

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, January 30, 2018 7:48 AM
To: Carter, Carmen
Cc: HQS-SMB-FOIA
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

Good Morning,

Thank you for the consultation review (b)(5) [REDACTED]. Very best regards,

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 Tue, Jan 30, 2018 at 6:52 AM, Carter, Carmen (b)(6) [REDACTED] wrote:

Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011

(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language (b)(5) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(b)(5)

[Redacted text block]

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- [Redacted text block]
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Detailed review comments:

■ [Redacted text block]

■ [Redacted text block]

■ [Redacted text block]

- [Redacted text block]
- [Redacted text block]
- [Redacted text block]

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(b)(5)

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■ [Redacted]

[Redacted]

[Redacted]

■ [Redacted]

■ [Redacted]

Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

CG-0942 Office of Information and Intelligence Law

[202-372-3847](tel:202-372-3847)

Wednesdays/Telework: [301-518-5911](tel:301-518-5911)

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

From: HQS-SMB-FOIA <EFOIA@uscg.mil>

To: "Carter, Carmen" (b)(6)

Cc: "Rice, Lisa M CDR" (b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

Good afternoon,

The attached consultation has been assigned to your office for processing and direct response to Mr. Mark Graff (mark.graff@noaa.gov) of NOAA under consultation number 2018-CGCO-00011 . Please provide your final response by January 31, 2018 . Please provide CG-611 with a copy of your final response letter via EFOIA@uscg.mil <<mailto:EFOIA@uscg.mil>> so that the request may be closed in the system.

Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)

Office of Information Management

Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

Telephone:

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, January 30, 2018 7:50 AM
To: Samuel Dixon - NOAA Affiliate
Cc: Kimberly Katzenbarger - NOAA FEDERAL; Shawn Puyear - NOAA Federal
Subject: Fwd: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

Hi Sam,

Below is the review from the USCG Attorney on the -000170 CoA request consultation (b)(5)

Thanks, Sam--

Mark H. Graff
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National Oceanic and Atmospheric Administration
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From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Tue, Jan 30, 2018 at 7:48 AM
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)
To: "Carter, Carmen" (b)(6)
Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

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[\(301\) 628-5658](tel:3016285658) (O)
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Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011

(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language. (b)(5)

[Redacted]

- [Redacted]

- [Redacted]

- [Redacted]
- [Redacted]
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- [Redacted]

(b)(5)

[Redacted]

Detailed review comments:

[Redacted]

[Redacted]

[Redacted]

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[Redacted]

[Redacted]

[Redacted]

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[Redacted] (b)(5)

■ [REDACTED]

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[REDACTED]

■ [REDACTED]
[REDACTED]
[REDACTED]

■ [REDACTED]

■ [REDACTED]

Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

CG-0942 Office of Information and Intelligence Law

[202-372-3847](tel:202-372-3847)

Wednesdays/Telework: [301-518-5911](tel:301-518-5911)

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From: HQS-SMB-FOIA <EFOIA@uscg.mil>

To: "Carter, Carmen"

(b)(6)

Cc: "Rice, Lisa M CDR"

(b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

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The attached consultation has been assigned to your office for processing and direct response to Mr. Mark Graff (mark.graff@noaa.gov) of NOAA under consultation number 2018-CGCO-00011 . Please provide your final response by January 31, 2018 . Please provide CG-611 with a copy of your final response letter via EFOIA@uscg.mil <mailto:EFOIA@uscg.mil> so that the request may be closed in the system.

Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)

Office of Information Management

Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

Telephone:

Samuel Dixon

From: Samuel Dixon
Sent: Wednesday, January 31, 2018 12:02 PM
To: Mark Graff - NOAA Federal
Cc: Kimberly Katzenbarger - NOAA FEDERAL; Shawn Puyear - NOAA Federal
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

Thanks Mark.

What do these page numbers correspond to? We sent them an export from Clearwell correct?

Kim do you know who redacted these?

Thanks,

Sam

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

On Tue, Jan 30, 2018 at 7:50 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Hi Sam,

Below is the review from the USCG Attorney on the -000170 CoA request consultation (b)(5)

(b)(5)
Thanks, Sam--

Mark H. Graff
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[\(301\) 628-5658](tel:(301)628-5658) (O)
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From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Tue, Jan 30, 2018 at 7:48 AM
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)
To: "Carter, Carmen" (b)(6)

Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

Good Morning,

Thank you for the consultation review (b)(5)

Very best regards,

Mark H. Graff
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On Tue, Jan 30, 2018 at 6:52 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011

(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language. (b)(5)

[Redacted]

[Redacted]

(b) (5)

[Redacted]

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Detailed review comments:

(b) (5)

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[REDACTED]

[REDACTED]

Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

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To: "Carter, Carmen" (b)(6)

Cc: "Rice, Lisa M CDR" (b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

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Amanda Ackerson

U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <<mailto:EFOIA@uscg.mil>>

Telephone:

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, January 31, 2018 12:36 PM
To: Samuel Dixon
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

I honestly don't know--I'd have to dig a bit more.

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, Jan 31, 2018 at 12:02 PM, Samuel Dixon <samuel.dixon@noaa.gov> wrote:

Thanks Mark.

What do these page numbers correspond to? We sent them an export from Clearwell correct?

Kim do you know who redacted these?

Thanks,

Sam

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Contractor - IBSS Corp
(301) 427-8739
samuel.dixon@noaa.gov

On Tue, Jan 30, 2018 at 7:50 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

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Below is the review from the USCG Attorney on the -000170 CoA request consultation (b)(5)

[REDACTED]

[REDACTED]

[REDACTED] Thanks, Sam--

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[\(b\)\(6\)](#) (C)

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From: **Mark Graff - NOAA Federal** <mark.graff@noaa.gov>

Date: Tue, Jan 30, 2018 at 7:48 AM

Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

To: "Carter, Carmen" [\(b\)\(6\)](#)

Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

Good Morning,

Thank you for the consultation review [\(b\)\(5\)](#)

[\(b\)\(6\)](#). Very best regards,

Mark H. Graff

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(NOAA Consultation # 2017-000170)

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[REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

- [REDACTED]

- [REDACTED]

Detailed review comments:

(b)(5) [REDACTED]

- [REDACTED]

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■ [REDACTED]

■ [REDACTED]

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U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

Telephone:

Kimberly Katzenbarger - NOAA Federal

From: Kimberly Katzenbarger - NOAA Federal
Sent: Wednesday, January 31, 2018 1:15 PM
To: Samuel Dixon
Cc: Mark Graff - NOAA Federal; Shawn Puyear - NOAA Federal
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

Hi Sam, I am not positive, but I am fairly certain that it was Ayeisha. If Ayeisha, she is no longer available to work on this FOIA.

Shawn, can you check in CW?

Thanks, Kim

On Wed, Jan 31, 2018 at 12:02 PM, Samuel Dixon <samuel.dixon@noaa.gov> wrote:

Thanks Mark.

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Kim do you know who redacted these?

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[REDACTED]

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Detailed review comments:

■ [Redacted text block]

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(b) (6)

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Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

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To: "Carter, Carmen" (b)(6)

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Bcc:

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Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

Telephone:

--

Kimberly Katzenbarger, Attorney
National Oceanic and Atmospheric Administration
Office of General Counsel, Natural Resources Section
1315 East West Hwy, Suite 15104
Silver Spring, MD 20910-3282
301-325-3522

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Shawn Puyear - NOAA Federal

From: Shawn Puyear - NOAA Federal
Sent: Wednesday, January 31, 2018 1:18 PM
To: Kimberly Katzenbarger - NOAA Federal
Cc: Samuel Dixon; Mark Graff - NOAA Federal
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

Sure. Give me a few minutes.

Shawn

On Wed, Jan 31, 2018 at 1:15 PM, Kimberly Katzenbarger - NOAA Federal

<kimberly.katzenbarger@noaa.gov> wrote:

Hi Sam, I am not positive, but I am fairly certain that it was Ayeisha. If Ayeisha, she is no longer available to work on this FOIA.

Shawn, can you check in CW?

Thanks, Kim

On Wed, Jan 31, 2018 at 12:02 PM, Samuel Dixon <samuel.dixon@noaa.gov> wrote:

Thanks Mark.

What do these page numbers correspond to? We sent them an export from Clearwell correct?

Kim do you know who redacted these?

Thanks,

Sam

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

On Tue, Jan 30, 2018 at 7:50 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Hi Sam,

Below is the review from the USCG Attorney on the -000170 CoA request consultation (b)(5)

[REDACTED]

[REDACTED]

[REDACTED] Thanks, Sam--

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: Tue, Jan 30, 2018 at 7:48 AM

Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

To: "Carter, Carmen"

(b)(6)

Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

Good Morning,

Thank you for the consultation review (b)(5)

Very best regards,

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

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

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On Tue, Jan 30, 2018 at 6:52 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011

(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language (b)(5)

[Redacted]

- [Redacted]

- [Redacted]

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

- [Redacted]

- [Redacted]

Detailed review comments:

(b)(5) [Redacted]

- [Redacted]

- [Redacted]

■ (b)(5) [Redacted]

■ [Redacted]

■ [Redacted]

■ [Redacted]

[Redacted]

■ [Redacted]

■ [Redacted]

[Redacted]

■ [Redacted]

■ [Redacted]

■ [Redacted]

[Redacted]

[Redacted]

[Redacted]

■ [Redacted] (b)(5)

■ [Redacted]

■ [Redacted]

■ [Redacted]

[Redacted]

■ [Redacted]

[Redacted]

[Redacted]

■ [Redacted]

■ [Redacted]

Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

CG-0942 Office of Information and Intelligence Law

[202-372-3847](tel:202-372-3847)

Wednesdays/Telework: [301-518-5911](tel:301-518-5911)

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From: HQS-SMB-FOIA <EFOIA@uscg.mil>

To: "Carter, Carmen" (b)(6)

Cc: "Rice, Lisa M CDR" (b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

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Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

Telephone:

--

Kimberly Katzenbarger, Attorney
National Oceanic and Atmospheric Administration
Office of General Counsel, Natural Resources Section
[1315 East West Hwy, Suite 15104](#)
[Silver Spring, MD 20910-3282](#)
[301-325-3522](#)

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--

Shawn Puyear
Program Manager
(301) 427-7713
shawn.puyear@noaa.gov

Shawn Puyear - NOAA Federal

From: Shawn Puyear - NOAA Federal
Sent: Wednesday, January 31, 2018 2:33 PM
To: Kimberly Katzenbarger - NOAA Federal
Cc: Samuel Dixon; Mark Graff - NOAA Federal
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

(b)(5)



Is this acceptable?

Shawn

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Thanks, Sam--

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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Date: Tue, Jan 30, 2018 at 7:48 AM
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)
To: "Carter, Carmen" (b)(6)
Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

Good Morning,

Thank you for the consultation review (b)(5). Very best regards,

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On Tue, Jan 30, 2018 at 6:52 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011

(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language. (b)(5)

[Redacted]

- [Redacted]

- [Redacted]

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

- [Redacted]

- [Redacted]

Detailed review comments:

(b)(5)

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

(b)(5)

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

FOIA [REDACTED]

[REDACTED]

Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

CG-0942 Office of Information and Intelligence Law

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From: HQS-SMB-FOIA <EFOIA@uscg.mil>

To: "Carter, Carmen" (b)(6) [REDACTED]

Cc: "Rice, Lisa M CDR" (b)(6) [REDACTED]

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

Good afternoon,

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Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

Telephone:

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Kimberly Katzenbarger, Attorney
National Oceanic and Atmospheric Administration
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Shawn Puyear
Program Manager
[\(301\) 427-7713](tel:(301)427-7713)
shawn.puyear@noaa.gov

--

Shawn Puyear

Program Manager

(301) 427-7713

shawn.puyear@noaa.gov

Shawn Puyear - NOAA Federal

From: Shawn Puyear - NOAA Federal
Sent: Thursday, February 1, 2018 11:34 AM
To: Kimberly Katzenbarger - NOAA Federal
Cc: Samuel Dixon; Mark Graff - NOAA Federal
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

(b)(5) [Redacted]

- [Redacted]
- [Redacted]
- [Redacted]

[Redacted]

- [Redacted]
- [Redacted]
- [Redacted]

[Redacted]

Sorry,
Shawn

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(b)(5) [Redacted]

Is this acceptable?

Shawn

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[REDACTED]
[REDACTED]
[REDACTED] Thanks, Sam--

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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>
Date: Tue, Jan 30, 2018 at 7:48 AM
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)
To: "Carter, Carmen" (b)(6)
Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

Good Morning,

Thank you for the consultation review (b)(5) [REDACTED]. Very best regards,

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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(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language (b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■ [REDACTED]

[REDACTED]

Detailed review comments:

■ [REDACTED]

[REDACTED]

■ [REDACTED]

[REDACTED]

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■ [REDACTED]

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■ [REDACTED]

■ [REDACTED]

TOP SECRET [REDACTED]

[REDACTED]

[REDACTED]

TOP SECRET [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

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- [REDACTED]

Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

CG-0942 Office of Information and Intelligence Law

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To: "Carter, Carmen" (b)(6)

Cc: "Rice, Lisa M CDR" (b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

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Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

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Shawn Puyear
Program Manager
[\(301\) 427-7713](#)
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Shawn Puyear
Program Manager
[\(301\) 427-7713](#)
shawn.puyear@noaa.gov

Kimberly Katzenbarger - NOAA Federal

From: Kimberly Katzenbarger - NOAA Federal
Sent: Wednesday, February 7, 2018 11:39 AM
To: Shawn Puyear - NOAA Federal
Cc: Samuel Dixon; Mark Graff - NOAA Federal
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

Thanks Shawn.

(b)(5) [Redacted]

[Redacted]

Thanks, Kim

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(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

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(b) (5)

[Redacted text block]

[Redacted text block]

- [Redacted list item]
- [Redacted list item]
- [Redacted list item]
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[Redacted text block]

[Redacted text block]

Detailed review comments:

(b) (5)

[Redacted text block]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

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USCG Information Law Attorney

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Cc: "Rice, Lisa M CDR" (b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

Good afternoon,

The attached consultation has been assigned to your office for processing and direct response to Mr. Mark Graff (mark.graff@noaa.gov) of NOAA under consultation number 2018-CGCO-00011 . Please provide your final response by January 31, 2018 . Please provide CG-611 with a copy of your final response letter via EFOIA@uscg.mil <mailto:EFOIA@uscg.mil> so that the request may be closed in the system.

Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

Telephone:

--

Kimberly Katzenbarger, Attorney
National Oceanic and Atmospheric Administration
Office of General Counsel, Natural Resources Section
[1315 East West Hwy, Suite 15104](#)
[Silver Spring, MD 20910-3282](#)
[301-325-3522](#)

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--

Shawn Puyear
Program Manager
[\(301\) 427-7713](tel:(301)427-7713)
shawn.puyear@noaa.gov

--

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Samuel Dixon

From: Samuel Dixon
Sent: Wednesday, February 7, 2018 12:32 PM
To: Kimberly Katzenbarger - NOAA Federal
Cc: Shawn Puyear - NOAA Federal; Mark Graff - NOAA Federal
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

(b)(5) [Redacted]

I'll be on leave from the 9th to the 19th, hopefully can figure something out before I leave.

Sam

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

On Wed, Feb 7, 2018 at 11:38 AM, Kimberly Katzenbarger - NOAA Federal
<kimberly.katzenbarger@noaa.gov> wrote:

Thanks Shawn.

(b)(5) [Redacted]

(b)(5) [Redacted]

Sam, can you advise on this?

Thanks, Kim

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(b)(5) [Redacted]

- [Redacted]
- [Redacted]
- [Redacted]

[Redacted]

- [Redacted]
- [Redacted]
- [Redacted]

(b)(5)

Sorry,
Shawn

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(b)(5)

Is this acceptable?

Shawn

On Wed, Jan 31, 2018 at 1:18 PM, Shawn Puyear - NOAA Federal <shawn.puyear@noaa.gov> wrote:
Sure. Give me a few minutes.

Shawn

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Hi Sam, I am not positive, but I am fairly certain that it was Ayeisha. If Ayeisha, she is no longer available to work on this FOIA.

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Thanks, Kim

On Wed, Jan 31, 2018 at 12:02 PM, Samuel Dixon <samuel.dixon@noaa.gov> wrote:
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What do these page numbers correspond to? We sent them an export from Clearwell correct?

Kim do you know who redacted these?

Thanks,

Sam

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

On Tue, Jan 30, 2018 at 7:50 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
Hi Sam,

Below is the review from the USCG Attorney on the -000170 CoA request consultation (b)(5)

Thanks, Sam--

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: **Mark Graff - NOAA Federal** <mark.graff@noaa.gov>
Date: Tue, Jan 30, 2018 at 7:48 AM
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)
To: "Carter, Carmen" (b)(6)
Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

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On Tue, Jan 30, 2018 at 6:52 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011

(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language. (b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

Detailed review comments:

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

[REDACTED]

[REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

(b)(5)

Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

CG-0942 Office of Information and Intelligence Law

[202-372-3847](tel:202-372-3847)

Wednesdays/Telework: [301-518-5911](tel:301-518-5911)

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From: HQS-SMB-FOIA <EFOIA@uscg.mil>

To: "Carter, Carmen" (b)(6)

Cc: "Rice, Lisa M CDR" (b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

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Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)
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Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Monday, March 5, 2018 8:11 AM
To: Samuel Dixon - NOAA Affiliate
Cc: Kimberly Katzenbarger - NOAA FEDERAL; Shawn Puyear - NOAA Federal
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

Hey Sam,

This was the USCG response to our consultation request that I sent to you--

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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Thanks, Sam--

Mark H. Graff
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[\(301\) 628-5658](tel:(301)628-5658) (O)
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Date: Tue, Jan 30, 2018 at 7:48 AM
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

To: "Carter, Carmen" (b)(6)

Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

Good Morning,

Thank you for the consultation review (b)(5). Very best regards,

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Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011
(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language. (b)(5)

[Redacted]

[Redacted]

(b) (5)

[Redacted]

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

■ [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

■

■ [Redacted]
[Redacted]

Detailed review comments:

(b) (5)

[Redacted]
[Redacted]

■ [Redacted]
[Redacted]

■ [Redacted]

- [Redacted]
- [Redacted]
- [Redacted]

■ [Redacted]
[Redacted]

■ [Redacted]

■ [Redacted]
[Redacted]

(b)(5) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

(b)(5) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Respectfully,

Carmen

Carmen Smith Carter
USCG Information Law Attorney
CG-0942 Office of Information and Intelligence Law
[202-372-3847](tel:202-372-3847)
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To: "Carter, Carmen" (b)(6)

Cc: "Rice, Lisa M CDR" (b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

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Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <<mailto:EFOIA@uscg.mil>>

Telephone:

Kimberly Katzenbarger - NOAA Federal

From: Kimberly Katzenbarger - NOAA Federal
Sent: Monday, March 5, 2018 2:50 PM
To: Mark Graff - NOAA Federal
Cc: Samuel Dixon - NOAA Affiliate; Shawn Puyear - NOAA Federal
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

Sam/Mar (b)(5)

I will be out of town again March 14-19, and then in a conference March 20-24, so I will be out of packet for two weeks, and I want this done by then.

Thanks, Kim

On Mon, Mar 5, 2018 at 8:11 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Hey Sam,

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Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:(301)628-5658) (O)
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Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

To: "Carter, Carmen" (b)(6)

Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

Good Morning,

Thank you for the consultation review. NOAA will incorporate the USCG reviews into the records and contact you should there be any questions on exemption application. Very best regards,

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

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

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(b)(5)

[Redacted text block]

[Redacted text block]

- [Redacted list item]
- [Redacted list item]
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[Redacted text block]

[Redacted text block]

Detailed review comments:

[Redacted text block]

[Redacted text block]

[Redacted text block]

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■ [REDACTED]

■ [REDACTED]

■ [REDACTED]
[REDACTED]

■ [REDACTED]

■ [REDACTED]
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■ [REDACTED]

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[REDACTED]
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■ [REDACTED]

■ [REDACTED]
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■ [REDACTED]

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Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

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Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
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To: Samuel Dixon
Cc: Kimberly Katzenbarger - NOAA Federal; Shawn Puyear - NOAA Federal
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(b)(5)

Mark H. Graff
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(b)(5)

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Samuel Dixon
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(b)(5)

- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

- [REDACTED]
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- [REDACTED]

(b)(5)

[REDACTED]

Sorry,
Shawn

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(b)(5)

[REDACTED]

Is this acceptable?

Shawn

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Thanks,

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Hi Sam,

Below is the review from the USCG Attorney on the -000170 CoA request consultation (b)(5)

[REDACTED]
[REDACTED]
[REDACTED] Thanks, Sam--

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: Tue, Jan 30, 2018 at 7:48 AM
Subject: Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)
To: "Carter, Carmen" (b)(6)
Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

Good Morning,

Thank you for the consultation review (b)(5). Very best regards,

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 Tue, Jan 30, 2018 at 6:52 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011

(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language. (b)(5)

[Redacted]

[Redacted]

[Redacted]

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

[Redacted]

(b)(5) [Redacted text block]

[Redacted text block]

Detailed review comments:

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

(b)(5) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

CG-0942 Office of Information and Intelligence Law

[202-372-3847](tel:202-372-3847)

Wednesdays/Telework: [301-518-5911](tel:301-518-5911)

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

From: HQS-SMB-FOIA <EFOIA@uscg.mil>

To: "Carter, Carmen" (b)(6)

Cc: "Rice, Lisa M CDR" (b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

Good afternoon,

The attached consultation has been assigned to your office for processing and direct response to Mr. Mark Graff (mark.graff@noaa.gov) of NOAA under consultation number 2018-CGCO-00011 . Please provide your final response by January 31, 2018 . Please provide CG-611 with a copy of your final response letter via EFOIA@uscg.mil <mailto:EFOIA@uscg.mil> so that the request may be closed in the system.

Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

Telephone:

--

Kimberly Katzenbarger, Attorney

National Oceanic and Atmospheric Administration
Office of General Counsel, Natural Resources Section
[1315 East West Hwy, Suite 15104](#)
[Silver Spring, MD 20910-3282](#)
[301-325-3522](#)

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--

Shawn Puyear
Program Manager
[\(301\) 427-7713](#)
shawn.puyear@noaa.gov

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Shawn Puyear
Program Manager
[\(301\) 427-7713](#)
shawn.puyear@noaa.gov

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Shawn Puyear
Program Manager
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--

Kimberly Katzenbarger, Attorney
National Oceanic and Atmospheric Administration
Office of General Counsel, Natural Resources Section
[1315 East West Hwy, Suite 15104](#)
[Silver Spring, MD 20910-3282](#)
[301-325-3522](#)

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Samuel Dixon

From: Samuel Dixon
Sent: Friday, March 9, 2018 10:04 AM
To: Carter, Carmen
Cc: Mark Graff - NOAA Federal
Subject: Re: [Non-DoD Source] NOAA Consultation # 2017-000170

Thanks Carmen,

However I am unable to view the records you are describing. I need access to them.

Sam

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

On Fri, Mar 9, 2018 at 9:20 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Dixon – please see attached email to Mark Graff.

Carmen

Carmen Smith Carter

CG-JAG Information Law Attorney

Office: [202-372-3847](tel:202-372-3847)

Wednesdays: [301-518-5911](tel:301-518-5911)

From: Samuel Dixon [mailto:samuel.dixon@noaa.gov]
Sent: Friday, March 9, 2018 9:01 AM
To: Carter, Carmen (b)(6) Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Subject: [Non-DoD Source] NOAA Consultation # 2017-000170

Hi Carmen,

You sent some responsive records back to NOAA after consultation for this FOIA request but the accellion link has expired. Do you mind resending them?

Thanks,

Samuel Dixon

NMFS Assistant FOIA Liaison

Contractor - IBSS Corp

[\(301\) 427-8739](tel:(301)427-8739)

samuel.dixon@noaa.gov

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

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

To: "Carter, Carmen" (b)(6)

Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

Bcc:

Date: Tue, 30 Jan 2018 12:48:00 +0000

Subject: [Non-DoD Source] Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

Good Morning,

Thank you for the consultation review (b)(5)

. Very best regards,

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 Tue, Jan 30, 2018 at 6:52 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011

(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language (b)(5) [REDACTED]

[REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

- [REDACTED]

- [REDACTED]

Detailed review comments:

(b)(5)

[Redacted text block containing multiple paragraphs and bulleted lists]

(b)(5)

[Redacted text block containing multiple paragraphs and bulleted lists]

Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

CG-0942 Office of Information and Intelligence Law

[202-372-3847](tel:202-372-3847)

Wednesdays/Telework: [301-518-5911](tel:301-518-5911)

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From: HQS-SMB-FOIA <EFOIA@uscg.mil>

To: "Carter, Carmen" (b)(6)

Cc: "Rice, Lisa M CDR" (b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

Good afternoon,

The attached consultation has been assigned to your office for processing and direct response to Mr. Mark Graff (mark.graff@noaa.gov) of NOAA under consultation number 2018-CGCO-00011 . Please provide your final response by January 31, 2018 . Please provide CG-611 with a copy of your final response letter via EFOIA@uscg.mil <mailto:EFOIA@uscg.mil> so that the request may be closed in the system.

Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

Telephone:

Arlyn Penaranda - NOAA Federal

From: Arlyn Penaranda - NOAA Federal
Sent: Monday, March 12, 2018 3:29 PM
To: Mark Graff - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Samuel Dixon - NOAA Affiliate
Subject: RE: DOC-NOAA-2017-001376 question
Attachments: Still Interested Letter_DOC-NOAA-2017-001376.docx

Please see attached draft. I'll send once I get the greenlight from you.

From: Arlyn Penaranda - NOAA Federal [mailto:arlyn.penaranda@noaa.gov]
Sent: Monday, March 12, 2018 3:11 PM
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>
Subject: Re: DOC-NOAA-2017-001376 question

Thank you. Will do and send via FOIA Online.

On Mon, Mar 12, 2018 at 3:00 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Hi Arlyn--

(b)(5)

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 Mon, Mar 12, 2018 at 2:41 PM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

Thank you. I'll wait for Mark's response. I'll continue to process the last sets of records starting tomorrow unless I hear from Mark otherwise.

On Mon, Mar 12, 2018 at 2:25 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Arlyn - I believe we can and add an explanation similar to what you stated in your email. I defer to Mark for final guidance.

Lola

On Thu, Mar 8, 2018 at 3:48 PM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

Mark/Ms. Lola,

I'm doing the last leg of review...

(b)(5) [Redacted]

[Redacted]

Please let me know how I should proceed. Will your office send the letter or will I?

Thanks.

Arlyn

----- Forwarded message -----
From: **Arlyn Penaranda - NOAA Federal** <arlyn.penaranda@noaa.gov>
Date: Mon, Jan 29, 2018 at 4:44 PM

Subject: DOC-NOAA-2017-001376 question

To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Mark,

(b)(5)

■

■

Thanks!

Arlyn

--

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>

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6)

lola.m.stith@noaa.gov

--

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>

--

Arlyn Penaranda
Records Management Specialist
Office of Law Enforcement
NOAA, National Marine Fisheries Service
Office: 301-427-8256
arlyn.penaranda@noaa.gov <arlyn.penaranda@noaa.gov>



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Office of Law Enforcement
Headquarters
1315 East West Highway
Silver Spring, MD 20910

March 12, 2018

Gabe Flick
10672 Kenai Spur
Highway, 112 PMB 916
Kenai, AK 99611

Re: FOIA Request DOC-NOAA-2017-001376

Dear Mr. Flick:

(b) (5)



(b) (5)

(b) (5)

Sincerely,

Arlyn Penaranda
FOIA Coordinator
Office of Law Enforcement

From: i360Gov Knowledge Center
Sent: Thursday, April 5, 2018 9:20 PM
To: mark.graff@noaa.gov
Subject: This week's complimentary papers and webinars for Government Professionals

Having trouble viewing this e-mail? [Click here](#) to view as a web page.
To ensure our emails reach your inbox, add info@i360gov.com to your address book or Safe Sender List.

i360Gov: Knowledge Is Key



i360Gov: Knowledge Is Key

Thursday, April 5th, 2018



Policy & Technology. News & Analysis.



Webinars

Accelerating Agency IT Modernization

The White House's American Technology Council and Office of American Innovation on modernizing federal technology published specific recommendations to jumpstart a new wave of modernization efforts by accelerating cloud adoption, consolidating networks and prioritizing key applications for needed upgrades.

Now the daunting task of implementing these recommendations sits within agencies, and it is not a one size fits all proposition. Where do they begin to successfully move away from expensive legacy infrastructure? How do they transition to a more secure, agile, and cost-effective technology ecosystem, much of which will be supported by shared services?

Join i360Gov and senior level technology leaders from government and industry as we provide an overview of current initiatives and solutions to the many IT modernization challenges agencies face, such as:

- Maintenance that often requires immediate attention and runs the risk of breaking integrations and upgrades
- Legacy solutions that are unable to properly communicate between on-premises, mobile, and the cloud
- Citizen facing services not designed for today's technology environment

You will also learn about Identity, the hidden accelerator to IT modernization, and how by creating a single solution for identity, agencies can speed up digital and cloud programs that will enable you to:

- Reduce costs and architecture complexity
- Securely connect any employee, vendor, partner or citizen to any resource, on premise or in the cloud
- Make administrators self-sufficient and decrease reliance on customization

- Scale seamlessly as you move services into the cloud

Webinar Presenters

- Dr. Ronald Ross, Computer Scientist, NIST Fellow
- David Hogue, Technical Director, Cybersecurity Threat Operations Center, NSA
- Joe Diamond, Director, Cybersecurity Strategy, Okta

Archive now available for viewing!

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Whitepapers

Invisible Data Center Infrastructure

To better understand the benefits of invisible data center infrastructure, think about the evolution of currency. In the past, we primarily relied on cash for monetary transactions. But you can only carry so much cash at one time – wallets and pockets are only so deep. And changing exchange rates for different currencies presented another frustrating and time-consuming obstacle.

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Cloud First, but Not Always

There is a lot to consider when planning a cloud strategy as it is not always the right option for government agencies. Some applications should be moved to the cloud earlier, some can reasonably be deferred, while others may never need to be in the cloud.

Private companies tend to use the cloud more than government agencies, and there are “lessons learned” from these companies that agencies can apply. Government has been slow to move towards the cloud - and for good reason. They have many questions around risk/reward, efficiencies, access, availability, and more.

Download to learn how governments can leverage private companies’ best practices and discover recommendations on making the right cloud computing decisions.

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A Portal to Improved Grantee Experience

Federal agencies are given hundreds of billions of dollars to run various public service programs and stimulate the economy. Managing these funds through the grant lifecycle is extremely challenging. Given these high stakes, agencies are focusing more on improving the user experience which will ultimately improve results.

As grantee experience improves, they would spend more time and attention on activities that matter while lowering fiscal overhead that eats into dollars available for beneficiaries of those programs.

REI Systems can help alleviate grant management challenges with a portal approach. A portal offers:

- Improved user experience
- Automation
- Increased security

- Standardization
- Performance monitoring

To learn more about what a portal can do for your agency, download now.

Sponsored by REI Systems.

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E-Signatures: How to improve service, reduce cost and increase auditability in government

If you are interested in learning how the US Army, GSA, State of Vermont, USDA and others have improved efficiency, contained cost and increased auditability with e-signatures, this Guide is for you. This ebook gives an introduction to electronic signatures for all levels of government and how the technology is transforming government processes.

E-Book highlights:

- The history of e-signatures in government
- Terminology
- Adoption trends
- How it works (support for mobile and identity management)
- Security best practices

Download this complimentary ebook now.

Sponsored by e-SignLive by Vasco.

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Unlock the Power of Now

Data storage is a constant balancing act for most organizations. Underestimate your needs and day-to-day performance can be severely hampered but buy too much capacity and you can tie up valuable capital.

Red River's Storage Capacity on Demand with Dell/EMC is the adaptable, affordable, fully-customizable solution you've been waiting for. With Storage Capacity on Demand, you can instantly cope with any unexpected increases in storage requirements and pay for exactly what you need, when you need it.

Learn more about how Red River and Dell/EMC can deliver the flexible storage you need with our latest ViewPoint, The Power of Now.

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Can you weather the storm of a cyber attack?

For most organizations, the question is not if a data breach will occur but when. In 2016, 4,149 data breaches were reported, exposing an all-time high of roughly 4.3 billion records.

It isn't enough to guard against an attack – you need to plan for the worst-case scenario. DellEMC and Red River deliver a new incident response solution, which utilizes an air gap to create an isolated recovery zone. As your last line of defense, our solution can:

- Isolate mission-critical data
- Replicate data and workflows
- Perform integrity checks and alerts
- Speed recovery time

Learn more about how DellEMC and Red River can help you prepare for your worst day and get you on the road to recovery in our

new ebook: Can you weather the storm of a cyber attack?

Download the ebook

Sponsored by *Red River*.

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eBook: Five Reasons You Should Be Thinking Flash

All-Flash storage is transforming storage architecture and revolutionizing the enterprise data center. And, with prices dropping fast, Flash is now in easy reach of agencies under tight budget constraints.

With this eBook from Red River and NetApp, you'll learn the Five Reasons You Should be Thinking Flash, along with:

- How Flash delivers more speed, capacity and responsiveness
- Why IT departments are using Flash to suit a wider variety of workloads and performance demands
- When Flash became a cost-effective option that delivers significant total cost of ownership savings
- What you can do capitalize on Flash's lightning fast, always-on cost-saving capabilities

Sponsored by *NetApp and Red River*.

Download Now | Share:

Expand Capabilities and Push Boundaries – Without Risk.

Red River and Dell EMC can help you reimagine the possibilities with leading-edge technology services and expertise in our Innovation Center in Austin, TX. A sandbox environment for testing, development, training and integration, the secure lab environment enables every application, technology and business function to be fully vetted, without the cost of infrastructure or staff.

Without risk, organizations can expand capabilities such as:

- Move to the Cloud
- Establish disaster recovery
- Enhance business continuity
- Ensure interoperability
- Meet highly unique mission demands

Download our latest datasheet to learn more what the Red River Innovation Center, powered by Dell EMC technology, can do for you.

Sponsored by *Dell EMC and Red River*.

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The Next Generation Data Center

Now is the time to ensure your data center is optimized with the latest technologies and a flexible financial model that fits your organization's changing needs. ViON has partnered with DELL EMC and Nutanix to provide exactly what you need, when you need it. With our Data Center as-a-Service, you get the latest technology and highest level of service and support accelerate your modernization efforts and reduce costs.

Download this Data Center as-a-Service infographic to learn more.

Sponsored by *Dell EMC, Nutanix and Vion*.

Download Now | Share:

IDC: Nutanix Delivering Strong Value as a Cost-Effective, Efficient, Scalable Platform for Enterprise Applications

IDC interviewed 11 organizations about their experiences running various enterprise workloads on Nutanix Enterprise Cloud Platform (Nutanix) solutions. These interviews revealed that the study participants are realizing significant value with Nutanix as a cost-effective, efficient, and business-enabling IT platform built on hyperconverged infrastructure. IDC calculates that study participants will achieve average annual benefits of \$4.24 million per organization (\$51,077 per 100 users), which would result in a five-year return on investment (ROI) of 534%, because Nutanix:

- Serves as a cost-effective IT platform
- Requires less IT staff time to deploy, manage, and support
- Provides an agile, scalable, and high-performing IT platform
- Enables improved business results and higher user productivity

Read this IDC whitepaper to learn more.

Sponsored by *Nutanix*.

[Download Now](#) | Share:

City of Redmond Moves Up to Nutanix Enterprise Cloud

Keith Laycock and Simrat Sekhon are network systems engineers for the City of Redmond. They are responsible for managing the City's networking and server infrastructure and operations. "There were a lot of moving components in our previous environment," explained Laycock. "We were using HPE servers, VMware for virtualization, Brocade switches for the SAN traffic, and NetApp storage. Trying to maintain all of that disparate infrastructure was a nightmare."

When it came time to refresh the aging infrastructure, Laycock and Sekhon were challenged by management to look for more innovative IT solutions. "NetApp maintenance is incredibly high once the systems are out of warranty," explained Sekhon. "Plus, this was our third NetApp upgrade and we were ready to try something more efficient and leading-edge. We needed to find a product that would save us time, with the high performance and reliability needed to run the City's applications and services."

This city Government IT Team Chose Nutanix for management simplicity and increased performance. Read this case study to learn more.

Sponsored by *Nutanix*.

[Download Now](#) | Share:

TCO Analysis Comparing Private and Public Cloud Solutions for Running Enterprise Workloads Using the 5Cs Framework

Is your agency in the midst of a digital transformation journey? Are you assessing the value your agency is able to extract from data? Is there a new executive mandate to embrace data-driven decision making? If you answered "yes" to any of these questions, your agency is among the majority of those in the midst of looking for agile, reliable, and flexible infrastructure to support your digital transformation initiatives in a cost-efficient manner. Organizations are looking for a structured methodology to help decide the right deployment model and location that helps accelerate their pace of innovation, improve customer experience, and gain competitive edge.

IDC recommends using a holistic approach to determine deployment location for applications to meet enterprise SLAs.

In this white paper, IDC describes the business and technical considerations and provides a framework for choosing the appropriate cloud (on-premises private cloud or off-premises public cloud) solution for deployment of customer workloads. It draws upon IDC research, customer interviews, and analysis of vendor offerings.

Sponsored by *Nutanix*.

[Download Now](#) | Share:

2017 Email Fraud Report

ValiMail's analysis of the most popular 1 million global domains shows that most domain owners have not attempted to implement fraud protection through the latest and most complete form of protection, DMARC. Of those that have attempted only 23 percent are actually achieving protection from fraud.

Sponsored by *ValiMail*.

[Download Now](#) | Share:

Public Safety & Social Media

Public Records Policies & Best Practices

Regardless of how your public safety agency plans to use social media, there are two things to keep in mind. The first is that using social media for public safety is not traditional. Social media is an open and instant means of communication, but it is also subject to higher standards and internal policies. What passes for simple commentary in the "civilian world," could lead to heavy scrutiny and disciplinary action by agency leaders when the same comment is made by a public employee.

The second is that every piece of content your agency creates on social media is considered a matter of public record, and may be used in response to an open records request. This report will analyze these two points, and provide you with the tools needed to create and maintain a social media presence that acts as a supporting extension of your public safety efforts.

Sponsored by *Smarsh*.

[Download Now](#) | Share:

Bringing you the ultimate Cloud solution

When it comes to cloud solutions, typically you have to decide what's more important: security or flexibility. But in today's world you need to be nimble to drive innovation and respond to the needs of the business, and guard against ever-increasing threats.

Now there's a way to get the flexibility you want without sacrificing the security you need.

Thanks to a partnership by industry leaders Palo Alto Networks, VMware and Red River, organizations can fully realize the agility, efficiency and cost benefits of a cloud environment while ensuring it is protected by next-generation security policies.

Learn more about how Red River, Palo Alto Networks and VMare in our new ebook: *Flexible & Secure: A Partnership that Delivers the Ultimate Cloud Solution*

Sponsored by *Palo Alto Networks, Red River and VMware*.

[Download Now](#) | Share:

The Public Sector Guide to Social Media Strategy & Policy

The widespread adoption of social media across public agencies is creating new possibilities for public outreach and media relationships. But to be heard above the noise on social networks like LinkedIn, Facebook and Twitter requires a smart strategy and thoughtful policies.

