-13-09 | | | |
| 0.7.743.10210 | | for this afternoon | 2/2/2010 10:52 | kelly_hornaday@f ws.gov |
| 0.7.743.10210.1 | SPR Team update 2- 1-2010v2 | | | |
| 0.7.743.10211 | | Re: docs | 10/26/2009 9:34 | kelly_hornaday@f ws.gov |
| 0.7.743.10211.1 | tucsonherpsociety_ v_salazar_07-16641 | | | |
| 0.7.743.10211.2 | New_flat- tailed_horned_lizar d_decision_09 | | | |
| 0.7.743.10212 | | Re: Call Tuesday 2pm w/ Gary Frazer and Michael Bean | 12/7/2009 12:50 | susan_jacobsen@f ws.gov |

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| 0.7.743.10214 | | update | 5/19/2010 13:29 | kelly_hornaday@fws.gov |
| 0.7.743.10215 | | FW: Reminder: call TODAY at 2pm | 11/6/2009 10:30 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |
| 0.7.743.10215.1 | SPR workgroupdraft agenda 11-04-09 | | | |
| 0.7.743.10216 | | Fw: SPR contingency plan | 12/8/2009 12:06 | kelly_hornaday@fws.gov |
| 0.7.743.10216.1 | spr plan -KLH comments | | | |

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| 0.7.743.10230 | | Re: can we have 2 calls next week? | 12/4/2009 12:02 | susan_jacobsen@fws.gov |
| 0.7.743.10231 | | Re: | 1/29/2010 15:57 | kelly_hornaday@fws.gov |
| 0.7.743.10233 | | Re: [Fwd: FW: FYI - new docs on SPOIR Options from Michael Bean (with SOL analysis)] | 12/3/2009 20:47 | Robin Waples <robin.waples@noaa.gov> |
| 0.7.743.10234 | | RE: notes and revised outline posted | 11/12/2009 8:02 | kelly_hornaday@fws.gov |
| 0.7.743.10235 | | Re: SPR follow up | 11/13/2009 16:27 | kelly_hornaday@fws.gov |

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| 0.7.743.10236 | | notes and revised outline posted | 11/9/2009 10:20 | kelly_hornaday@fws.gov |
| 0.7.743.10239 | | draft of SPR white paper | 3/24/2010 14:59 | kelly_hornaday@fws.gov |
| 0.7.743.10241 | | Re: can we have 2 calls next week? | 12/4/2009 12:57 | anne_hecht@fws.gov |
| 0.7.743.10243 | | example of NOAA listing based on SPR | 5/3/2010 8:58 | anne_hecht@fws.gov |
| 0.7.743.10244 | | call today 2pm ET | 3/17/2010 9:11 | kelly_hornaday@fws.gov |
| 0.7.743.10244.1 | SPR workgroupdraft agenda 3-17-10 | | | |

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| <p>0.7.743.10245</p> | | <p>Re: draft of SPR white paper</p> | <p>4/5/2010 8:09</p> | <p>anne_hecht@fws.gov</p> |
| <p>0.7.743.10245.1</p> | <p>SPR options paper 3-24-10 HechtComments</p> | | | |
| <p>0.7.743.10245.2</p> | <p>SPR options paper3-24-10 Hecht Recommendations</p> | | | |
| <p>0.7.743.10246</p> | | <p>RE: call today 2pm ET</p> | <p>3/17/2010 12:05</p> | <p>Ruth Ann Lowery <ruthann.lowery@noaa.gov></p> |

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| 0.7.743.10247 | | Re: draft of SPR white paper | 4/2/2010 21:59 | Marta Nammack <marta.nammack@noaa.gov> |
| 0.7.743.10249 | | Fw: SPR contingency plan | 12/8/2009 12:00 | kelly_hornaday@fws.gov |
| 0.7.743.10249.1 | spr plan | | | |
| 0.7.743.10251 | | RE: Fw: reminder: call today 2pm ET | 12/9/2009 13:38 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |

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| 0.7.743.10253 | | call reminder: 2pm today | 3/24/2010 9:55 | kelly_hornaday@fws.gov |
| 0.7.743.10253.1 | SPR workgroupdraft agenda 3-24-10 | | | |
| 0.7.743.10254 | | Re: docs | 10/26/2009 9:32 | kelly_hornaday@fws.gov |
| 0.7.743.10254.1 | Summary of Regional SPR Comments - short | | | |
| 0.7.743.10254.2 | Summary of Regional SPR Comments | | | |
| 0.7.743.10256 | | Call today 2pm eastern time | 4/21/2010 9:40 | kelly_hornaday@fws.gov |

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| 0.7.743.10258 | | Re: reminder: call today 2pm ET | 12/9/2009 9:57 | ellen_vangelder@fws.gov |
| 0.7.743.10260 | | Re: for this afternoon | 2/2/2010 10:58 | marta.nammack@noaa.gov |
| 0.7.743.10261 | | RE: SPOIR? | 4/23/2010 13:37 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |
| 0.7.743.10263 | | SPR call reminder and question about rescheduling | 11/12/2009 8:45 | kelly_hornaday@fws.gov |
| 0.7.743.10263.1 | SPR workgroupdraft agenda 11-12-09 | | | |

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| 0.7.743.10264 | | Re: Exec Summary | 4/20/2010 9:58 | kelly_hornaday@fws.gov |
| 0.7.743.10265 | | RE: can we have 2 calls next week? | 12/4/2009 11:39 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |
| 0.7.743.10266 | | RE: SPR call reminder and question about rescheduling | 11/12/2009 9:55 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |
| 0.7.743.10268 | | today's call cancelled | 3/3/2010 8:13 | kelly_hornaday@fws.gov |
| 0.7.743.10269 | | RE: Reminder: call today 2pm ET | 1/20/2010 14:02 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |

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| | | Re: Call Tuesday 2pm w/ Gary Frazer and Michael Bean | 12/7/2009 12:54 | kelly_hornaday@f ws.gov |
| 10 | 0.7.743.10304 | RE: Call today 2pm eastern time | 4/21/2010 10:48 | Ruth Ann Lowery <ruthann.lowery@ noaa.gov> |
| 11 | 0.7.743.10305 | RE: [Fwd: Call Tuesday 2pm w/ Gary Frazer and Michael Bean] | 12/7/2009 15:09 | Ruth Ann Lowery <ruthann.lowery@ noaa.gov> |

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| 0.7.743.10308 | | Re: for today's call | 12/16/2009 12:12 | kelly_hornaday@fws.gov |
| 0.7.743.10308.1 | SPR workgroupdraft agenda 12-16-09 | | | |
| 0.7.743.10310 | | docs | 10/26/2009 9:07 | kelly_hornaday@fws.gov |
| 0.7.743.10310.1 | SPR workgroup call Notes 10-20-09 | | | |
| 0.7.743.10310.2 | spor implications | | | |
| 0.7.743.10310.3 | spor def | | | |

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| 0.7.743.10312 | | Re: can we have 2 calls next week? | 12/4/2009 16:52 | susan_jacobsen@fws.gov |
| 0.7.743.10313 | | Re: today's call cancelled | 3/3/2010 11:36 | susan_jacobsen@fws.gov |
| 0.7.743.10315 | | Re: can we have 2 calls next week? | 12/4/2009 16:41 | kelly_hornaday@fws.gov |
| 0.7.743.10316 | | Re: Fw: reminder: call today 2pm ET | 12/9/2009 14:04 | kit_hershey@fws.gov |

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| 0.7.743.10316.1 | SPR contingency bcj comments | | | |
| 0.7.743.10316.2 | SPR significance bcj comments | | | |
| 0.7.743.10318 | | Re: SPR call reminder and question about rescheduling | 11/12/2009 11:21 | seth_willey@fws.g ov |
| 0.7.743.10320 | | can we have 2 calls next week? | 12/4/2009 9:42 | kelly_hornaday@f ws.gov |
| 0.7.743.10321 | | Re: new call in info | 11/13/2009 12:22 | anne_hecht@fws.g ov |
| 0.7.743.10322.1 | SPR workgroupdraft agenda 11-13-09 | | | |

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| 0.7.743.10323 | | Re: new call in info | 11/13/2009 13:04 | kelly_hornaday@fws.gov |
| 0.7.743.10324 | | Re: notes and revised outline posted | 11/9/2009 10:22 | kelly_hornaday@fws.gov |
| 0.7.743.10324.1 | SPR workgroup notes 11-04-09 | | | |
| 0.7.743.10324.2 | SPR white paper - draft outline 11-09-09 | | | |
| 0.7.743.10325 | | Re: [Fwd: FW: FYI - new docs on SPOIR Options from Michael Bean (with SOL analysis)] | 1/8/2010 16:58 | Marta Nammack <marta.nammack@noaa.gov> |

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| 0.7.743.10326 | | Re: SPR call rescheduled for 2pm Friday | 11/12/2009 14:01 | jenifer_kohout@fws.gov |
| 0.7.743.10327 | | Re: Reminder: call today 2pm ET | 2/3/2010 8:51 | ruthann.lowery@noaa.gov |
| 0.7.743.10332 | | Waple's definition of significance" in SPR" | 4/14/2010 14:23 | seth_willey@fws.gov |
| 0.7.743.10333 | | Re: Fw: reminder: call today 2pm ET | 12/9/2009 14:03 | susan_jacobsen@fws.gov |

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| 0.7.743.10333.1 | SPR contingency bcj comments | | | |
| 0.7.743.10333.2 | SPR significance bcj comments | | | |
| 0.7.743.10334 | | reminder: call today 2pm ET | 12/9/2009 9:47 | kelly_hornaday@fws.gov |
| 0.7.743.10335 | | Call Tuesday 2pm w/ Gary Frazer and Michael Bean | 12/7/2009 11:23 | kelly_hornaday@fws.gov |
| 0.7.743.10336 | | Re: SPR call rescheduled for 2pm Friday | 11/12/2009 16:45 | benjamin.jesup@sol.doi.gov |
| 0.7.743.10337 | | Re: Fw: can we have 2 calls next week? | 12/4/2009 13:32 | jenifer_kohout@fws.gov |

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| 0.7.743.10389 | | Re: Fw: can we have 2 calls next week? | 12/4/2009 12:19 | kit_hershey@fws.gov |
| 0.7.743.10390 | | notes | 12/7/2009 11:42 | kelly_hornaday@fws.gov |
| 0.7.743.10390.1 | SPR workgroup notes 12-02-09 | | | |
| 0.7.743.10391 | | RE: [Fwd: notes] | 12/9/2009 13:57 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |
| 0.7.743.10392.1 | SPR workgroupdraft agenda 3-24-10 | | | |
| 0.7.743.10393 | | Re: SPR call reminder and question about rescheduling | 11/12/2009 14:52 | susan_jacobsen@fws.gov |
| 0.7.743.10393.1 | SPR-alternative interpretations-revised 11-12-09 | | | |

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0.7.743.10394

RE: SPR call
rescheduled for
2pm Friday

11/13/2009 11:18

Ruth Ann Lowery
<ruthann.lowery@
noaa.gov>

15

0.7.743.10396

Re: for today's call

1/5/2010 18:44

susan_jacobsen@f
ws.gov

16

0.7.743.10397

RE: draft of SPR
white paper

4/2/2010 20:00

susan_jacobsen@f
ws.gov

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| 0.7.743.10398 | | Fw: reminder: call today 2pm ET | 12/9/2009 10:35 | kelly_hornaday@fws.gov |
| 0.7.743.10398.1 | SPR contingency bcj comments | | | |
| 0.7.743.10398.2 | SPR significance bcj comments | | | |
| 0.7.743.10399 | | FW: FYI - new docs on SPOIR Options from Michael Bean (with SOL analysis) | 12/3/2009 11:55 | Ruth Ann Lowery <ruthann.lowery@noaa.gov> |
| 0.7.743.10399.1 | PKline analysis of SPR options | | | |
| 0.7.743.10399.2 | 12-1-09 email on MBean SPR options | | | |