Sponsored by *Smarsh*.

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What you don't know can hurt you: Mining government data to fix issues, validate business processes, mitigate risk and improve financial statement reporting

Abstract: Governments face unprecedented challenges today. To navigate this era of increased accountability under reduced resources, you are expected to focus relentlessly on operational efficiency, cost effectiveness, productivity, service and innovation.

And that's not all.

Scrutiny of public agencies is at an all-time high around the world. Today's public servant is expected to know their business processes, identify and close the loop on red flags, transparently document and manage workflow, and collaborate with management and stakeholders in order to maintain full accountability to the taxpaying public and the lawmakers that represent them.

This 18-page eBook explores how government departments can leverage specialized risk and control analytics from ACL to:

- identify and mitigate risks, including improper payments
- identify opportunities for cost savings
- improve financial statement reporting
- stop fraud, waste, and abuse

Learn from the experts on how to "listen to your data." These tips will help you self-scrutinize for audit-readiness, fix issues quickly and build a stronger, more fiscally robust, more effective department.

Sponsored by ACL.

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How to combat government fraud, waste and abuse: A focus on government programs

It's no secret that fraud, waste and abuse in all levels of governments is a problem—and a big one. To some extent it is not surprising. Just think about the sheer number of different types of entitlement, healthcare and grant programs that exist at federal, state/provincial and local levels. Not to mention the complexity of the eligibility rules surrounding them. Trillions of dollars of payments are made to hundreds of millions of recipients. And similar size sums are collected from similar numbers of taxpayers. Inevitably, mistakes will be made. Just as inevitably, some people are going to abuse the system and make fraudulent claims and evade taxes.

Government activities and programs at all levels are so comprehensive and cover so many areas, often overlapping between levels, that the potential for different types of fraud, waste, and abuse seems almost unlimited.

This eBook will cover:

- Fraud prevention across various government programs and payment areas
- Five applications of technology and how technology can make a real difference in the ongoing challenge of keeping fraud, waste and abuse under control
- How to use Human Data as an effective method to fight fraud
- The logical steps in an overall approach to addressing the problem

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The Public Sector Guide to Text Messaging Policy and Retention

Learn the practical steps that will help your organization develop a text message policy and retention strategy to protect against the risk involved with use of this popular, universal form of communication. It also outlines smart text records management practices so you'll be better prepared to respond to open records requests or other e-discovery needs when they arise.

Download this guide to learn:

- Text message record management best practices
- How to craft a text message policy for your organization

- How records management technology helps meet your state's open records laws

Sponsored by *Smarsh*.

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Healthcare Just Got More Secure

While most healthcare organizations recognize that networked medical devices can revolutionize patient care, they often lack the resources and expertise needed to secure their devices. But with Red River, healthcare organizations don't have to worry about threat detection. Instead, they can focus on what they know best—the patients.

Secure your devices and protect your infrastructure and utility systems with help from Red River's Medical Device Isolation Architecture experts. In this datasheet, learn how to:

- Identify, classify and register all devices that connect to the network
- Align your medical device procurement strategy to identify and mitigate gaps before the device operation begins
- Implement an integrated security solution with automation to detect threats faster
- Improve risk management focused on patient care by analyzing and correlating IoT security data to inform stakeholders of risks
- Continuously monitor network access, network behavior and vulnerabilities

Download our Medical Device Isolation Architecture Overview to learn more.

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Reducing the burden of FOIA

Responding to open records requests comes with the territory when you work for a government agency. Unfortunately, many struggle with compiling and producing the requested information in a timely manner. In this three-part series, Smarsh provides you with knowledge to help reduce the burden of responding to record requests, and to stay compliant with the Freedom of Information Act (FOIA) and state and local open records laws.

Sponsored by *Smarsh*.

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Public Safety Departments & Text Messaging

Simplify Public Records with Policies and Procedures

Text messaging for business purposes is on the rise. In fact, 80 percent of respondents from a 2015 Instantly/RingCentral study are using text messaging for business purposes, and 15 percent said more than half of their texts are sent or received for business purposes.¹ Although text messaging is the most popular cell phone feature, there are certain guidelines and considerations that public safety agencies should be aware of when allowing employees to communicate by text. One such consideration is the role text messages could play in open records requests, eDiscovery, and litigious events.

In this report, we examine how public safety agencies can create policies that allow for compliant use of SMS/text messaging, and how to retain and archive those communications for a more efficient response to open records requests.

Sponsored by *Smarsh*.

Download Now | Share:

5 Actions to take for an Airtight Mobile Use Strategy in Government

Enable text messaging and reduce your organization's legal and open-records risk around mobile communications.

Many government employees and their colleagues prefer texting as a tool to conduct business because it's simply faster and easier. FOIA laws require all electronic communications used for business to be archived and supervised. It doesn't matter whether an employee uses his/her personal or government-issued cell phone. Both are fair game.

In this guide we'll provide five actions for public sector organizations to build an airtight mobile use strategy. Learn about device scenarios, policy creation, mobile device management, and the archiving process.

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Lessons in Archiving for Public Sector Agencies

In this three-part e-book, Don DeLoach, former Chief Information Officer for City of Tallahassee and consultant to local government firms, walks public sector organizations through the key elements needed to respond quickly and accurately to open records requests: identifying what information needs to be retained and archived, best practices and procedures for retaining communications, finding and implementing an automated solution, and the important roles stakeholders play in the records response process.

Sponsored by Smarsh.

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eBook: Five Reasons You Should Be Thinking Flash

All-Flash storage is transforming storage architecture and revolutionizing the enterprise data center. And, with prices dropping fast, Flash is now in easy reach of agencies under tight budget constraints.

With this eBook from Red River and Dell-EMC, you'll learn the Five Reasons You Should be Thinking Flash, along with:

- How Flash delivers more speed, capacity and responsiveness
- Why IT departments are using Flash to suit a wider variety of workloads and performance demands
- When Flash became a cost-effective option that delivers significant total cost of ownership savings
- What you can do to capitalize on Flash's lightning fast, always-on cost-saving capabilities

Sponsored by Dell EMC and Red River.

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A Faster Path to Cloud

With VSPEX and Red River, nothing stands in the way of the cost savings, extreme flexibility and opportunities for innovation that Cloud provides. The latest eBook from the experts at Red River charts a faster path to Cloud with Dell-EMC VSPEX Cloud architectures and hyper-converged infrastructure.

This eBook will show you how to:

- Take the complexity out of Cloud with a complete Cloud architecture customized to your unique infrastructure and application needs.
- Determine the right type of Cloud, be it Public, Private or Hybrid
- Drastically shorten Cloud provisioning with either VSPEX Reference Architectures or VSPEX BLUE Hyper-Converged Infrastructure
- Maximize flexibility with right-sized infrastructure, servers and network from the start
- Take control by automating provisioning and Cloud management tasks to enable operational simplicity and reduce risk

Sponsored by Dell EMC and Red River.

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Build Your Cloud Strategy with Confidence

Organizations are under immense pressure to get to the cloud now. But with tight budgets, limited resources and concerns about security and control, cloud remains out of reach for many.

In this eBook from ViON and NetApp, you'll learn how to Build Your Cloud Strategy with Confidence and use a cloud-based business model to:

- Experience freedom and flexibility using operational vs. capital funds to break free from traditional procurement constraints
- Avoid over purchasing IT resources and infrastructure
- Access best-in-class IT infrastructure, either on-premise or off, and pay only for the services you use, when you use them
- Empower security and control with ViON's unique on-prem private cloud and Anything-As-A-Service financial model
- Rapidly expand capabilities and free resources to focus on mission-critical demands

As a Veteran-owned, privately-held company with over 15 years of experience delivering cloud-based solutions, including on-premises private cloud for the Federal government, and superior expertise in XaaS models, ViON is the perfect partner to help start smart with cloud and XaaS. Discover how you can Build Your Cloud Strategy with Confidence by filling out the fields below to download this essential eBook now.

Sponsored by *NetApp and Vion.*

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The Real Costs of Building vs. Buying Data Analytics Capabilities

Companies that leverage big data analytics outperform their competitors by 20% or more and big data can help businesses realize a potential increase of 60% operating margins. But what's the best way to efficiently add these capabilities? Compare the benefits of building or buying your data analytics solution to determine which option best fits your needs in the new whitepaper from the experts at ViON and IBM. The paper evaluates all the factors associated with this decision that impact your organization including:

- Up-front costs associated with design, coding, testing, documentation as well as resource allocation
- Typical timelines for implementing a solution and an analysis of time-to-value
- Maintenance costs and considerations to ensure optimal operation after launching your solution

Get this new whitepaper now to understand your options for implementing data analytics capabilities and how you can best support your organization.

Sponsored by *IBM and Vion.*

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Public Sector Text Messaging Scandals and 3 Major Tips to Avoid Them

Being in the public eye is difficult. Just ask any celebrity. Everything they do or say can cause quite the stir, and anything they do serves as fodder for the court of public opinion. Similar rules and judgment—befalls employees of local and state government agencies. The only difference is their public notoriety often comes on the back of an embarrassing scandal. Download this guide to examine 3 recent government text message scandals, and proactive ways to avoid them.

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The Government Social Media Survival Guide

For public sector organizations, interacting with the community is an absolute necessity. Social media not only makes it easy to

communicate instantly – it can also establish your agency as a go-to resource for news, alerts, and emergency instructions.

The Government Social Media Survival Guide from Smarsh walks you through the essential steps to create an approachable, engaging relationship with your community through social media.

Download this complimentary guide now.

Sponsored by *Smarsh*.

Download Now | Share:

3 Ways Text Messaging Exposes Government Organizations to Massive Risk

Texting is simple, concise and compatible with virtually every mobile device, operating system and wireless carrier—making it extremely accessible when a government official or employee wants to communicate with staff or community members in a time-crunched world. But even though text is easy, reliable and intuitive—if it’s used for official business communications, it can create tremendous risk.

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Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Thursday, April 5, 2018 5:26 PM
To: Stacey Nathanson - NOAA Federal
Cc: Robert Swisher - NOAA Federal; Lola Stith - NOAA Affiliate
Subject: Cause of Action Follow-Up Request
Attachments: Fee Waiver Denial with appeal language.docx

Hey Stacey,

(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) (C)

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U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

August 19, 2020

Attn: Ryan P. Mulvey
Cause of Action Institute
1875 Eye St. NW, Suite 800
Washington, DC 20006

Re: FOIA Request No. DOC-NOAA-2018-001058

Dear Mr./Ms. Mulvey:

(b) (5)

(b) (5)

(b) (5)

Sincerely,

Mr. Mark Graff
NOAA FOIA Officer



Lola Stith - NOAA Affiliate

From: Lola Stith - NOAA Affiliate
Sent: Monday, April 9, 2018 5:53 AM
To: Mark Graff - NOAA Affiliate
Subject: March Monthly FOIA Report (DRAFT FOR YOUR REVIEW)
Attachments: FOIA Monthly Status Report 03-31-2018.xlsx; FOIA Monthly Status Report 03-31-2018.pdf; Incoming_032018.xls; Closed_032018.xls; Backlog_032018.xls; Open_032018.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) [REDACTED])
lola.m.stith@noaa.gov

Tracking Number	Type	Track	Requester	Submitted
DOC-NOAA-2018-000716	Request	Simple	Vivian Wang	02/08/2018
DOC-NOAA-2018-000803	Request	Simple	Rose Santos	02/21/2018
DOC-NOAA-2017-001994	Request	Simple	Rose Santos	06/01/2017
DOC-NOAA-2017-001995	Request	Simple	Rose Santos	06/01/2017
DOC-NOAA-2017-001996	Request	Simple	Rose Santos	06/01/2017
DOC-NOAA-2018-000784	Request	Simple	Sean Ahern	11/10/2017
DOC-NOAA-2018-000730	Request	Simple	Rose Santos	02/12/2018
DOC-NOAA-2018-000694	Request	Simple	Tori Foster	02/06/2018
DOC-NOAA-2018-000670	Request	Simple	Rose Santos	01/31/2018
DOC-NOAA-2018-000662	Request	Simple	Rose Santos	01/30/2018
DOC-NOAA-2018-000604	Request	Simple	Mary McCullough	01/20/2018
DOC-NOAA-2018-000589	Request	Simple	Rose Santos	01/17/2018
DOC-NOAA-2018-000590	Request	Simple	Rose Santos	01/17/2018
DOC-NOAA-2018-000511	Request	Simple	Rose Santos	12/30/2017
DOC-NOAA-2017-000298	Request	Complex	Charles Mouton	11/30/2016
DOC-NOAA-2015-001487	Request	Simple	Richard Knudsen	06/29/2015
DOC-NOAA-2018-000765	Request	Simple	Naja Girard	02/01/2018
DOC-NOAA-2018-000303	Request	Simple	Ronald B. Hardwig	11/17/2017
DOC-NOAA-2017-001987	Request	Simple	Victoria Abbasi	04/13/2017
DOC-NOAA-2018-000819	Request	Simple	Max Alexander	02/22/2018
DOC-NOAA-2017-002002	Request	Simple	Daniel Bladele	09/15/2017
DOC-NOAA-2017-001966	Request	Simple	Alex Kotch	09/15/2017
DOC-NOAA-2018-000763	Request	Complex	Adam Carlesco	02/14/2018
DOC-NOAA-2018-000684	Request	Simple	Hallie G. Templeton	02/05/2018
DOC-NOAA-2017-001190	Request	Simple	ERIC R. BOLINDER	05/09/2017
DOC-NOAA-2017-001992	Request	Complex	Margaret Townsend	09/26/2017
DOC-NOAA-2017-001991	Request	Complex	Thomas C. Sullivan	06/23/2017
DOC-NOAA-2018-000780	Request	Simple	Eric Coleman	01/29/2018
DOC-NOAA-2018-000740	Request	Simple	Doug Gillie	02/13/2018
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DOC-NOAA-2018-000587	Request	Simple	Hallie G. Templeton	01/17/2018
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DOC-NOAA-2018-000070	Request	Complex	Cathy Readinger	10/03/2017
DOC-NOAA-2018-000377	Request	Complex	Alicia Cate	12/01/2017
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DOC-NOAA-2018-000318	Request	Simple	Sarah N. Emerson	11/21/2017
DOC-NOAA-2018-000183	Request	Complex	Sean Sherman	10/25/2017
DOC-NOAA-2018-000077	Request	Complex	Maraya Cornell	10/11/2017
DOC-NOAA-2017-001974	Request	Complex	Ryan P. Mulvey	09/21/2017
DOC-NOAA-2017-001798	Request	Complex	Brett Sommermeyer	08/31/2017
DOC-NOAA-2017-001741	Request	Complex	Vivian Wang	08/22/2017
DOC-NOAA-2017-001606	Request	Complex	Molly Masterton	07/26/2017
DOC-NOAA-2017-001394	Request	Complex	Ivy N. Fredrickson	06/19/2017
DOC-NOAA-2017-001316	Request	Complex	Chris Saeger	06/07/2017
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DOC-NOAA-2017-001431	Request	Complex	Margaret Townsend	06/27/2017
DOC-NOAA-2017-001391	Request	Complex	Elizabeth A. Mitchell	06/16/2017
DOC-NOAA-2017-001376	Request	Complex	Gabe Flick	06/12/2017
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DOC-NOAA-2017-001092	Request	Complex	Brettny E. Hardy	04/26/2017
DOC-NOAA-2017-001093	Request	Complex	Brettny E. Hardy	04/26/2017

DOC-NOAA-2017-001094	Request Complex	Brettny E. Hardy	04/26/2017
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DOC-NOAA-2017-001220	Request Complex	Nathan Eagle	05/16/2017
DOC-NOAA-2017-001217	Request Complex	Nathan Eagle	05/16/2017
DOC-NOAA-2017-001219	Request Complex	Nathan Eagle	05/16/2017
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DOC-NOAA-2017-000304	Request Complex	Bryn Blomberg	11/30/2016
DOC-NOAA-2017-000170	Request Complex	Kara McKenna	11/09/2016
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DOC-NOAA-2016-000423	Request Complex	Ryan P. Mulvey	12/21/2015
DOC-NOAA-2015-000190	Request Simple	Miyo Sakashita	11/02/2014
DOC-NOAA-2018-000802	Request Simple	Patrick Martin	10/24/2017
DOC-NOAA-2018-000781	Request Simple	Russ Kick	01/05/2018
DOC-NOAA-2018-000428	Request Complex	Ryan P. Mulvey	12/11/2017
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DOC-NOAA-2018-000798	Request Complex	Jonathan Clark	11/04/2017
DOC-NOAA-2018-000752	Request Complex	david swatland	02/13/2018
DOC-NOAA-2017-000414	Request Complex	Arnold & Porter Kaye Scholer LLP	01/09/2017
DOC-NOAA-2018-000202	Request Complex	Marshall R. Morales	11/01/2017
DOC-NOAA-2018-000273	Request Complex	Andrew G. Ogden	11/14/2017
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DOC-NOAA-2017-001009	Request Complex	Edward Duhe	03/31/2017
DOC-NOAA-2017-001676	Request Complex	Vincent C. Catania	08/09/2017
DOC-NOAA-2017-001569	Request Complex	Sarah N. Emerson	07/19/2017
DOC-NOAA-2018-000816	Request Simple	Susan Carroll	10/25/2017
DOC-NOAA-2018-000761	Request Simple	John B. Mena	02/14/2018
DOC-NOAA-2018-000698	Request Expedited	Daniel Wagner	10/17/2017
DOC-NOAA-2018-000561	Request Simple	Stephanie Kuzydym	01/12/2018
DOC-NOAA-2018-000580	Referral Simple	Allan Blutstein	12/22/2017
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DOC-NOAA-2017-001059	Request Simple	Richard Hirn	04/18/2017
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DOC-NOAA-2018-000671	Request Simple	Margaret Townsend	02/01/2018
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DOC-NOAA-2017-001954	Request Simple	Alex Veeneman	09/28/2017
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DOC-NOAA-2017-001756	Request Simple	Jeff Tollefson	08/24/2017
DOC-NOAA-2017-001734	Request Simple	Andrew C. Revkin	08/21/2017
DOC-NOAA-2017-001739	Request Simple	Lauren N. Evans	08/22/2017
DOC-NOAA-2017-001722	Request Simple	Michael Ravnitzky	08/21/2017
DOC-NOAA-2018-000622	Request Simple	Patricia Mann	12/28/2017

Assigned To	Due	Days Backlogged
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AGO	03/19/2018	15
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AGO	03/06/2018	24
AGO	02/22/2018	32
AGO	02/21/2018	33
AGO	02/21/2018	33
AGO	02/08/2018	41
AGO	01/13/2017	266
AGO	07/31/2015	673
CAO	03/29/2018	1
CAO	12/20/2017	74
CAO	05/11/2017	227
CIO	03/26/2018	10
LA	03/27/2018	3
LA	11/08/2017	102
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NMFS	01/24/2018	52
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NMFS	05/09/2017	213
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NMFS	10/27/2016	361
NMFS	02/04/2016	462
NMFS	12/05/2014	829
NOAA FOIA	03/21/2018	13
NOAA FOIA	03/19/2018	15
NOAA FOIA	02/01/2018	46
NOS	03/06/2018	6
NOS	03/21/2018	13
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NOS	09/19/2017	137
NOS	09/05/2017	147
NWS	03/26/2018	10
NWS	03/15/2018	17
NWS	03/07/2018	23
NWS	02/14/2018	37
NWS	01/24/2018	52
NWS	10/24/2017	111
NWS	05/19/2017	177
NWS	04/12/2017	237
OAR	03/14/2018	18
OAR	02/26/2018	30
OAR	02/22/2018	32
OAR	12/05/2017	85
OAR	11/16/2017	97
OAR	10/30/2017	109
OAR	10/25/2017	110
OAR	11/25/2016	202
OAR	11/09/2016	205
OC	11/08/2017	13
OC	08/30/2017	150
OC	08/16/2017	160
OGC	12/01/2017	38
OGC	06/16/2017	202
OMAO	11/08/2017	102
USEC	09/22/2017	134
USEC	09/20/2017	136
USEC	09/20/2017	136
USEC	09/19/2017	137
WFMO	02/27/2018	29

Tracking Number	Type	Requester
DOC-NOAA-2018-000423	Request	Rose Santos
DOC-NOAA-2018-000731	Request	Rose Santos
DOC-NOAA-2018-000582	Request	Joel P. Angeles
DOC-NOAA-2018-000555	Request	Skyler Kopko
DOC-NOAA-2018-000615	Request	Gary M. Crothers
DOC-NOAA-2018-000788	Request	Martha L. Parkinson
DOC-NOAA-2018-000468	Request	Katarina Zimmer
DOC-NOAA-2018-000463	Request	John Fulweiler
DOC-NOAA-2018-000387	Request	Ryan P. Mulvey
DOC-NOAA-2018-000105	Request	Allan Parachini
DOC-NOAA-2017-002001	Request	David Michel
DOC-NOAA-2016-001751	Request	Thomas Knudson
DOC-NOAA-2017-001986	Request	Beryl C. Lipton
DOC-NOAA-2018-000865	Request	Taylor S. Johnson
DOC-NOAA-2018-000861	Request	Douglas B. Noltie
DOC-NOAA-2018-000859	Request	John Hoey
DOC-NOAA-2018-000835	Request	Jordan Waltz
DOC-NOAA-2018-000820	Request	John R. Leek
DOC-NOAA-2018-000813	Request	Shannon M. Cremeans
DOC-NOAA-2018-000785	Request	David Morgante
DOC-NOAA-2018-000762	Request	Philip Bayley
DOC-NOAA-2018-000756	Request	Gregory A. Zitani
DOC-NOAA-2018-000749	Request	Alan Abend
DOC-NOAA-2018-000688	Request	Joe Frawley
DOC-NOAA-2018-000666	Request	Alexis Thomas
DOC-NOAA-2018-000665	Request	Alexis Thomas
DOC-NOAA-2017-002004	Request	David Abell
DOC-NOAA-2018-000821	Request	Lisa Cavazuti
DOC-NOAA-2018-000818	Request	Max Alexander
DOC-NOAA-2018-000758	Request	Gregory A. Zitani
DOC-NOAA-2018-000757	Request	Gregory A. Zitani
DOC-NOAA-2018-000636	Request	Steve Ham
DOC-NOAA-2017-001999	Request	Marie Ashford-Smith
DOC-NOAA-2018-000882	Request	Thomas Wyatt
DOC-NOAA-2018-000621	Request	stephen j. franklin
DOC-NOAA-2018-000453	Request	Hallie G. Templeton
DOC-NOAA-2018-000437	Request	Paul Lannus
DOC-NOAA-2018-000572	Request	Jeff Ruch
DOC-NOAA-2018-000714	Request	Eric Feist
DOC-NOAA-2018-000854	Request	Holly Jablonski
DOC-NOAA-2017-001745	Request	Michael Ravnitzky
DOC-NOAA-2018-000598	Request	Brian C. Eiler
DOC-NOAA-2018-000467	Request	Pamela Paige Murphy-Youn
DOC-NOAA-2018-000180	Request	James McNally
DOC-NOAA-2017-001760	Request	John Harding

Requester Organization	Submitted	Received	Assigned To
FOIA GROUP INC	12/09/2017	12/11/2017	AGO
FOIA GROUP INC	02/12/2018	02/12/2018	AGO
	01/17/2018	01/17/2018	AGO
Muckrock	10/05/2017	10/05/2017	CAO
Small-Medium	01/24/2018	01/24/2018	CAO
AECOM	02/20/2018	02/20/2018	NESDIS
Self-employed	12/18/2017	12/18/2017	NMFS
Fulweiler Ite	12/08/2017	12/08/2017	NMFS
Cause of Action Institute	12/05/2017	12/05/2017	NMFS
The Garden Island, Lihue, HI	10/16/2017	10/16/2017	NMFS
	09/20/2017	09/20/2017	NMFS
Center for Investigative Reporting	09/14/2016	09/14/2016	NMFS
MuckRock	08/25/2017	08/25/2017	NMFS
Tacoma Community College	03/01/2018	03/01/2018	NMFS
University of Missouri, School of Natural Resources	03/01/2018	03/01/2018	NMFS
University of Massachusetts Dartmouth	02/28/2018	02/28/2018	NMFS
	02/23/2018	02/23/2018	NMFS
San Diego Council of Divers	02/23/2018	02/23/2018	NMFS
	02/21/2018	02/21/2018	NMFS
Seton Hall University (Student)	02/16/2018	02/16/2018	NMFS
	02/14/2018	02/14/2018	NMFS
Greg Zitani	02/14/2018	02/14/2018	NMFS
University of Massachusetts Boston	02/12/2018	02/12/2018	NMFS
	02/05/2018	02/05/2018	NMFS
	01/31/2018	01/31/2018	NMFS
	01/31/2018	01/31/2018	NMFS
Sierra Club	08/08/2017	08/08/2017	NOAA FOIA
NBC News	02/23/2018	02/23/2018	NOAA FOIA
	02/22/2018	02/22/2018	NOAA FOIA
Greg Zitani	02/14/2018	02/14/2018	NOAA FOIA
Greg Zitani	02/14/2018	02/14/2018	NOAA FOIA
Secure Lead Solutions LLC	01/28/2018	01/29/2018	NOAA FOIA
Banker Lopez Gassler P.A.	09/07/2017	09/07/2017	NOS
QUATTLEBAUM, GROOMS & TULL PLLC	02/28/2018	02/28/2018	NOS
	01/24/2018	01/24/2018	NOS
Friends of the Earth	12/15/2017	12/15/2017	OAR
	12/13/2017	12/13/2017	OAR
PEER	01/16/2018	01/16/2018	OAR
GS Environmental Inc.	10/17/2017	10/17/2017	OMAO
	02/27/2018	02/27/2018	OMAO
	08/22/2017	08/22/2017	USEC
	01/18/2018	01/18/2018	USEC
	12/12/2017	12/12/2017	WFMO
QUINTAIROS, PRIETO, WOOD Be BOYER, P.A.	10/30/2017	10/30/2017	WFMO
Martin Kane & Kuper	08/16/2017	08/16/2017	WFMO

Perfected?	Due	Closed Date	Status	Dispositions
Yes	01/16/2018	03/07/2018	Closed	Request withdrawn
Yes	03/15/2018	03/06/2018	Closed	Request withdrawn
Yes	02/21/2018	03/07/2018	Closed	No records
Yes	11/03/2017	03/21/2018	Closed	No records
Yes	02/22/2018	03/15/2018	Closed	No records
Yes	03/23/2018	03/05/2018	Closed	No records
Yes	02/23/2018	03/20/2018	Closed	Fee-related reason
Yes	01/18/2018	03/08/2018	Closed	Other - Directed requester to publicly available information
Yes	01/24/2018	03/08/2018	Closed	Partial grant/partial denial
Yes	11/16/2017	03/14/2018	Closed	Partial grant/partial denial
Yes	03/26/2018	03/08/2018	Closed	Full grant
Yes	10/28/2016	03/05/2018	Closed	Partial grant/partial denial
Yes	09/25/2017	03/16/2018	Closed	Other - Admin close - still interested letter
Yes	04/02/2018	03/29/2018	Closed	Full grant
Yes	04/02/2018	03/20/2018	Closed	Request withdrawn
Yes	03/28/2018	03/21/2018	Closed	Full grant
Yes	03/27/2018	03/05/2018	Closed	Full grant
Yes	03/26/2018	03/08/2018	Closed	No records
Yes	03/26/2018	03/26/2018	Closed	Full grant
Yes	03/23/2018	03/29/2018	Closed	Partial grant/partial denial
Yes	04/06/2018	03/20/2018	Closed	Partial grant/partial denial
Yes	03/29/2018	03/08/2018	Closed	Full denial based on exemptions
Yes	03/15/2018	03/08/2018	Closed	Full grant
Yes	03/14/2018	03/29/2018	Closed	Full grant
Yes	03/13/2018	03/26/2018	Closed	Full grant
Yes	03/13/2018	03/26/2018	Closed	Full grant
No	TBD	03/07/2018	Closed	Request withdrawn
No	TBD	03/07/2018	Closed	Duplicate request
Yes	03/26/2018	03/14/2018	Closed	Other - Aggregate cases
No	TBD	03/07/2018	Closed	Duplicate request
No	TBD	03/07/2018	Closed	Duplicate request
Yes	03/06/2018	03/07/2018	Closed	Other - Directed requester to publicly available information
Yes	03/20/2018	03/22/2018	Closed	Full grant
Yes	04/02/2018	03/28/2018	Closed	No records
Yes	03/06/2018	03/30/2018	Closed	Partial grant/partial denial
Yes	01/19/2018	03/16/2018	Closed	No records
Yes	01/18/2018	03/14/2018	Closed	No records
Yes	02/21/2018	03/14/2018	Closed	No records
Yes	03/09/2018	03/15/2018	Closed	Full grant
Yes	03/27/2018	03/15/2018	Closed	Full grant
Yes	09/22/2017	03/13/2018	Closed	No records
Yes	02/21/2018	03/13/2018	Closed	Full grant
Yes	01/17/2018	03/13/2018	Closed	Not an agency record
Yes	12/05/2017	03/08/2018	Closed	Request withdrawn
Yes	10/10/2017	03/01/2018	Closed	Request withdrawn

Detail

[Reference FGI 17-55354] relevant to DOCDCG133E09CN0094 we seek the following: (1) contract with current SOV [Reference FGI 18- 56254] relevant to DOCST133017CQ0061 we seek the following: (1) Contract sections A-M ar Hello, Hope this message finds you well. I worked on the NPOESS NPP/JPSS (VIIRS) program from 2005-2008. I This is a request under the Freedom of Information Act. I hereby request the following records: Any records and co I am requesting the Inspector General Report composed as a result of DOC OIG Referral 17-0688-N. I filed the all In the NOAA Data Catalogue, there exists Enhanced Hourly Wind Station Data for the Contiguous United States. V December 18, 2017 Dear FOIA Officer: This is a request under the Freedom of Information Act. I hereby request th 1. Copy of Confirmation of Permit History fur the f/v ALEX MARIE (Doc. Number 1027010). 2. Copies of all permits Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, CoA Institute hereby requests access tc REVISED DESC 11/1: -Final reports and official letters addressed to the Navy from NOAA -NMFSPacific Islands R Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of all repo A copy of the NMFS contract Arinex Pty Ltd. for the 8th International Fisheries Observer & Monitoring Confere As discussed 24 Jan 2018, for now we'll limit this request to the Level A reports for stranded or deceased whales (u I am conducting a statistical study of the average lifespans of Killer Whales in captivity and in the wild and am kindl I am seeking a report prepared using either Dingell-Johnson funding, or U.S. Department of Commerce, National C Please find attached a public records act request from Cause of Action Institute. As detailed in our letter, we are se I would like to request any necropsy or medical documents pertaining to Ripley (NOA0003759), an Atlantic Bottlenc On the morning Feb 21, a dead sea lion was found on the beach at Children's Pool San Diego, CA 93037. It was sl I am requesting a copies of permit #884 filed in 1994 or 1993 for the public display or import of a killer whale at Sea I am a doctoral student at Seton Hall University. I am also a career law enforcement officer. I am conducting a diss I want all written and verbal communications (text, images, pictures, etc) between Conrad Newell (conrad.newell@ Request full investigative file and any other documents related an investigation of my clients Alexander Kompother A copy of Marine Mammal Rescue Nantucket (MMRACK) Stranding Agreement application. I would like information on the granting of an ESA permit for TULALIP TRIBES REGULATION NO: 2017-214-104 (I am requesting any marine mammal necropsy reports or necropsy-related information reported from Dolphin Ques I am requesting any marine mammal necropsy reports or necropsy-related information reported by Sea Life Park F Global Change Research Act of 1990. For all NOAA programs and activities described above, the Sierra Club requ February 23, 2018 National Oceanic and Atmospheric Administration Public Reference Facility (SOU1000) 1315 E. I am writing to request the official records for an incident that was investigated by NOAA's Cyber Security Center. T Request full investigative file and any other documents related an investigation of my clients Alexander Kompother Request full investigative file and any other documents related an investigation of my clients Alexander Kompother I am requesting a employee e-mail contact list in Excel Spreadsheet format (if possible) for all N.O.A.A. employees In regard to Marker "G" referenced on the attached CG-2554s , please provide us with copies of the following: 1. Al Benchmarks and any conversion from North American Vertical Data 1988 (NA VD88) . and National Geodetic Vert Requesting digital (online) copies of Approved Special Use Permits for Scientific Scuba Diving Activities on the US REVISED DESCRIPTION: This request pertains specifically to any ESA Section 7 consultations, and NEPA catego Under Title 5 of the United States Code Section 552 and the California Public Records Act, I hereby request an opp Pursuant to the Freedom of Information Act, 5 U.S.C. 552, as amended, Public Employees for Environmental Resp I would like to FOIA the results of the above referenced solicitation (NMAN7100-17-01612). Specifically I would like I am requesting the list of 15 Commanders for whom personnel actions were approved and who were to receive Le A copy of the Meeting Minutes for the Gulf Coast Interagency Environmental Restoration Working Group, during C. A letter from Deputy Under Secretary for Operations Ben Friedman to the Government Accountability Office regard A former NOAA employee, I am requesting records in response to a Social Security Administration (SSA) requirem YOUR ENTIRE FILE WITH ALL CONTENTS, including but not limited to any and all personnel records, employe A true, complete and certified copy of your entire personnel/employment file of Thomas E. Taylor, III including but r

[REDACTED]

N/PWS; and attachments, modifications

and all attachments, including SOW.

I would like to request any contract pertaining to this program for this time period. This was also under NOAA communications regarding the "NOAA Withdrawal Land" outside of Fairbanks, AK. Here is a link to the allegations that triggered this IG report process under the Whistleblower Act, I am the Whistleblower in this case. We would be deeply obliged if you could provide us with the equivalent data for cities in the United Kingdom. The following records: All records, including but not limited to, reports, memos and communications (electronic); including, but not limited to, access and moratorium permits for the f/v ALEX MARIE (Doc. Number 102); all issues of "Fathoms," a NOAA-generated publication of the Greater Atlantic Regional Office, published by the Regional Office, concerning the causes of death of pilot whales in the State of Hawaii for the period of January 1980 to March 1981 submitted to NOAA from the Maritime Aquarium of Norwalk (Connecticut). Particularly, if there are any records in San Diego, California from August 29 to September 2, 2016, including attachments. Copies of all records used to reference animals with "whale" in the common name) from Jan 1, 2017 through Dec 31, 2017 for the purpose of requesting an inventory database of all living and deceased orcas and their estimated ages in an effort to support the Oceanic and Atmospheric Administration, National Marine Fisheries Service, Management Division, State of Hawaii, seeking public records under the control of Dr. John Quinn.

Case of a dolphin from Indianapolis Zoo, who died December 21, 2017.

The dolphin was found dead on a beach in Hawaii, perhaps premature or only starved. Lifeguards and a ranger retrieved the body to turn in to authorities in Hawaii. I would like to request all documents associated with permit #884 including, if possible, the application for the permit, the permit research project and respectfully request NOAA's current firearms policy for law enforcement of Hawaii (noaa.gov) and any of the following persons listed below relating to Philip Bayley, Big D's Beach Cabin, Lilihue, Hawaii and Jason Boyll, for the investigation conducted by S/A Kelly Kamala, and/or others at NOAA Office of Hawaiian Affairs.

(Steelhead 8A1,8A2,8A3,8A4, 8D), which enacts a steelhead season for Tulalip tribal members. Because of the steelhead season in Hawaii and Dolphin Quest Oahu from 2000 to present. Thank you.

Case of a dolphin from Hawaii (Owned by Palace Entertainment) from 2000 to present. Particularly, I am looking for the necropsy reports and all Records including, but not limited to, the following: 1. All Records regarding proposed elimination of the West Highway (SSMC3) Room 9719 Silver Spring, Maryland 20910 Dear FOI Officer, Pursuant to the incident number is NOAA-INC-223951. Please provide me with a copy of: 1. the investigative findings and reports of Philip Bayley and Jason Boydd, for the investigation conducted by S/A Kelly Kamala, and/or others at NOAA Office of Hawaiian Affairs; 2. the investigative findings and reports of Philip Bayley and Jason Boydd, for the investigation conducted by S/A Kelly Kamala, and/or others at NOAA Office of Hawaiian Affairs; 3. the investigative findings and reports of Philip Bayley and Jason Boydd, for the investigation conducted by S/A Kelly Kamala, and/or others at NOAA Office of Hawaiian Affairs; in the states of IL, IN, MN, and PA, separated by state if possible, to be sent via e-mail.

All correspondence and documentation of any communications and/or documents between NOAA and the National Oceanic and Atmospheric Administration (NOAA) for the following location: Physical Address 108 Jones Lane Mayflower, Massachusetts 01906. The time frame is from 2007 through the present. I am requesting an opportunity to inspect or obtain copies of the following records that pertain to the ship, USC&GSS Plover (USCGC 22070) for the purpose of conducting a Peer Review (PEER), requests information concerning recent actions to comply with the requirements of the PEER. I would like to know: The firm awarded the contract The awarded dollar amount.

Letters of Commendation for Performance as a result of the NOAA Corps 2017 Annual Review, as stated in the Annual Report for the calendar Years 2015, 2016 and 2017. NOAA serves as the Chair of this Interagency Working Group.

Requesting National Weather Service staffing vacancies. This letter should have been transmitted in the second quarter of 2017. I am requesting documentation relevant to my appeal of the SSA's initial benefits determination. Specifically, the following records, including employment application, letters of recommendation, health records, physical examination reports, and performance evaluations, not limited to application for employment, performance evaluations, wage earnings, disability records, attestation of service, and other records.