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| 0.7.743.10399.3 | MBean SPR options | | | |
| 0.7.743.10401 | | Re: Reminder: call TODAY at 2pm | 11/4/2009 11:27 | kelly_hornaday@f ws.gov |
| 0.7.743.10401.1 | SPR_M_Opinion[dra ft][FINAL] | | | |
| 0.7.743.10401.2 | SPR M Opinion Issue Chart | | | |
| 0.7.743.10401.3 | 2006 draft SPR guidance memo- clarification 7-19- 2006 | | | |

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| 0.7.743.10402 | | Re: Waple's definition of significance" in SPR" | 4/14/2010 16:58 | Marta Nammack <marta.nammack@noaa.gov> |
| 0.7.743.15409 | | Re: OIRA has concluded review of the final SPR policy | 6/13/2014 0:31 | Donna Wieting - NOAA Federal <donna.wieting@noaa.gov> |
| 0.7.743.5003 | | FW: SPR progress plan | 11/7/2013 15:15 | ruthann.lowery <ruthann.lowery@noaa.gov> |
| 0.7.743.5004 | | FW: Revised Strategy/Timeline for Completing SPR Policy | 11/14/2013 13:15 | ruthann.lowery <ruthann.lowery@noaa.gov> |

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| 0.7.743.5004.1 | SPR timeline 10-24-13 | | | |
| 0.7.743.5010.1 | Draft Timeline for Draft White paper-1 | | | |
| 0.7.743.5010.10 | SPR workgroupdraft agenda 10-28-09-1 | | | |
| 0.7.743.5010.3 | spor def | | | |
| 0.7.743.5010.4 | spor implications | | | |
| 0.7.743.5010.6 | SPR Options Paper3-11 | | | |
| 0.7.743.5010.7 | SPR Team Objectives | | | |

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| 0.7.743.5010.8 | SPR white paper - draft outline 10-28- 09-1 | | | |
| 0.7.743.5010.9 | SPR workgroup call Notes 10-20-09 | | | |
| 0.7.743.5011 | | FYI - Status of SPOIR Group Work | 12/11/2009 12:44 | Ruth Ann Lowery <ruthann.lowery@ noaa.gov> |
| 0.7.743.5011.1 | Draft options white paper timeline | | | |
| 0.7.743.5011.2 | SPR Contingency plan timeline | | | |

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| <p>0.7.743.5012</p> | | <p>SPR comments and recommendation</p> | <p>4/5/2010 17:27</p> | <p>Jessica_Hogrefe@fws.gov <jessica_hogrefe@fws.gov></p> |
| <p>0.7.743.5012.1</p> | <p>draft SPR options paper 3-24-10 clean R3 comments</p> | | | |
| <p>0.7.743.5012.2</p> | <p>Region 3 SPR Alternative Recommendation</p> | | | |
| <p>0.7.743.5013</p> | | <p>RE: FYI - Update on ESA Significant Portion of Its Range" Workgroup Thinking"</p> | <p>12/4/2009 14:41</p> | <p>Choe, Tricia <tchoe@doc.gov></p> |

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| <p>0.7.743.5014</p> | | <p>Fw: SPR alternative choice and comments on whitepaper</p> | <p>4/5/2010 11:58</p> | <p>Kit_Hershey@fws.gov ov <kit_hershey@fws.gov></p> |
| <p>0.7.743.5014.1</p> | <p>draft SPR options paper 3-24-10 clean kit's comments</p> | | | |
| <p>0.7.743.5014.2</p> | <p>SPR_Congressional Intent</p> | | | |
| <p>0.7.743.5015.1</p> | <p>MBean memo on 1973 EIS</p> | | | |
| <p>0.7.743.5016</p> | | <p>Re: update</p> | <p>6/16/2010 17:57</p> | <p>Philip Kline <pgeorgekline@yahoo.com></p> |

| To | CC | Attach Count | Attach Names | BegDoc |
|--|--|--------------|-------------------------------------|----------------------------|
| | ellen_vangelder@fws.gov;kit_hershey@fws.gov;susan_jacobsen@fws.gov;jessica_hogrefe@fws.gov;anne_hecht@fws.gov;seth_willey@fws.gov;jenifer_kohout@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;ben_thatcher@fws.gov;Ruth Ann Lowery <ruthann.lowery@noaa.gov>;Jesup, Benjamin <benjamin.jesup@sol.doi.gov>;Philip Kline <pgeorgekline@yahoo.com> | | | Final, Refer to FWS0001034 |
| ellen_vangelder@fws.gov;kit_hershey@fws.gov;susan_jacobsen@fws.gov;jessica_hogrefe@fws.gov;anne_hecht@fws.gov;seth_willey@fws.gov;jenifer_kohout@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;ben_thatcher@fws.gov;benjamin.jesup@exchange.sol.doi.gov;Ruth Ann Lowery <ruthann.lowery@noaa.gov> | | 1 | | Final, Refer to FWS0000991 |
| Jesup, Benjamin <benjamin.jesup@sol.doi.gov> | Hecht, Anne <anne_hecht@fws.gov>;Thatcher, Ben <ben_thatcher@fws.gov>;VanGelder, Ellen <ellen_vangelder@fws.gov>;Kohout, Jenifer <jenifer_kohout@fws.gov>;Hogrefe, Jessica <jessica_hogrefe@fws.gov>;Hornaday, Kelly <kelly_hornaday@fws.gov>;Hershey, Kit <kit_hershey@fws.gov>;Myers, Marilyn <marilyn_myers@fws.gov>;Marta Nammack <marta.nammack@noaa.gov>;Miller, Martin <martin_miller@fws.gov>;Philip Kline <pgeorgekline@yahoo.com>;Ruth Ann Lowery <ruthann.lowery@noaa.gov>;Willey, Seth <seth_willey@fws.gov> | 1 | SPR pros and cons bcj comments.docx | Final, Refer to FWS0001256 |
| | | | | Final, Refer to FWS0001258 |

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| <p>kit_hershey@fws.gov;susan_jacobsen@fws.gov;jessica_hogrefe@fws.gov;anne_hecht@fws.gov;seth_willey@fws.gov;jenifer_kohout@fws.gov;ellen_vangelder@fws.gov;ben_thatcher@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;Ruth Ann Lowery <ruthann.lowery@noaa.gov>;Jesup, Benjamin <benjamin.jesup@sol.doi.gov>;Philip Kline <pgeorgekline@yahoo.com></p> | | 1 | SPR work group notes 2-3-10.docx | Final, Refer to FWS0001196 |
| | | | | Final, Refer to FWS0001197 |
| <p>Marta Nammack <marta.nammack@noaa.gov></p> | | 3 | | Final, Refer to FWS0000654 |
| <p>ellen_vangelder@fws.gov;kit_hershey@fws.gov;susan_jacobsen@fws.gov;jessica_hogrefe@fws.gov;anne_hecht@fws.gov;seth_willey@fws.gov;jenifer_kohout@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;ben_thatcher@fws.gov;benjamin.jesup@sol.doi.gov;Ruth Ann Lowery <ruthann.lowery@noaa.gov></p> | | 2 | SPR workgroupdraft agenda 11-24-09.doc | Final, Refer to FWS0000838 |
| | | | | Final, Refer to FWS0000839 |
| <p>Philip Kline <pgeorgekline@yahoo.com></p> | <p>anne_hecht@fws.gov;Jesup, Benjamin <benjamin.jesup@sol.doi.gov>;ben_thatcher@fws.gov;ellen_vangelder@fws.gov;jenifer_kohout@fws.gov;jessica_hogrefe@fws.gov;kelly_hornaday@fws.gov;kit_hershey@fws.gov;marilyn_myers@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;Ruth Ann Lowery <ruthann.lowery@noaa.gov>;seth_willey@fws.gov;susan_jacobsen@fws.gov</p> | 4 | | Final, Refer to FWS0001401 |