DOA Contract No. 50-SPNA-9-00010 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.201.280>
link to the land I am referring to <https://eplanning.blm.gov/epl-front-office/projects/nepa/77455/104562/12>
is matter under federal law, and my allegations included allegations that NOAA consciously and with mali
om. In particular, the city of Leeds is of interest.

ronic, physical and otherwise sent or received by representatives of this agency), regarding an investiga
27010). 3. Copies of all completed Applications for Vessel Replacement, Upgrade, and Confirmation of I
ad between December 1, 2015 and the present. You may exclude from the scope of this request the Apr
r. 1, 2000, to the present. -Final reports and full documentation for necropsies performed on pilot whales
ny of the following, they would be considered priority : marine Mammal Inventory Reports (MMIR), necro
I NMFS correspondence (electronic and hard-copy) with Arinex Pty Ltd. regarding the conference, includ
r the East Coast and Gulf of Mexico area, and from there, I'll identify the events for which I would like to
t to keep my study non-biased and with a large enough sample size.

e-Federal Relations Branch, Commercial Fisheries Research and Development funding. The report wou

ties. I would like to get a copy of the necropsy if one was done. Certainly a copy of the disposition of t
lication for import permit, the application for public display permit, the approved permit for public display
fficers. Please include areas of policy regarding carrying duty-weapons while off-duty, as well as carrying
.LC, Army Corp's case "Bayley, P. NWS 2017-729": 1) Jason Sweeney (jason.t.sweeney@usace.army.r
: of Law Enforcement in St. Petersburg, FL

e this request could potentially produce many documents, please contact me, via email or telephone, to

y or any reported information regarding the death of Mikioi, a bottlenose dolphin that died at Sea Life Pa
n or reduced levels of funding for the 2017- 2018 fiscal year. 2. All Records regarding statutory obligatio
ie federal Freedom of Information Act (5 U.S.C. § 552) I am requesting a record of all employee an
is of the incident 2) The internet browsing history of the person(s) who used a government information s;
æ of Law Enforcement in St. Petersburg, FL
æ of Law Enforcement in St. Petersburg, FL

e United States Coast Guard relating to the revisions and/or changes to the location of "Marker G" in the
rkansas 72106 Geographical Coordinates Latitude: 34 Degrees, 57 Minutes, 19 Seconds Longitude: 92
ie end of 2017 (in essence 10 years looking back from current date). I only wish for permits that are for s
nents, including any records related to the preparation of such documents and the documents themsel
ner (OSS-31). • Ship/captain's logs for the USC&GSS Pioneer (OSS-31). • Documents concerning
e Animal Welfare Act by two components of the National Oceanic & Atmospheric Administration (NOAA)

in email from the Director (RADM David Score) dated 11 May 2017 and titled "Director's Message

l half of 2016, most likely through NOAA's GAO liaison. If this letter is difficult to locate, perhaps ask the
SSA is requiring documents: 1) Showing that I am not (and have not been) receiving monthly pension b
ination report, payroll records, questionnaire forms, correspondence, documents concerning background
endance records, vacation and/or sick time taken, workers' compensation claims; copies of any and all

5&rep=rep1&type=pdf

8131/Withdrawal_Land_Status_Map.pdf Of particular interest is communication surrounding "Parc
ice of forethought, sought to abuse it's jurisdiction to deprive me of my federally recognized property righ

tion with case number PI1501648. According to a NOAA Public Affairs officer, this investigation was cor
-history for the f/v ALEX MARIE (Doc. Number 102701 O).

ril 1– 15, 2017 issue of Fathoms, which has been already disclosed in response to another FOIA reques
s in the State of Hawaii by NOAA-NMFS-Pacific Islands Regional Office for the period of January 1, 200
psy reports, Marine Mammal Transfer Notifications (MMTTN). Also, I request a full animal inventory of t
ling attachments.

receive necropsy reports.

ld also have been submitted to the Ohio Department of Natural Resources. The report citation is: Hayw

re remains. Sea World was not involved.

and all documentation within the application such as letters, correspondence, inspection reports, invent
y personal weapons off-duty. Thank you for your assistance. In summary, please provide your firearms p
nil) 2) Matthew Bennett (matthew.j.bennett@usace.army.mil) 3) Pongkhamsing, Chan 4) Rave-Perkins,

discuss what exactly is being requested.

rk in 2017. Thank you.

ns to perform a program or observation proposed for elimination or reduced funding for the 2017-2018 fi
ld contractor expenses that include payment to the Trump International Hotel Washington D.C. since Se
ystem to impersonate me using my email address maxalexander81@verizon.net, 3) the investigative rep

3 Choctawhatchee Bay noted on Chart 11385 19th Ed. Sept. 29/90; 2. All correspondence and documen
: Degrees, 31 Minutes, 34 Seconds Section Description Section 29, Township 4 North, Range 13 West,
scuba diving activities only, and only those permits that have been approved. I do not request any permit
es. These records should include, but not be limited to, any internal or external correspondence regardin
g the presence or remediation (including abatement) of asbestoscontaining materials aboard or from the
: the Oceanic & Atmospheric Research (OAR) and the National Ocean Service (NOS). Specifically, we r

3 - Lineal List Annual Review". A copy of this email is attached.

GAO liaison to search his email for internal correspondence to/or from Brian Eiler (myself) who helped
enefits associated with my work for NOAA; and 2) Providing proof of the amount of any lump sum paym
d investigations, telephone messages, notes, time lost from work due to any injury or illness, reason for
doctor's reports, doctors notes concerning medical/physical limitations; and reports of physical examina

[REDACTED]

rel G," the land that NOAA may be relinquishing to Kinross. I am interested in any agency commun
its in the matter of Kohala Coast Enterprises v. Unidentified Shipwrecked Vessel, as such, I believe the l

ducted by NOAA's Office of Law Enforcement and forwarded to NOAA's Office of General Counsel, En

t. Please see the attached PDF for a complete description of CoA Institute's FOIA request.

0, to the present. This includes supporting materials such as lab reports, Level A data, photographs, res
he permanent "exhibits", in particular the seals (marine mammals) and all sharks and stingrays, includer

ard, R.S.; and F.J. Margraf. 1983. Analysis of yellow perch growth in western and central basins of Lake

ory reports, mortality reports. The permit would apply to animal #NOA0003091

olicy for law enforcement officers and be sure to include off-duty firearm

, Krista 5) Mickey Adkins mickey.adkins@noaa.gov 6) Kim Kratz - NOAA Federal kim.kratz@noaa.gov

iscal year. 3. All Records regarding how statutory obligations will be met after the program or observatio
ptember 1, 2016, as well as all expenditures made by the National Oceanic and Atmospheric Administr
port and or SIEM data regarding the incident, and 4) any email related to the incident

tation of any communications and/or documents between NOAA and the United States Coast Guard rel
in Faulkner County, Arkansas Mile Marker Arkansas River mile+/- 143 marker

ls that have been denied. These permits are specifically for the USS Monitor National Marine Sanctuary
g the application of the aforementioned laws and preparation of assessments, statements, and consulta

: USC&GSS Pioneer (OSS-31). • Documents concerning the repair, overhaul or maintenance of the
request the following: 1. The roster for the IACUC members for OAR and NOS; 2. Minutes of the IACUC

pull the letter together.

ent received and the effective date of such payment. The Social Security Administration requires that su
termination of employment, AND ANY AND ALL RECORDS WHATSOEVER YOU MAY HA VE regardir
tions.

ications that have any of
law entitles me to see all the information and repor

forc

ponse reports, and e
d all their medical reports. I request as well, the or

: Erie. Final Report. Period Covered: 1 July 1982 - 30 June 1983.

7) Jennifer L Quan 5) Lisa Lavington (rub

n is eliminated or receives reduced funding f
ation to the Trump International Hotel Washington D.C. since September 1, 2016. The ex

ating to the revisions and/or changes to the location of "Mark

w
ition

3 USC&GSS Pioneer (OSS- 31). • Photographs of
meetings for OAR and NOS; 3. Actions that

ich proof "be th
rg: MELISSA SOLDEVILLA.





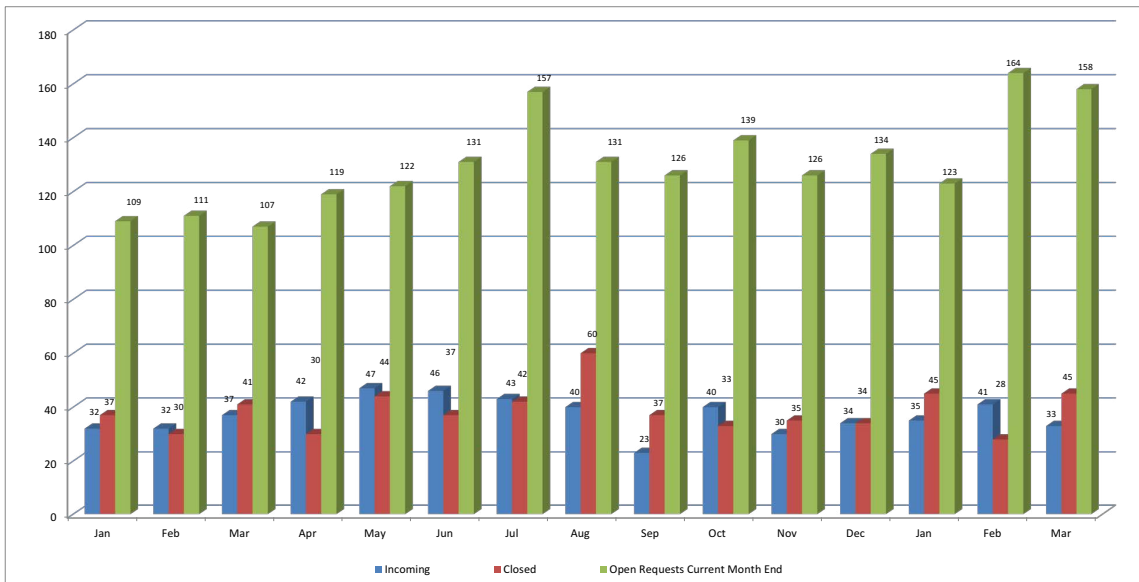




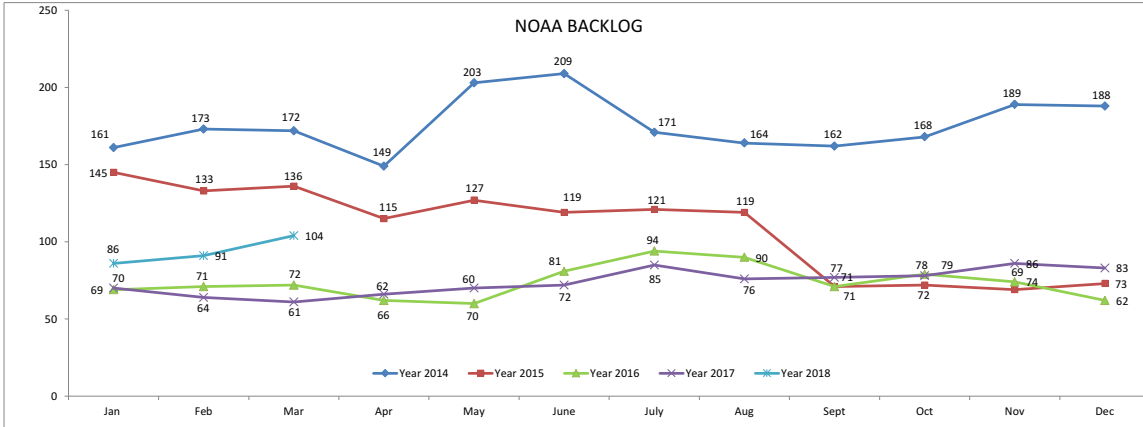
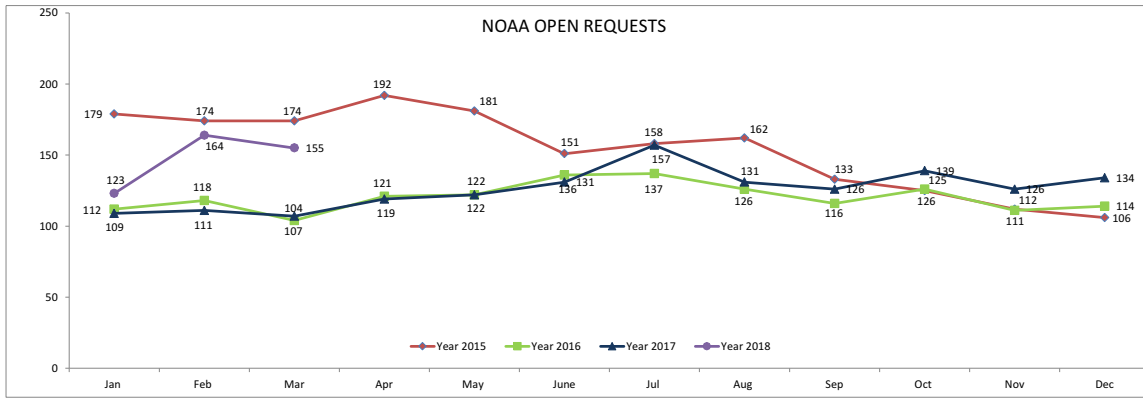


FOIA Monthly Status Report 03-31-2018

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	19	2	3	19	14	1	1	16
CAO	6	0	2	4	2	1	0	3
CFO	0	0	0	0	0	0	0	0
CIO	1	0	0	1	1	0	0	1
CIO/FOIA	6	1	6	4	3	0	0	3
GC	2	4	0	6	1	1	0	2
IA	0	0	0	0	0	0	0	0
LA	2	0	0	2	2	0	0	2
NESDIS	1	2	1	2	0	0	0	0
NMFS	71	18	20	69	18	20	2	40
NOS	15	3	3	14	8	2	0	10
NWS	8	0	0	8	6	2	0	8
OAR	15	0	3	11	7	2	0	9
OMAO	3	0	2	1	1	0	0	1
OC	3	3	0	6	1	2	0	3
PPI	0	0	0	0	0	0	0	0
USEC	6	0	2	4	0	4	0	4
WFMO	6	0	3	4	2	0	0	2
NOAA Totals	164	33	45	155	66	35	3	104

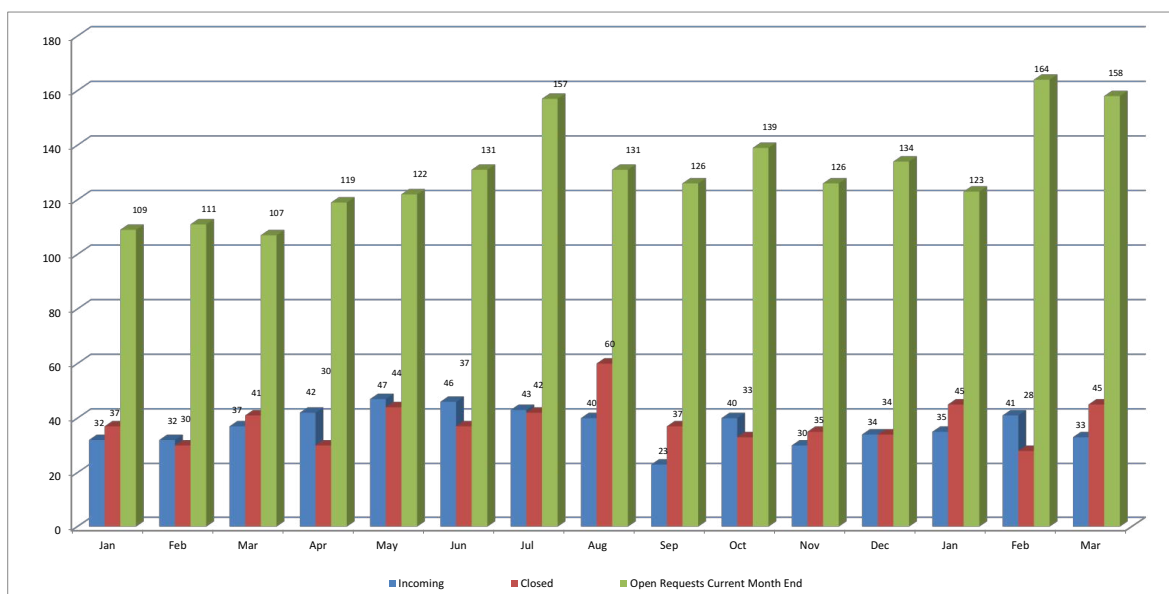


FOIA Monthly Status Report 03-31-2018

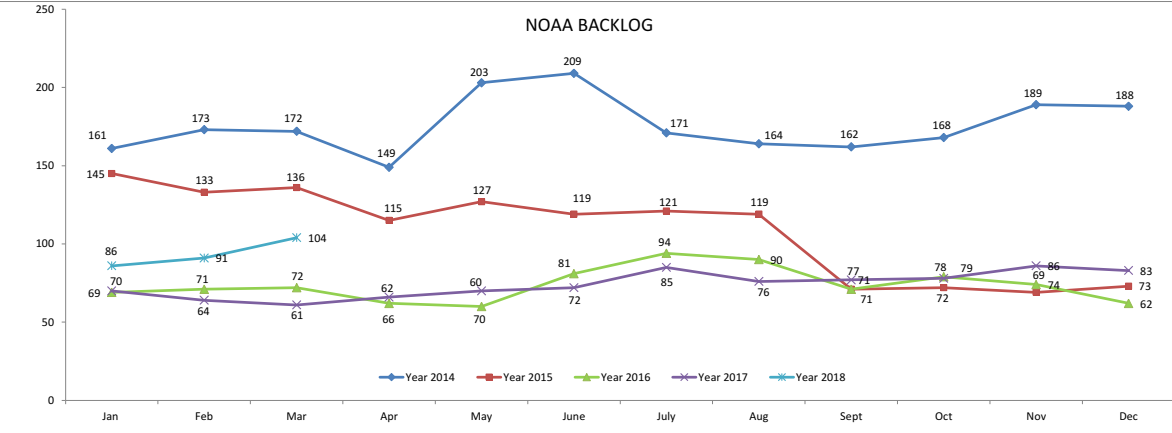
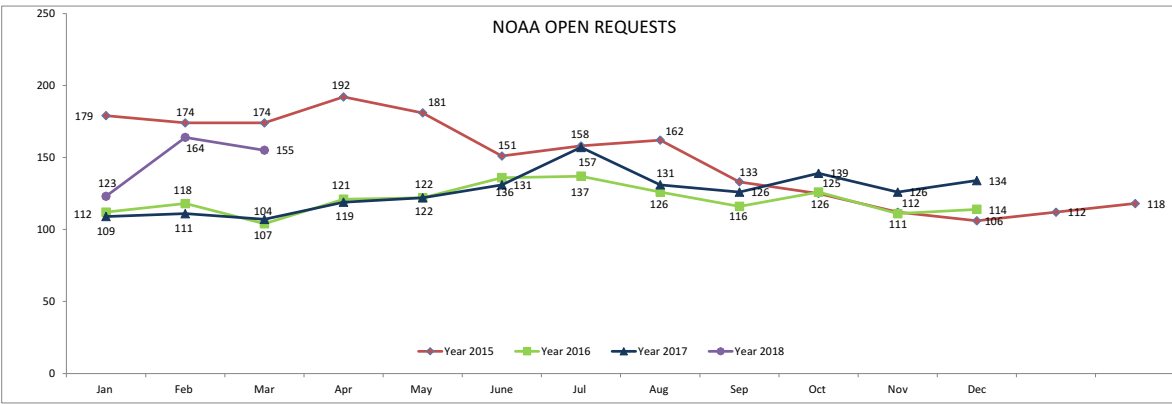


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Organization	Open Requests Previous Month End	Incoming Requests	Closed Requests	Open Requests Current Month End	Backlog 21-120 days	Backlog 121-364 days	Backlog 365 or more days	Total Backlog
AGO	19	2	3	19	14	1	1	16
CAO	6	0	2	4	2	1	0	3
CFO	0	0	0	0	0	0	0	0
CIO	1	0	0	1	1	0	0	1
CIO/FOIA	6	1	6	4	3	0	0	3
GC	2	4	0	6	1	1	0	2
IA	0	0	0	0	0	0	0	0
LA	2	0	0	2	2	0	0	2
NESDIS	1	2	1	2	0	0	0	0
NMFS	71	18	20	69	18	20	2	40
NOS	15	3	3	14	8	2	0	10
NWS	8	0	0	8	6	2	0	8
OAR	15	0	3	11	7	2	0	9
OMAO	3	0	2	1	1	0	0	1
OC	3	3	0	6	1	2	0	3
PPI	0	0	0	0	0	0	0	0
USEC	6	0	2	4	0	4	0	4
WFMO	6	0	3	4	2	0	0	2
NOAA Totals	164	33	45	155	66	35	3	104



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Tracking Number	Type	Requester	Requester Organization
DOC-NOAA-2018-001001	Request	Jeff Berebitsky	
DOC-NOAA-2018-000952	Request	Richard George	
DOC-NOAA-2018-001090	Request	Oryx Gazella	None
DOC-NOAA-2018-000976	Request	wade bryant	
DOC-NOAA-2018-001044	Request	Jeremy D. Mckay	Environmental and Animal Defense
DOC-NOAA-2018-001037	Request	Jane Davenport	Defenders of Wildlife
DOC-NOAA-2018-001075	Request	Amy Eberling	
DOC-NOAA-2018-001063	Request	Caleb Jones	Associated Press
DOC-NOAA-2018-001005	Request	Anne Philbrick	
DOC-NOAA-2018-000991	Request	David Becker	Law Office of David H Becker
DOC-NOAA-2018-000986	Request	Raymond Clarke	
DOC-NOAA-2018-000984	Request	Caleb Jones	Associated Press
DOC-NOAA-2018-001011	Request	Nicholas Jimenez	SOUTHERN ENVIRONMENTAL LAW CENTER
DOC-NOAA-2018-000948	Request	Hallie G. Templeton	Friends of the Earth
DOC-NOAA-2018-000947	Request	Hallie G. Templeton	Friends of the Earth
DOC-NOAA-2018-001079	Request	Lyla Gray-Etherson	Property Solutions INC.
DOC-NOAA-2018-000920	Request	Alicia Clark	Southern Environmental Law Center
DOC-NOAA-2018-000918	Request	Hallie G. Templeton	Friends of the Earth
DOC-NOAA-2018-001078	Request	Lyla Gray-Etherson	Property Solutions INC.
DOC-NOAA-2018-000891	Request	John R. Leek	San Diego Council of Divers
DOC-NOAA-2018-000865	Request	Taylor S. Johnson	Tacoma Community College
DOC-NOAA-2018-000861	Request	Douglas B. Noltie	University of Missouri, School of Natural Resources
DOC-NOAA-2018-000985	Request	Adi Poturovic	
DOC-NOAA-2018-000923	Request	Veronica Gonzalez	Clínica UIPR
DOC-NOAA-2018-000958	Request	Drew Bishop	
DOC-NOAA-2018-000903	Request	Alex J. DeGiulio	
DOC-NOAA-2018-001085	Request	Kyla Mandel	Ms.
DOC-NOAA-2018-001083	Request	Nicholas Kusnetz	InsideClimate News
DOC-NOAA-2018-000951	Request	Beryl C. Lipton	MuckRock
DOC-NOAA-2018-001058	Request	Ryan P. Mulvey	Cause of Action Institute
DOC-NOAA-2018-001022	Request	Michael L. Johnson	
DOC-NOAA-2018-001009	Request	Michael L. Johnson	
DOC-NOAA-2018-000892	Request	Florian C. Rabitz	Kaunas University of Technology

Submitted	Received	Assigned To	Perfected?	Due	Closed Date
03/23/2018	03/23/2018	AGO	Yes	04/23/2018	TBD
03/12/2018	03/12/2018	AGO	Yes	04/13/2018	TBD
03/30/2018	03/30/2018	NESDIS	Yes	05/02/2018	TBD
03/19/2018	03/19/2018	NESDIS	Yes	04/23/2018	TBD
03/28/2018	03/28/2018	NMFS	Yes	04/25/2018	TBD
03/27/2018	03/27/2018	NMFS	Yes	04/25/2018	TBD
03/27/2018	03/27/2018	NMFS	Yes	04/27/2018	TBD
03/26/2018	03/26/2018	NMFS	Yes	04/25/2018	TBD
03/25/2018	03/26/2018	NMFS	Yes	04/23/2018	TBD
03/21/2018	03/21/2018	NMFS	Yes	05/07/2018	TBD
03/21/2018	03/21/2018	NMFS	Yes	04/23/2018	TBD
03/20/2018	03/20/2018	NMFS	Yes	04/23/2018	TBD
03/20/2018	03/20/2018	NMFS	Yes	05/07/2018	TBD
03/15/2018	03/15/2018	NMFS	Yes	04/26/2018	TBD
03/15/2018	03/15/2018	NMFS	Yes	04/12/2018	TBD
03/14/2018	03/14/2018	NMFS	Yes	05/11/2018	TBD
03/13/2018	03/13/2018	NMFS	Yes	04/12/2018	TBD
03/12/2018	03/12/2018	NMFS	Yes	04/26/2018	TBD
03/09/2018	03/09/2018	NMFS	Yes	04/27/2018	TBD
03/06/2018	03/06/2018	NMFS	Yes	04/09/2018	TBD
03/01/2018	03/01/2018	NMFS	Yes	04/02/2018	03/29/2018
03/01/2018	03/01/2018	NMFS	Yes	04/02/2018	03/20/2018
03/20/2018	03/20/2018	NOAA FOIA	Yes	04/23/2018	TBD
03/13/2018	03/13/2018	NOS	Yes	04/12/2018	TBD
03/09/2018	03/09/2018	NOS	Yes	04/27/2018	TBD
03/07/2018	03/07/2018	NOS	Yes	04/09/2018	TBD
03/29/2018	03/29/2018	OC	Yes	04/27/2018	TBD
03/29/2018	03/29/2018	OC	Yes	04/27/2018	TBD
03/13/2018	03/13/2018	OC	Yes	04/16/2018	TBD
03/28/2018	03/28/2018	OGC	Yes	04/25/2018	TBD
03/27/2018	03/27/2018	OGC	Yes	04/25/2018	TBD
03/26/2018	03/26/2018	OGC	Yes	04/23/2018	TBD
03/06/2018	03/06/2018	OGC	Yes	04/09/2018	TBD

Detail

Interested in obtaining the contract and certificates of insurance that would have been in place between NOAA and Please be advised I am making a FOIA Request for the Application of Federal Assistance for New York State Dep: Please provide a copy of the remote sensing space system license granted to SpaceX for the Iridium-5 mission wh Marine Pollution Surveillance Report prepared by NOAA. Dates 4/1/2015 through 9/1/2015 Area Central California C Environmental and Animal Defense, (hereinafter "eaDefense") requests all "agency records" of the National Ocean FOIA request for records relating to the decision by the National Marine Fisheries Service to list the oceanic whiteti 1. I would like to make a FOIA request to learn how much funding BPA provides for your science, research or for a Observer logs for F/V Princess Hawaii for its latest (and last) trip

Looking for any information documents about harassment of NMFS observers working aboard foreign fish process FOIA request on behalf of The Conservation Angler for two categories of documents, as described in more detail ir We are seeking catch and related data on South Pacific Tuna Corporation's US Treaty licensed purse seine vesse NOAA/NMFS National Observer Program observer logs that include any information about crew/captain/observer/ Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the Southern Environmental Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Friends of the Earth requests all records Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Friends of the Earth requests all records Property Solutions Inc. is conducting a Phase I Environmental Assessment of the aforementioned property. As part **ATTN: SOUTHEAST REGION** To Whom It May Concern: Under the Freedom of Information Act (FOIA), 5 U.S. Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Friends of the Earth requests all records Property Solutions Inc. is conducting a Phase I Environmental Assessment of the aforementioned property. As part In February 2017 the Pacific Scientific Review Group met in Honolulu. There were 11 members listed in the resultir I am conducting a statistical study of the average lifespans of Killer Whales in captivity and in the wild and am kindr I am seeking a report prepared using either Dingell-Johnson funding, or U.S. Department of Commerce, National C I am trying to find out who is the contact person in purchasing for DOC.

Any information, data and/or documents related to monitoring ground and surface water quality at Jobos Bay Natio Please provide the following information relative to each respective grant award: NA11NOS4630176 Grant Agreem I am with the Tulane Environmental Law Clinic. On behalf of our client Ian MacDonald, Professor of Oceanography Dear FOIA Officer: Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to ar This is a request under the Freedom of Information Act. On behalf of InsideClimate News, I'd like to request copies This is a request under the Freedom of Information Act. I hereby request the following records: For the 16-month, § Pursuant to the FOIA, 5 U.S.C. § 552, CoA Institute hereby requests access to the following records. The time peri I request a copy of Exhibit 31 from UNITED STATES DEPARTMENT OF COMMERCE NATIONAL OCEANIC ANI I request a copy of Exhibit 10 from UNITED STATES DEPARTMENT OF COMMERCE NATIONAL OCEANIC ANI Dear Sir or Madam, Under the Freedom of Information Act, I seek to obtain any documents which the National Oce

[REDACTED]

Marine Vacuum Services, Inc. See attached invoices. I am interested in the years between 1984 and 1991. Department of State Coastal Management Program to implement the Coastal Zone Management Act for the Pacific Coast - see attached file jpg area from Gaviota point to Los Angeles Example report is attached also. Pacific and Atmospheric Administration (“NOAA” or NOAA Fisheries”) associated with: 1. A recovery plan, permit for shark as a threatened species pursuant to the Endangered Species Act. We request that you provide any other reasons you might describe? 2. In this same FOIA request, I would also like to know who/what

persons within the 200 mile zone between 1980 and 1991. Specifically Anne Hartmann, Anne Hartmann Bureau of the attached pdf letter: (1) All documents regarding requests by Idaho Fish & Game Department (IDFG) for an analysis that we are under-going related to Marine Stewardship Council (MSC) certification. As part of the assessment, we wish to determine whether there are any fisheries regulations, permits, data reports, and passenger injuries and/or deaths aboard U.S.-flagged commercial fishing vessels operating in the U.S. Exclusive Economic Zone (EEZ). (2) The Southern Environmental Law Center (SELC) requests copies of the following records in the possession or control of NOAA: pertaining to the attached correspondence from Manna Fish Farms Owner and Chief Executive Officer, pertaining to the attached correspondence from Friends of the Earth, Center for Biological Diversity, Center for the assessment, we wish to determine whether there are any fisheries regulations, permits, data reports, and passenger injuries and/or deaths aboard U.S.-flagged commercial fishing vessels operating in the U.S. Exclusive Economic Zone (EEZ). § 552, as amended, the Southern Environmental Law Center (SELC) requests any and all documents pertaining to Rose Canyon Fisheries, from January 1, 2016 to present.

of the assessment, we wish to determine whether there are any fisheries regulations, permits, data reports, and passenger injuries and/or deaths aboard U.S.-flagged commercial fishing vessels operating in the U.S. Exclusive Economic Zone (EEZ). Aug 2017 recommendation letter http://www.nmfs.noaa.gov/pr/sars/pdf/pacific_srg_2017_recommendation_letter.pdf requesting an inventory database of all living and deceased orcas and their estimated ages in an effort to assess the status of the population. Pacific and Atmospheric Administration, National Marine Fisheries Service, Management Division, State

National Estuarine Research Reserve and South Coast Aquifer (in Salinas and Guayama), Puerto Rico. 1. Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA) compliant Appraisal Report (AR) prepared by [REDACTED] at Florida State University, we request a copy of “MC20 Unified Command Sheen Source Location Work Product” and 10 copies of documents related to the publication and public release of “NOAA Technical Report NOS C-84-41” of the following documents: • Any emails or other written communication, including notes and memos, received or sent during the 5-day period from Tuesday, November 8, 2016 through Tuesday, March 13, 2018: (SUMMARY) Any and all documents for all items of this request is July 1, 2017 to the present. 1. All communications between NOAA and the U.S. Department of Atmospheric Administration DOCKET NUMBER NE980310FM/V (F/V Independence) IN THE PACIFIC AND ATMOSPHERIC ADMINISTRATION DOCKET NUMBER NE980310FM/V (F/V Independence) IN THE PACIFIC AND ATMOSPHERIC ADMINISTRATION may be holding in regards to diplomatic negotiations and technical

988. Please let me know if you need any clarification.

year 2017. Attached is the 2016 Federal Assistance Contract awarded by NOAA under the Secretary of :13 a.m. EDT. In addition, please include the application and any or all addendum, correspondences, an F of report and and shape files or kmz.


er ESA sections 4(f)(1) and 4(f)(1)(A), or lack thereof with associated findings that such a plan will not p certain records in your possession, whether received, created, and/or distributed by NMFS, in connectic department(s) in NOAA is being funded by BPA? 3. I would also like to make another FOIA request to le

nham, Kyung Yang Ho 6 NBI, Dae Jin Ho No 52, Dae Sung Ho, Korean ships, Soviet processors, Marin ("IDFG") to the National Marine Fisheries Service ("NMFS"), or correspondence fr the result of recent changes in MSC fishery standards on compartmentalization, it requires all fishing ge Pacific island region (Hawaii, Guam, American Samoa, Northern Mariana Islands and other Pacific island the National Oceanic & Atmospheric Administration ("NOAA")) related to the Kerr-McGe Donna Lanzetta, dated January 15, 2018. This request encompasses any records in the possession of l nter for Food Safety, Food and Water Watch, and Recirculating Farms Coalition, dated January 24, 201: orting & restoration projects located in the vicinity of this location. Truffles – 34 Desbrosses Street - iments in the possession or control of the National Marine Fisheries Service (NMFS) that relate to the D

orting & restoration projects located in the vicinity of this location. Spring District Block 16 1226 124 dations_to_nmfs.pdf. They were Michael Scott, Scott Baker, Hanna Bernard, Robin Brown, John Calam t to keep my study non-biased and with a large enough sample size.

e-Federal Relations Branch, Commercial Fisheries Research and Development funding. The report wou

“Yellow Book Appraisal”) UASFLA compliant Appraisal Review NA12NOS4630176 Grant Agreement UA rkgroup Final Report” dated 11/17/2017 involving Taylor Energy Company LLC. The document should b O-OPS 086: PATTERNS AND PROJECTIONS OF HIGH TIDE FLOODING ALONG THE U.S. COASTI of any members of NOAA’s Office of Communications that mention or discuss NOAA Technical Report l all talking points and similar memorandums, emails, and transcripts providing advice or direction on ho the Attorney General of the United States concerning records created or received by NOAA employees E MATTER OF: Lobster's Inc. Lawrence M. Yacubian, Respondents. Exhibit 31 contains information anc E MATTER OF: Lobster's Inc. Lawrence M. Yacubian, Respondents. Exhibit 10 has the basic and nine a l deliberations under the United Nations Convention on Biological Diversity insofar that they relate to the



f Commerce. See Below and attached 2016 Application. I am requesting the 2017 Application and 2018
id any other records pertaining to the remote sensing space system license referenced above.

romote the conservation of the species, of the largetooth sawfish (collectively *Pristis pristis*; formerly *Pri-*
on with the development of the 90-day finding, the proposed rule, and the final rule. Pursuant to 5 U.S.C.
earn how much money the Corps provides for your science, research or for any other reasons you might

e Resources Company, Thorne Tasker, Alaska Joint Venture Fisheries, groundfish fishery 1980-1990.
om NMFS to IDFG, regarding ESA take coverage or ESA permits for IDFG-authorized fish harvest progr
ars on the fishing trip, no matter it's FAD/associated or free school, to be certified to maintain MSC statu
ds) from the year 2000 to present (March 20, 2018). This includes copies of all observer logs that includ
e Chemical Corp. site (the "Site"); • Balance, budget, and expenditure information for the ap
NOAA or its Atlantic States Marine Fisheries Commission.

8. This request includes any records in the possession of NOAA or any of its Interstate Marine Fisheries
– Block 224, Lot 1 Biltmore – 271 West 47th Street – Block 1019, Lot 1 Parker Towers – 104-20, 104-4C
raft Environmental Impact Statement for Spaceport Camden in Camden County, Georgia, as prepared t

th Avenue Northeast Parcel: 793330-0000 Bellevue, King County, Washington 98005 Property Solutions
bokidis, Doyle Hanan, David Itano, Steve Jeffries, Tim Ragen, Katherine Ralls, Terry Wright. Since then

uld also have been submitted to the Ohio Department of Natural Resources. The report citation is: Hayw

\SFLA compliant Appraisal Report ("Yellow Book Appraisal") UASFLA compliant Appraisal Review NA1;
e approximately 664 pages in length. Mr. Brad Benggio, NOAA SSC D7 (representing the USCG); Mr. C
_LINE USING A COMMON IMPACT THRESHOLD" (<https://tidesandcurrents.noaa.gov/publications/techr>
NOS CO-OPS 086, which is titled "PATTERNS AND PROJECTIONS OF HIGH TIDE FLOODING ALON
w to handle the media, media interviews, and statements. ---- (SPECIFICALLY) Please include in your r
through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.9 2l A
l data relevant to the "USCG Research & Development Center and Eight Coast Guard District BOA
attachments as follows: Exhibit 10 – Statement by Linda Galvin dated 14 January 1999 with a supplemer
following themes: climate engineering, geoengineering, negative emissions technology, carbon dioxide

Application if available.

stis pristis, Pristis microdon, and Pristis perotteti). The request in (I) include
§ 552(a)(3)(B) we ask that these records be provided in electronic and searchable format. To streamline
describe? Thanks for your help with those numbers. 4. In the FOIA request mentioned in #3, I would also

streams in Idaho that are habitat for Snake River Basin DPS steelhead during the period from July 1980 to 1985. In a previous request – we sought and obtained information on the free school portion of our fishing license. We also seek any report of an injury or death aboard a vessel in the Hawaii region. Personal identifying information that was used to fund approximately \$23 million natural resources damages fund for the Site, including documents showing expenditures

Commissions, which also received a copy of the correspondence.
104-60 and 104-70 Queens Blvd – Block 3175 Lots 1 and 70 New York and Forest Hills, New York
by the Federal Aviation Administration (FAA). We seek all documents in the file, including drafts and emails

Inc Project #: 20180371
all but John Calambokidis and Tim Ragen have resigned. Four replacements have been found. The search results are as follows:
ard, R.S.; and F.J. Margraf. 1983. Analysis of yellow perch growth in western and central basins of Lake

3NOS4630165 Grant Agreement UASFLA compliant Appraisal Report (“Yellow Book Appraisal”) UASFLA
Charlie Henry, NOAA (representing USCG); Dr. Jacqueline Michel, NOAA (representing USCG); LCDR Scott
pt86_PaP_of_HTFlooding.pdf). Specifically, I am requesting the release of all emails received or sent by me
REG THE U.S. COASTLINE USING A COMMON IMPACT THRESHOLD.” I’d like to limit my request to electronic
responsive materials any documents, emails, or communications with the following phrases in the title or
all records reflecting notification by NOAA to the Archivist of the United States or NARA under 44 U.S.C.
“TRACS Test and Evaluation Project Test Report” dated July 1998; and may in fact be the Test Report.
of 25 January 1999. Exhibit 10A – Instructions, not needed by me. Exhibit 10B – Morning Report E-mail
removal, solar radiation management, albedo modification, bioenergy with carbon capture and storage

[REDACTED]

re this process, we exclude from th
so lik

January 1, 2014 to the date of the agency's search for documents responsive to t
activities. We ar
hat is required to be withheld under the law may be redac
nditures to date and the nature of those expenditures. • Al

York 10013 & 11375 Property Solutions Pr
ails between NMFS staff and FAA staff. FOIA directs a respondi

cheduled March 2018 PSRG meeting in San Di

Erie. Final Report. Period Covered: 1 July 1982 - 30 June 1983.

.A compliant Appraisal Rev
Sam Greenaway, NOAA (representing USCG); and LTJG Steve Wall
y the NOAA communication's team (as listed here: <http://www>
mails dated between Nov 1, 2017 and the date this request is process
- subjec
§ 3106 or submission

Thank you for your assistance.

ail dated 11 December 1998 titled "Vessels in Closed Araes during Past Week." Exhi
(BECCS) or related concepts. In particular, this relates











Tracking Number	Type	Requester
DOC-NOAA-2018-000511	Request	Rose Santos
DOC-NOAA-2017-000298	Request	Charles Mouton
DOC-NOAA-2018-000784	Request	Sean Ahern
DOC-NOAA-2015-001487	Request	Richard Knudsen
DOC-NOAA-2017-001996	Request	Rose Santos
DOC-NOAA-2017-001995	Request	Rose Santos
DOC-NOAA-2017-001994	Request	Rose Santos
DOC-NOAA-2018-001001	Request	Jeff Berebitsky
DOC-NOAA-2018-000952	Request	Richard George
DOC-NOAA-2018-000855	Request	Rose Santos
DOC-NOAA-2018-000836	Request	Christopher W. Moores
DOC-NOAA-2018-000803	Request	Rose Santos
DOC-NOAA-2018-000730	Request	Rose Santos
DOC-NOAA-2018-000694	Request	Tori Foster
DOC-NOAA-2018-000670	Request	Rose Santos
DOC-NOAA-2018-000662	Request	Rose Santos
DOC-NOAA-2018-000604	Request	Mary McCullough
DOC-NOAA-2018-000590	Request	Rose Santos
DOC-NOAA-2018-000589	Request	Rose Santos
DOC-NOAA-2018-000449	Request	Omar Purcell
DOC-NOAA-2018-000303	Request	Ronald B. Hardwig
DOC-NOAA-2017-001987	Request	Victoria Abbasi
DOC-NOAA-2018-000765	Request	Naja Girard
DOC-NOAA-2018-000819	Request	Max Alexander
DOC-NOAA-2017-002002	Request	Daniel Bladele
DOC-NOAA-2017-001966	Request	Alex Kotch
DOC-NOAA-2018-001090	Request	Oryx Gazella
DOC-NOAA-2018-000976	Request	wade bryant
DOC-NOAA-2018-000557	Request	Markos Scheer
DOC-NOAA-2016-000423	Request	Ryan P. Mulvey
DOC-NOAA-2018-000459	Request	Margaret Townsend
DOC-NOAA-2018-000422	Request	Philip N. Brown
DOC-NOAA-2018-000377	Request	Alicia Cate
DOC-NOAA-2017-000304	Request	Bryn Blomberg
DOC-NOAA-2018-000318	Request	Sarah N. Emerson
DOC-NOAA-2017-000170	Request	Kara McKenna
DOC-NOAA-2015-000190	Request	Miyo Sakashita
DOC-NOAA-2018-000183	Request	Sean Sherman
DOC-NOAA-2018-000126	Request	HASSELMAN, JAN
DOC-NOAA-2018-000077	Request	Maraya Cornell
DOC-NOAA-2018-000070	Request	Cathy Readinger
DOC-NOAA-2017-001992	Request	Margaret Townsend
DOC-NOAA-2017-001974	Request	Ryan P. Mulvey
DOC-NOAA-2016-001763	Request	Thomas Knudson
DOC-NOAA-2017-001798	Request	Brett Sommermeyer
DOC-NOAA-2017-001741	Request	Vivian Wang
DOC-NOAA-2017-001606	Request	Molly Masterton
DOC-NOAA-2017-001431	Request	Margaret Townsend
DOC-NOAA-2016-001402	Request	Stephen S. Schwartz
DOC-NOAA-2017-001991	Request	Thomas C. Sullivan
DOC-NOAA-2017-001411	Request	Margaret Townsend

DOC-NOAA-2017-001394 Request Ivy N. Fredrickson
DOC-NOAA-2017-001391 Request Elizabeth A. Mitchell
DOC-NOAA-2017-001376 Request Gabe Flick
DOC-NOAA-2017-001316 Request Chris Saeger
DOC-NOAA-2017-001220 Request Nathan Eagle
DOC-NOAA-2017-001219 Request Nathan Eagle
DOC-NOAA-2017-001217 Request Nathan Eagle
DOC-NOAA-2017-001198 Request Brett Sommermeyer
DOC-NOAA-2017-001190 Request ERIC R. BOLINDER
DOC-NOAA-2017-001094 Request Brettny E. Hardy
DOC-NOAA-2017-001093 Request Brettny E. Hardy
DOC-NOAA-2017-001092 Request Brettny E. Hardy
DOC-NOAA-2017-001038 Request Sean Sherman
DOC-NOAA-2017-000994 Request Mariel Combs
DOC-NOAA-2018-001044 Request Jeremy D. Mckay
DOC-NOAA-2018-001037 Request Jane Davenport
DOC-NOAA-2018-001075 Request Amy Eberling
DOC-NOAA-2018-001063 Request Caleb Jones
DOC-NOAA-2018-001005 Request Anne Philbrick
DOC-NOAA-2018-000991 Request David Becker
DOC-NOAA-2018-000986 Request Raymond Clarke
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DOC-NOAA-2018-001079 Request Lyla Gray-Etherson
DOC-NOAA-2018-000920 Request Alicia Clark
DOC-NOAA-2018-000918 Request Hallie G. Templeton
DOC-NOAA-2018-001078 Request Lyla Gray-Etherson
DOC-NOAA-2018-000891 Request John R. Leek
DOC-NOAA-2018-000860 Request Allison J. Johnson
DOC-NOAA-2018-000881 Request Jeffrey Leary
DOC-NOAA-2018-000794 Request Sarah B. Brady
DOC-NOAA-2018-000763 Request Adam Carlesco
DOC-NOAA-2018-000768 Request JACKSON MINASIAN
DOC-NOAA-2018-000740 Request Doug Gillie
DOC-NOAA-2018-000716 Request Vivian Wang
DOC-NOAA-2018-000685 Request John R. Leek
DOC-NOAA-2018-000684 Request Hallie G. Templeton
DOC-NOAA-2018-000661 Request Hume Ross
DOC-NOAA-2018-000660 Request Hume Ross
DOC-NOAA-2018-000659 Request Hume Ross
DOC-NOAA-2018-000780 Request Eric Coleman
DOC-NOAA-2018-000587 Request Hallie G. Templeton
DOC-NOAA-2018-000585 Request Andrew Hitchings
DOC-NOAA-2018-000565 Request Matthew Owens
DOC-NOAA-2018-000428 Request Ryan P. Mulvey
DOC-NOAA-2018-000802 Request Patrick Martin
DOC-NOAA-2018-000985 Request Adi Poturovic
DOC-NOAA-2018-000781 Request Russ Kick
DOC-NOAA-2017-000268 Request Brian D. Israel
DOC-NOAA-2018-000273 Request Andrew G. Ogden

DOC-NOAA-2018-000798 Request Jonathan Clark
DOC-NOAA-2018-000202 Request Marshall R. Morales
DOC-NOAA-2017-001676 Request Vincent C. Catania
DOC-NOAA-2017-001678 Request James Zeiler
DOC-NOAA-2017-001569 Request Sarah N. Emerson
DOC-NOAA-2017-001009 Request Edward Duhe
DOC-NOAA-2018-000923 Request Veronica Gonzalez
DOC-NOAA-2018-000958 Request Drew Bishop
DOC-NOAA-2018-000903 Request Alex J. DeGiulio
DOC-NOAA-2018-000752 Request david swatland
DOC-NOAA-2018-000657 Request Daniel G. Sullivan
DOC-NOAA-2017-000414 Request Arnold & Porter Kaye Scholer LLP
DOC-NOAA-2018-000816 Request Susan Carroll
DOC-NOAA-2018-000698 Request Daniel Wagner
DOC-NOAA-2017-001874 Request Susanne Rust
DOC-NOAA-2017-001059 Request Richard Hirn
DOC-NOAA-2017-000768 Request Julio C. Gomez
DOC-NOAA-2018-000761 Request John B. Mena
DOC-NOAA-2018-000727 Request Tia Justice
DOC-NOAA-2018-000561 Request Stephanie Kuzydym
DOC-NOAA-2018-000229 Request Nicole Mason
DOC-NOAA-2017-000058 Request Christopher T. Clack
DOC-NOAA-2017-000034 Request Christopher T. Clack
DOC-NOAA-2018-000024 Request Allan Blutstein
DOC-NOAA-2014-001694 Request Lawrence A. Kogan
DOC-NOAA-2017-001796 Request Margaret Townsend
DOC-NOAA-2017-001975 Request Margaret Townsend
DOC-NOAA-2014-000714 Request Lawrence Kogan
DOC-NOAA-2018-000671 Request Margaret Townsend
DOC-NOAA-2018-000607 Request David E. Holcomb
DOC-NOAA-2018-000638 Request Nicole Mason
DOC-NOAA-2017-001954 Request Alex Veeneman
DOC-NOAA-2017-001523 Request Brian L. Kahn
DOC-NOAA-2017-001565 Request Charles Seife
DOC-NOAA-2018-001085 Request Kyla Mandel
DOC-NOAA-2018-001083 Request Nicholas Kusnetz
DOC-NOAA-2018-000951 Request Beryl C. Lipton
DOC-NOAA-2018-000204 Request Nicole Mason
DOC-NOAA-2017-001163 Request Jacqueline Iwata
DOC-NOAA-2018-001058 Request Ryan P. Mulvey
DOC-NOAA-2018-001022 Request Michael L. Johnson
DOC-NOAA-2018-001009 Request Michael L. Johnson
DOC-NOAA-2018-000892 Request Florian C. Rabitz
DOC-NOAA-2017-001967 Request Jennifer E. Kollmer
DOC-NOAA-2017-001756 Request Jeff Tollefson
DOC-NOAA-2017-001739 Request Lauren N. Evans
DOC-NOAA-2017-001734 Request Andrew C. Revkin
DOC-NOAA-2017-001722 Request Michael Ravnitzky
DOC-NOAA-2018-000622 Request Patricia Mann
DOC-NOAA-2018-000760 Request John B. Mena
DOC-NOAA-2018-000755 Request John B. Mena
DOC-NOAA-2018-000554 Request Terra Mowatt

Requester Organization	Submitted	Received	Assigned To
FOIA GROUP INC	12/30/2017	01/02/2018	AGO
Mahtook & Lafleur	11/30/2016	11/30/2016	AGO
Manson Construction Co.	11/10/2017	11/13/2017	AGO
	06/29/2015	06/29/2015	AGO
FOIA GROUP INC	06/01/2017	06/01/2017	AGO
FOIA GROUP INC	06/01/2017	06/01/2017	AGO
FOIA GROUP INC	06/01/2017	06/01/2017	AGO
	03/23/2018	03/23/2018	AGO
	03/12/2018	03/12/2018	AGO
FOIA GROUP INC	02/27/2018	02/27/2018	AGO
Cook Brown LLP	02/23/2018	02/23/2018	AGO
FOIA GROUP INC	02/21/2018	02/21/2018	AGO
FOIA GROUP INC	02/12/2018	02/12/2018	AGO
McAllister & Quinn	02/06/2018	02/06/2018	AGO
FOIA GROUP INC	01/31/2018	01/31/2018	AGO
FOIA GROUP INC	01/30/2018	01/30/2018	AGO
	01/20/2018	01/22/2018	AGO
FOIA GROUP INC	01/17/2018	01/17/2018	AGO
FOIA GROUP INC	01/17/2018	01/17/2018	AGO
NOAA	12/14/2017	12/14/2017	CAO
	11/17/2017	11/17/2017	CAO
Colliers International	04/13/2017	04/13/2017	CAO
Key West The Newspaper [The Blue Paper]	02/01/2018	02/01/2018	CAO
	02/22/2018	02/22/2018	CIO
	09/15/2017	09/15/2017	LA
	09/15/2017	09/15/2017	LA
None	03/30/2018	03/30/2018	NESDIS
	03/19/2018	03/19/2018	NESDIS
Premium Aquatics, LLC	12/28/2017	12/28/2017	NMFS
Cause of Action	12/21/2015	12/21/2015	NMFS
	12/18/2017	12/18/2017	NMFS
	12/08/2017	12/08/2017	NMFS
Oceana	12/01/2017	12/01/2017	NMFS
Western Resources Legal Center	11/30/2016	11/30/2016	NMFS
VICE	11/21/2017	11/21/2017	NMFS
Cause of Action	11/09/2016	11/09/2016	NMFS
Center for Biological Diversity	11/02/2014	11/03/2014	NMFS
Public Citizen, Inc	10/25/2017	10/25/2017	NMFS
Earthjustice	10/18/2017	10/18/2017	NMFS
Freelance Writer	10/11/2017	10/11/2017	NMFS
	10/03/2017	10/03/2017	NMFS
	09/26/2017	09/26/2017	NMFS
Cause of Action Institute	09/21/2017	09/21/2017	NMFS
Center for Investigative Reporting	09/14/2016	09/15/2016	NMFS
	08/31/2017	08/31/2017	NMFS
Natural Resources Defense Council	08/22/2017	08/22/2017	NMFS
Natural Resources Defense Council	07/26/2017	07/26/2017	NMFS
	06/27/2017	06/27/2017	NMFS
Cause of Action Institute	06/27/2016	06/27/2016	NMFS
Moseley Prichard Parrish Knight & Jones	06/23/2017	06/23/2017	NMFS
	06/22/2017	06/23/2017	NMFS

Ocean Conservancy	06/19/2017	06/19/2017	NMFS
Association for Professional Observers	06/16/2017	06/16/2017	NMFS
	06/12/2017	06/12/2017	NMFS
Western Values Project	06/07/2017	06/07/2017	NMFS
Honolulu Civil Beat	05/16/2017	05/17/2017	NMFS
Honolulu Civil Beat	05/16/2017	05/17/2017	NMFS
Honolulu Civil Beat	05/16/2017	05/17/2017	NMFS
	05/11/2017	05/11/2017	NMFS
Cause of Action Institute	05/09/2017	05/09/2017	NMFS
Earthjustice	04/26/2017	04/26/2017	NMFS
Earthjustice	04/26/2017	04/26/2017	NMFS
Earthjustice	04/26/2017	04/26/2017	NMFS
Public Citizen, Inc	04/17/2017	04/17/2017	NMFS
Oceana	04/10/2017	04/11/2017	NMFS
Environmental and Animal Defense	03/28/2018	03/28/2018	NMFS
Defenders of Wildlife	03/27/2018	03/27/2018	NMFS
	03/27/2018	03/27/2018	NMFS
Associated Press	03/26/2018	03/26/2018	NMFS
	03/25/2018	03/26/2018	NMFS
Law Office of David H Becker	03/21/2018	03/21/2018	NMFS
	03/21/2018	03/21/2018	NMFS
Associated Press	03/20/2018	03/20/2018	NMFS
SOUTHERN ENVIRONMENTAL LAW CENTER	03/20/2018	03/20/2018	NMFS
Friends of the Earth	03/15/2018	03/15/2018	NMFS
Friends of the Earth	03/15/2018	03/15/2018	NMFS
Property Solutions INC.	03/14/2018	03/14/2018	NMFS
Southern Environmental Law Center	03/13/2018	03/13/2018	NMFS
Friends of the Earth	03/12/2018	03/12/2018	NMFS
Property Solutions INC.	03/09/2018	03/09/2018	NMFS
San Diego Council of Divers	03/06/2018	03/06/2018	NMFS
Trieu Law, LLC	02/28/2018	02/28/2018	NMFS
Miami Dade Citizen's for Property Rights	02/27/2018	02/27/2018	NMFS
Delaware Riverkeeper Network	02/20/2018	02/20/2018	NMFS
Public Employees for Environmental Responsibility (PEER)	02/14/2018	02/14/2018	NMFS
MINASIAN, MEITH, SOARES, SEXTON & COOPER, LL	02/14/2018	02/14/2018	NMFS
Parks & Solar, LLP	02/13/2018	02/13/2018	NMFS
Natural Resources Defense Council	02/08/2018	02/08/2018	NMFS
San Diego Council of Divers	02/05/2018	02/05/2018	NMFS
Friends of the Earth	02/05/2018	02/05/2018	NMFS
	01/30/2018	01/30/2018	NMFS
	01/30/2018	01/30/2018	NMFS
	01/30/2018	01/30/2018	NMFS
Carlton Fields Jordan Burt, P.A.	01/29/2018	01/29/2018	NMFS
Friends of the Earth	01/17/2018	01/17/2018	NMFS
SOMACH SIMMONS & DUNN	01/16/2018	01/16/2018	NMFS
	01/12/2018	01/12/2018	NMFS
Cause of Action Institute	12/11/2017	12/11/2017	NOAA FOIA
NBC News	10/24/2017	10/24/2017	NOAA FOIA
	03/20/2018	03/20/2018	NOAA FOIA
	01/05/2018	01/05/2018	NOAA FOIA
ARNOLD & PORTER LLP	11/28/2016	11/28/2016	NOS
Turtle Island Restoration Network	11/14/2017	11/14/2017	NOS

Ursinus College	11/04/2017	11/06/2017	NOS
Beveridge & Diamond P.C.	11/01/2017	11/01/2017	NOS
	08/09/2017	08/09/2017	NOS
Citizens for Responsible Zoning and Landowner Rights	08/07/2017	08/07/2017	NOS
VICE	07/19/2017	07/19/2017	NOS
LISKOW & LEWIS	03/31/2017	03/31/2017	NOS
Clínica UIPR	03/13/2018	03/13/2018	NOS
	03/09/2018	03/09/2018	NOS
	03/07/2018	03/07/2018	NOS
	02/13/2018	02/13/2018	NOS
Roux Associates, Inc	01/30/2018	01/30/2018	NOS
Arnold & Porter Kaye Scholer LLP	01/09/2017	01/09/2017	NOS
Houston Chronicle	10/25/2017	10/25/2017	NWS
BuzzFeed	10/17/2017	10/17/2017	NWS
Columbia University - Graduate School of Journalism	09/18/2017	09/18/2017	NWS
National Weather Service Employees	04/18/2017	04/18/2017	NWS
GOMEZ LLC Attorney At Law	03/10/2017	03/10/2017	NWS
National Weather Service	02/14/2018	02/14/2018	NWS
Logansport Historical Preservation Committee	02/11/2018	02/12/2018	NWS
KHOU-TV	01/12/2018	01/12/2018	NWS
	11/03/2017	11/03/2017	OAR
	10/13/2016	10/13/2016	OAR
	10/11/2016	10/11/2016	OAR
America Rising Squared	10/04/2017	10/04/2017	OAR
Institute for Trade, Standards and Sustainable Development	09/22/2014	09/22/2014	OAR
Center for Biological Diversity	08/31/2017	08/31/2017	OAR
	08/31/2017	08/31/2017	OAR
ITSSD	03/26/2014	03/26/2014	OAR
	02/01/2018	02/01/2018	OAR
	01/23/2018	01/23/2018	OAR
	01/11/2018	01/11/2018	OAR
Kettle Magazine, London	09/28/2017	09/28/2017	OC
Climate Central	07/14/2017	07/14/2017	OC
	06/19/2017	06/19/2017	OC
Ms.	03/29/2018	03/29/2018	OC
InsideClimate News	03/29/2018	03/29/2018	OC
MuckRock	03/13/2018	03/13/2018	OC
	11/01/2017	11/01/2017	OGC
Natural Resources Defense Council	05/05/2017	05/05/2017	OGC
Cause of Action Institute	03/28/2018	03/28/2018	OGC
	03/27/2018	03/27/2018	OGC
	03/26/2018	03/26/2018	OGC
Kaunas University of Technology	03/06/2018	03/06/2018	OGC
Rolls-Royce Marine North America Inc.	09/22/2017	09/22/2017	OMAO
Nature	08/24/2017	08/24/2017	USEC
	08/22/2017	08/22/2017	USEC
ProPublica	08/21/2017	08/21/2017	USEC
	08/21/2017	08/21/2017	USEC
Ferguson Case Orr Paterson LLP	12/28/2017	12/28/2017	WFMO
National Weather Service	02/14/2018	02/14/2018	WFMO
National Weather Service	02/14/2018	02/14/2018	WFMO
	01/08/2018	01/08/2018	WFMO

Perfected?	Due	Closed Date	Status	Dispositions
Yes	02/08/2018	TBD	Assignment Determination	
Yes	01/13/2017	TBD	Assignment Determination	
Yes	03/19/2018	TBD	Assignment Determination	
Yes	07/31/2015	TBD	Assignment Determination	
Yes	03/19/2018	TBD	Assignment Determination	
Yes	03/19/2018	TBD	Assignment Determination	
Yes	03/19/2018	TBD	Assignment Determination	
Yes	04/23/2018	TBD	Assignment Determination	
Yes	04/13/2018	TBD	Assignment Determination	
Yes	03/27/2018	TBD	Assignment Determination	
Yes	03/27/2018	TBD	Assignment Determination	
Yes	03/26/2018	TBD	Assignment Determination	
Yes	03/15/2018	TBD	Research Records	
Yes	03/14/2018	TBD	Assignment Determination	
Yes	03/13/2018	TBD	Assignment Determination	
Yes	03/06/2018	TBD	Final Preparation of Response	Full grant
Yes	02/22/2018	TBD	Assignment Determination	
Yes	02/21/2018	TBD	Assignment Determination	
Yes	02/21/2018	TBD	Assignment Determination	
Yes	02/01/2018	TBD	Research Records	
Yes	12/20/2017	TBD	Research Records	
Yes	05/11/2017	TBD	Estimate Costs	
Yes	03/29/2018	TBD	Assignment Determination	
Yes	03/26/2018	TBD	Assignment Determination	
Yes	03/27/2018	TBD	Assignment Determination	
Yes	11/08/2017	TBD	Evaluation of Records	
Yes	05/02/2018	TBD	Assignment Determination	
Yes	04/23/2018	TBD	Assignment Determination	
Yes	04/04/2018	TBD	Assignment Determination	
Yes	02/04/2016	TBD	Research Records	
Yes	09/20/2018	TBD	Research Records	
Yes	01/16/2018	TBD	Evaluation of Records	
Yes	01/24/2018	TBD	Research Records	
Yes	01/13/2017	TBD	Research Records	
Yes	01/09/2018	TBD	Assignment Determination	
Yes	01/05/2017	TBD	Research Records	
Yes	12/05/2014	TBD	Research Records	
Yes	12/13/2017	TBD	Research Records	
Yes	04/30/2018	TBD	Research Records	
Yes	12/01/2017	TBD	Evaluation of Records	
Yes	12/14/2017	TBD	Evaluation of Records	
Yes	09/14/2018	TBD	Assignment Determination	
Yes	11/21/2017	TBD	Evaluation of Records	
Yes	10/27/2016	TBD	Final Preparation of Response	Partial grant/partial denial
Yes	10/25/2017	TBD	Research Records	
Yes	10/06/2017	TBD	Evaluation of Records	
Yes	09/21/2017	TBD	Evaluation of Records	
Yes	07/28/2017	TBD	Evaluation of Records	
Yes	08/19/2016	TBD	Assignment Determination	
Yes	03/20/2018	TBD	Research Records	
Yes	08/10/2017	TBD	Research Records	

Yes	08/11/2017	TBD	Final Preparation of Response
Yes	08/01/2017	TBD	Research Records
Yes	07/26/2017	TBD	Evaluation of Records
Yes	07/21/2017	TBD	Research Records
Yes	08/16/2017	TBD	Evaluation of Records
Yes	06/20/2017	TBD	Evaluation of Records
Yes	06/20/2017	TBD	Research Records
Yes	07/21/2017	TBD	Research Records
Yes	06/22/2017	TBD	Assignment Determination
Yes	07/03/2017	TBD	Assignment Determination
Yes	07/03/2017	TBD	Assignment Determination
Yes	07/03/2017	TBD	Research Records
Yes	05/16/2017	TBD	Evaluation of Records
Yes	05/09/2017	TBD	Assignment Determination
Yes	04/25/2018	TBD	Assignment Determination
Yes	04/25/2018	TBD	Assignment Determination
Yes	04/27/2018	TBD	Assignment Determination
Yes	04/25/2018	TBD	Assignment Determination
Yes	04/23/2018	TBD	Assignment Determination
Yes	05/07/2018	TBD	Assignment Determination
Yes	04/23/2018	TBD	Assignment Determination
Yes	04/23/2018	TBD	Assignment Determination
Yes	05/07/2018	TBD	Assignment Determination
Yes	04/26/2018	TBD	Assignment Determination
Yes	04/12/2018	TBD	Assignment Determination
Yes	05/11/2018	TBD	Assignment Determination
Yes	04/12/2018	TBD	Assignment Determination
Yes	04/26/2018	TBD	Assignment Determination
Yes	04/27/2018	TBD	Assignment Determination
Yes	04/09/2018	TBD	Assignment Determination
Yes	04/02/2018	TBD	Assignment Determination
Yes	04/02/2018	TBD	Assignment Determination
Yes	04/06/2018	TBD	Research Records
Yes	03/29/2018	TBD	Research Records
Yes	03/16/2018	TBD	Assignment Determination
Yes	03/15/2018	TBD	Research Records
Yes	03/28/2018	TBD	Evaluation of Records
Yes	03/14/2018	TBD	Final Preparation of Response Full grant
Yes	03/28/2018	TBD	Assignment Determination
Yes	09/07/2018	TBD	Assignment Determination
Yes	09/07/2018	TBD	Assignment Determination
Yes	09/07/2018	TBD	Assignment Determination
Yes	03/19/2018	TBD	Final Preparation of Response Full grant
Yes	03/07/2018	TBD	Research Records
Yes	03/01/2018	TBD	Assignment Determination
Yes	02/14/2018	TBD	Assignment Determination
Yes	02/01/2018	TBD	Evaluation of Records
Yes	03/21/2018	TBD	Assignment Determination
Yes	04/23/2018	TBD	Assignment Determination
Yes	03/19/2018	TBD	Assignment Determination
Yes	01/10/2017	TBD	Assignment Determination
Yes	12/14/2017	TBD	Assignment Determination

Yes	03/21/2018	TBD	Research Records
Yes	02/08/2018	TBD	Evaluation of Records
Yes	09/19/2017	TBD	Assignment Determination
Yes	10/02/2017	TBD	Assignment Determination
Yes	09/05/2017	TBD	Evaluation of Records
Yes	05/23/2017	TBD	Research Records
Yes	04/12/2018	TBD	Assignment Determination
Yes	04/27/2018	TBD	Assignment Determination
Yes	04/09/2018	TBD	Assignment Determination
Yes	03/15/2018	TBD	Assignment Determination
Yes	03/06/2018	TBD	Assignment Determination
Yes	03/07/2017	TBD	Research Records
Yes	03/26/2018	TBD	Assignment Determination
Yes	03/07/2018	TBD	Assignment Determination
Yes	10/24/2017	TBD	Assignment Determination
Yes	05/19/2017	TBD	Research Records
Yes	04/12/2017	TBD	Research Records
Yes	03/15/2018	TBD	Assignment Determination
Yes	03/14/2018	TBD	Assignment Determination
Yes	02/14/2018	TBD	Assignment Determination
Yes	12/05/2017	TBD	Evaluation of Records
Yes	11/25/2016	TBD	Evaluation of Records
Yes	11/09/2016	TBD	Research Records
Yes	11/16/2017	TBD	Research Records
Yes	10/22/2014	TBD	Assignment Determination
Yes	10/25/2017	TBD	Assignment Determination
Yes	10/30/2017	TBD	Research Records
Yes	05/13/2014	TBD	Assignment Determination
Yes	03/14/2018	TBD	Assignment Determination
Yes	02/22/2018	TBD	Assignment Determination
Yes	02/26/2018	TBD	Assignment Determination
Yes	11/08/2017	TBD	Evaluation of Records
Yes	08/16/2017	TBD	Assignment Determination
Yes	08/30/2017	TBD	Research Records
Yes	04/27/2018	TBD	Assignment Determination
Yes	04/27/2018	TBD	Assignment Determination
Yes	04/16/2018	TBD	Assignment Determination
Yes	12/01/2017	TBD	Assignment Determination
Yes	06/16/2017	TBD	Assignment Determination
Yes	04/25/2018	TBD	Assignment Determination
Yes	04/25/2018	TBD	Assignment Determination
Yes	04/23/2018	TBD	Assignment Determination
Yes	04/09/2018	TBD	Assignment Determination
Yes	11/08/2017	TBD	Assignment Determination
Yes	09/22/2017	TBD	Assignment Determination
Yes	09/20/2017	TBD	Assignment Determination
Yes	09/20/2017	TBD	Assignment Determination
Yes	09/19/2017	TBD	Assignment Determination
Yes	02/27/2018	TBD	Assignment Determination
Yes	04/12/2018	TBD	Assignment Determination
Yes	04/12/2018	TBD	Assignment Determination
Yes	02/06/2018	TBD	Assignment Determination

Detail

[Reference FGI 17- 55437] relevant to DOC DG133W10CQ0049 Orders 8,12,14,15,18-23,25 we seek the following We are representing Harvest Pipeline Company in connection with an incident which occurred on 5 September 2017 at Chenier Ronquille Barrier Island Restoration Project (BA-76); Solicitation/Contract # WC133F-15-RB-0008/WC133 I request an April 1, 2009 Blanked Purchase Agreement (BPA) order for Verizon Wireless wireless supplies-and see I hereby request a copy of the following documents identified to DOCAB133F14CQ0017 1. Contract 2. Most Current I hereby request a copy of the following documents identified to DOCAB133F14CQ0018 1. Contract 2. Most Current I hereby request a copy of the following documents identified to DOCAB133F14CQ0019: 1. Contract 2. Most Current I am interested in obtaining the contract and certificates of insurance that would have been in place between NOAA and Please be advised I am making a FOIA Request for the Application of Federal Assistance for New York State Department of Environmental Conservation [FGI 53604] Relevant to DOCAB133F14CQ0017 and DOCAB133F14CQ0018, we seek contract with SOW/PWS for Please accept this letter as a Freedom of Information Act request for all documents relating to Contract# AB-133M- [Reference FGI# 18-56371] Relevant to NOAA ST133015CQ0053/DOCST133015CQ0053 for PUBLIC CLOUD IN [Reference FGI 18- 56253] relevant to DOC DG133W12CQ0010 we seek the following: (1) Contract sections A-M and I am writing to make a FOIA request for the following applications to NOAA Chesapeake Bay B-WET (CFDA: 11.41 [FGI 18-56059] Relevant to Contract No. DOCEA133C17BA0062, National Oceanic and Atmospheric Administration [Reference FGI# 18-56041] Good morning, under the provisions of the Freedom of Information Act, and relevant to Any and all records, files, notes, personnel actions, contracts regarding my contract and temporary employment at [FGI 18- 55919] Relevant to DOCAB133018CN0002, we seek copy of the contract SOW/PWS; and attachments [FGI 18- 55918] Relevant to DOCAB133018CN0003, we seek copy of the contract SOW/PWS; and attachments I would like a copy of final findings or response made by the inquiry officials at NMFS for OIG complaint number 17 The final report for Case Number 17-1346

I would like to obtain data on all National Oceanic and Atmospheric Administration direct leased properties excluded Please provide a copy of the full report on the investigation by the National Oceanic and Atmospheric Administration ADDED FROM DOC-NOAA-2018-000818: Please provide me with a copy of: 1. the investigative findings of the investigation A copy of correspondence from Congresswoman Diane Black or her staff and the response to the correspondence All correspondence from these selected Texas members of Congress (listed below) and their staff members, Texas Please provide a copy of the remote sensing space system license granted to SpaceX for the Iridium-5 mission with Marine Pollution Surveillance Report prepared by NOAA. Dates 4/1/2015 through 9/1/2015 Area Central California Coast This request is for the following categories of documents and information. Data, reports or memoranda created before All records of communications between (i) Eileen Sobeck, Assistant Administrator for Fisheries; (ii) Samuel Rauch, The Center requests from National Marine Fisheries Service ("NMFS"): all records generated in connection with the I request the following information through the Freedom of Information Act pertaining to my work as a NMFS fisher Oceana requests copies of all documents, records, and materials, including but not limited to all memoranda, studies This request generally concerns records related to the NMFS document entitled "Technical Guidance for Assessment Please provide all records generated in connection with the deployment of US Navy dolphins to locate endangered CoA Institute hereby requests access to the following records for the time period of January 1, 2014, to the present

- All documents and communications related to the National Marine Fisheries Service's (NMFS) listing determination

Any and all records concerning the effect of Executive Order 13771, entitled "Reducing Regulation and Controlling 1) All records reflecting or relating to inter-agency analysis, discussion or correspondence regarding the boundaries Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and a copy of the National I am requesting the following: 1) Copy of Cathy Readinger's personnel file from October 27, 1982 to present in its entirety 1. All records generated in connection with Endangered Species Act, 16 U.S.C. §§ 1531- 1544 ("ESA"), § With the foregoing as background, and pursuant to the FOIA, 5 U.S.C. § 552, CoA Institute hereby requests a Copies of all emails pertaining to observer health and safety written or received by National Marine Fisheries Service I am writing on behalf of Sea Shepherd Legal ("SSL") with a request for records maintained by the National Marine Please produce records of the following types in the possession, custody, or control of the National Oceanic and / Please find attached a FOIA request from the Natural Resources Defense Council (NRDC) for records regarding the The Center requests the following records from the U.S. Department of Commerce ("DOC") from April 1, 2017 to the All documents, including intra-agency discussions and communications with outside parties, related to (1) NOAA's 2/13 SCOPE CLARIFICATION: Ask that NOAA prioritize review and release of NOAA's April 14, 2017 and January The Center requests from the National Marine Fisheries Service ("NMFS") all records generated in connection with

copies of all memoranda, studies, reports, data, correspondence, comments, conversation records, files, electronic

On 28 June 2017, via email, the requester clarified the search scope of the request to: "I would like both foreign of

REVISED SCOPE 6/20: For the time period of May 8, 2015 through May 8, 2017 all text messages, facsimiles and

SCOPE REVISION 6/20 - To exclude the following information: out-of-office replies, duplicates of the same emails

I'd like to request information related to lobbying by the Western Pacific Regional Fishery Management Council (W

I'd like to request information related to the staff, consultants, and members of the Western Pacific Regional Fisher

I'd like to request financial information concerning the Western Pacific Regional Fishery Management Council (WP

I am writing with a request for records maintained by the National Marine Fisheries Service ("NMFS") regarding the

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), CoA Institute hereby requests access to

We request copies of all memoranda, studies, reports, data, correspondence, comments, conversation records, fil

We request copies of all memoranda, studies, reports, data, correspondence, comments, conversation records, fil

We request copies of all memoranda, studies, reports, data, correspondence, comments, conversation records, fil

Any and all records concerning implementation of Executive Order 13771, entitled "Reducing Regulation and Cont

REVISED SCOPE: PART 1: You request the following information for the HI SLL Fishery from 2014 to 2017 (Prior

Environmental and Animal Defense, (hereinafter "eaDefense") requests all "agency records" of the National Ocean

FOIA request for records relating to the decision by the National Marine Fisheries Service to list the oceanic whiteti

1. I would like to make a FOIA request to learn how much funding BPA provides for your science, research or for a

Observer logs for F/V Princess Hawaii for its latest (and last) trip

Looking for any information documents about harassment of NMFS observers working aboard foreign fish process

FOIA request on behalf of The Conservation Angler for two categories of documents, as described in more detail ir

We are seeking catch and related data on South Pacific Tuna Corporation's US Treaty licensed purse seine vesse

NOAA/NMFS National Observer Program observer logs that include any information about crew/captain/observer/

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the Southern Environmental

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Friends of the Earth requests all records

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Friends of the Earth requests all records

Property Solutions Inc. is conducting a Phase I Environmental Assessment of the aforementioned property. As part

****ATTN: SOUTHEAST REGION**** To Whom It May Concern: Under the Freedom of Information Act (FOIA), 5 U.S

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Friends of the Earth requests all records

Property Solutions Inc. is conducting a Phase I Environmental Assessment of the aforementioned property. As part

In February 2017 the Pacific Scientific Review Group met in Honolulu. There were 11 members listed in the resultir

Records of every vessel selected for observer coverage through the Pelagic Observer Program from 2013 to prese

1.) Any and all communications regarding an Endangered Species Act Section 7 consultation carried out between 1

Any and all requests for technical assistance for projects or initiatives that would impact the Atlantic sturgeon in the

A summary of all incidents of violence, threats, or harassment against NOAA employees that occurred in calendar

1. All records or documents, electronic, written, or otherwise, related or referring to Deer Creek, Mill Creek, Antek

Emails or other communications between the National Oceanic and Atmospheric Administration ("NOAA" and

Please produce records in the National Marine Fisheries Service's possession, custody, or control pertaining to the

A paper was recently published by J. Laake titled California sea lions: Environmental impacts on population status

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Friends of the Earth is amending FOIA Reque

As set out fully in the attached letter, this request is for records possessed by the National Marine Fisheries Service

As set out fully in the attached letter, this request is for records possessed by the National Marine Fisheries Service

As set out fully in the attached letter, this request is for records possessed by the National Marine Fisheries Service

I request a copy of the following categories of documents relating to Florida Power and Light's ("FPL") Turkey Point

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Friends of the Earth requests all records

The request seeks all records and documents subject to disclosure under FOIA within the following nine categories

Request directed to National Marine Fisheries Service, Pacific Islands Regional Office. Please see attached files.

1. All weekly reports, charts, and transmittal e-mails that identify "high visibility" or otherwise "sensitive" FOIA reque

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, a copy of the agency's FOIA log for the p

I am trying to find out who is the contact person in purchasing for DOC.