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| kelly_hornaday@fws.gov | anne_hecht@fws.gov;ben_tatcher@fws.gov;ellen_vangelder@fws.gov;jenifer_kohout@fws.gov;jessica_hogrefe@fws.gov;kit_hershey@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;ruthann.lowery@noaa.gov;;seth_willey@fws.gov;susan_jacobsen@fws.gov;pgeorgekline@yahoo.com | 2 | SPR case law.docx | Final, Refer to FWS0000789 |
| | | | | Final, Refer to FWS0000790 |
| jenifer_kohout@fws.gov | anne_hecht@fws.gov;ben_tatcher@fws.gov;ellen_vangelder@fws.gov;jessica_hogrefe@fws.gov;kelly_hornaday@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;seth_willey@fws.gov;susan_jacobsen@fws.gov | | | Final, Refer to FWS0000678 |
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| | | | | Final, Refer to FWS0000998 |
| | | | | Final, Refer to FWS0000999 |
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| | | | | Final, Refer to FWS0000783 |
| ellen_vangelder@fws.gov;kit_hershey@fws.gov;susan_jacobsen@fws.gov;jessica_hogrefe@fws.gov;anne_hecht@fws.gov;seth_willey@fws.gov;jenifer_kohout@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;ben_thatcher@fws.gov;Ruth Ann Lowery <ruthann.lowery@noaa.gov>;Jesup, Benjamin <benjamin.jesup@sol.doi.gov>;Philip Kline <pgeorgekline@yahoo.com> | | 1 | SPR workgroup notes 1-13 10.docx | Final, Refer to FWS0001043 |
| | | | | Final, Refer to FWS0001044 |

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| <p>Kelly Hornaday <kelly_hornaday@fws.gov>; Ellen VanGelder <ellen_vangelder@fws.gov>; Kit Hershey <kit_hershey@fws.gov>; Susan Jacobsen <susan_jacobsen@fws.gov>; Jessica Hogrefe <jessica_hogrefe@fws.gov>; Anne Hecht <anne_hecht@fws.gov>; Seth Willey <seth_willey@fws.gov>; Jenifer Kohout <jenifer_kohout@fws.gov>; Marta Nammack <marta.nammack@noaa.gov>; Ben Thatcher <ben_thatcher@fws.gov>; Ruth Ann Lowery <ruthann.lowery@noaa.gov>; Philip Kline <pgeorgekline@yahoo.com></p> | | 2 | Proposed SPR definition jhogrefe 011510.docx | Final, Refer to FWS0001053 |
| | | | | Final, Refer to FWS0001054 |
| <p>kit_hershey@fws.gov;susan_jacobsen@fws.gov;jessica_hogrefe@fws.gov;anne_hecht@fws.gov;seth_willey@fws.gov;jenifer_kohout@fws.gov;ellen_vangelder@fws.gov;ben_thatcher@fws.gov;Marta Nammack <marta.nammack@noaa.gov>; Ruth Ann Lowery <ruthann.lowery@noaa.gov>; Jesup, Benjamin <benjamin.jesup@sol.doi.gov>; Philip Kline <pgeorgekline@yahoo.com></p> | | 1 | SPR work group notes 2-3-10.docx | Final, Refer to FWS0001162 |
| | | | | Final, Refer to FWS0001164 |
| <p>kit_hershey@fws.gov</p> | <p>anne_hecht@fws.gov;ben_thatcher@fws.gov;Jesup, Benjamin <benjamin.jesup@sol.doi.gov>;ellen_vangelder@fws.gov;jenifer_kohout@fws.gov;kelly_hornaday@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;Philip Kline <pgeorgekline@yahoo.com>;Ruth Ann Lowery <ruthann.lowery@noaa.gov>;seth_willey@fws.gov;susan_jacobsen@fws.gov</p> | 6 | | Final, Refer to FWS0001181 |

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| Marta Nammack <marta.nammack@noaa.gov> | | | | Final, Refer to FWS0000996 |
| kelly_hornaday@fws.gov | anne_hecht@fws.gov;ben_th atcher@fws.gov;Jesup, Benjamin <benjamin.jesup@sol.doi.gov >;jenifer_kohout@fws.gov;je ssica_hogrefe@fws.gov;kit_h ershey@fws.gov;marilyn_my ers@fws.gov;Marta Nammack <marta.nammack@noaa.gov >;Philip Kline <pgeorgekline@yahoo.com>; Ruth Ann Lowery <ruthann.lowery@noaa.gov> ;seth_willey@fws.gov;susan_ jacobsen@fws.gov | 1 | Executive summary and recommendations 4-20-2010 - evg comments.docx | Final, Refer to FWS0001321 |
| | | | | Final, Refer to FWS0001323 |