This is a request under the Freedom of Information Act. I hereby request the following records: your agency's FOIA

1. All information (including work plans, quality assurance plans, validated and unvalidated data, results, correspon

TIRN requests from the National Oceanic and Atmospheric Administration (NOAA), the Office of National Marine S

I'm an academic researcher who's interested in learning more about the history of the the Marine Debris Program's

1. The most recent index for the administrative record of the Portland Harbor natural resource damage assessment. This is a Freedom of Information Act Request on behalf of Alliance of Communities for Sustainable Fisheries (ACS). We are requesting copies of all emails, sent or received, of NOAA employees Ellen Brody and Russ Green that contain information regarding the assessment. Please provide all records generated in connection to complaints made to the Monterey Bay National Marine Sanctuary.
1. Any and all records, photographs, correspondence, documents, including email communication, pertaining to the monitoring of ground and surface water quality at Jobos Bay National Marine Sanctuary.
- Please provide the following information relative to each respective grant award: NA11NOS4630176 Grant Agreement with the Tulane Environmental Law Clinic. On behalf of our client Ian MacDonald, Professor of Oceanography.
- 1) Any and all reports, results, etc. provided to Ms. Athline Clark, the Office of National Marine Sanctuaries' NOAA.
- Request a copy of the Natural Resource Damage Assessment and the Habitat Equivalency Analysis (if not already provided).
- REQUEST UPDATED 3/27 - The requester has approved that the \$18,212 refund for FOIA #2017-000320 be rolled into the current budget.
- Copies of all weather and forecast communication with the U.S. Army Corps of Engineers regarding Addicks/Barkett Dam.
1. Any and all records, which includes but is not limited to emails, memos, letters, reports, talking points, and after-action reports.
- UPDATED SCOPE 11/2017: Seeking records regarding the influence of two NWS reports on a catastrophe bond issued by the U.S. Treasury.
1. A copy of any and all reports on the testing of the radiosonde autolauncher manufactured by the Vaisala Corporation.
- Copies of all reports submitted to the Secretary of Commerce pursuant to 15 U.S.C. §330a, concerning "weather-related" activities.
- The amount of appropriated funding under the FY2018 budget used for personal performance awards in the Analyze and Report program.
- This is a request for all documentation (up to and including studies, research, and notations) concerning the effects of climate change on the coastal zone.
- January 12, 2018 Pursuant to the Freedom of Information Act, KHOU-TV respectfully requests: Copies of any and all records mentioning, including and/or referencing the decision to terminate, or otherwise not renew, the Federal Climate Change Act.
1. Official record of panel notes and recommendations of NOAA's 2016 Leadership Competencies Development Program.
- UPDATED DESCRIPTION 10/26/16: All emails (and attachments) that have been received by or sent by the following NOAA employees (over the course of the past 12 months):
- Emails (and attachments) that have been received by or sent by the following NOAA employees (over the course of the past 12 months):
- Any email sent by David Fahey, NOAA Earth System Research Lab, from June 14, 2017, through June 27, 2017, that mentions the name of the requester.
- This new FOIA Request seeks disclosure of as yet publicly disclosed documents substantiating the IQA conformance of the facility.
- All records mentioning, including and/or referencing timing for release of 4th National Climate Assessment, whether in the form of a report or otherwise.
1. All records mentioning, including, and/or referencing the decision to terminate, or otherwise not renew, the Federal Climate Change Act.
- Enactment by the USEPA of a series of national greenhouse gas (GHG) emission regulations based primarily upon the findings of the report.
- All records mentioning, including, and/or referencing the Seventh Climate Action Report ("CAR-7"), which is bifurcated into two parts.
- All radar data captured by the National Weather Radar Testbed (Phased Array Site, Norman, OK) on May 20, 2017.
- AJJ time and attendance records and computer records retrieved and submitted to the Office of Audits and Investigations.
- Per the Act, I am requesting copies of correspondence or memorandums dated from January 20, 2017 to the date of production.
- I request any records and email communications relating to drafting the press release on the 2017 edition of NOAA's State of the Climate Report.
- I therefore request the following documents: Any e-mails, memos, presentations, or other documents that a) are dated from January 20, 2017 to the date of production.
- Dear FOIA Officer: Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to any records that contain information regarding the assessment.
- This is a request under the Freedom of Information Act. On behalf of InsideClimate News, I'd like to request copies of all records mentioning, including and/or referencing the decision to terminate, or otherwise not renew, the Federal Climate Change Act.
- This is a request under the Freedom of Information Act. I hereby request the following records: For the 16-month period from January 20, 2017 to the date of production:
1. Official record from The Office of Special Counsel indicating that I was in violation of the Hatch Act in Aug 2016.
- Please produce the following records in the National Oceanic & Atmospheric Administration's (NOAA) possession:
- Pursuant to the FOIA, 5 U.S.C. § 552, CoA Institute hereby requests access to the following records. The time period is from January 20, 2017 to the date of production.
- I request a copy of Exhibit 31 from UNITED STATES DEPARTMENT OF COMMERCE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION.
- I request a copy of Exhibit 10 from UNITED STATES DEPARTMENT OF COMMERCE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION.
- Dear Sir or Madam, Under the Freedom of Information Act, I seek to obtain any documents which the National Oceanic and Atmospheric Administration (NOAA) has in its possession, custody, or control.
- Request information regarding vessel equipment maintenance records for Rolls-Royce equipment. We are requesting information regarding vessel equipment maintenance records for Rolls-Royce equipment. We are requesting information regarding vessel equipment maintenance records for Rolls-Royce equipment.
- I would like copies of all emails including the word CLIMATE or the word CHARTER or the phrase "ADVISORY COMMITTEE".
- A copy of each email that includes the word CLIMATE or the word CHARTER or the phrase "ADVISORY COMMITTEE".
- I request access to and copies of all email correspondence to and from Acting NOAA Administrator (and Under Secretary for Oceans and Atmosphere).
- A copy of each email that includes the word CLIMATE or the word CHARTER or the phrase "ADVISORY COMMITTEE".
- All pay records from January 1, 2015, to the date of production for the EMPLOYEE: a. All annual gross income from the position.
- All non-personal identifying information concerning the person selected for position Management and Program Analysis.
- All non-personal identifying information concerning the person selected for position number NWS-ER-2017-0083 located at the following address: 5000 Lighthouse Avenue, Silver Spring, MD 20910.
- CLARIFIED REQUEST SCOPE 1/23/18: A FOIA request for job announcement number (Financial Management Section).

current definition of "marine debris." I write to request any and all records relating to the dev
it. 2. All external correspondence (including letters, emails, and memoranda) created or received betwe
;F), for copies of all internal and external communications concerning and regarding proposed wave or v
ntain the "key words" Lake Michigan, Lake Michigan National Marine Sanctuary, Lake Michig
uary about wildlife being harassed or disturbed by drones or unmanned aerial vehicles. This request is I
a National Oceanic and Atmospheric Administration's approval of Louisiana's State and Local Coastal R
nal Estuarine Research Reserve and South Coast Aquifer (in Salinas and Guayama), Puerto Rico.
rent Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA) compliant Appraisal Report ('
at Florida State University, we request a copy of "MC20 Unified Command Sheen Source Location Wor
Superintendent of Papahānaumokuākea Marine National Monument, associated with her 360 evaluation
included in the Damage Assessment) for the Lower Duwamish Waterway Superfund Site in Seattle, W
d into the cost of this FOIA (#2017-000414). As such, this FOIA has been narrowed to the production of
r reservoir releases from Aug. 23 through Sept 8.
action reports, that mention or refer to assessments about impact, response, evacuation and preparedn
ssued by the World Bank and the government of Mexico -----
ation conducted by the National Weather Service. We understand that such testing has been conducted
her modification" as defined by federal law 15 U.S.C. §330, from 1971 (the date this federal law wa
, Forecast, and Support Office of the National Weather Service with a breakdown of what positions withi
s and effects of wind turbines and commercial/industrial wind farms on radar used by NOAA/NWS for an
all email between August 23 to August 30 sent or received by Weather Prediction Center director David
ogram (LCDP X) for Oceanic and Atmospheric Research (OAR); 2. Official record of employee recomm
ing NOAA employees since April of 2016 to the present: 1. Melinda Marquis [Melinda.Marquis@noaa.g
f 2016]; 1. Melinda Marquis [Melinda.marquis@noaa.gov], 2. Kevin Kelleher [Kevin.Kelleher@noaa.gov]
hat mentions or refers to the Climate Science Special Report (CSSR).
ice of NOAA and NOAA third-party contractor peer reviews of ten NOAA-developed climate assessment
r it will be issued in final form by the statutory deadline, obstacles for completing by the deadline, and w
ral Advisory Committee Act charter for the "Advisory Committee for the Sustained National Climate Ass
on reviews of third-party (including NOAA) prepared scientific assessments.
ited into both the Seventh U.S. National Communication ("NC-7") and the Third U.S. Biennial Report ("B
3 from 2:00PM CDT until 4:00PM CDT. (Essentially the EF-5 tornado event) This data requested would i
gations Unit pertaining to the Office of Inspector General complaint filed by Katy Stewart referencing Nic
of this request originating from the Office of the Administrator or the Office of Communications when it c
's Annual Greenhouse Gas Index found here: <http://www.noaa.gov/news/noaa-s-greenhouse-gas-index>
ated from 1/1/2015 onward b) originate with, or are sent to or from personnel in the following offices: Cor
nd copies of documents related to the publication and public release of "NOAA Technical Report NOS C
s of the following documents: • Any emails or other written communication, including notes and memos, r
5-day period from Tuesday, November 8, 2016 through Tuesday, March 13, 2018: (SUMMARY) Any anc
2. Official record of my ethical violation in having a NOAA logo on my personal website under coaching s
sion, custody or control that are referenced in Administration of Coral Reef Resources in the Northwest
od for all items of this request is July 1, 2017 to the present. 1. All communications between NOAA and
) ATMOSPHERIC ADMINISTRATION DOCKET NUMBER NE980310FM/V (F/V Independence) IN THE
) ATMOSPHERIC ADMINISTRATION DOCKET NUMBER NE980310FM/V (F/V Independence) IN THE
anic and Atmospheric Administration may be holding in regards to diplomatic negotiations and technica
iting a complete history of planned maintenance, corrective maintenance and repair records for the follo
RY COMMITTEE"; I limit this search to an electronic search of emails in the email accounts of the /
MMITTEE"; I limit this search to an electronic search of emails in the email accounts of the Acting
retary of Commerce for Oceans and Atmosphere) Ben Friedman, his senior advisor, special assistant, /
MMITTEE"; I limit this search to an electronic search of emails in the email accounts of the Acting
r all sources including, but not limited to, regular pay, overtime, bonuses, cash, profit sharing, commissic
alyst GS-0343-13/14 (MAP), position number NWS-ER-2017-0074 located at NOAA-NWS-Office of Faci
cated at NOAA-OPPSD. I request full disclosure of the selectee's 1. Age at time of selection 2. Declare
pecialist SO-CFO-2017-0020/SO-CFO-2017-0021) for which I interviewed for on 8 September 2017 at 1

[REDACTED]

under the Freedom of Information Act, we request you provide us with a true and correct copy of the official records of the project (including but not limited to all correspondence, reports, and the BD & AD hydrographic/land surveys (.xyz format) for the above referenced project. Management Division I MC3; 325 Broadway, Boulder, CO 80305. The NOAA Contracting Officer was Mark. Bids without any pricing (other than the total dollar amount of award) Bids without any pricing (other than the total dollar amount of award) Orders without any pricing (other than the total dollar amount of award). 988. Please let me know if you need any clarification. 2017. Attached is the 2016 Federal Assistance Contract awarded by NOAA under the Secretary of

("NOAA") Oscar Elton Sette ("Sette") between Mare Island Dry Dock LLC ("MIDD") and the NOAA. Specifications (W/PWS), attachments and modifications

Orders with NGSS & MD Environmental Literacy; 2. Earth Force Inc. Alliance to Advance Science issued under GSA Schedule No. GS00F217CA, we seek a copy of the BPA Contract, all task orders issued from January 1, 2017 through Present, relevant to your agency's employee SMARTPAY Credit Card Purchase Force Contract in my name Mary McCullough, Company: Hometown Events and Management. (2) Temp

of the audit. The final response or findings was sent to OCAO.

under the National Marine Sanctuaries program in the Florida Keys. Please also provide copies of financial information system to impersonate me using my email address maxalexander81@verizon.net and 2) the majority staff of the House Budget Committee from January 1, 2017 through present. I believe the committee members from 2015 through the present: Sen. John Cornyn, Sen. Ted Cruz, Rep. Louie Gohmert, Rep. Ted Poe, Rep. Louie Gohmert. 10:13 a.m. EDT. In addition, please include the application and any or all addendum, correspondences, an affidavit of report and and shape files or kmz.

located on or near Madre de Dios Island, or the Ladrone Islands identified in NOAA Chart 17405, and Management and Budget; (iv) Alan Risenhoover, Director of the Office of Sustainable Fisheries; or (v) John Risenhoover; 1531-1544 ("ESA"). See Attachment A (12 Month Decision Not To List Pacific Bluefin Tuna).

sequent decertification or ineligibility as an observer in this program: 1) All my sea time with dates of employment records, or other documents, which have been generated, received, kept, and/or considered by NMFS for Onset of Permanent and Temporary Threshold Shifts; (Technical Guidance); limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence) to a NOAA Town Hall meeting held on or about September 15, 2015, in Providence, Rhode Island, and the Endangered Species Act. All documents and communications to and from all NMFS staff, including division: (1) the rulemaking entitled Designation of Critical Habitat for Threatened Indo-Pacific Reef-building corals and related to intra-agency analysis, discussion or internal correspondence regarding the boundary changes in Alaska in 2012 with selling seal-skin bowhunting tabs falsely marketed as Alaska Native-made; time and attendance records for the 24-month period preceding March 8, 2016; 3) Copy of Cathy Read's 2013 amendment of traffic separation schemes ("TSS"), and associated federal rulemaking process, in the form of Google Chat messages, text messages, SMS messages, Blackberry messages, Skype messages, and email (including attachments).

(Pseudorca crassidens) at Hog Key, on Florida's southwestern coast, on or about January 14, 2017. Unpublished—internal or external to Commerce—concerning President Trump's Executive Order titled "Implementation of the Atlantic Coastal Fisheries Cooperative Management Act" regarding management of its recreational summer flounder fishery under the Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. & 1531-1544 ("ESA") regarding the rulemaking process, in the form of Google Chat messages, text messages, SMS messages, Blackberry messages, Skype messages, and email (including attachments).

and, pursuant to the Freedom of Information Act, that the National Oceanic and Atmospheric Administration request you provide us with a true and correct copy of the official records of the project (including but not limited to all correspondence, reports, and the BD & AD hydrographic/land surveys (.xyz format) for the above referenced project. Management Division I MC3; 325 Broadway, Boulder, CO 80305. The NOAA Contracting Officer was Mark. Bids without any pricing (other than the total dollar amount of award) Bids without any pricing (other than the total dollar amount of award) Orders without any pricing (other than the total dollar amount of award). 988. Please let me know if you need any clarification. 2017. Attached is the 2016 Federal Assistance Contract awarded by NOAA under the Secretary of

development of the regulatory definition of "marine debris" for purposes of the Marine Debris Re
on January 1, 2007, and June 1, 2009, to or from the Yakama Nation, or its designated representatives a
wind energy projects offshore California between January 1, 2010, to date. This request includes, but is r
an NMS, Wisconsin, or any combination of those words related to the creation of an National Marine Sa
limited to the time-frame between January 1, 2016 and the time this request is processed. For this requ
Resources Management Act of 1978 and/or Louisiana's Coastal Resources Program. 2. Any and all recor

"Yellow Book Appraisal") UASFLA compliant Appraisal Review NA12NOS4630176 Grant Agreement UA
rkgroup Final Report" dated 11/17/2017 involving Taylor Energy Company LLC. The document should b
1 conducted by Edge Training Systems, Inc. between July 1, 2017 and the present. 2) Any and all raw da
ashington. It is possible that the Damage Assessment has a slightly different title, or is Preliminary, or Dr.
the native MATLAB files used in the publication, L. Jay Field et al., Re-visiting projections of PCBs in Lo

ess relating to Hurricane Maria. 2. Any and all communications between the National Hurricane Center :
----- All correspondence (from 2012 - present) between staff/scientists at the National Hurrica
by the NWS at Sterling, Virginia and possibly at one or more locations in Alaska, and that the report ma
is enacted) to the present.

in subordinate divisions and branches received the awards and the amount for each position not to inclu
y and all purposes, with a primary interest in weather prediction, storm mapping/tracking over populat
Novak, deputy director Kathy Gilbert, administrative officer Crystal Rickett and secretary Dawn Cyrus inc
endations to the OAR Assistant Administrator (AA), Craig N. McLean, in March 2016 from the 3 membe
v] 2. Kevin Kelleher [Kevin.Kelleher@noaa.gov] 3. Jennifer Mahoney [Jennifer.Mahoney@noaa.gov] 4.
], 3. Jennifer Mahoney [jennifer.mahoney@noaa.gov], that pertain to the following subjects; 1. The NEW

ts that NOAA knew or had reason to know the EPA Administrator would use as the scientific foundation,
hether the recent decision to terminate the 'Advisory Committee for Sustained National Climate Assessm
essment" (hereafter "Committee") including, but not limited to: a. Who participated in this decision-makin

R-3"), as mandated to be submitted under the United Nations Framework Convention on Climate Chang
include (but not be limited to) Base Reflectivity, Base Velocity, Storm Relative Velocity and correlation cc
ole Mason; 2. The first management inquiry written by Glenn Boledorich for OAR Leadership and submi
came to requests from members of the media. This information is being requested in light of recent repo
:-up-40-percent-since-1990 I would prefer to receive these in electronic format if possible.

munications Legislative and Intergovernmental Affairs c) include one or more of the following terms: &
O-OPS 086: PATTERNS AND PROJECTIONS OF HIGH TIDE FLOODING ALONG THE U.S. COASTI
of any members of NOAA's Office of Communications that mention or discuss NOAA Technical Report
d all talking points and similar memorandums, emails, and transcripts providing advice or direction on ho
services versus "as seen at" section for where I have been a speaker 3. Official record of my
Hawaiian Islands, 24 O.L.C. 183, 184 & n.1 (2000). • Memorandum for Randolph Moss, Assistant /
the Attorney General of the United States concerning records created or received by NOAA employees
E MATTER OF: Lobster's Inc. Lawrence M. Yacubian, Respondents. Exhibit 31 contains information anc
E MATTER OF: Lobster's Inc. Lawrence M. Yacubian, Respondents. Exhibit 10 has the basic and nine a
l deliberations under the United Nations Convention on Biological Diversity insofar that they relate to the
wing Rolls-Royce equipment: Fishery Survey Vessel - FSV 6 NOAA Ship Reuben Lasker Shafting, Seals
Acting Administrator Ben Friedman, and those of his Senior Advisor, Special Assistant, Chief of Staff, De
Administrator Ben Friedman, and those of his Senior Advisor, Special Assistant, Chief of Staff, Deputy (
chief of staff, deputy chief of staff and policy director, between the dates of July 1, 2017, and the date thi
Administrator Ben Friedman, and those of his Senior Advisor, Special Assistant, Chief of Staff, Deputy (c
ons and expense accounts, identifying said sources other than regular income. b. The annual deductions
ilities. I request full disclosure of the selectee's 1. Age at time of selection 2. Declared race at time of sel
d race at time of selection 3. Veterans status 4. Length of service with NWS prior to appointment. 5. Tot
7:00 PST via telephone in Seattle, WA with Angela Hunter. Request the following: Hiring decision docu

[REDACTED]

United States Department of Commerce, National Oceanic and Atmospheric Administration, concerning E. Caban.

Commerce. See Below and attached 2016 Application. I am requesting the 2017 Application and 2018 Specifically, I request that you provide any and all documents maintained by the NOAA which related to Con

Student Action Projects”;
and thereunder, all modifications issued thereto, and all communications between the Contracting Officer ;
Program for your agency : Specifically we request: 1. All credit card holder (names, address, tel #, email)
ary worker through a temporary service, I cannot recall the name of the temp agency. (3) Copy of IBS

City Renewal Options Property State Renewal Notice Date Property Zip Code Renewal Option Type Pr
redits that were done in relation to the investigation.
the name of the person(s) who conducted the activity. I am writing to request the official records for an
Correspondence are most likely to be held by your Office of Congressional Affairs, Office of Legislative Af
. Sam Johnson, Rep. John Ratcliffe, Rep. Jeb Hensarling, Rep. Joe Barton, Rep. John Culberson, Rep.
id any other records pertaining to the remote sensing space system license referenced above.

excerpt of which is shown below (the “Madre de Dios Island Complex”). The Madre de Dios Island Com
n Bullard, Regional Administrator for the Greater Atlantic Region, and any person associated with the fol

arkation and disembarkation, number of sea days, and names of vessels; 2) All performance evaluation
; and/or NOAA relating to OMB’s review of the Final Rule with RIN 0648-BG45.

1. Information not cited in the final version of the Technical Guidance or released to the public that NMF;
y correspondence as well as correspondence with entities or individuals outside the federal government
nd publicized on NOAA’s website on or about September 3, 2015 (attached as Exhibit 1 to this FOIA req
isions beyond the Protected Resources division, concerning the petitioned, proposed, and listed corals
g Corals, including the timing and content of any such designation. 2) the rulemaking entitled Designat
ies of the Corps’ CWA § 404 jurisdiction in Puget Sound’s tidally influenced waters. 3) Any records
de. I would like to receive the information in electronic copies via email.

inger’s time and attendance records from March 8, 2016 through June 27, 2017; 4) Listing of administra
re Santa Barbara Channel (“SBC”) and approach to the ports of Long Beach and Los Angeles; 2. All rec
icrosoft Exchange Server messages, handwritten notes, or correspondence through any other medium-

unless otherwise stated below, and for purposes of this request, SSL seeks only those records produced
ting an America-First Offshore Energy Strategy” (April 28, 2017) (“Executive Order”) (Exh. A) as it pertai
operative Management Act. 1. Decision memoranda, letters, emails, situation summaries, discussion c
‘ESA’); 2. All records mentioning, including, and/or referencing the draft and/or final biological evaluation

n produce for inspection and copying its full investigation file pertaining to this matter. This includes but is
nuary 20, 2017 to the date of the search.

9, 2017. This includes documents, records, and materials regarding: 1. extension or reopening of the pri
he following documents: A summary of all complaints of violence, threats, or harassment against fisherie
alsiger – NOAA, Alaska Regional Administrator Robert D. Mecum – NOAA, Alaska Deputy Regional Adr
or expansions during the specified time periods: Northeast Canyons and Seamounts Marine National Mc
effort to influence legislation or executive action, including indirect or grassroots lobbying. 2) All WPRFM
:h person identified, documents sufficient to identify the individual's employment status, including but not
and a general ledger, in the greatest level of detail available without need for redaction. I would like this i
s relating to the facts surrounding the Stranding, including how the event was discovered, the condition c
ten notes, or communications through any other media—sent or received by the following individuals for
sharks in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atla
:h fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottc
and shark bottom longline fisheries. 2. Logbook data related to shark bycatch, by species, in the HMS s
ulatory Costs,” or the April 5, 2017 Office of Management and Budget (OMB) guidance entitled, “Implem
ies discarded dead (up to 10 per year/species) ☐ (Prioritizing images of sea turtles and marine mammal
omote the conservation of the species, of the largetooth sawfish (collectively *Pristis pristis*; formerly *Pri
on with the development of the 90-day finding, the proposed rule, and the final rule. Pursuant to 5 U.S.C.
earn how much money the Corps provides for your science, research or for any other reasons you might*

e Resources Company, Thorne Tasker, Alaska Joint Venture Fisheries, groundfish fishery 1980-1990.
om NMFS to IDFG, regarding ESA take coverage or ESA permits for IDFG-authorized fish harvest progr
ars on the fishing trip, no matter it's FAD/associated or free school, to be certified to maintain MSC statu
ds) from the year 2000 to present (March 20, 2018). This includes copies of all observer logs that includ
e Chemical Corp. site (the "Site"): • Balance, budget, and expenditure information for the ap
NOAA or its Atlantic States Marine Fisheries Commission.

8. This request includes any records in the possession of NOAA or any of its Interstate Marine Fisheries
– Block 224, Lot 1 Biltmore – 271 West 47th Street – Block 1019, Lot 1 Parker Towers – 104-20, 104-4C
raft Environmental Impact Statement for Spaceport Camden in Camden County, Georgia, as prepared b

th Avenue Northeast Parcel: 793330-0000 Bellevue, King County, Washington 98005 Property Solutions
bokidis, Doyle Hanan, David Itano, Steve Jeffries, Tim Ragen, Katherine Ralls, Terry Wright. Since then

MFS tracking number SER-2017-18430 or including the following individuals: -Ingrid Gilbert -Megan Clou
ation for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River; Any and all i
ngoing investigation). A summary of all incidents of violence, threats, or harassment against profession
stream flows, Mill Creek instream flows, Antelope Creek instream flows, Deer Creek emergency regulati
emoranda, policy statements, or other documents relating to the enforcement of the pressed weight sta

tal population abundance. To understand it I need all the values of the data points vs dates used to mak
t (RAPP). We are hereby narrowing our request to encompass only applications or proposals for marin
17. (1) Any and all records in NMFS's possession which in any way relate to the discussion of the prepa
9, 2017. (1) Any and all records in NMFS's possession which in any way relate to the discussion of the p
7. ☐ (1) Any and all records in NMFS's possession which in any way relate to the discussion of the prepara
ndence, communications or summaries of communications PERTAINING TO COOLING CANAL SYST

usages refer to the United States Department of Commerce, National Oceanic and Atmospheric Admin
vention area. The Tri Marine-specific data request is for fisheries data for activities in the WCPFC conve
or handling of “high visibility” FOIA requests, including politically-sensitive requests or those submitted b

such as PDF and Excel). Under the terms of the E-FOIA Amendments of 1996, Section 5, if a document
rustees"), as well as all information generated by the Trustees as part of the 2008, 2009 and any q
is request, including without limitation all inter and intra-agency communications and data, used, consult

Research, Prevention, and Reduction Act. I have already reviewed the records in the relevant regulatory and consultants (including Ridolfi Environmental), where the correspondence refers to Portland Harbor, and not exclusive of, any policy-development discussions for these types of energy projects, and/or discussion sanctuary in Lake Michigan. The period for the requested emails is January 1, 2017 through July 31, 2017. Next, the term "all records" refers to, but is not limited to, any and all complaints submitted to the Monterey records, photographs, correspondence, documents, including email communication, related to every periodic

USFLA compliant Appraisal Report ("Yellow Book Appraisal") UASFLA compliant Appraisal Review NA1: is approximately 664 pages in length. Mr. Brad Benggio, NOAA SSC D7 (representing the USCG); Mr. C. Ita submitted to Edge Training Systems (ETS) by the respondents in response to ETS's invitation to participate, but since it is being used to compensate the public for the lost services of public domain resources, Lower Hudson River fish using model emulation, Science of the Total Environment 557-558:489-501 (July

and any local, state and federal agency mentioning or referring to Hurricane Maria. I have addressed this to the Center and Josh Morgerman, Cyclone, and any employees or representatives at AIR, RMS, AGROA who may be located in or maintained by Joe Pica, the Director of the NWS Office of Observations. 2. Document

include PII. The amount of time off award granted by the AFS Director personnel within the AFSO Front Office and un-populated areas including hazards, injuries, and any/all cases where turbines/wind farms have included the keyword(s): • rain • flood • Houston • Hurricane • Harvey • tropical storm • inches • disaster (through Carolyn McDonald, OAR Representative; 3. The employee names that OAR submitted Stanley Benjamin [Stan.Benjamin@noaa.gov] That pertains to the following subjects: 1. The reasons for the S [National Energy with Weather Systems] project, 2. The future direction of the NEWS project, 3. Plans

in part, of the Clean Air Act endangerment analysis the EPA had been required to undertake in response to the report will impact the date for issuance of the final 4th National Climate Assessment. 1. The ongoing process, both within and outside the agency and the U.S. Department of Commerce; b. What factors

are ("UNFCCC") Articles 4 and 12, including but not limited to: a. All records mentioning, including, and/or related to efficient radar products at all angles scanned for that two hour window of time. b. Documents submitted to the Office of Audits and Investigations Unit regarding the Office of Inspector General complaint filed regarding concerns on relationships between other federal agencies and journalists, particularly those

that are "embargoed" and "embargoed until" and "press conference" and "press briefing" and "LINE USING A COMMON IMPACT THRESHOLD" (https://tidesandcurrents.noaa.gov/publications/technical-reports/2016/NOOS_CO-OPS_086), which is titled "PATTERNS AND PROJECTIONS OF HIGH TIDE FLOODING ALONG THE COAST" to handle the media, media interviews, and statements. --- (SPECIFICALLY) Please include in your report any ethical violation in sending sensitive information about a pending investigation to those that needed to be informed by the Attorney General, Office of Legal Counsel, from John Leshy, Solicitor, Department of the Interior, James through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system. 9 2. All data relevant to the "USCG Research & Development Center and Eight Coast Guard District BOA" attachments as follows: Exhibit 10 – Statement by Linda Galvin dated 14 January 1999 with a supplement on the following themes: climate engineering, geoengineering, negative emissions technology, carbon dioxide capture, and Bearings Fixed Pitch Propeller Steering Gear (Model SR662) Moving Vessel Profiler Survey System. I am Deputy Chief of Staff and Policy Director. I limit this search to the dates July 1, 2017 to the present.

This request is fulfilled with the following search terms: "climate assessment" "advisory committee" "Advisory Committee" Chief of Staff and Policy Director. I limit this search to the dates July 1, 2017 to the present.

3. Deductions from pay, identifying the nature of said deductions. c. Bonuses: All records necessary to reflect any bonuses received. 3. Veterans status 4. Length of service with NWS prior to appointment. 5. Total length of government service prior to appointment. 6. Gender of appointee. I also request how many interviews, interview notes and associated correspondence Rating sheets listing all applicants identified as

[REDACTED]

ing the Cheniere Ronquille Barrier Island Coastal Restoration Project FED NO. BA-76 and the pipeline sp

Applicaion if available.

tract# AB-133M-15CQ-0020 including but not limited to: 1. All contract documents, reports, memoranda,

and the contractor arising out of or relating to the subject contract. [Agency POC is EMILY.CLARK@NO
& their respective transaction data for the last "FY" year in the format as previously provided. To in
S contract with NOAA for my services as a temporary/contract worker at NOAA, including rate of pay, re;

roperty Rentable SF Owner Contact Name Property Usable SF Owner Address Lease Number Owner C

incident that was investigated by NOAA's Cyber Security Center. The incident number is NOAA-INC-22;
fairs, or the office of the Executive Secretariat and likely tracked within a correspondence management :
Kevin Brady, Rep. Michael McCaul, Rep. Michael Conaway, Rep. Kay Granger, Rep. Mac Thornberry, I

plex is located in Bucareli Bay approximately 6 miles south of Craig, Alaska on Prince of Wales Island. A
lowing entities concerning industry funding for the Northeast Multispecies Fishery's At-Sea Monitor Prog

s made by NMFS and/or Techsea International, Inc. staff after each trip; 3) The original complaint from I

S relied upon in the Technical Guidance, including scientific documents, studies, and reports. 2. Technic
uest), including & but not limited to all written comments, as well as all communications with nonq
See attached for full request and fee waiver request.

ion of Critical Habitat for the Arctic Ringed Seal, including the timing and content of any such designatio
reflecting Army Corps' directives, guidance, rules, or other authorities regarding the appropriate tidal

tive hours provided to Council staff from March 8, 2016 through June 27, 2017; 5) Confirmation from the
ords generated in connection with ESA Section 7 consultation conducted with respect to the IMO's June
—sent or received by all NOAA employees and members of the Gulf of Mexico Fishery Management Cc

or received by NMFS since May 25, 2017. SSL selected this date on the basis of representations by NM
ns to "Incidental Take Authorization requests, including Incidental Harassment Authorizations and Letter
documents, or briefing documents that discuss summer flounder and New Jersey's 2017 recreational se
of malathion under the ESA; 3. All records mentioning, including, and/or referencing the draft and/or fin

s not limited to, any and all reports, findings, documents, photographs, films, sketches, plans, drawings,

ocket (<https://www.regulations.gov/docket?D=USCG-2007-0164>). What I'm looking for now are any other the Lower Columbia River, the Multnomah Channel, or the Willamette River. For the Lower Columbia Ri ons of the fiscal implications to the national marine sanctuary program, or to individual sanctuary sites, a

/ Bay National Marine Sanctuary (via email, mail, fax, and phone) about wildlife being harassed or distur evaluation by the National Oceanic and Atmospheric Administration of Louisiana's State and Local Coe

3NOS4630165 Grant Agreement UASFLA compliant Appraisal Report ("Yellow Book Appraisal") UASFL h; Charlie Henry, NOAA (representing USCG); Dr. Jacqueline Michel, NOAA (representing USCG); LCDR S icipate in the evaluation. Specifically, this raw data consists of 11 pages of feedback provided by each re as well as a basis for monetizing multiple Natural Resource Damage Settlements with Potentially Respo 2016), and as time permits, John Kern and Jay Field will organize and provide computer code to read th

s request to NOAA's main FOIA office so that you may convey and transmit it to the several offices or cc \SEMEX, Swiss Re, Goldman Sac

ts that reveal the cost of the Vaisala radiosonde autolaunchers procured by the National Weather Servic

è not to include PII.

impeded the function of radar. This request also encompasses any and all documentation (up to and inc Copies of any and all email between August 23 to August 30 sent or received by Storm Prediction Center to NOAA Leadership in March 2016; 4. Emails between Craig McLean and Gary Matlock on the LCDP ii ; behind the cancellation of the NEWS (National Energy with Weather System) project 2. The decisio s of the NEWS project after October 1, 2016, 4. CIRES employee Christopher T M Clack, 5. Budget info

è to the U.S. Supreme Court's decision in Massachusetts v. EPA, and of the positive 2009 Clean Air Ac

were considered in making this decision; and c. How the Committee's unfinished work will now be comp

r referencing the substantive content of the CAR-7, NC-7, and BR-3, including but not limited to U.S. gre

led by Katy Stewart referencing Nicole Mason and all documents attached to the management inquil); 3. ie CDC, especially agencies with a science focus.

quot; "press call" "press event" "press strategy" "presser" pt86_PaP_of_HTFlooding.pdf). Specifically, I am requesting the release of all emails received or sent b √G THE U.S. COASTLINE USING A COMMON IMPACT THRESHOLD." I'd like to limit my request to ei responsive materials any documents, emails, or communications with the following phrases in the title or :now (ie management officials and the Office of General Counsel representative).

; Dorskind, General Counsel, National Oceanic and Atmospheric Administration, and Dinah Bear, Genei ll records reflecting notification by NOAA to the Archivist of the United States or NARA under 44 U.S.C. \TRACS Test and Evaluation Project Test Report" dated July 1998; and may in fact be the Test Report. it of 25 January 1999. Exhibit 10A – Instructions, not needed by me. Exhibit 10B – Morning Report E-ma removal, solar radiation management, albedo modification, bioenergy with carbon capture and storage i am Oscar Dyson Class Fishery Research Vessels Shafting, Seals, and Bearings Fixed Pitch Propell

opy of each email that includes the phrase "CLIMATE ASSESSMENT" or the phrase "ADVISORY COMM

nuses paid to EMPLOYEE, including but not limited to the following information. 1. Date(s) ofbonus(es) (nent service prior to appointment. 6. Gender of appointee. I also request how many candidates were on candidates were on the hiring list from OPM, and how many were actually interviewed.

Not qualified, Qualified, and Best Qualified Resumes of all applicants

[REDACTED]

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ity Agency Name Owner State Agency Rentable SF Owner Zip Agency Usab

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Rep. Randy Weber, Rep. Bill Flores, Rep. Jodey Arrington, Rep. Lamar Smith, Rep. Pete Olson, Rep. W

Any reports, memoranda or comments provided to any party or other agency relating to any propo

Morgan Lynne Miller filed with NMFS detail

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presentations, consultation

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n. (3) the critical habitat desi

the Council's contracted Information Technology Company regarding the date of

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the Council ("Gulf Council") who attended the Gulf

IFS that it considered May 25 as the "cutoff" date

of Authorization" for seismic surveys. See Exh. A § 9. This includes but is not limited to records that ar

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- 12/31/16) Pacific Remote Islands Marine National Mo

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vestigation, whether conducted by NMFS or other

Mark Alexander □ Matthew McKenzie □ Terry Alexander □ Vincent Balzano □ Mary Beth Nickell-Tooley

of sharks, by species, in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Sc

cond Updates to the National Bycatch Report. 2. Logbook data used to estimate shark bycatch, by spec

h, by species, in the HMS

quest includes both records related to implementation generally

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January 1, 2014 to the date of the agency's search for documents responsive to t

activities. We ar

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nditures to date and the nature of those expenditures. • Al

York 10013 & 11375 Property Solutions Pr

ails between NMFS staff and FAA staff. FOIA directs a respondi

cheduled March 2018 PSRG meeting in San Di

oyees or officers -Any other National Marine Fisheri

Delaware River; NMFS/NOAA responses to requests for formal

uld include incidents against observers aboard NO

s Milliron, Patricia Bratcher, Trish Bratcher, Jason Rob

enforcement proceeding or recommendations no

called "California sea lion population 1975-2014" in a

which have been received pursuant to the RAPP by NOA

committee meeti

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will be made avail

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er records generated during, or retrospective
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Sam Greenaway, NOAA (representing USCG); and LTJG Steve Wall
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t GHG Endangerm

leted, including: i. NOAA's

enhouse gas emission inventories, climate action plans

. The cover letter by OAR Leadership to Mack Cato included

"media event" "media call" "
y the NOAA communication's team (as listed here: <http://www>
mails dated between Nov 1, 2017 and the date this request is process
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ral Counsel, Council on Environmental Quality, Re: Request for Opini
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Thank you for your assistance.

ail dated 11 December 1998 titled "Vessels in Closed Araes during Past Week." Exhi
(BECCS) or related concepts. In particular, this relates

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declared; n
the hiring list from OPM, and how



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e or reflect: NOAA's evaluation of applications for incidental harassment authorizations (IHAs) for seis

/ □ Mark Gibson □ Eric Reid □ Rick Bellavance □ David E. Pierce □ Michael Sissenwine □ Elizabeth E
outheastern Atlantic snapper-grouper fishery (bottom longline and vertical line). 3. Observer data regardi
cies, in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlant
-grouper fisher,



ismic airgun surveys in the Mid- and South Atlantic Planning Areas; and communications with applicants

trie □ John Pappalardo □ Douglas Grout □ Peter T. Kendall □ Mark Godfroy □ Thomas A. Nies □ Chris
ng the bycatch of sharks, by species, in the Gulf of Mexico reef fish fishery (bottom longline and vertical
tic snapper-grouper fishery (bottom longline and vertical line) in the First Edition of the U.S. National Byc
y. 5. The number of vessels that have both a directed shark permit and a directed reef fish or directed si



seeking IHAs for seismic surveys, and/or with any other industry group regarding the Executive Order a:

Christopher Kellogg □ Sandra Stone □ Janice Plante □ Andrew Applegate □ Michelle Bachman □ Deirdre B
line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line) and any a
yatch Report and the First and Second Updates to the National Bycatch Report. 3. Observer data used to
snapper-grouper permit in the Gulf of Mexico and Southeastern Atlantic. 6. The number of vessels that h



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oelke □ Jamie Cournane □ Rachel Feeney □ Lou Goodreau □ Demet Haksever □ Fiona Hogan □ Jon:
associated observer reports or characterizations of the f
o estimate shark bycatch, by species, in the Gulf of Mexico reef
ave both an incidental permit to land sharks and a directed reef fish



athon Peros □ Naresh Pradhan □ Rob

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, April 11, 2018 9:13 AM
To: Daniel Pollak - NOAA GC
Subject: Re: FOIA fee billing questions
Attachments: Complaint Stein 7.30.15.pdf

(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 Wed, Apr 11, 2018 at 8:38 AM, Daniel Pollak - NOAA GC <daniel.pollak@noaa.gov> wrote:

Thank (b)(5) ?

On Wed, Apr 11, 2018 at 7:32 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

(b)(5)

Let me know if you need anything else on this, Dan--talk to you soon.

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 11, 2018 at 7:22 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Hi Dan,

(b)(5)

(b)(5) [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 Tue, Apr 10, 2018 at 5:52 PM, Daniel Pollak - NOAA GC <daniel.pollak@noaa.gov> wrote:

(b)(5) [Redacted]

Thanks for any input you can offer. -Dan

--
Daniel Pollak, Attorney Advisor
NOAA Office of General Counsel
United States Department of Commerce
Silver Spring, MD

daniel.pollak@noaa.gov

(301) 628-1616

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--

Daniel Pollak, Attorney Advisor
NOAA Office of General Counsel
United States Department of Commerce
Silver Spring, MD

daniel.pollak@noaa.gov

(301) 628-1616

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--

Daniel Pollak, Attorney Advisor
NOAA Office of General Counsel
United States Department of Commerce
Silver Spring, MD

daniel.pollak@noaa.gov

(301) 628-1616

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1 David A. Bahr (Oregon Bar No. 90199)
2 Bahr Law Offices, P.C.
3 1035 ½ Monroe Street
4 Eugene, OR 97402
5 (541) 556-6439
6 davebahr@mindspring.com
7 (Application for admission *pro hac vice* pending)

8 Rachel S. Doughty (California Bar. No. 255904)
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
27
28

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).
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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.

5
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 **22.** On February 21, 2014, Plaintiff timely appealed NOAA's decision regarding FOIA Request
15 DOC NOAA 2013-138. The appeal was assigned tracking number DOC OS 2014-567.

16 **23.** The FOIA requires an agency to issue a final determination resolving a FOIA appeal within
17 twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(ii).

18 **24.** Defendant failed to issue a final decision on Plaintiff's FOIA Appeal DOC OS 2014-567 within
19 20 business days from receipt of Plaintiff's February 21, 2014 FOIA appeal as required by 5 U.S.C. §
20 552(a)(6)(A)(ii).

21 **25.** On April 4, 2014, September 3, 2014, May 13, 2015, and June 11, 2015, Plaintiff notified the
22 Defendant that it had violated FOIA's 20 business day appeal decision deadline, 5 U.S.C § 552(a)-
23 (6)(A)(ii), for FOIA Appeal DOC OS 2014-567 and further requested an estimated completion date for
24 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.
7

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 Fuglvog.

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).
27
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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
26

27
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.
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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 **128.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
8 this claim.

9 **129.** Plaintiff's claims presented herein are not insubstantial within the meaning of 5 U.S.C. §
10 552(a)(4)(E)(ii)(II).
11

12 **Regarding FOIA Request DOC NOAA 2015-694**

13 **130.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
14 herein.

15 **131.** Using Defendant's online portal "FOIAonline," on February 16, 2015, Plaintiff requested from
16 NOAA "correspondence log concerning NOAA Administrator Dr. Jane Lubchenco from January 1 2009
17 to March 1, 2013." Defendant assigned the request tracking number DOC NOAA 2015-694.
18

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.
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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.
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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 **215.** Plaintiff has suffered a legal wrong as a result of the Defendant DOC' failure to comply with the
12 mandates of FOIA. Defendant DOC's failure and refusal to: (1) provide to Plaintiff documents respon-
13 sive to his information requests and appeals that are not within the scope of any of FOIA's disclosure
14 exemption; (2) issue a timely final determination on Plaintiff's administrative requests and appeals; (3)
15 provide Plaintiff with the estimated completion dates of those requests and appeals, and; (4) undertake a
16 search reasonably calculated to locate records responsive to certain of Plaintiff's FOIA requests and ap-
17 peals as alleged above to have injured Plaintiff's interests in public oversight of governmental operations
18 and constitute a violation of Defendant DOC's statutory duties under the APA.

19 **216.** Defendant DOC's failure and refusal to: provide to Plaintiff documents responsive to his infor-
20 mation requests and appeals that are not within the scope of any of FOIA's disclosure exemptions, and;
21 (2) issue a timely final determination on Plaintiff's administrative requests and appeals; (3) provide
22 Plaintiff with the estimated completion dates of those requests and appeals, and; (4) undertake a search
23 reasonably calculated to locate records responsive to certain of Plaintiff's FOIA requests and appeals as
24 alleged above, constitutes agency action unlawfully withheld and unreasonably delayed and is therefore
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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
14 **6.** Award Plaintiff his costs and reasonable attorney fees pursuant to 5 U.S.C. §
15 552(a)(4)(E) and 28 U.S.C. § 2412.

16 **7.** Grant such other and further relief as the Court may deem just and proper.

17 Respectfully submitted for the Court’s consideration, this 30th day of July, 2015.

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)

s/ Rachel S. Doughty
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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

**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

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, April 11, 2018 2:51 PM
To: Roxie Allison-Holman - NOAA Federal
Subject: Re: redaction

The main case is (b)(5) [redacted]
[redacted]
[redacted]

[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]

[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]

Let me know if you need anything else on this--

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, Apr 11, 2018 at 1:59 PM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

Mark, can you please provide that cas (b)(5) [redacted]
[redacted].

--

Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
301-628-1625

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Roxie Allison-Holman - NOAA Federal

From: Roxie Allison-Holman - NOAA Federal
Sent: Wednesday, April 11, 2018 3:04 PM
To: Mark Graff - NOAA Federal
Subject: Re: redaction

Thank you, Mark! This is just what I needed.

On Wed, Apr 11, 2018 at 2:50 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

The main case i (b)(5) [Redacted]
[Redacted]
[Redacted]

[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
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[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Let me know if you need anything else on this--

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 11, 2018 at 1:59 PM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov>

> wrote:

Mark, can you please provide that cas (b)(5)

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Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
301-628-1625

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Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
301-628-1625

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Ryan Mulvey

From: Ryan Mulvey
Sent: Wednesday, April 11, 2018 7:20 PM
To: Mark Graff - NOAA Federal
Cc: foia@noaa.gov
Subject: FOIA Request Clarification, No. DOC-NOAA-2018-001058
Attachments: 2018.04.11 CoA Inst. FOIA Request Clarification, No. DOC-NOAA-2018-001058.pdf

Mr. Graff,

I hope that this e-mail finds you well. I have received your recent denial of CoA Institute's fee-related requests for FOIA request No. 2018-001058. In the denial letter you also indicated that the agency required clarification as to the scope of Items One and Four. Please find attached a letter providing the requested clarification. I am happy to discuss this matter further if there is still any ambiguity or confusion.

Kind regards,

Ryan Mulvey

Ryan P. Mulvey | Counsel

Cause of Action Institute

1875 Eye Street NW, Suite 800

Washington, D.C. 20006

(o) 202.400.2729 / ((b)(6))

Ryan.Mulvey@causeofaction.org

Admitted to the practice of law in New York State and the District of Columbia



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CAUSE *of* ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

April 11, 2018

VIA E-MAIL

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
ATTN: Mark Graff, NOAA FOIA Officer
E-mail: foia@noaa.gov / mark.graff@noaa.gov

Re: Freedom of Information Act Request No. NOAA-2018-001058

Dear Mr. Graff:

On March 28, 2018, CoA Institute submitted a Freedom of Information Act (“FOIA”) request to the National Oceanic and Atmospheric Administration (“NOAA”).¹ This request seeks four categories of records concerning NOAA’s response to a Federal Records Act (“FRA”) inquiry by the National Archives and Records Administration (“NARA”), as well as NOAA’s policy of treating all electronic messages created or received through the “chat” function of the agency’s Google-based e-mail platform as categorically “off the record.”² CoA Institute also requested a public interest fee waiver, categorization as a requester of the news media, and expedited processing.³

On April 2, 2018, NOAA denied CoA Institute’s request for expedited processing, indicating that “the records you are seeking primarily involve records regarding the processing of your own prior FOIA request, litigation, and communications with NARA regarding your own . . . allegations.”⁴ NOAA concluded that the requested “records would primarily be for [CoA Institute’s] own benefit, rather than the criteria in 15 [C.F.R. §] 4.6(e) [*sic*].”⁵ Yet NOAA provided no justification for its adverse determination, except to state that CoA Institute did “not satisfy the regulatory threshold for other-than ordinary processing.”⁶ CoA Institute filed an administrative appeal on April 4, 2018.⁷

On April 5, 2018, NOAA denied both CoA Institute’s request for a public interest fee waiver and CoA Institute’s request for treatment as a representative of the news media for fee purposes.⁸ Furthermore—and relevant here—NOAA requested clarification of the scope of CoA Institute’s request. Specifically, NOAA wrote the following:

The first item . . . is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to [CoA Institute’s] FOIA litigation as constituting communications with the Attorney

¹ Letter from CoA Inst. to Nat’l Oceanic & Atmospheric Admin. (Mar. 28, 2018) (on file with CoA Inst.).

² *Id.* at 2.

³ *Id.* at 2–5.

⁴ Letter from Nat’l Oceanic & Atmospheric Admin. to CoA Inst. at 1 (Apr. 2, 2018) (on file with CoA Inst.).

⁵ *Id.* It appears NOAA meant to cite 15 C.F.R. § 4.6(f). Subsection (e) concerns multi-track processing.

⁶ *Id.* at 2.

⁷ Letter from CoA Inst. to Dep’t of Commerce (Apr. 4, 2018) (on file with CoA Inst.).

⁸ Letter from Nat’l Oceanic & Atmospheric Admin. to CoA Inst. (Apr. 5, 2018) (attached as Exhibit 1). CoA Institute intends to appeal these adverse determinations.

General under an agent relationship. Additionally, the fourth item . . . would be, in part, duplicative of the records sought in [CoA Institute's] prior litigated request. Please identify what, if any, records [CoA Institute] seek[s] that would pre-date the submission of [that] previously-litigated request, or whether [CoA Institute] only seek[s] records created following the submission of [the] litigated request (DOC-NOAA-2017-001101).⁹

This letter follows to clarify the scope of Items One and Four.

Item One

Item One seeks “[a]ll communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.”¹⁰ As suggested by the citation to 44 U.S.C. § 3106(a), the scope of Item One is limited to NOAA’s communications with the Department of Justice *in furtherance of NOAA’s efforts to comply with the FRA*. For example, if NOAA sought to initiate action through the Attorney General for the recovery of electronic messages created or received on Google Hangouts, then records of those efforts would be responsive to Item One. By contrast, communications between NOAA and the Assistant U.S. Attorney who represented the agency in litigation against CoA Institute would fall outside the intended scope of Item One.

Item Four

Item Four seeks “all records concerning NOAA’s efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue [in NARA’s inquiry], or to investigate [NOAA’s] formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages.”¹¹ Because the time frame for this request is “July 1, 2017 to the present,” any potentially responsive records that “pre-date” the submission of FOIA Request No. DOC-NOAA-2017-001101 (April 27, 2017), would not be responsive. Moreover, it is unclear how this item is in any way “duplicative.” CoA Institute’s previously-litigated requests sought (1) agency guidance and (2) electronic messages created or received on Google Chat/Hangouts. Here, Item Four seeks records that concern NOAA’s efforts to (1) locate said guidance, (2) retrieve the previously-requested chat messages (as they were the subject of the allegations addressed by NARA), or (3) otherwise react or respond to NARA’s July 17, 2017 inquiry letter.

Conclusion

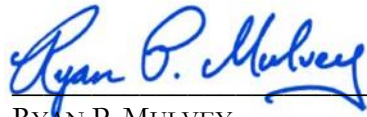
I hope that these clarifications are helpful. If you have any additional questions or require further clarification, please feel free to contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org. Thank you.

⁹ *Id.* at 2.

¹⁰ March 28, 2018 FOIA Request, *supra* note 1, at 2.

¹¹ *Id.*

Sincerely,

A handwritten signature in blue ink that reads "Ryan P. Mulvey". The signature is written in a cursive style with a horizontal line extending to the right from the end of the name.

RYAN P. MULVEY
COUNSEL

EXHIBIT

1



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

April 5, 2018

Attn: Ryan P. Mulvey
Cause of Action Institute
1875 Eye St. NW, Suite 800
Washington, DC 20006

Re: FOIA Request No. DOC-NOAA-2018-001058

Dear Mr./Ms. Mulvey:

This letter responds to your Freedom of Information Act (FOIA) request entered into FOIAonline on March 28, 2018, in which you requested records as follows:

1. All communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.⁹
2. All records reflecting notification by NOAA to the Archivist of the United States or NARA under 44 U.S.C. § 3106 or submission of a report under 36 C.F.R. § 1230.14.
3. All communications between NOAA and NARA concerning Google Chat, Google Hangouts, Skype, or other similar electronic messaging system, including, but not limited to, all communications concerning CoA Institute's allegations, CoA Institute's ongoing FOIA litigation against NOAA,¹⁰ or the July 17, 2017 NARA letter.
4. To the extent not already covered by the above items of this request, all records concerning NOAA's efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue, or to investigate its formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages. Responsive records would include, for example, correspondence between NOAA's FOIA Office or Office of the Chief Administrative Officer and the National Marine Fisheries Service's Greater Atlantic Regional Office or the New England Fishery Management Council.

Pursuant to procedures established in 15 CFR, Part 4.11(k), we rely on the following factors in determining whether the statutory standard for granting a fee waiver has been met:

1. The subject of the requested records must concern identifiable operations or activities of the Federal Government.

2. The disclosable portions of the requested records must be meaningfully informative about Government operations or activities in order to be “likely to contribute” to and increase public understanding of those operations or activities.
3. The disclosure of the requested information must 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. The disclosure of the requested information is likely to contribute “significantly” to the public’s understanding of Government operations or activities.
5. Whether the requester has a commercial interest that would be furthered by the requester.
6. Whether any identified commercial interest of the requester is sufficiently great, in comparison with the public interest in disclosure, such that the disclosure is not primarily in the commercial interest of the requester.

Your fee waiver justification does not satisfy the six factors contemplated in 15 CFR 4.11. The requested records, contrary to your assertions, would not significantly increase the public’s understanding of Government Activities. Rather, the records would, only be the records generated pursuant to your own prior FOIA request and allegations you personally raised with the news media. As such, the interest served through disclosure would primarily be to the benefit of the requester(s), rather than to a segment of interested individuals. Therefore this constitutes a denial of your fee waiver request. Your request will be processed under the “Other” fee category and if applicable, a fee estimate will be sent to you. Additionally, a clarification of the scope of your current request, as written, is required. The first item of your request is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to your FOIA litigation as constituting communications with the Attorney General under an agent relationship. Additionally, the fourth item of your request would be, in part, duplicative of the records sought in your prior litigated request. Please identify what, if any, records you are seeking that would pre-date the submission of your previously-litigated request, or whether you are only seeking records created following the submission of your litigated request (DOC-NOAA-2017-001101).

You have the right to appeal this denial of the FOIA Fee Waiver request. An appeal must be received within 90 calendar days of the date of this response letter by:

Assistant General Counsel for Employment, Litigation, and Information
U.S. Department of Commerce Room 5896
1401 Constitution Ave. NW
Washington, DC 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, or by FOIAonline, if you have an account in FOIAonline, at <https://foiaonline.regulations.gov/foia/action/public/home#>. The appeal should include a copy of the original request and initial denial, if any. The appeal should include a statement of the reasons why the Fee Waiver request should not be denied and why the adverse determination was in error. The appeal letter, the envelope, the e-mail subject line, should be clearly marked "Freedom of Information Act Appeal." The e-mail, FOIAonline, and Office are monitored only on working days during normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday). FOIA appeals posted to the e-mail box, fax

machine, FOIAonline, or Office after normal business hours will be deemed received on the next normal 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.

You also may contact the NOAA FOIA Public Liaison, Robert Swisher, at (301)-628-5755.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers 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

Sincerely,

Mr. Mark Graff
NOAA FOIA Officer

CAUSE *of* ACTION
— INSTITUTE —

FOIA Office - NOAA Service Account

From: FOIA Office - NOAA Service Account
Sent: Thursday, April 12, 2018 9:42 AM
To: Mark Graff - NOAA Federal
Subject: Fwd: FOIA Request Clarification, No. DOC-NOAA-2018-001058
Attachments: 2018.04.11 CoA Inst. FOIA Request Clarification, No. DOC-NOAA-2018-001058.pdf

fyi

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

From: Ryan Mulvey <ryan.mulvey@causeofaction.org>
Date: Wed, Apr 11, 2018 at 7:20 PM
Subject: FOIA Request Clarification, No. DOC-NOAA-2018-001058
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Cc: "foia@noaa.gov" <foia@noaa.gov>

Mr. Graff,

I hope that this e-mail finds you well. I have received your recent denial of CoA Institute's fee-related requests for FOIA request No. 2018-001058. In the denial letter you also indicated that the agency required clarification as to the scope of Items One and Four. Please find attached a letter providing the requested clarification. I am happy to discuss this matter further if there is still any ambiguity or confusion.

Kind regards,

Ryan Mulvey

Ryan P. Mulvey | Counsel

Cause of Action Institute

1875 Eye Street NW, Suite 800

Washington, D.C. 20006

(o) 202.400.2729 / ((b)(6))

Ryan.Mulvey@causeofaction.org

Admitted to the practice of law in New York State and the District of Columbia



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CAUSE *of* ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

April 11, 2018

VIA E-MAIL

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
ATTN: Mark Graff, NOAA FOIA Officer
E-mail: foia@noaa.gov / mark.graff@noaa.gov

Re: Freedom of Information Act Request No. NOAA-2018-001058

Dear Mr. Graff:

On March 28, 2018, CoA Institute submitted a Freedom of Information Act (“FOIA”) request to the National Oceanic and Atmospheric Administration (“NOAA”).¹ This request seeks four categories of records concerning NOAA’s response to a Federal Records Act (“FRA”) inquiry by the National Archives and Records Administration (“NARA”), as well as NOAA’s policy of treating all electronic messages created or received through the “chat” function of the agency’s Google-based e-mail platform as categorically “off the record.”² CoA Institute also requested a public interest fee waiver, categorization as a requester of the news media, and expedited processing.³

On April 2, 2018, NOAA denied CoA Institute’s request for expedited processing, indicating that “the records you are seeking primarily involve records regarding the processing of your own prior FOIA request, litigation, and communications with NARA regarding your own . . . allegations.”⁴ NOAA concluded that the requested “records would primarily be for [CoA Institute’s] own benefit, rather than the criteria in 15 [C.F.R. §] 4.6(e) [*sic*].”⁵ Yet NOAA provided no justification for its adverse determination, except to state that CoA Institute did “not satisfy the regulatory threshold for other-than ordinary processing.”⁶ CoA Institute filed an administrative appeal on April 4, 2018.⁷

On April 5, 2018, NOAA denied both CoA Institute’s request for a public interest fee waiver and CoA Institute’s request for treatment as a representative of the news media for fee purposes.⁸ Furthermore—and relevant here—NOAA requested clarification of the scope of CoA Institute’s request. Specifically, NOAA wrote the following:

The first item . . . is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to [CoA Institute’s] FOIA litigation as constituting communications with the Attorney

¹ Letter from CoA Inst. to Nat’l Oceanic & Atmospheric Admin. (Mar. 28, 2018) (on file with CoA Inst.).

² *Id.* at 2.

³ *Id.* at 2–5.

⁴ Letter from Nat’l Oceanic & Atmospheric Admin. to CoA Inst. at 1 (Apr. 2, 2018) (on file with CoA Inst.).

⁵ *Id.* It appears NOAA meant to cite 15 C.F.R. § 4.6(f). Subsection (e) concerns multi-track processing.

⁶ *Id.* at 2.

⁷ Letter from CoA Inst. to Dep’t of Commerce (Apr. 4, 2018) (on file with CoA Inst.).

⁸ Letter from Nat’l Oceanic & Atmospheric Admin. to CoA Inst. (Apr. 5, 2018) (attached as Exhibit 1). CoA Institute intends to appeal these adverse determinations.

General under an agent relationship. Additionally, the fourth item . . . would be, in part, duplicative of the records sought in [CoA Institute's] prior litigated request. Please identify what, if any, records [CoA Institute] seek[s] that would pre-date the submission of [that] previously-litigated request, or whether [CoA Institute] only seek[s] records created following the submission of [the] litigated request (DOC-NOAA-2017-001101).⁹

This letter follows to clarify the scope of Items One and Four.

Item One

Item One seeks “[a]ll communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.”¹⁰ As suggested by the citation to 44 U.S.C. § 3106(a), the scope of Item One is limited to NOAA’s communications with the Department of Justice *in furtherance of NOAA’s efforts to comply with the FRA*. For example, if NOAA sought to initiate action through the Attorney General for the recovery of electronic messages created or received on Google Hangouts, then records of those efforts would be responsive to Item One. By contrast, communications between NOAA and the Assistant U.S. Attorney who represented the agency in litigation against CoA Institute would fall outside the intended scope of Item One.

Item Four

Item Four seeks “all records concerning NOAA’s efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue [in NARA’s inquiry], or to investigate [NOAA’s] formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages.”¹¹ Because the time frame for this request is “July 1, 2017 to the present,” any potentially responsive records that “pre-date” the submission of FOIA Request No. DOC-NOAA-2017-001101 (April 27, 2017), would not be responsive. Moreover, it is unclear how this item is in any way “duplicative.” CoA Institute’s previously-litigated requests sought (1) agency guidance and (2) electronic messages created or received on Google Chat/Hangouts. Here, Item Four seeks records that concern NOAA’s efforts to (1) locate said guidance, (2) retrieve the previously-requested chat messages (as they were the subject of the allegations addressed by NARA), or (3) otherwise react or respond to NARA’s July 17, 2017 inquiry letter.

Conclusion

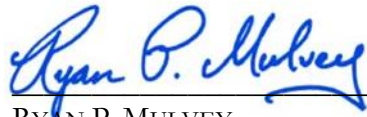
I hope that these clarifications are helpful. If you have any additional questions or require further clarification, please feel free to contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org. Thank you.

⁹ *Id.* at 2.

¹⁰ March 28, 2018 FOIA Request, *supra* note 1, at 2.

¹¹ *Id.*

Sincerely,



RYAN P. MULVEY
COUNSEL

EXHIBIT

1



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

April 5, 2018

Attn: Ryan P. Mulvey
Cause of Action Institute
1875 Eye St. NW, Suite 800
Washington, DC 20006

Re: FOIA Request No. DOC-NOAA-2018-001058

Dear Mr./Ms. Mulvey:

This letter responds to your Freedom of Information Act (FOIA) request entered into FOIAonline on March 28, 2018, in which you requested records as follows:

1. All communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.⁹
2. All records reflecting notification by NOAA to the Archivist of the United States or NARA under 44 U.S.C. § 3106 or submission of a report under 36 C.F.R. § 1230.14.
3. All communications between NOAA and NARA concerning Google Chat, Google Hangouts, Skype, or other similar electronic messaging system, including, but not limited to, all communications concerning CoA Institute's allegations, CoA Institute's ongoing FOIA litigation against NOAA,¹⁰ or the July 17, 2017 NARA letter.
4. To the extent not already covered by the above items of this request, all records concerning NOAA's efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue, or to investigate its formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages. Responsive records would include, for example, correspondence between NOAA's FOIA Office or Office of the Chief Administrative Officer and the National Marine Fisheries Service's Greater Atlantic Regional Office or the New England Fishery Management Council.

Pursuant to procedures established in 15 CFR, Part 4.11(k), we rely on the following factors in determining whether the statutory standard for granting a fee waiver has been met:

1. The subject of the requested records must concern identifiable operations or activities of the Federal Government.

2. The disclosable portions of the requested records must be meaningfully informative about Government operations or activities in order to be “likely to contribute” to and increase public understanding of those operations or activities.
3. The disclosure of the requested information must 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. The disclosure of the requested information is likely to contribute “significantly” to the public’s understanding of Government operations or activities.
5. Whether the requester has a commercial interest that would be furthered by the requester.
6. Whether any identified commercial interest of the requester is sufficiently great, in comparison with the public interest in disclosure, such that the disclosure is not primarily in the commercial interest of the requester.

Your fee waiver justification does not satisfy the six factors contemplated in 15 CFR 4.11. The requested records, contrary to your assertions, would not significantly increase the public’s understanding of Government Activities. Rather, the records would, only be the records generated pursuant to your own prior FOIA request and allegations you personally raised with the news media. As such, the interest served through disclosure would primarily be to the benefit of the requester(s), rather than to a segment of interested individuals. Therefore this constitutes a denial of your fee waiver request. Your request will be processed under the “Other” fee category and if applicable, a fee estimate will be sent to you. Additionally, a clarification of the scope of your current request, as written, is required. The first item of your request is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to your FOIA litigation as constituting communications with the Attorney General under an agent relationship. Additionally, the fourth item of your request would be, in part, duplicative of the records sought in your prior litigated request. Please identify what, if any, records you are seeking that would pre-date the submission of your previously-litigated request, or whether you are only seeking records created following the submission of your litigated request (DOC-NOAA-2017-001101).

You have the right to appeal this denial of the FOIA Fee Waiver request. An appeal must be received within 90 calendar days of the date of this response letter by:

Assistant General Counsel for Employment, Litigation, and Information
U.S. Department of Commerce Room 5896
1401 Constitution Ave. NW
Washington, DC 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, or by FOIAonline, if you have an account in FOIAonline, at <https://foiaonline.regulations.gov/foia/action/public/home#>. The appeal should include a copy of the original request and initial denial, if any. The appeal should include a statement of the reasons why the Fee Waiver request should not be denied and why the adverse determination was in error. The appeal letter, the envelope, the e-mail subject line, should be clearly marked "Freedom of Information Act Appeal." The e-mail, FOIAonline, and Office are monitored only on working days during normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday). FOIA appeals posted to the e-mail box, fax

machine, FOIAonline, or Office after normal business hours will be deemed received on the next normal 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.

You also may contact the NOAA FOIA Public Liaison, Robert Swisher, at (301)-628-5755.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers 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

Sincerely,

Mr. Mark Graff
NOAA FOIA Officer

CAUSE *of* ACTION
— INSTITUTE —

Daniel Pollak - NOAA GC

From: Daniel Pollak - NOAA GC
Sent: Thursday, April 12, 2018 11:47 AM
To: Kimberly Katzenbarger - NOAA Federal
Cc: Mark Graff
Subject: Re: FOIA - search fees/time
Attachments: Complaint Stein 7.30.15.pdf

Thanks Kim (b)(5) . -Dan

On Thu, Apr 12, 2018 at 11:36 AM, Kimberly Katzenbarger - NOAA Federal
<kimberly.katzenbarger@noaa.gov> wrote:

Hi Mar (b)(5) ?
(b)(5)
Thanks,
Kim

--
Kimberly Katzenbarger, Attorney
National Oceanic and Atmospheric Administration
Office of General Counsel, Natural Resources Section
[1315 East West Hwy, Suite 15104](#)
[Silver Spring, MD 20910](#)-3282
301-325-3522

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--
Daniel Pollak, Attorney Advisor
NOAA Office of General Counsel
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6 davebahr@mindspring.com
7 (Application for admission *pro hac vice* pending)

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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).
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STATEMENT OF OPERATIVE FACTS

Regarding FOIA Request DOC NOAA 2013-138/Appeal DOC OS 2014-567

1
2
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.

5
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.

7 **28.** As of the date this action was filed, the deadline for Defendant to issue a final determination on
8 Plaintiff’s pending FOIA Appeal DOC OS 2014-567 has passed.

9 **29.** As of the date this action was filed, the DOC had not issued a final determination on Plaintiff’s
10 FOIA Appeal DOC OS 2014-567.

11 **30.** As of the date this action was filed, Defendant has not informed Plaintiff of an estimated comple-
12 tion date for FOIA Appeal DOC OS 2014-567 currently pending with the Agency.

13 **31.** Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute
14 this claim.

15 **32.** 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 2013-139/Appeal DOC OS 2014-443**

18 **33.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
19 herein.

20 **34.** Via email, on October 18, 2012, Plaintiff requested documents from NOAA concerning NOAA
21 illegal conduct engaged in by Senator Lisa Murkowski's former staffer Arne Fuglvgog.

22 **35.** On November 9, 2012, NOAA split the request into two parts, assigning tracking numbers DOC
23 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-
27
28

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).
27
28

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
26

27 _____
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.
20

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.
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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
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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.
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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).

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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
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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. 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
22 (828) 424-2005
23 rdoughty@greenfirelaw.com

1 David A. Bahr (Oregon Bar No. 90199)
2 (Application for admission *pro hac vice* pending)
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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

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)
5 Greenfire Law
6 1202 Oregon Street
7 Berkeley, CA 94702
8 (828) 424-2005
9 rdoughty@greenfirelaw.com
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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

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Thursday, April 12, 2018 2:19 PM
To: Clete Otoshi - NOAA Federal
Cc: Lola Stith - NOAA Affiliate
Subject: Fwd: FOIA Request Clarification, No. DOC-NOAA-2018-001058
Attachments: 2018.04.11 CoA Inst. FOIA Request Clarification, No. DOC-NOAA-2018-001058.pdf

Hello Clete,

Below please find Cause of Actions response to the fee waiver denial with their clarified scope to their request. Clete, if you ca (b)(5)

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: Ryan Mulvey <ryan.mulvey@causeofaction.org>
Date: Wed, Apr 11, 2018 at 7:20 PM
Subject: FOIA Request Clarification, No. DOC-NOAA-2018-001058
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Cc: "foia@noaa.gov" <foia@noaa.gov>

Mr. Graff,

I hope that this e-mail finds you well. I have received your recent denial of CoA Institute's fee-related requests for FOIA request No. 2018-001058. In the denial letter you also indicated that the agency required clarification as to the scope of Items One and Four. Please find attached a letter providing the requested clarification. I am happy to discuss this matter further if there is still any ambiguity or confusion.

Kind regards,

Ryan Mulvey

Ryan P. Mulvey | Counsel

Cause of Action Institute

1875 Eye Street NW, Suite 800

Washington, D.C. 20006

(o) 202.400.2729 / (c) (b)(6)

Ryan.Mulvey@causeofaction.org

Admitted to the practice of law in New York State and the District of Columbia



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CAUSE *of* ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

April 11, 2018

VIA E-MAIL

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
ATTN: Mark Graff, NOAA FOIA Officer
E-mail: foia@noaa.gov / mark.graff@noaa.gov

Re: Freedom of Information Act Request No. NOAA-2018-001058

Dear Mr. Graff:

On March 28, 2018, CoA Institute submitted a Freedom of Information Act (“FOIA”) request to the National Oceanic and Atmospheric Administration (“NOAA”).¹ This request seeks four categories of records concerning NOAA’s response to a Federal Records Act (“FRA”) inquiry by the National Archives and Records Administration (“NARA”), as well as NOAA’s policy of treating all electronic messages created or received through the “chat” function of the agency’s Google-based e-mail platform as categorically “off the record.”² CoA Institute also requested a public interest fee waiver, categorization as a requester of the news media, and expedited processing.³

On April 2, 2018, NOAA denied CoA Institute’s request for expedited processing, indicating that “the records you are seeking primarily involve records regarding the processing of your own prior FOIA request, litigation, and communications with NARA regarding your own . . . allegations.”⁴ NOAA concluded that the requested “records would primarily be for [CoA Institute’s] own benefit, rather than the criteria in 15 [C.F.R. §] 4.6(e) [*sic*].”⁵ Yet NOAA provided no justification for its adverse determination, except to state that CoA Institute did “not satisfy the regulatory threshold for other-than ordinary processing.”⁶ CoA Institute filed an administrative appeal on April 4, 2018.⁷

On April 5, 2018, NOAA denied both CoA Institute’s request for a public interest fee waiver and CoA Institute’s request for treatment as a representative of the news media for fee purposes.⁸ Furthermore—and relevant here—NOAA requested clarification of the scope of CoA Institute’s request. Specifically, NOAA wrote the following:

The first item . . . is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to [CoA Institute’s] FOIA litigation as constituting communications with the Attorney

¹ Letter from CoA Inst. to Nat’l Oceanic & Atmospheric Admin. (Mar. 28, 2018) (on file with CoA Inst.).

² *Id.* at 2.

³ *Id.* at 2–5.

⁴ Letter from Nat’l Oceanic & Atmospheric Admin. to CoA Inst. at 1 (Apr. 2, 2018) (on file with CoA Inst.).

⁵ *Id.* It appears NOAA meant to cite 15 C.F.R. § 4.6(f). Subsection (e) concerns multi-track processing.

⁶ *Id.* at 2.

⁷ Letter from CoA Inst. to Dep’t of Commerce (Apr. 4, 2018) (on file with CoA Inst.).

⁸ Letter from Nat’l Oceanic & Atmospheric Admin. to CoA Inst. (Apr. 5, 2018) (attached as Exhibit 1). CoA Institute intends to appeal these adverse determinations.

General under an agent relationship. Additionally, the fourth item . . . would be, in part, duplicative of the records sought in [CoA Institute's] prior litigated request. Please identify what, if any, records [CoA Institute] seek[s] that would pre-date the submission of [that] previously-litigated request, or whether [CoA Institute] only seek[s] records created following the submission of [the] litigated request (DOC-NOAA-2017-001101).⁹

This letter follows to clarify the scope of Items One and Four.

Item One

Item One seeks “[a]ll communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.”¹⁰ As suggested by the citation to 44 U.S.C. § 3106(a), the scope of Item One is limited to NOAA’s communications with the Department of Justice *in furtherance of NOAA’s efforts to comply with the FRA*. For example, if NOAA sought to initiate action through the Attorney General for the recovery of electronic messages created or received on Google Hangouts, then records of those efforts would be responsive to Item One. By contrast, communications between NOAA and the Assistant U.S. Attorney who represented the agency in litigation against CoA Institute would fall outside the intended scope of Item One.

Item Four

Item Four seeks “all records concerning NOAA’s efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue [in NARA’s inquiry], or to investigate [NOAA’s] formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages.”¹¹ Because the time frame for this request is “July 1, 2017 to the present,” any potentially responsive records that “pre-date” the submission of FOIA Request No. DOC-NOAA-2017-001101 (April 27, 2017), would not be responsive. Moreover, it is unclear how this item is in any way “duplicative.” CoA Institute’s previously-litigated requests sought (1) agency guidance and (2) electronic messages created or received on Google Chat/Hangouts. Here, Item Four seeks records that concern NOAA’s efforts to (1) locate said guidance, (2) retrieve the previously-requested chat messages (as they were the subject of the allegations addressed by NARA), or (3) otherwise react or respond to NARA’s July 17, 2017 inquiry letter.

Conclusion

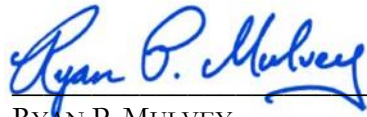
I hope that these clarifications are helpful. If you have any additional questions or require further clarification, please feel free to contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org. Thank you.

⁹ *Id.* at 2.

¹⁰ March 28, 2018 FOIA Request, *supra* note 1, at 2.

¹¹ *Id.*

Sincerely,



RYAN P. MULVEY
COUNSEL

EXHIBIT

1



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

April 5, 2018

Attn: Ryan P. Mulvey
Cause of Action Institute
1875 Eye St. NW, Suite 800
Washington, DC 20006

Re: FOIA Request No. DOC-NOAA-2018-001058

Dear Mr./Ms. Mulvey:

This letter responds to your Freedom of Information Act (FOIA) request entered into FOIAonline on March 28, 2018, in which you requested records as follows:

1. All communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.⁹
2. All records reflecting notification by NOAA to the Archivist of the United States or NARA under 44 U.S.C. § 3106 or submission of a report under 36 C.F.R. § 1230.14.
3. All communications between NOAA and NARA concerning Google Chat, Google Hangouts, Skype, or other similar electronic messaging system, including, but not limited to, all communications concerning CoA Institute's allegations, CoA Institute's ongoing FOIA litigation against NOAA,¹⁰ or the July 17, 2017 NARA letter.
4. To the extent not already covered by the above items of this request, all records concerning NOAA's efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue, or to investigate its formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages. Responsive records would include, for example, correspondence between NOAA's FOIA Office or Office of the Chief Administrative Officer and the National Marine Fisheries Service's Greater Atlantic Regional Office or the New England Fishery Management Council.

Pursuant to procedures established in 15 CFR, Part 4.11(k), we rely on the following factors in determining whether the statutory standard for granting a fee waiver has been met:

1. The subject of the requested records must concern identifiable operations or activities of the Federal Government.

2. The disclosable portions of the requested records must be meaningfully informative about Government operations or activities in order to be “likely to contribute” to and increase public understanding of those operations or activities.
3. The disclosure of the requested information must 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. The disclosure of the requested information is likely to contribute “significantly” to the public’s understanding of Government operations or activities.
5. Whether the requester has a commercial interest that would be furthered by the requester.
6. Whether any identified commercial interest of the requester is sufficiently great, in comparison with the public interest in disclosure, such that the disclosure is not primarily in the commercial interest of the requester.

Your fee waiver justification does not satisfy the six factors contemplated in 15 CFR 4.11. The requested records, contrary to your assertions, would not significantly increase the public’s understanding of Government Activities. Rather, the records would, only be the records generated pursuant to your own prior FOIA request and allegations you personally raised with the news media. As such, the interest served through disclosure would primarily be to the benefit of the requester(s), rather than to a segment of interested individuals. Therefore this constitutes a denial of your fee waiver request. Your request will be processed under the “Other” fee category and if applicable, a fee estimate will be sent to you. Additionally, a clarification of the scope of your current request, as written, is required. The first item of your request is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to your FOIA litigation as constituting communications with the Attorney General under an agent relationship. Additionally, the fourth item of your request would be, in part, duplicative of the records sought in your prior litigated request. Please identify what, if any, records you are seeking that would pre-date the submission of your previously-litigated request, or whether you are only seeking records created following the submission of your litigated request (DOC-NOAA-2017-001101).

You have the right to appeal this denial of the FOIA Fee Waiver request. An appeal must be received within 90 calendar days of the date of this response letter by:

Assistant General Counsel for Employment, Litigation, and Information
U.S. Department of Commerce Room 5896
1401 Constitution Ave. NW
Washington, DC 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, or by FOIAonline, if you have an account in FOIAonline, at <https://foiaonline.regulations.gov/foia/action/public/home#>. The appeal should include a copy of the original request and initial denial, if any. The appeal should include a statement of the reasons why the Fee Waiver request should not be denied and why the adverse determination was in error. The appeal letter, the envelope, the e-mail subject line, should be clearly marked "Freedom of Information Act Appeal." The e-mail, FOIAonline, and Office are monitored only on working days during normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday). FOIA appeals posted to the e-mail box, fax

machine, FOIAonline, or Office after normal business hours will be deemed received on the next normal 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.

You also may contact the NOAA FOIA Public Liaison, Robert Swisher, at (301)-628-5755.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers 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

Sincerely,

Mr. Mark Graff
NOAA FOIA Officer

CAUSE *of* ACTION
— INSTITUTE —

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Thursday, April 12, 2018 4:29 PM
To: Toland, Michael; Purvis, Katrina
Cc: Lola Stith - NOAA Affiliate; Robert Swisher - NOAA Federal; Ed Kearns - NOAA Federal
Subject: New Oceana FOIA Lawsuit--Dusky Shark Requests
Attachments: DOC-NOAA-2018-001093 original request.pdf; DOC-NOAA-2018-001094 original request.pdf; Oceana lawsuit re FOIA.pdf; DOC-NOAA-2018-001092 original request.pdf

Hello Mike/Catrina,

NOAA/NMFS was sued in a FOIA lawsuit by Earthjustice on behalf of Oceana regarding three underlying FOIA requests seeking various records related to the Dusky Shark (b)(5)

I've reached out and spoken with Stacey Nathanson (NOAA/GC), and also provided notice to Mike Bogomolny (DOC/GC) and Bob Hogan (NOAA/GC) about the lawsuit.

Please let me know anything else you need on this. I'm attaching a copy of all 3 requests and a copy of the Complaint for your reference.

A copy of the
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.



April 26, 2017

SENT VIA FOIA ONLINE

National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3), Room 9719
Silver Spring, Maryland 20910
E: FOIA@noaa.gov

Re: Freedom of Information Act Request for Documents, Records, and Materials

Dear FOIA Officer(s):

Earthjustice, on behalf of Oceana, submits this request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

Documents Requested

The Highly Migratory Species Division of NMFS manages the dusky shark fishery under the Highly Migratory Species Fishery Management Plan (HMS FMP). NMFS published a final rule for Amendment 5b to the HMS FMP on April 4, 2017 and a related final environmental impact statement (EIS) under the National Environmental Policy Act in February 2017, which evaluated alternatives for dusky shark management and selected preferred alternatives for Amendment 5b. The Highly Migratory Species Division of NMFS collects self-reported logbook data on both the pelagic longline fishery and the shark bottom longline fishery and utilizes that data to monitor bycatch in both fisheries, including the bycatch of dusky sharks.