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| <p>kelly_hornaday@fws.gov</p> | <p>anne_hecht@fws.gov;ben_thatcher@fws.gov;Jesup, Benjamin <benjamin.jesup@sol.doi.gov>;ellen_vangelder@fws.gov;jenifer_kohout@fws.gov;jessica_hogrefe@fws.gov;kit_hershey@fws.gov;marilyn_myers@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;Philip Kline <pgeorgekline@yahoo.com>;Ruth Ann Lowery <ruthann.lowery@noaa.gov>;seth_willey@fws.gov</p> | | | <p>Final, Refer to FWS0001418</p> |
| <p>kelly_hornaday@fws.gov</p> | <p>ben_thatcher@fws.gov;Jesup, Benjamin <benjamin.jesup@sol.doi.gov>;ellen_vangelder@fws.gov;jenifer_kohout@fws.gov;jessica_hogrefe@fws.gov;kit_hershey@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;philip.kline@sol.doi.gov;Ruth Ann Lowery <ruthann.lowery@noaa.gov>;seth_willey@fws.gov;susan_jacobsen@fws.gov</p> | <p>4</p> | | <p>Final, Refer to FWS0001009</p> |
| <p>anne_hecht@fws.gov;ben_thatcher@fws.gov;Jesup, Benjamin <benjamin.jesup@sol.doi.gov>;ellen_vangelder@fws.gov;jenifer_kohout@fws.gov;jessica_hogrefe@fws.gov;kit_hershey@fws.gov;marilyn_myers@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;martin_miller@fws.gov;Philip Kline <pgeorgekline@yahoo.com>;Ruth Ann Lowery <ruthann.lowery@noaa.gov>;seth_willey@fws.gov;susan_jacobsen@fws.gov</p> | | <p>1</p> | <p>Executive summary and recommendations.docx</p> | <p>Final, Refer to FWS0001275</p> |
| | | | | <p>Final, Refer to FWS0001277</p> |

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|--|--|---|---|-----------------------------------|
| <p>kit_hershey@fws.gov;susan_jacobsen@fws.gov;jessica_hogrefe@fws.gov;anne_hecht@fws.gov;seth_willey@fws.gov;jenifer_kohout@fws.gov;ellen_vangelder@fws.gov;ben_thatcher@fws.gov;Marta Nammack <marta.nammack@noaa.gov>;Ruth Ann Lowery <ruthann.lowery@noaa.gov>;Jesup, Benjamin <benjamin.jesup@sol.doi.gov>;Philip Kline <pgeorgekline@yahoo.com></p> | | 2 | <p>SPR Team update 2-1-2010.docx;scenarios.docx</p> | <p>Final, Refer to FWS0001137</p> |
| | | | | <p>Final, Refer to FWS0001138</p> |
| | | | | <p>Final, Refer to FWS0001140</p> |
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| | | | | Final, Refer to FWS0001212 |
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| | | | | <p>Final, Refer to FWS0000737</p> |
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| | | | | <p>Final, Refer to FWS0001111</p> |

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| | | | | <p>Final, Refer to FWS0001331</p> |
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| | | | | <p>Final, Refer to FWS0001147</p> |

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| | | | | Final, Refer to FWS0000834 |
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| | | | | Final, Refer to FWS0001381 |
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| | | | | Final, Refer to FWS0001025 |
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| | | | | Final, Refer to FWS0000778 |
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| | | | | Final, Refer to FWS0000866 |

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| | | | | Final, Refer to FWS0000720 |
| | | | | Final, Refer to FWS0000721 |
| | | | | Final, Refer to FWS0000722 |

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| | | | | <p>Final, Refer to FWS0001119</p> |
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