We request copies of all memoranda, studies, reports, data, correspondence, comments, conversation records, files, electronic mail records, or other documents, which were generated, received, kept, and/or considered by NMFS relating to:

- 1. The data sources used to estimate shark bycatch in the HMS pelagic longline and shark bottom longline fisheries.**

2. Logbook data related to shark bycatch, by species, in the HMS shark bottom longline and pelagic longline fisheries.
3. Observer data and reports related to shark bycatch, by species, in the HMS shark bottom longline and pelagic longline fisheries.
4. The total number of permitted vessels in the Gulf of Mexico reef fish fishery and Southeastern Atlantic snapper-grouper fishery.
5. The number of vessels that have both a directed shark permit and a directed reef fish or directed snapper-grouper permit in the Gulf of Mexico and Southeastern Atlantic.
6. The number of vessels that have both an incidental permit to land sharks and a directed reef fish permit or directed snapper-grouper permit in the Gulf of Mexico and Southeastern Atlantic.

We request that any documents, records, and materials be produced in response to these requests in an aggregated format, to the extent providing individualized data on fishing boats or permits would implicate confidentiality concerns. In any case, we request that that documents, records, data, and materials, aggregated or otherwise, reflect species-specific information to the maximum extent it is available. This request does not include the observer reports from the shark bottom longline fishery observer program that are readily available on NMFS's website (*i.e.*, Characterization of the Shark Bottom Longline Fishery: 2015, NOAA Technical Memorandum NMFS-SEFSC-689).

For purposes of this request, "documents, records, and materials" should be interpreted to include copies of all correspondence, including, but not limited to, internal memoranda, memoranda and correspondence with any other federal, state or foreign agencies or individuals, papers, maps, data, scientific (clinical and nonclinical) studies, samples, schematics, field notes/reports, telephone logs, briefing/application documents, electronic mail, and notes documenting any communication (regardless of physical form or characteristics).

Fee Waiver Requested

We request a waiver of any fees associated with this request. FOIA mandates that agencies waive or reduce search and copying fees where the disclosure is "in the public interest because it is likely to contribute significantly to public understanding of the

operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

In addition to the statutory direction, the U.S. Department of Commerce has issued regulations outlining factors that it considers in deciding whether a fee waiver is warranted: (1) the request concerns the operations or activities of the government; (2) the disclosure will have value to the public and will likely contribute to public understanding of government operations or activities; (3) the disclosure will contribute significantly to public understanding; (4) the disclosure is not primarily in the requester’s commercial interest. *See* 15 C.F.R. § 4.11(k).

As one court explained, if a non-profit organization has “identified why they wanted the administrative record, what they intended to do with it, to whom they planned on distributing it, and the [relevant] expertise of their membership,” then a waiver is appropriate. *Ctr. for Biological Diversity v. Office of Mgmt. & Budget*, 546 F. Supp. 2d 722, 727 (N.D. Cal. 2008) (internal quotation omitted). The information provided below demonstrates that Oceana meets the required criteria and are entitled to a full fee waiver.

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

This FOIA request seeks information relevant to NMFS’s management of dusky shark bycatch in the HMS fishery.

The EIS at issue here directly implicates the overfishing of dusky sharks in the HMS fishery and the steep declines of the dusky shark population over the last few decades, placing the species in an overfished state. This request will enable Oceana to evaluate the strength of, and basis for, the agency’s analysis. Accordingly, the FOIA request directly implicates the operations and activities of the government in managing public resources in the HMS fishery.

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

There is a direct connection between the requested records and NMFS’s operations and activities in managing dusky shark bycatch in the HMS fishery. The requested records relate to the government’s evaluation of bycatch and management of the HMS fishery. Access to these records will allow Oceana to evaluate NMFS’s dusky shark bycatch estimations for the HMS fishery. Consequently, the requested documents are critical to

a meaningful assessment of the agency's actions and a thorough public understanding of the government's operations and activities in regulating dusky shark bycatch.

While observer reports from the shark bottom longline fishery observer program are available to the public, observer reports from the pelagic longline fishery and logbook data from both fisheries, as requested by Oceana, are not. The requested documents are necessary for the public to gain a complete understanding of the government's estimations of dusky shark bycatch in HMS fisheries. This information is critical to assessing the government's actions in protecting dusky sharks. Accordingly, disclosure of the requested information will contribute significantly to public understanding of the government's operations and activities with respect to the HMS fisheries.

Oceana is a public-interest organization whose core mission involves using science, law, and policy to protect the world's oceans by, among other mechanisms, monitoring government management of public resources, encouraging public participation in government processes, and ensuring enforcement of applicable public laws. Oceana's experts will scrutinize the scientific underpinnings of the requested documents; these analyses will form the basis for responding to NMFS's proposed Amendment 5b and related EIS, as well as educating the public. *See Friends of the Coast Fork v. U.S. Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

Oceana also intends to disseminate information that may be available in the requested records through various means, including newsletters, reports, newspaper and magazine articles, electronic action alerts, web sites, and through other formal and informal communications. These types of public outreach are sufficient to warrant a fee waiver. *See W. Watersheds Proj. v. Brown*, 318 F. Supp. 2d 1036, 1041 (D. Idaho 2004) (noting cases holding "statements of intent to disseminate requested information through newsletters, popular news outlets, and presentations to public interest groups, government agencies, and the general public sufficient to entitle an organization to a fee waiver").

Oceana possesses the experience and expertise necessary to evaluate the requested information and provide it to the public in a useful form. *Cf. W. Watersheds Proj.*, 318 F. Supp. 2d at 1040-41. Oceana is highly qualified to extract, synthesize, analyze, and convey the requested information to its members, other organizations, and the public at large in a way that will increase understanding of government actions affecting public resources in the Southeastern Atlantic Ocean and Gulf of Mexico.

Oceana staff and board include resource analysts, scientists (including a marine scientist focused on sharks), lawyers, and professionals who specialize in public outreach. They

use that expertise to analyze and evaluate information about government decisions affecting public resources, such as the management of dusky shark bycatch, and provide analyses and evaluations to members, other organizations, and the general public.

Oceana has a long history of evaluating information similar to that requested here and distributing it to help inform the public and encourage participation in future planning processes. Oceana has gained a detailed understanding of the issues surrounding the problem of dusky shark bycatch.

NMFS appointed marine scientists from Oceana to serve on the HMS FMP Advisory Panel for numerous years, including most recently from 2009 through 2011 and from 2014 to present. Oceana's efforts concerning dusky sharks include numerous public comments regarding the species to NMFS. Oceana has been involved in public awareness events concerning dusky sharks and alerts its membership on issues involving the protection of dusky sharks.

In addition, Oceana has a dedicated campaign to reduce bycatch throughout the United States and published numerous reports describing the problem of bycatch in various fisheries throughout the United States, including in the Gulf of Mexico and Southeastern Atlantic Ocean, as well as reports describing the valuable species affected by bycatch in these fisheries, including sharks and turtles. For example, in June 2014, Oceana published a report entitled, "Wasted Cash: The price of Waste in the U.S. Fishing Industry," which reported on the value of discarded fish caught as bycatch in the U.S. fishing industry.¹ Likewise, in March of 2014, Oceana published a report entitled, "Wasted Catch: Unsolved Problems in U.S. Fisheries, which reported on comprehensive national bycatch estimates nation-wide.² In addition, Oceana has engaged in a public awareness campaign to inform U.S. citizens of the need for NMFS to take measures that will reduce dusky shark bycatch and ensure this depleted shark species recovers from its overfished status and 65 percent population decline.³

Moreover, Oceana staff and members have participated extensively in the relevant public processes over the last decade, by, among other things, submitting comments to NMFS concerning the management of the dusky shark fishery and the protection of dusky sharks in the marine ecosystem through the reduction of bycatch; commenting

¹ Amanda Keledjian et al., *Wasted Catch: The Price of Waste in the U.S. Fishing Industry* (June 2014), http://usa.oceana.org/sites/default/files/reports/wasted_cash_report_final.pdf.

² Amanda Keledjian et al., *Wasted Catch: Unsolved Problems in U.S. Fisheries* (Mar. 2014), http://usa.oceana.org/sites/default/files/reports/Bycatch_Report_FINAL.pdf.

³ Oceana, *Dusky Sharks*, <http://usa.oceana.org/our-work/promote-responsible-fishing/bycatch/dusky-sharks> (last visited April 17, 2017).

on the protection of endangered and threatened species; and engaging in the more general public discourse over the HMS fisheries and associated marine life in various public and scientific symposia.⁴

3. The Disclosure Will Contribute Significantly to Public Understanding.

Disclosure of these records will further the understanding of the public at large and is likely to be of interest to a broad audience. Oceana is a public-interest organization whose core mission is to protect the environment, public resources, and human health by, among other mechanisms, monitoring government management of marine waters, encouraging public participation in government processes, and ensuring enforcement of applicable public laws. The requested documents will undergo significant scientific and legal scrutiny by Oceana and these analyses will form the foundation for responding to NMFS's actions to address dusky shark bycatch. The records will further both the organization's and members' understanding of dusky shark bycatch in HMS fisheries.

Issues involving dusky shark bycatch in the HMS fishery are of significant public interest and have been the subject of significant public discourse as well as NMFS and fishery management council processes.

The requested disclosure will significantly increase public understanding of NMFS's operations and activities pertaining to dusky sharks. Oceana's headquarters is located in Washington, D.C., and Oceana has additional offices in key U.S. coastal areas. Oceana's website and publications educate its over 700,000 members and supporters and the public regarding shark bycatch. Oceana obtains broad media coverage. For example, in 2016, over 12,000 media stories about Oceana or citing Oceana were published or broadcast in the United States.

These records will provide information underlying the agency's decision-making, afford insight into the agency's decision-making processes, and highlight any competing viewpoints. These records will allow the requester to evaluate the agency's decision-making and the adequacy of the analyses, thereby facilitating public oversight of agency operations.

Oceana, and other members of the public have participated actively in efforts to address and reduce dusky shark bycatch. Oceana will use information gained through this

⁴ See, e.g., Oceana Comments on Listing Oceanic Whitetip Shark as Threatened Under the ESA (Mar. 29, 2017); Oceana Comments on Proposed Amendment 5b and DEIS (Dec. 22, 2016); Oceana Comments on Draft Addendum IV to the Coastal Sharks Interstate Fishery Management Plan (July 11, 2016).

FOIA request to inform its participation in fishery management council meetings, comments to the agency, and as a basis for evaluating the analyses and conclusions NMFS management decisions to address dusky shark bycatch.

4. Oceana Has No Commercial Interest in the Disclosure of the Information.

Oceana is a § 501(c)(3) tax-exempt nonprofit international advocacy organization dedicated to mitigating environmental threats to the oceans, including threats that affect marine wildlife, such as sharks. Oceana's Responsible Fishing Campaign includes the goal of seeking protections for sharks, as many shark populations worldwide have faced severe population declines in recent years due to overfishing, either through directed fisheries, bycatch, or the demand for fins.⁵ The requester is a nonprofit organization that has no commercial interest in the requested records. *See McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (noting that FOIA's fee waiver provision is to be "liberally construed in favor of waivers for noncommercial requestors" (quoting legislative history)).

5. Oceana Is a Media Representative.

Members of the news media are entitled to waivers of search fees. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 43 C.F.R. § 2.39(a). A representative of the news media includes "publishers of periodicals . . . who make their products available for purchase by or subscription by or free distribution to the general public." 5 U.S.C. § 552(a)(4)(A)(ii)(III); 43 C.F.R. § 2.70. News media broadly disseminate "information that is about current events or that would be of current interest to the public." *Id.* The waiver extends to a nonprofit organization that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (quoting 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986)); *Cause of Action v. FTC*, 799 F.3d 1108, 1115-17 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr. V. Dep't of Def.*, 241 F. Supp.2d 5, 12 (D.D.C. 2003).

Oceana functions as a member of the news media because it regularly gathers, publishes, and disseminates information to the public. Oceana gathers, synthesizes, and

⁵ Worm, B., B. Davis, L. Kettner, C.A. Ward-Paige, D. Chapman, M.R. Heithaus, S.T. Kessel, and S.H. Gruber. 2013. Global catches, exploitation rates, and rebuilding options for sharks. *Marine Policy* 40:194–204; Stevens, J. D., T.I. Walker, S.F. Cook, and S.V. Fordham. 2005. Threats faced by chondrichthyan fish. Page 461, in S.L. Fowler, R.D. Cavanagh, M. Camhi, G.H. Burgess, G.M. Cailliet, S.V. Fordham, C.A. Simpfendorfer, and J.A. Musick, editors. *Sharks, rays and chimaeras: the status of chondrichthyan fishes*. IUCN/SSG Shark Specialist Group, Gland, Switzerland; Clarke, S. 2007. Social, economic, and regulatory drivers of the shark fin trade. *Marine Resource Economics*, 22:305–327.

publishes information and news concerning marine conservation and bycatch which it broadly disseminates to its membership and the press through its website and blog, press releases, quarterly print magazine, and monthly email newsletter which it distributes to its over 700,000 members and supporters. *Cause of Action*, 799 F.3d at 1124 (for the news-media provision, an organization's website, newsletter, press releases, and press contacts will be considered in combination); *Judicial Watch v. U.S. Dept. of Justice*, 133 F. Supp. 2d 52, 53-4 (D.D.C. 2000) (website that disseminated information and radio show were sufficient to establish status of representative of media) 22 880 F.2d at 1387 (quoting 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986)); 241 F. Supp. 2d at 14 n.6 (noting that newsletter that was "published regularly, over a period of time, and . . . disseminate[d] actual 'news' to the public" was evidence that nonprofit organization was a member of the news media).

As provided by 5 U.S.C. § 552(a)(6)(A), we look forward to a reply within twenty (20) working days. If the agency chooses to withhold certain documents from disclosure pursuant to FOIA exemptions, we request that it: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied); (ii) explain in full the basis on which non-disclosure is justified; and (iii) provide us with any segregable portions of the documents for which a specific exemption is not claimed.

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

Sincerely,

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



April 26, 2017

SENT VIA FOIA ONLINE

National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3), Room 9719
Silver Spring, Maryland 20910
E: FOIA@noaa.gov

Re: Freedom of Information Act Request for Documents, Records, and Materials

Dear FOIA Officer(s):

Earthjustice, on behalf of Oceana, submits this request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

Documents Requested

On September 16, 2011, the Headquarters of the National Marine Fisheries Service (NMFS) published the first edition of the U.S. National Bycatch Report. NMFS published two updates to the National Bycatch Report, dated December 2013 and February 2016. In the National Bycatch Report and the two updates to the report, NMFS documented bycatch estimates from the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line).

The First Edition of the National Bycatch Report states in Table 4.2.1 that both logbooks and observer data were used as data sources to estimate bycatch for the Gulf of Mexico reef fish fishery and the Southeastern Atlantic snapper-grouper fishery. Appendix 3 to the first and second updates to the National Bycatch Report states that only logbook data was used as a data source to estimate bycatch in the Southeastern Atlantic snapper-grouper fishery for those updates, and that logbook, observer data, stock assessment or publication, and survey data was used to estimate bycatch in the Gulf of Mexico reef fish fishery for those updates.

We request copies of all memoranda, studies, reports, data, correspondence, comments, conversation records, files, electronic mail records, or other documents, which were generated, received, kept, and/or considered by NMFS relating to:

- 1. The data sources used to estimate shark bycatch in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line) in the First Edition of the U.S. National Bycatch Report and the First and Second Updates to the National Bycatch Report.**
- 2. Logbook data used to estimate shark bycatch, by species, in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line) in the First Edition of the U.S. National Bycatch Report and the First and Second Updates to the National Bycatch Report.**
- 3. Observer data used to estimate shark bycatch, by species, in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line) in the First Edition of the U.S. National Bycatch Report and the First and Second Updates to the National Bycatch Report.**
- 4. Stock assessments or publications used to estimate shark bycatch, by species, in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line) in the First Edition of the U.S. National Bycatch Report and the First and Second Updates to the National Bycatch Report.**
- 5. Survey data used to estimate shark bycatch, by species, in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line) in the First Edition of the U.S. National Bycatch Report and the First and Second Updates to the National Bycatch Report.**
- 6. Any other data used to estimate shark bycatch in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line) in the First Edition of the U.S. National Bycatch Report and the First and Second Updates to the National Bycatch Report.**

We request that any documents, records, and materials be produced in response to these requests in an aggregated format, to the extent providing individualized data on fishing boats or permits would implicate confidentiality concerns. In any case, we request that that documents, records, data, and materials, aggregated or otherwise, reflect species-specific information to the maximum extent it is available.

For purposes of this request, “documents, records, and materials” should be interpreted to include copies of all correspondence, including, but not limited to, internal memoranda, memoranda and correspondence with any other federal, state or foreign agencies or individuals, papers, maps, data, scientific (clinical and nonclinical) studies, samples, schematics, field notes/ reports, telephone logs, briefing/application documents, electronic mail, and notes documenting any communication (regardless of physical form or characteristics).

Fee Waiver Requested

We request a waiver of any fees associated with this request. FOIA mandates that agencies waive or reduce search and copying fees where the disclosure is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

In addition to the statutory direction, the U.S. Department of Commerce has issued regulations outlining factors that it considers in deciding whether a fee waiver is warranted: (1) the request concerns the operations or activities of the government; (2) the disclosure will have value to the public and will likely contribute to public understanding of government operations or activities; (3) the disclosure will contribute significantly to public understanding; (4) the disclosure is not primarily in the requester’s commercial interest. *See* 15 C.F.R. § 4.11(k).

As one court explained, if a non-profit organization has “identified why they wanted the administrative record, what they intended to do with it, to whom they planned on distributing it, and the [relevant] expertise of their membership,” then a waiver is appropriate. *Ctr. for Biological Diversity v. Office of Mgmt. & Budget*, 546 F. Supp. 2d 722, 727 (N.D. Cal. 2008) (internal quotation omitted). The information provided below demonstrates that Oceana meets the required criteria and are entitled to a full fee waiver.

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

This FOIA request seeks information relevant to NMFS's management of shark bycatch in the Gulf of Mexico reef fish and Southeastern Atlantic snapper-grouper fisheries.

Accordingly, the FOIA request directly concerns the operations and activities of the government in managing and protecting public resources managed by NMFS. This request will enable Oceana to evaluate the strength of and basis for the agency's analysis of shark bycatch. Accordingly, the FOIA request directly implicates the operations and activities of the government in managing public resources in the Gulf of Mexico and Southeastern Atlantic Ocean.

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

There is a direct connection between the requested records and NMFS's operations and activities in managing shark bycatch. The requested records relate to the government's evaluation of bycatch and management of fisheries in the Gulf of Mexico and Southeastern Atlantic Ocean. Access to these records will allow Oceana to evaluate NMFS's shark bycatch estimations for fisheries in these areas. Consequently, the requested documents are critical to a meaningful assessment of the agency's actions and a thorough public understanding of the government's operations and activities in regulating shark bycatch.

While the National Bycatch Reports and Updates are available to the public, the data sources and documents requested by Oceana are not. The requested documents are necessary for the public to gain a complete understanding of the government's estimations of shark bycatch in certain fisheries. This information is critical to assessing the government's actions in protecting these public resources. Accordingly, disclosure of the requested information will contribute significantly to public understanding of the government's operations and activities with respect to these fisheries.

Oceana is a public-interest organization whose core mission involves using science, law, and policy to protect the world's oceans by, among other mechanisms, monitoring government management of public resources, encouraging public participation in government processes, and ensuring enforcement of applicable public laws. Oceana's experts will scrutinize the scientific underpinnings of the requested documents; these analyses will form the basis for responding to NMFS's estimates and educating the

public. See *Friends of the Coast Fork v. U.S. Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

Oceana also intends to disseminate information that may be available in the requested records through various means, including newsletters, reports, newspaper and magazine articles, electronic action alerts, web sites, and through other formal and informal communications. These types of public outreach are sufficient to warrant a fee waiver. See *W. Watersheds Proj. v. Brown*, 318 F. Supp. 2d 1036, 1041 (D. Idaho 2004) (noting cases holding “statements of intent to disseminate requested information through newsletters, popular news outlets, and presentations to public interest groups, government agencies, and the general public sufficient to entitle an organization to a fee waiver”).

Oceana possesses the experience and expertise necessary to evaluate the requested information and provide it to the public in a useful form. Cf. *W. Watersheds Proj.*, 318 F. Supp. 2d at 1040-41. Oceana is highly qualified to extract, synthesize, analyze, and convey the requested information to its members, other organizations, and the public at large in a way that will increase understanding of government actions affecting public resources in the Southeastern Atlantic Ocean and Gulf of Mexico.

Oceana staff and board include resource analysts, scientists (including a marine scientist focused on sharks), lawyers, and professionals who specialize in public outreach. They use that expertise to analyze and evaluate information about government decisions affecting public resources, such as the management of the shark bycatch in fisheries across the United States, and provide analyses and evaluations to members, other organizations, and the general public.

Oceana has a long history of evaluating information similar to that requested here and distributing it to help inform the public and encourage participation in future planning processes. Oceana has gained a detailed understanding of the issues surrounding the problem of shark bycatch.

Oceana has a dedicated campaign to reduce bycatch throughout the United States and published numerous reports describing the problem of bycatch in various fisheries throughout the United States, including in the Gulf of Mexico and Southeastern Atlantic Ocean, as well as reports describing the valuable species affected by bycatch in these fisheries, including sharks. For example, in June 2014, Oceana published a report entitled, “Wasted Cash: The price of Waste in the U.S. Fishing Industry,” which

reported on the value of discarded fish caught as bycatch in the U.S. fishing industry.¹ Likewise, in March of 2014, Oceana published a report entitled, “Wasted Catch: Unsolved Problems in U.S. Fisheries, which reported on comprehensive national bycatch estimates nation-wide.² In addition, Oceana has engaged in a public awareness campaign to inform U.S. citizens of the need for NMFS to take measures that will reduce dusky shark bycatch and ensure this depleted shark species recovers from its overfished status and 65 percent population decline.³

Moreover, Oceana staff and members have participated extensively in the relevant public processes over the last decade, by, among other things, submitting comments to NMFS concerning the management of fisheries and the protection of marine life in the marine ecosystem through the reduction of shark bycatch; commenting on the protection of endangered and threatened species; and engaging in the more general public discourse over these fisheries and associated marine life in various public and scientific symposia.⁴

3. The Disclosure Will Contribute Significantly to Public Understanding.

Disclosure of these records will further the understanding of the public at large and is likely to be of interest to a broad audience. Oceana is a public-interest organization whose core mission is to protect the environment, public resources, and human health by, among other mechanisms, monitoring government management of marine waters, encouraging public participation in government processes, and ensuring enforcement of applicable public laws. The requested documents will undergo significant scientific scrutiny by Oceana and these analyses will form the foundation for commenting upon and responding to NMFS’s actions to address shark bycatch. The records will further both the organization’s and members’ understanding of the shark bycatch in the Gulf of Mexico reef fish and Southeastern Atlantic snapper-grouper fisheries.

Issues involving shark bycatch in the Gulf of Mexico reef fish and Southeastern Atlantic snapper-grouper fisheries are of significant public interest and have been the subject of significant public discourse as well as NMFS and fishery management council processes.

¹ Amanda Keledjian et al., *Wasted Catch: The Price of Waste in the U.S. Fishing Industry* (June 2014), http://usa.oceana.org/sites/default/files/reports/wasted_cash_report_final.pdf.

² Amanda Keledjian et al., *Wasted Catch: Unsolved Problems in U.S. Fisheries* (Mar. 2014), http://usa.oceana.org/sites/default/files/reports/Bycatch_Report_FINAL.pdf.

³ Oceana, *Dusky Sharks*, <http://usa.oceana.org/our-work/promote-responsible-fishing/bycatch/dusky-sharks> (last visited April 17, 2017).

⁴ See, e.g., Oceana Comments on Listing Oceanic Whitetip Shark as Threatened Under the ESA (Mar. 29, 2017); Oceana Comments on Proposed Amendment 5b and DEIS (Dec. 22, 2016); Oceana Comments on Draft Addendum IV to the Coastal Sharks Interstate Fishery Management Plan (July 11, 2016).

The requested disclosure will significantly increase public understanding of NMFS's operations and activities pertaining to these public resources. Oceana's headquarters is located in Washington, D.C., and Oceana has additional offices in key U.S. coastal areas. Oceana's website and publications educate its over 700,000 members and supporters and the public regarding shark bycatch. Oceana obtains broad media coverage. For example, in 2016, over 12,000 media stories about Oceana or citing Oceana were published or broadcast in the United States.

These records will provide information underlying the agency's decision-making, afford insight into the agency's decision-making processes, and highlight any competing viewpoints. These records will allow the requester to evaluate the agency's decision-making and the adequacy of the analyses, thereby facilitating public oversight of agency operations.

Oceana, and other members of the public have participated actively in efforts to address and reduce shark bycatch. Oceana will use information gained through this FOIA request to inform its participation in fishery management council meetings, comments to the agency, and as a basis for evaluating the analyses and conclusions NMFS management decisions to address shark bycatch.

4. Oceana Has No Commercial Interest in the Disclosure of the Information.

Oceana is a § 501(c)(3) tax-exempt nonprofit international advocacy organization dedicated to mitigating environmental threats to the oceans, including threats that affect marine wildlife, such as sharks. Oceana's Responsible Fishing Campaign includes the goal of seeking protections for sharks, as many shark populations worldwide have faced severe population declines in recent years due to overfishing, either through directed fisheries, bycatch, or the demand for fins.⁵ The requester is a nonprofit organization that has no commercial interest in the requested records. *See McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (noting that FOIA's fee waiver provision is to be "liberally construed in favor of waivers for noncommercial requestors" (quoting legislative history)).

⁵ Worm, B., B. Davis, L. Kettner, C.A. Ward-Paige, D. Chapman, M.R. Heithaus, S.T. Kessel, and S.H. Gruber. 2013. Global catches, exploitation rates, and rebuilding options for sharks. *Marine Policy* 40:194–204; Stevens, J. D., T.I. Walker, S.F. Cook, and S.V. Fordham. 2005. Threats faced by chondrichthyan fish. Page 461, in S.L. Fowler, R.D. Cavanagh, M. Camhi, G.H. Burgess, G.M. Cailliet, S.V. Fordham, C.A. Simpfendorfer, and J.A. Musick, editors. *Sharks, rays and chimaeras: the status of chondrichthyan fishes*. IUCN/SSG Shark Specialist Group, Gland, Switzerland; Clarke, S. 2007. Social, economic, and regulatory drivers of the shark fin trade. *Marine Resource Economics*, 22:305–327.

5. Oceana Is a Media Representative.

Members of the news media are entitled to waivers of search fees. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 43 C.F.R. § 2.39(a). A representative of the news media includes "publishers of periodicals . . . who make their products available for purchase by or subscription by or free distribution to the general public." 5 U.S.C. § 552(a)(4)(A)(ii)(III); 43 C.F.R. § 2.70. News media broadly disseminate "information that is about current events or that would be of current interest to the public." *Id.* The waiver extends to a nonprofit organization that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (quoting 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986)); *Cause of Action v. FTC*, 799 F.3d 1108, 1115-17 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr. V. Dep't of Def.*, 241 F. Supp.2d 5, 12 (D.D.C. 2003).

Oceana functions as a member of the news media because it regularly gathers, publishes, and disseminates information to the public. Oceana gathers, synthesizes, and publishes information and news concerning marine conservation and bycatch which it broadly disseminates to its membership and the press through its website and blog, press releases, quarterly print magazine, and monthly email newsletter which it distributes to its over 700,000 members and supporters. *Cause of Action*, 799 F.3d at 1124 (for the news-media provision, an organization's website, newsletter, press releases, and press contacts will be considered in combination); *Judicial Watch v. U.S. Dept. of Justice*, 133 F. Supp. 2d 52, 53-4 (D.D.C. 2000) (website that disseminated information and radio show were sufficient to establish status of representative of media) 22 880 F.2d at 1387 (quoting 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986)); 241 F. Supp. 2d at 14 n.6 (noting that newsletter that was "published regularly, over a period of time, and . . . disseminate[d] actual 'news' to the public" was evidence that nonprofit organization was a member of the news media).

As provided by 5 U.S.C. § 552(a)(6)(A), we look forward to a reply within twenty (20) working days. If the agency chooses to withhold certain documents from disclosure pursuant to FOIA exemptions, we request that it: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied); (ii) explain in full the basis on which non-disclosure is justified; and (iii) provide us with any segregable portions of the documents for which a specific exemption is not claimed.

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

Sincerely,

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



April 26, 2017

SENT VIA FOIA ONLINE

National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3), Room 9719
Silver Spring, Maryland 20910
E: FOIA@noaa.gov

Re: Freedom of Information Act Request for Documents, Records, and Materials

Dear FOIA Officer(s):

Earthjustice, on behalf of Oceana, submits this request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

Documents Requested

The Southeast Regional Office of the National Marine Fisheries Service (NMFS) manages fisheries in the Gulf of Mexico and South Atlantic, including the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line). There has been a voluntary observer program in place for the Gulf of Mexico reef fish fishery (bottom longline and vertical line) since 1993 and a mandatory observer program in place since 2006. The Galveston Laboratory published a technical memorandum in May 2013 to report on observer coverage of the 2010-2011 Gulf of Mexico reef fish fishery (bottom longline and vertical line) (NOAA Technical Memorandum NMFS-SEFSC-646). The Southeast Regional Office also collects self-reported logbook data on the catch and bycatch in the Gulf of Mexico reef fish fishery (bottom longline and vertical line).

There has been a voluntary observer program in place in the Southeastern Atlantic vertical line snapper-grouper fishery since 2007 and a mandatory program since 2013. The Panama City Laboratory published a technical memorandum characterizing the Southeastern U.S. Atlantic mid-shelf and deepwater reef fish fishery in June 2015 (NOAA Technical Memorandum NMFS-SEFSC-679). The Southeast Regional Office

also collects self-reported logbook data on the catch and bycatch in the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line).

We request copies of all memoranda, studies, reports, data, correspondence, comments, conversation records, files, electronic mail records, or other documents, which were generated, received, kept, and/or considered by NMFS Southeast Regional Office relating to:

- 1. The data sources used to estimate the bycatch of sharks in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line).**
- 2. Logbook data regarding the bycatch of sharks, by species, in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line).**
- 3. Observer data regarding the bycatch of sharks, by species, in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line) and any associated observer reports or characterizations of the fisheries.**
- 4. Any other data related to shark bycatch in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line).**
- 5. The total number of permitted vessels in the Gulf of Mexico reef fish fishery and Southeastern Atlantic snapper-grouper fishery.**
- 6. The number of vessels that have both a directed shark permit and a directed reef fish or directed snapper-grouper permit in the Gulf of Mexico and Southeastern Atlantic.**
- 7. The number of vessels that have both an incidental permit to land sharks and a directed reef fish permit or directed snapper-grouper permit in the Gulf of Mexico and Southeastern Atlantic.**

We request that any documents, records, and materials be produced in response to these requests in an aggregated format, to the extent providing individualized data on fishing boats or permits would implicate confidentiality concerns. In any case, we

request that that documents, records, data, and materials, aggregated or otherwise, reflect species-specific information to the maximum extent it is available.

For purposes of this request, “documents, records, and materials” should be interpreted to include copies of all correspondence, including, but not limited to, internal memoranda, memoranda and correspondence with any other federal, state or foreign agencies or individuals, papers, maps, data, scientific (clinical and nonclinical) studies, samples, schematics, field notes/ reports, telephone logs, briefing/application documents, electronic mail, and notes documenting any communication (regardless of physical form or characteristics).

Fee Waiver Requested

We request a waiver of any fees associated with this request. FOIA mandates that agencies waive or reduce search and copying fees where the disclosure is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

In addition to the statutory direction, the U.S. Department of Commerce has issued regulations outlining factors that it considers in deciding whether a fee waiver is warranted: (1) the request concerns the operations or activities of the government; (2) the disclosure will have value to the public and will likely contribute to public understanding of government operations or activities; (3) the disclosure will contribute significantly to public understanding; (4) the disclosure is not primarily in the requester’s commercial interest. *See* 15 C.F.R. § 4.11(k).

As one court explained, if a non-profit organization has “identified why they wanted the administrative record, what they intended to do with it, to whom they planned on distributing it, and the [relevant] expertise of their membership,” then a waiver is appropriate. *Ctr. for Biological Diversity v. Office of Mgmt. & Budget*, 546 F. Supp. 2d 722, 727 (N.D. Cal. 2008) (internal quotation omitted). The information provided below demonstrates that Oceana meets the required criteria and are entitled to a full fee waiver.

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

This FOIA request seeks information relevant to NMFS’s management of shark bycatch in the Gulf of Mexico reef fish and Southeastern Atlantic snapper-grouper fisheries.

Accordingly, the FOIA request directly concerns the operations and activities of the government in managing and protecting public resources managed by NMFS. This request will enable Oceana to evaluate the strength of and basis for the agency's analysis of bycatch. Accordingly, the FOIA request directly implicates the operations and activities of the government in managing public resources in the Gulf of Mexico and Southeastern Atlantic Ocean.

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

There is a direct connection between the requested records and NMFS's operations and activities in managing bycatch. The requested records relate to the government's evaluation of bycatch and management of fisheries in the Gulf of Mexico and Southeastern Atlantic Ocean. Access to these records will allow Oceana to evaluate NMFS's bycatch estimations for fisheries in these areas. Consequently, the requested documents are critical to a meaningful assessment of the agency's actions and a thorough public understanding of the government's operations and activities in regulating bycatch.

While some of the technical reports related to the observer programs in the Gulf of Mexico reef fish fishery and the Southeastern Atlantic vertical line snapper-grouper fishery are available to the public, the remainder of the reports, data sources and documents requested by Oceana are not. The requested documents are necessary for the public to gain a complete understanding of the government's estimations of shark bycatch in certain fisheries. This information is critical to assessing the government's actions in protecting these public resources. Accordingly, disclosure of the requested information will contribute significantly to public understanding of the government's operations and activities with respect to these fisheries.

Oceana is a public-interest organization whose core mission involves using science, law, and policy to protect the world's oceans by, among other mechanisms, monitoring government management of public resources, encouraging public participation in government processes, and ensuring enforcement of applicable public laws. Oceana's experts will scrutinize the scientific underpinnings of the requested documents; these analyses will form the basis for responding to NMFS's actions to address shark bycatch and educating the public. See *Friends of the Coast Fork v. U.S. Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

Oceana also intends to disseminate information that may be available in the requested records through various means, including newsletters, reports, newspaper and magazine articles, electronic action alerts, web sites, and through other formal and informal communications. These types of public outreach are sufficient to warrant a fee waiver. *See W. Watersheds Proj. v. Brown*, 318 F. Supp. 2d 1036, 1041 (D. Idaho 2004) (noting cases holding “statements of intent to disseminate requested information through newsletters, popular news outlets, and presentations to public interest groups, government agencies, and the general public sufficient to entitle an organization to a fee waiver”).

Oceana possesses the experience and expertise necessary to evaluate the requested information and provide it to the public in a useful form. *Cf. W. Watersheds Proj.*, 318 F. Supp. 2d at 1040-41. Oceana is highly qualified to extract, synthesize, analyze, and convey the requested information to its members, other organizations, and the public at large in a way that will increase understanding of government actions affecting public resources in the Southeastern Atlantic Ocean and Gulf of Mexico.

Oceana staff and board include resource analysts, scientists (including a marine scientist focused on sharks), lawyers, and professionals who specialize in public outreach. They use that expertise to analyze and evaluate information about government decisions affecting public resources, such as the management of the bycatch in fisheries across the United States, and provide analyses and evaluations to members, other organizations, and the general public.

Oceana has a long history of evaluating information similar to that requested here and distributing it to help inform the public and encourage participation in future planning processes. Oceana has gained a detailed understanding of the issues surrounding the problem of bycatch.

Oceana has a dedicated campaign to reduce bycatch throughout the United States and published numerous reports describing the problem of bycatch in various fisheries throughout the United States, including in the Gulf of Mexico and Southeastern Atlantic Ocean, as well as reports describing the valuable species affected by bycatch in these fisheries, including sharks. For example, in June 2014, Oceana published a report entitled, “Wasted Cash: The price of Waste in the U.S. Fishing Industry,” which reported on the value of discarded fish caught as bycatch in the U.S. fishing industry.¹ Likewise, in March of 2014, Oceana published a report entitled, “Wasted Catch:

¹ Amanda Keledjian et al., *Wasted Catch: The Price of Waste in the U.S. Fishing Industry* (June 2014), http://usa.oceana.org/sites/default/files/reports/wasted_cash_report_final.pdf.

Unsolved Problems in U.S. Fisheries,” which reported on comprehensive national bycatch estimates nation-wide.² In addition, Oceana has engaged in a public awareness campaign to inform U.S. citizens of the need for the NMFS to take measures that will reduce dusky shark bycatch and ensure this depleted shark species recovers from its overfished status and 65 percent population decline.³

Moreover, Oceana staff and members have participated extensively in the relevant public processes over the last decade, by, among other things, submitting comments to NMFS concerning the management of fisheries and the protection of marine life in the marine ecosystem through the reduction of bycatch; commenting on the protection of shark species;⁴ and engaging in the more general public discourse over these fisheries and associated marine life in various public and scientific symposia.⁵

3. The Disclosure Will Contribute Significantly to Public Understanding.

Disclosure of these records will further the understanding of the public at large and is likely to be of interest to a broad audience. Oceana is a public-interest organization whose core mission is to protect the environment, public resources, and human health by, among other mechanisms, monitoring government management of marine waters, encouraging public participation in government processes, and ensuring enforcement of applicable public laws. The requested documents will undergo significant scientific and legal scrutiny by Oceana and these analyses will form the foundation for commenting upon NMFS’s actions to address shark bycatch. The records will further both the organization’s and members’ understanding of the shark bycatch in the Gulf of Mexico reef fish and Southeastern Atlantic snapper-grouper fisheries.

Issues involving shark bycatch in the Gulf of Mexico reef fish and Southeastern Atlantic snapper-grouper fisheries are of significant public interest and have been the subject of significant public discourse as well as NMFS and fishery management council processes.

The requested disclosure will significantly increase public understanding of NMFS’s operations and activities pertaining to these public resources. Oceana’s headquarters is

² Amanda Keledjian et al., *Wasted Catch: Unsolved Problems in U.S. Fisheries* (Mar. 2014), http://usa.oceana.org/sites/default/files/reports/Bycatch_Report_FINAL.pdf.

³ Oceana, *Dusky Sharks*, <http://usa.oceana.org/our-work/promote-responsible-fishing/bycatch/dusky-sharks> (last visited April 17, 2017).

⁴ *See, e.g.*, Comment Letter from Oceana to NMFS re. Proposed Amendment 5b, 81 Fed. Reg. 71,672 (Oct. 18, 2016), dated Dec. 22, 2016.

⁵ *See, e.g.*, Oceana Comments on Listing Oceanic Whitetip Shark as Threatened Under the ESA (Mar. 29, 2017); Oceana Comments on Proposed Amendment 5b and DEIS (Dec. 22, 2016); Oceana Comments on Draft Addendum IV to the Coastal Sharks Interstate Fishery Management Plan (July 11, 2016).

located in Washington, D.C., and Oceana has additional offices in key U.S. coastal areas. Oceana's website and publications educate its over 700,000 members and supporters and the public regarding shark bycatch. Oceana obtains broad media coverage. For example, in 2016, over 12,000 media stories about Oceana or citing Oceana were published or broadcast in the United States.

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⁶ Worm, B., B. Davis, L. Kettner, C.A. Ward-Paige, D. Chapman, M.R. Heithaus, S.T. Kessel, and S.H. Gruber. 2013. Global catches, exploitation rates, and rebuilding options for sharks. *Marine Policy* 40:194–204; Stevens, J. D., T.I. Walker, S.F. Cook, and S.V. Fordham. 2005. Threats faced by chondrichthyan fish. Page 461, in S.L. Fowler, R.D. Cavanagh, M. Camhi, G.H. Burgess, G.M. Cailliet, S.V. Fordham, C.A. Simpfendorfer, and J.A. Musick, editors. *Sharks, rays and chimaeras: the status of chondrichthyan fishes*. IUCN/SSG Shark Specialist Group, Gland, Switzerland; Clarke, S. 2007. Social, economic, and regulatory drivers of the shark fin trade. *Marine Resource Economics*, 22:305–327.

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

Sincerely,

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

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

Oceana, Inc.,)
<i>Plaintiff</i>)
v.)
National Marine Fisheries Service, et al.,)
<i>Defendant</i>)

Civil Action No. 18-cv-00648-CRC

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*
National Marine Fisheries Service
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:

Stephen D. Mashuda
Earthjustice
705 Second Ave. Suite 203
Seattle, WA 98104

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: 3/26/2018



/s/ Tonya T. Hightower
Signature of Clerk or Deputy Clerk

Civil Action No. _____

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.

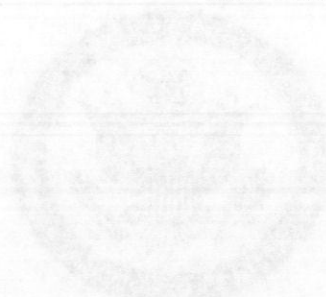
Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:



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

OCEANA, INC.)
1350 Connecticut Avenue NW, Fifth Floor)
Washington, D.C. 20036)

Plaintiff)

v.)

Civil Action No.)

NATIONAL OCEANIC AND ATMOSPHERIC)
ADMINISTRATION)
United States Department of Commerce)
Room 5128)
1401 Constitution Avenue, NW)
Washington, D.C. 20230)

NATIONAL MARINE FISHERIES SERVICE)
Department of Commerce)
Room 14555)
1315 East-West Highway)
Silver Spring, MD 20910)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Oceana brings this case to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by Defendants the National Marine Fisheries Service and National Oceanic and Atmospheric Administration (collectively “the Fisheries Service”). The violations arise out of the Fisheries Service’s continuing failure to respond to Oceana’s FOIA requests.

2. In April 2017, the Fisheries Service issued a Final Rule implementing Amendment 5b to the Highly Migratory Species (“HMS”) Fishery Management Plan. 82 Fed. Reg. 16,478 (April 4, 2017). The Final Rule was meant to reduce the bycatch and mortality of dusky sharks, a species that has been overfished for over a decade, in order to allow the species

to recover to a healthy level. However, in the Final Rule, the Fisheries Service did not correctly estimate the number of dusky sharks currently being killed as bycatch, preventing the agency from rationally determining the amount by which it needed to reduce the number of dusky sharks being killed to rebuild the population. The Fisheries Service also ignored data from a number of fisheries that continue to catch and kill dusky sharks in evaluating alternatives for its Final Rule.

3. Oceana filed three FOIA requests with the Fisheries Service, an agency of the National Oceanic and Atmospheric Administration (“NOAA”), on April 26, 2017, seeking records to enable Oceana to analyze the basis for and impact of the Final Rule and to disseminate the information to the public. The records sought in the FOIA requests are related to Oceana’s advocacy and public education missions to support protecting the dusky shark population. The Fisheries Service failed to provide Oceana determinations on its FOIA requests within the time required under FOIA and have not to date provided Oceana any determinations on its requests.

4. Although the Fisheries Service has provided Oceana a small, partial release of responsive records, the agency continues to unlawfully withhold the information sought by Oceana. The Fisheries Service has provided Oceana limited information on additional responsive records in their possession. By failing to provide the requested records, the Fisheries Service is actively impeding Oceana’s access to government information and blocking its ability to carry out its organizational mission.

5. Having constructively exhausted its administrative remedies with the Fisheries Service, Oceana now turns to this Court to enforce FOIA’s guarantee of public access to agency records and to remedy the Fisheries Service’s withholding of that access. Accordingly, Oceana asks this Court to declare that the Fisheries Service has violated FOIA by failing to make determinations on Oceana’s FOIA requests and by withholding the requested records, to order

Defendants to immediately provide Oceana with legally compliant responses to its outstanding record requests, to order Defendants to promptly provide Oceana all responsive records, and to grant other appropriate relief, including attorneys' fees and costs.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1333 (federal question) and 5 U.S.C. § 552(a)(4)(B) (FOIA).

7. Venue properly vests in this District pursuant to 5 U.S.C. § 552(a)(4)(B) because Oceana resides in this District. Venue also properly vests in this District pursuant to 28 U.S.C. § 1391(b) and (e)(i) because the Defendants are officers or employees of the United States and reside in this District.

8. This Court has authority to grant the requested relief in this case pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), (E), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

PARTIES

9. Plaintiff Oceana, Inc. is a non-profit, international conservation organization dedicated to maintaining and protecting the world's oceans, including the northwest Atlantic, the Gulf of Mexico, and the Caribbean. Oceana's mission includes making oceans vibrant and healthy by obtaining protection and conservation for Atlantic marine ecosystems and wildlife, like sharks. Oceana has over 720,000 members and supporters worldwide, including over 260,000 members and supporters in the Atlantic, Gulf, and Caribbean coastal states and territories. The Fisheries Service has appointed marine scientists from Oceana to serve on the HMS Fishery Management Plan Advisory Panel on several occasions, including most recently from 2009 through 2011 and from 2014 to 2016. Oceana's efforts concerning dusky sharks

include filing numerous public comments regarding the species to the Fisheries Service and filing litigation to protect the dusky shark, *Oceana v. Pritzker*, No. 1:15-cv-01824-CRC (D.D.C. filed Oct. 27, 2015). Oceana also alerts its membership on issues involving the protection of dusky sharks through a webpage, a blog series, and written reports. Oceana's headquarters is located in Washington, D.C. It has offices or staff in North Carolina, South Carolina, Florida, New York, Massachusetts, California, Oregon, and Alaska, in addition to the District of Columbia; as well as worldwide offices in Madrid, Spain; Brussels, Belgium; Copenhagen, Denmark; Geneva, Switzerland; Belmopan, Belize; Santiago, Chile; Manila, Philippines; Brasilia, Brazil; Mexico City, Mexico; and Toronto, Canada.

10. Defendant NATIONAL MARINE FISHERIES SERVICE is an agency of the U.S. Department of Commerce that has been delegated the responsibility to manage the highly migratory species fishery under the authority of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"). 16 U.S.C. §§ 1801 *et seq.* The Fisheries Service is the United States government agency with primary responsibility to ensure that the requirements of the Magnuson-Stevens Act are followed and enforced, including the requirements to implement annual catch limits, accountability measures, and others actions necessary to end overfishing and rebuild overfished populations of fish. The Fisheries Service is in possession and control of the records that Oceana seeks.

11. Defendant NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION is an agency of the U.S. Department of Commerce with supervisory responsibility for the Fisheries Service. NOAA administers and oversees FOIA requests made to the Fisheries Service. NOAA is in possession and control of the records that Oceana seeks.

STATUTORY BACKGROUND

12. FOIA's basic purpose is to ensure government transparency and the expeditious disclosure of government records. FOIA creates a statutory right of public access to agency records by requiring that federal agencies make records available to any person upon request. 5 U.S.C. § 552(a)(3)(A).

13. FOIA imposes strict deadlines on federal agencies to respond to requests. FOIA requires an agency to issue a final determination resolving an information request within 20 working days from the date of the request's receipt and to immediately notify the requester of the agency's determination and the reasons therefore. *Id.* § 552(a)(6)(A)(i).

14. Issuing a final determination requires the agency to "(i) gather and review the documents; (ii) determine and communicate the scope of the agency's documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the 'determination' is adverse." *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 188 (D.C. Cir. 2013); *see* 5 U.S.C. § 552(a)(6)(A)(i).

15. An agency may extend this 20-day period only in "unusual circumstances," as defined by 5 U.S.C. § 552(a)(6)(B)(iii), and only for a maximum of ten working days. *Id.* § 552(a)(6)(B)(i); *see also* 15 C.F.R. § 4.6(b), (d).

16. Agencies are required to provide "an estimated date on which the agency will complete action on the request" whenever a request will take more than ten days to resolve. 5 U.S.C. § 552(a)(7)(B). Agencies extending the period for unusual circumstances must, when providing notice of the extension, provide "the date on which a determination is expected to be dispatched." *Id.* § 552(a)(6)(B)(i); *see also* 15 C.F.R. § 4.6(d)(1).

17. The agency must then make the requested records “promptly” available. 5 U.S.C. § 552(a)(3)(A). In so doing, the agency must make reasonable efforts to search for records in a manner that is reasonably calculated to locate all records responsive to the FOIA request. *Id.* § 552(a)(3)(C), (D).

18. The agency may withhold from production the limited classes of records exempted under 5 U.S.C. § 552(b). For any record withheld, the agency bears the burden of proving that one of the statutory exemptions applies. *Id.* § 552(a)(4)(B). Even if some information is exempt from disclosure, “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.” *Id.* § 552(b).

19. An agency’s failure to comply with FOIA’s deadlines constitutes a constructive denial of the request, and the requester’s administrative remedies are deemed exhausted for purposes of litigation. *Id.* § 552(a)(6)(C)(i).

STATEMENT OF FACTS

20. On April 4, 2017, the Fisheries Service issued a Final Rule for Amendment 5b to the HMS Fishery Management Plan. The agency produced a related final Environmental Impact Statement under the National Environmental Policy Act in February 2017, which evaluated alternatives for dusky shark management and selected preferred alternatives for Amendment 5b.

21. The HMS Division of the Fisheries Service collects observer data and fisher’s self-reported logbook data for boats in the HMS fishery using both pelagic longline gear and bottom longline gear. It utilizes those data to monitor bycatch in the HMS fishery, including the bycatch of dusky sharks.

22. On April 26, 2017, Oceana submitted three FOIA requests to the Fisheries Service seeking reports reflecting dusky shark bycatch and records related to observer and logbook data

and reports. The first request sought all documents reflecting dusky shark bycatch and relating to observer and logbook data and reports, as well as the number of vessels permitted to land sharks in two sectors of the HMS fishery—the HMS pelagic bottom longline and shark bottom longline sectors. The second request sought all reports reflecting dusky shark bycatch and documents relating to observer and logbook data and, as well as the number of vessels permitted to land sharks in two other fisheries—the Gulf of Mexico reef fish fishery (using bottom longline and vertical line gear) and the Southeastern Atlantic snapper-grouper fishery (using bottom longline and vertical line gear). The third request sought all documents related to observer and logbook data used to estimate dusky shark bycatch in the Fisheries Service’s National Bycatch Reports.

23. The three requests specified that any responsive documents or other material could be produced in aggregated format, to the extent that providing individualized data on fishing boats or permits would implicate confidentiality concerns. The requests also specified that material readily available on the Fisheries Service’s website, including observer reports from the HMS fishery (*i.e.*, “Characterizations of the Shark Bottom Longline Fishery: 2014”, NOAA Technical Memorandum NMFS-SEFSC-677), were not included in the request and need not be produced.

24. Oceana’s FOIA requests further the organization’s objectives to end overfishing and inform its members and the public about conservation and management of dusky shark bycatch.

25. On May 4, 2017, Oceana filed a federal lawsuit challenging the Fisheries Service’s decision to adopt Amendment 5b because it failed to end overfishing or rebuild the

dusky shark population. *Oceana, Inc. v. Ross*, No. 1:17-cv-00829-CRC (D.D.C. filed May 4, 2017).

26. On May 18, 2017, the Fisheries Service notified Oceana that the agency had granted Oceana's fee waiver requests. *See* 5 U.S.C. § 552(a)(4)(A)(i); 15 C.F.R. § 4.11(l).

27. On May 19, 2017, Oceana received a form email from the Fisheries Service acknowledging receipt of the requests and assigning the requests tracking numbers: DOC-NOAA-2017-001092 (requesting documents related to fishery data in HMS fishery), DOC-NOAA-2017-001093 (requesting documents related to fishery data used in National Bycatch Reports), and DOC-NOAA-2017-001094 (requesting documents related to fishery data in Gulf of Mexico and Southeast Atlantic fisheries). The acknowledgement did not indicate the scope of the documents the Fisheries Service would produce, nor did it indicate any planned withholdings or exemptions.

28. The due date for the Fisheries Service to issue determinations on Oceana's FOIA requests was no later than June 19, 2017, under 5 U.S.C. § 552(a)(6)(A)(i).

29. On June 16, 2017, the Fisheries Service sent Oceana a letter regarding each request, stating it was invoking the ten working day-extension allowed for unusual circumstances under 5 U.S.C. § 552(a)(6)(B)(i) and 15 C.F.R. § 4.6(b), (d). The Fisheries Service stated that it anticipated providing interim releases for all three requests on July 3, 2017. None of the letters requested a new due date for final determinations (beyond the ten-day extension) nor did they indicate the scope of the documents the Fisheries Service would produce or any planned withholdings or exemptions.

30. Under 5 U.S.C. § 552(a)(6)(A), the new due date for the Fisheries Service to issue determinations was July 5, 2017.

31. On June 19, 2017, Oceana responded to the letters via email, asking for the date by which the Fisheries Service anticipated completing production for the requests and for a schedule of anticipated interim release dates, as applicable.

32. On June 26, 2017, Oceana and the Fisheries Service discussed the production schedule for the requests over the phone. On the call, the Fisheries Service was unable to provide any definitive dates for final determinations, interim releases, or final production for the three requests. Instead, the Fisheries Service requested that Oceana narrow its requests by date ranges and identify which requests should be given a higher priority.

33. On June 28, 2017, Oceana sent the Fisheries Service an email to provide additional information regarding the three requests and limiting the requests by date range and fishery. Oceana also identified which records were a higher priority and which were a lower priority.

34. On July 3, 2017, Oceana received an email from the Fisheries Service stating that the Fisheries Service needed to extend the timeline for its first interim production due to the unusual work week resulting from the July 4th holiday. The Fisheries Service stated it would provide the first interim production on July 6, 2017—one day after the Fisheries Service's statutory deadline for issuing determinations on the requests.

35. On July 6, 2017, the Fisheries Service sent Oceana letters providing first interim releases for FOIA request numbers DOC-NOAA-2017-001092 and DOC-NOAA-2017-001094. The Fisheries Service did not include any documents with its letters. The Fisheries Service simply provided hyperlinks to preexisting information on its website. The Fisheries Service provided hyperlinks to two Technical Memoranda reflecting the characterization of the shark bottom longline fishery observer program from 2009 and 2015, both of which were previously

readily available on the Fisheries Service's website. Neither of those hyperlinks were responsive to Oceana's FOIA requests because the requests stated that all Technical Memorandum available on the Fisheries Service's website were not included as part of the request. The letters also included a hyperlink to a Fisheries Service website listing permit numbers for each fishery. In the letters, the Fisheries Service did not indicate the full scope of the documents the Fisheries Service would produce in response to either request nor any planned withholdings or exemptions. The Fisheries Service did not produce an interim release for request number DOC-NOAA-2017-001093.

36. The same day, July 6, 2017, Oceana spoke to the Fisheries Service by phone regarding the requests. On that call and in a follow-up email that the Fisheries Service sent the same day, the Fisheries Service stated that it would "strive" to complete production for request numbers DOC-NOAA-2017-001092 and DOC-NOAA-2017-001094 by the end of July and anticipated completion of all three requests by the end of August.

37. By the end of July 2017, Oceana had received no additional documents or further correspondence from the Fisheries Service in response to the requests.

38. On August 3, 2017, Oceana sent the Fisheries Service an email noting that production of two of the requests had been expected by the end of July and asking when Oceana could expect to receive completed production.

39. On August 4, 2017, the Fisheries Service sent Oceana an email stating that it now anticipated production of records responding to request numbers DOC-NOAA-2017-001092 and DOC-NOAA-2017-001094 by late August.

40. After receiving no further updates or documents, Oceana again emailed the Fisheries Service on August 17, 2017. The Fisheries Service responded that the agency hoped to

have more information later that week.

41. After receiving no further documents, Oceana emailed the Fisheries Service again on August 30, 2017, asking when Oceana could expect the completed production for the three requests.

42. On August 30, 2017, the Fisheries Service emailed Oceana, stating for the first time that the Fisheries Service would not provide any logbook data purportedly due to confidentiality concerns. The Fisheries Service stated it could provide aggregated data. Oceana already had asked in its original requests that aggregated data be produced to the extent confidentiality was an issue. The Fisheries Service requested Oceana to further narrow the logbook information requested, despite the fact that Oceana had already narrowed its request for logbook data by date range, fishery, and priority two months earlier, on June 28, 2017. The Fisheries Service further stated that it could not guarantee a final date for production due to complications from Hurricane Harvey.

43. During a telephone conference on September 7, 2017, the Fisheries Service stated that it had received documents from its Galveston laboratory related to data from the Gulf of Mexico reef fish observer program that it would produce shortly in response to request number DOC-NOAA-2017-001094. The Fisheries Service stated that it was in the process of collecting observer data from the HMS shark bottom longline and pelagic longline sectors in response to request number DOC-NOAA-2017-001092, and that it expected to finish production of those documents in the next three weeks. The Fisheries Service stated that it was in the process of collecting logbook data from all three fisheries (HMS, Gulf of Mexico reef fish, and South Atlantic snapper/grouper) in response to request numbers DOC-NOAA-2017-001092 and DOC-NOAA-2017-001094. The Fisheries Service stated it expected to complete production on those

two requests in the next three weeks. Finally, the Fisheries Service stated that it was reviewing an interim set of emails in response to request number DOC-NOAA-2017-001093 and that it expected to produce those emails in the next two weeks.

44. On September 19, 2017, the Fisheries Service released two additional documents in response to request number DOC-NOAA-2017-001092. One document was a scientific paper describing observer data collected in the Gulf of Mexico reef fish fishery (using bottom longline and vertical line gear) from 2006–2009. The second document reflected a two-page table of sharks observed caught in several unspecified fisheries in the Gulf of Mexico: using “logline [sic],” bandit reel, hook timer, buoy, and spearfishing gear. This second document was not responsive to any of Oceana’s FOIA requests as it did not reflect data from the Gulf of Mexico reef fish fishery using bottom longline and vertical line gear, as requested. The Fisheries Service also indicated that the agency was still in the process of reviewing emails but was unable to produce any emails at that time.

45. On September 26, 2017, the Fisheries Service sent Oceana an email stating that the agency was proceeding with the email review and would get those documents to Oceana “as soon as possible.” The Fisheries Service also stated it was going to be working to obtain pelagic longline data and other information from its Galveston office.

46. On October 12, 2017, Oceana and the Fisheries Service had a conference call in which the Fisheries Service stated it would provide responsive emails the week of October 15, 2017.

47. The Fisheries Service did not produce the responsive emails by October 15, 2017. On October 24, 2017, Oceana sent the Fisheries Service an email inquiring when Oceana should expect to receive the promised emails and other forthcoming documents. The Fisheries Service

responded, on October 26, 2017, that the logbook data aggregation was complete and the data were being processed for release, but did not provide any further updates regarding the emails or other documents.

48. On November 8, 2017, the Fisheries Service sent Oceana a one-page document reflecting a table of the number of sharks reported by fishers to the “discard logbook program” in the Gulf of Mexico reef fish (using bottom longline and vertical line gear) and the South Atlantic snapper/grouper fishery (using bottom longline and vertical line gear) during January 2008 to December 2016. However, the table did not break down the discards by year or explain if it reflected all dusky shark bycatch reported in logbooks for those fisheries during that time period. Oceana requested additional information and clarification from the Fisheries Service, but the Fisheries Service never responded. The Fisheries Service did not provide any logbook information or documents related to the HMS fishery.

49. On November 17, 2017, Oceana spoke to the Fisheries Service by phone. The Fisheries Service again stated it was continuing to process Oceana’s requests, but could not provide any additional responses at that time.

50. Oceana received no further correspondence from the Fisheries Service for the next five months.

51. On March 12, 2018, Oceana received a letter by email, attaching a “third interim release” in response to all three requests. However, the letter was dated November 3, 2017, and only included one document—the exact same document that the Fisheries Service provided Oceana on November 8, 2017. The letter stated that the Fisheries Service would “follow up with [Oceana] shortly on the next interim release.”

52. Oceana has received no further correspondence or documents from the Fisheries

Service to date.

53. In total, Oceana has only received two purportedly responsive documents in response to its three FOIA requests: a one-page table of sharks reported in the “discard logbook program” and a scientific paper discussing observer data. The Fisheries Service has also provided a two-page table of shark numbers observed in various fisheries and hyperlinks which are not responsive to any of Oceana’s requests. Oceana has not received all the responsive records or the reasonably segregable portions of non-exempt responsive records to date.

54. The due date for the Fisheries Service’s FOIA determinations remains July 3, 2017.

55. While the Fisheries Service acknowledged receipt of the FOIA requests and granted the fee waivers, the Fisheries Service has failed to substantively respond to Oceana’s FOIA requests. None of the Fisheries Service’s communications indicated the scope of the documents it would produce. Nor did any of these communications include information on planned withholdings or exemptions. The Fisheries Service thus never provided Oceana with the determinations required by FOIA and the governing regulations—more than ten months after acknowledging receipt of the requests and initially granting the fee waivers, more than nine months after the statutory due date for issuing determinations, and more than eight months after the agreed-upon extended due date for issuing determinations.

CLAIMS FOR RELIEF

Count I – Failure to Make Determinations on FOIA Requests, 5 U.S.C. § 552(a)(6), (7)

56. The allegations made in all preceding paragraphs are realleged and incorporated by this reference.

57. NOAA and the Fisheries Service are “agencies” under FOIA. 5 U.S.C. § 552(f)(1). NOAA and the Fisheries Service have possession and control of the requested records.

58. The Fisheries Service was required to provide determinations within 20 working days on Oceana’s FOIA requests, dated April 26, 2017. *Id.* § 552(a)(6).

59. The Fisheries Service was required to provide “estimated date[s] on which the agency [would] complete action on the request[s].” *Id.* § 552(a)(7)(B); *accord id.* § 552(a)(6)(B)(i).

60. The Fisheries Service violated FOIA by failing to provide estimated date[s] by which they would complete action on Oceana’s April 26, 2017 FOIA requests or to make any of the other findings required in a FOIA determination. *Id.* § 552(a)(6)(B)(i), (7)(B); *Citizens for Responsibility & Ethics in Wash.*, 711 F.3d at 188.

61. Oceana agreed to extend the Fisheries Service’s deadline to respond to Oceana’s FOIA requests from June 19, 2017, to July 3, 2017. Oceana has not agreed to any further extensions. Even so, the Fisheries Service has not issued determinations on Oceana’s FOIA requests, nearly nine months after the statutory deadline and more than eight months after the agreed-upon extended deadline.

62. Oceana has constructively and fully exhausted all administrative remedies required by FOIA. *Id.* § 552(a)(6)(A), (C).

63. The Fisheries Service violated FOIA by failing to make the required determinations within 20 working days in response to Oceana’s April 26, 2017 FOIA requests. *Id.* § 552(a)(6).

Count II – Failure to Respond to FOIA Requests, 5 U.S.C. § 552(a)(3), (b)

64. The allegations made in all preceding paragraphs are realleged and incorporated by this reference.

65. FOIA requires the Fisheries Service to process records requests and promptly provide the requested records or the reasonably segregable portion of the requested records not subject to a FOIA exemption. 5 U.S.C. § 552(a)(3), (b).

66. The Fisheries Service has provided Oceana only two purportedly responsive documents, which is a small subset of the requested records. The Fisheries Service has not claimed that any of the records they have not yet provided are exempt from disclosure. Therefore, the interim communications from the Fisheries Service do not constitute the reasonably segregable portions of the requested records not subject to a FOIA exemption.

67. The Fisheries Service has acknowledged it is in possession of additional responsive records they have not provided to Oceana to date.

68. The Fisheries Service has not provided Oceana all the requested records. The Fisheries Service have not provided Oceana the reasonably segregable portions of the requested records not subject to a FOIA exemption.

69. The Fisheries Service has violated FOIA by failing to promptly provide the responsive records or the reasonably segregable portions of lawfully exempt responsive records to Oceana. *Id.*

REQUEST FOR RELIEF

WHEREFORE, Oceana prays that this Court:

1. Declare that the Fisheries Service failed to make timely determinations on Oceana's records requests in violation of FOIA, 5 U.S.C. § 552(a)(6), (7);
2. Declare that the Fisheries Service failed to promptly provide records in response

to Oceana's information requests in violation of 5 U.S.C. § 552(a)(3), (b);

3. Order the Fisheries Service to immediately provide determinations on Oceana's FOIA requests, as required by FOIA;

4. Order the Fisheries Service to conduct searches that are reasonably calculated to locate all records responsive to Oceana's FOIA requests, as required by FOIA;

5. Order the Fisheries Service to provide Oceana all responsive records or the reasonably segregable portions of lawfully exempt records, as required by FOIA, within ten days of this Court's order;

6. Maintain jurisdiction over this action until the Fisheries Service is in compliance with FOIA and every order of this Court;

7. Award Oceana its costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412; and

8. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 21st day of March, 2018.

/s/ Stephen D. Mashuda

Stephen D. Mashuda (DC Bar No. WA0005)

Christopher D. Eaton (*pro hac vice* pending)

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Attorneys for Plaintiff Oceana

CIVIL COVER SHEET

JS-44 (Rev. 7/16 DC)

<p>I. (a) PLAINTIFFS Oceana, Inc.</p> <p>(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>88888</u> (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) See Attachment.</p>	<p>DEFENDANTS The National Oceanic and Atmospheric Administration; the National Marine Fisheries Service</p> <p>COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (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>
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<p>II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)</p> <p><input type="radio"/> 1 U.S. Government Plaintiff <input checked="" type="radio"/> 2 U.S. Government Defendant <input type="radio"/> 3 Federal Question (U.S. Government Not a Party) <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: none;"> <tr> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DFT</td> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DFT</td> </tr> <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> </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
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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 <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 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <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> <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))</p> <p><u>Other Statutes</u> <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <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>
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<input type="radio"/> E. General Civil (Other)		OR	<input type="radio"/> F. Pro Se General Civil	
<p><u>Real Property</u> <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</p> <p><u>Personal Property</u> <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</p>	<p><u>Bankruptcy</u> <input type="checkbox"/> 422 Appeal 27 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p><u>Prisoner Petitions</u> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Conditions <input type="checkbox"/> 560 Civil Detainee – Conditions of Confinement</p> <p><u>Property Rights</u> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark</p> <p><u>Federal Tax Suits</u> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609</p>	<p><u>Forfeiture/Penalty</u> <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other</p> <p><u>Other Statutes</u> <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions</p>	<p><input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <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 <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.)
 Failure to appropriately respond to Freedom of Information Act requests 5 U.S.C. § 552.

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 checked="" type="checkbox"/> NO <input type="checkbox"/>	If yes, please complete related case form

DATE: 2/23/2018	SIGNATURE OF ATTORNEY OF RECORD: /s/ Stephen D. Mashuda
-----------------	---

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.

Plaintiff's Counsel:

Stephen D. Mashuda
Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
Telephone 206-343-7340

Brettny Hardy (*Pro Hac Vice* pending)
Earthjustice
50 California St., Suite 500
San Francisco, CA 94111
Telephone 415-217-2000

Christopher D. Eaton (*Pro Hac Vice* pending)
Earthjustice
705 2nd Ave., Suite 203
Seattle, WA 98104
Telephone 206-343-7340

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(es) 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):

N/A

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

Oceana, Inc. v. National Marine Fisheries Service, et al. C.A. No. 17-cv-829

3/23/2018
DATE

/s/ Stephen D. Mashuda
Signature of Plaintiff /Defendant (or counsel)

United States District Court For the District of Columbia

Oceana, Inc.,)		
)		
)		
vs)	Plaintiff	Civil Action No. <u>1:18-cv-00648</u>
)		
National Marine Fisheries Service, et)		
al.,)		
)		
Defendant)		

CERTIFICATE RULE LCvR 7.1

I, the undersigned, counsel of record for Oceana, Inc. certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries or affiliates of Oceana, Inc. which have any outstanding securities in the hands of the public:

None.

These representations are made in order that judges of this court may determine the need for recusal.

D.C. Bar No. WA0005
BAR IDENTIFICATION NO.

Attorney of Record
/s/ Stephen D. Mashuda
Signature
Stephen D. Mashuda
Print Name
705 Second Avenue, Suite 203
Address
Seattle WA 98104
City State Zip Code
206-343-7340
Phone Number

UNITED STATES DISTRICT AND BANKRUPTCY COURTS
FOR THE DISTRICT OF COLUMBIA

ANGELA D. CAESAR
Clerk of Court

NOTICE OF RIGHT TO CONSENT TO TRIAL
BEFORE A UNITED STATES MAGISTRATE JUDGE

The substantial criminal caseload in this Court and the requirements of the criminal Speedy Trial Act frequently result in the delay in the trial of civil cases. Aware of the hardship and expense to the parties, counsel, and witnesses caused by the delays which are beyond the control of the Court, this notice is to advise you of your right to trial of your case by a United States Magistrate Judge. By statute, 28 USC §636(c), Fed.R.Civ.P. 73 and Local Civil Rule 73.1, the parties, by consent, can try their case by means of a jury trial or bench trial before a United States Magistrate Judge. Appeals from judgments and final orders are taken directly to the United States Court of Appeals for the District of Columbia Circuit, in the same manner as an appeal from a judgment of a United States District Judge in a civil case.

WHAT IS THE PROCEDURE?

One of the matters you are required to discuss at the meet-and-confer conference mandated by Local Civil Rule 16.3 is whether the case should be assigned to a United States Magistrate Judge for all purposes, including trial

All parties must consent before the case is assigned to a Magistrate Judge for trial. You may consent at any time prior to trial. If you expressly decline to consent or simply fail to consent early in the case, you are not foreclosed from consenting later in the case. However, a prompt election to proceed before a Magistrate Judge is encouraged because it will facilitate a more orderly scheduling of the case.

Counsel for the plaintiff has been furnished a copy of the "Consent to Proceed Before a United States Magistrate Judge for all Purposes" form. If and when the form is executed, your response should be made to the Clerk of the United States District Court only.

WHAT IS THE ADVANTAGE?

The case will be resolved sooner and less expensively. The earlier the parties consent to assigning the case to a Magistrate Judge the earlier a firm and certain trial date can be established, even if the case is to be tried to a jury.

Upon the filing of the consent form the case will be randomly assigned for all purposes to a Magistrate Judge.

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

Plaintiff

v.

Civil Action No. _____

Defendant

NOTICE, CONSENT, AND REFERENCE OF A CIVIL ACTION TO A MAGISTRATE JUDGE

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment. Once judgment is entered an appeal must be taken to the U.S. Court of Appeals for the D.C. Circuit and not to the United States District Judge. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your case referred to a magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's authority. The following parties consent to have a United States magistrate judge conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings.

<i>Parties' printed names</i>	<i>Signatures of parties or attorneys</i>	<i>Dates</i>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Note: Return this form to the clerk of court only if you are consenting to the exercise jurisdiction by a United States magistrate judge. Do not return this form to a judge.

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Monday, April 16, 2018 11:49 AM
To: Emily Ho - NOAA Affiliate
Subject: Re: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])

Hi Emily,

(b)(5) [Redacted]

My recommendation is (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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On Mon, Apr 16, 2018 at 11:21 AM, Zachary Goldstein - NOAA Federal <zachary.goldstein@noaa.gov> wrote:

fwd from Emily

Hi Mark,

I was out of the office at the end of last week and just saw this. Would you please review and see if you have any comments for us to submit in response, before the 11am deadline tomorrow 4/17?

Best,
Emily

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

From: **Leg Affairs - NOAA Service Account** <leg.affairs@noaa.gov>

Date: Thu, Apr 12, 2018 at 8:34 PM

Subject: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])

To: _HDQ OLA NOAA <OLA.NOAA@noaa.gov>, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>, David Price - NOAA Federal <david.g.price@noaa.gov>, Edward Horton - NOAA Federal <edward.horton@noaa.gov>, Elizabeth McLanahan <elizabeth.mclanahan@noaa.gov>, Jessica Kondel <jessica.kondel@noaa.gov>, Merriam Norris <Merriam.Norris@noaa.gov>, _NOS Policy Division <NOS.Policy@noaa.gov>, Brianne Smith - NOAA Federal <Brianne.Smith@noaa.gov>, Janice Sessing <Janice.Sessing@noaa.gov>, Glenn Tallia - NOAA Federal <Glenn.E.Tallia@noaa.gov>, Chad Wagner - NOAA Federal <chad.wagner@noaa.gov>, Chief of Staff OMAO - NOAA Service Account <OMAO.COS@noaa.gov>, Eric Myers - NOAA Federal <eric.myers@noaa.gov>, Gregory Raymond - NOAA Federal <gregory.raymond@noaa.gov>, Micah Effron - NOAA Federal <micah.effron@noaa.gov>, Michelle Reed <michelle.reed@noaa.gov>, nesdis.cfocao.management@noaa.gov, nesdis.executive.affairs@noaa.gov, _NWS Congressional Affairs Unknown <nws.congressionalaffairs@noaa.gov>, Peter Oppenheimer <peter.oppenheimer@noaa.gov>, Adam Dilts - NOAA Federal <adam.dilts@noaa.gov>, Erik Noble - NOAA Federal <erik.noble@noaa.gov>, Kenneth Bailey - NOAA Federal <kenneth.bailey@noaa.gov>, Jeff Dillen <jeff.dillen@noaa.gov>, Leslie Kinnas - NOAA Affiliate <leslie.kinnas@noaa.gov>, _OAR Congressional Analysis Relations Division <oar.hq.card@noaa.gov>, Rachel Fontana - NOAA Affiliate <rachel.fontana@noaa.gov>, Samantha Guidon - NOAA Affiliate <samantha.guidon@noaa.gov>, Stephanie Altman - NOAA Federal <stephanie.altman@noaa.gov>, Zachary Goldstein - NOAA Federal <zachary.goldstein@noaa.gov>, Chris Hayes - NOAA Federal <chris.hayes@noaa.gov>, Tanya Dobrzynski - NOAA Federal <tanya.dobrzynski@noaa.gov>, Wendy Lewis - NOAA Federal <wendy.lewis@noaa.gov>, Brandon Elsner - NOAA Federal <brandon.elsner@noaa.gov>, Taylor Jordan - NOAA Federal <taylor.jordan@noaa.gov>, Kevin Wheeler - NOAA Federal <kevin.wheeler@noaa.gov>, Stuart Levenbach - NOAA Federal <stuart.levenbach@noaa.gov>, Kristine Cherry - NOAA Federal <kristine.cherry@noaa.gov>, Charles Powell - NOAA Federal <charles.powell@noaa.gov>

LEGISLATIVE REFERRAL MEMORANDUM

H.R. 5253

DEADLINE: 11:00 AM Tuesday, April 17, 2018

(b)(5)

The text "(b)(5)" is followed by four thick black horizontal bars that redact the content of the memorandum. The bars vary in length and are positioned at the bottom of the page.

(b)(5)

Thank you.

Chris Hayes

Legislative Affairs Specialist

NOAA's Office of Legislative and Intergovernmental Affairs

U.S. Department of Commerce

Herbert C. Hoover Building

O: [\(202\) 482-1284](tel:(202)482-1284)

C: (b)(6)

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--

Zachary G. Goldstein

Chief Information Officer and Director, High Performance Computing and Communications

National Oceanic and Atmospheric Administration

emily.s.ho@noaa.gov

From: emily.s.ho@noaa.gov
Sent: Monday, April 16, 2018 11:21 AM
To: Mark Graff - NOAA Federal
Cc: Robert Swisher; Emily Ho
Subject: Fwd: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])
Attachments: CLEAN_ DOJ views letter_HR 5253 OGIS empowerment Act of 2018 117143.docx; HR 5253 OGIS Empowerment Act of 2018 Bill Text.pdf

fwd from Emily

Hi Mark,

I was out of the office at the end of last week and just saw this. Would you please review and see if you have any comments for us to submit in response, before the 11am deadline tomorrow 4/17?

Best,
Emily

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

From: Leg Affairs - NOAA Service Account <leg.affairs@noaa.gov>
Date: Thu, Apr 12, 2018 at 8:34 PM
Subject: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])
To: _HDQ OLA NOAA <OLA.NOAA@noaa.gov>, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>, David Price - NOAA Federal <david.g.price@noaa.gov>, Edward Horton - NOAA Federal <edward.horton@noaa.gov>, Elizabeth McLanahan <elizabeth.mclanahan@noaa.gov>, Jessica Kondel <jessica.kondel@noaa.gov>, Merriam Norris <Merriam.Norris@noaa.gov>, _NOS Policy Division <NOS.Policy@noaa.gov>, Brianne Smith - NOAA Federal <Brianne.Smith@noaa.gov>, Janice Sessing <Janice.Sessing@noaa.gov>, Glenn Tallia - NOAA Federal <Glenn.E.Tallia@noaa.gov>, Chad Wagner - NOAA Federal <chad.wagner@noaa.gov>, Chief of Staff OMAO - NOAA Service Account <OMAO.COS@noaa.gov>, Eric Myers - NOAA Federal <eric.myers@noaa.gov>, Gregory Raymond - NOAA Federal <gregory.raymond@noaa.gov>, Micah Efron - NOAA Federal <micah.efron@noaa.gov>, Michelle Reed <michelle.reed@noaa.gov>, nesdis.cfocao.management@noaa.gov, nesdis.executive.affairs@noaa.gov, _NWS Congressional Affairs Unknown <nws.congressionalaffairs@noaa.gov>, Peter Oppenheimer <peter.oppenheimer@noaa.gov>, Adam Dilts - NOAA Federal <adam.dilts@noaa.gov>, Erik Noble - NOAA Federal <erik.noble@noaa.gov>, Kenneth Bailey - NOAA Federal <kenneth.bailey@noaa.gov>, Jeff Dillen <jeff.dillen@noaa.gov>, Leslie Kinnas - NOAA Affiliate <leslie.kinnas@noaa.gov>, _OAR Congressional Analysis Relations Division <oar.hq.card@noaa.gov>, Rachel Fontana - NOAA Affiliate <rachel.fontana@noaa.gov>, Samantha Guidon - NOAA Affiliate <samantha.guidon@noaa.gov>, Stephanie Altman - NOAA Federal <stephanie.altman@noaa.gov>, Zachary Goldstein - NOAA Federal <zachary.goldstein@noaa.gov>, Chris Hayes - NOAA Federal <chris.hayes@noaa.gov>, Tanya Dobrzynski - NOAA Federal <tanya.dobrzynski@noaa.gov>, Wendy Lewis - NOAA Federal <wendy.lewis@noaa.gov>, Brandon Elsner - NOAA Federal <brandon.elsner@noaa.gov>, Taylor Jordan - NOAA Federal

<taylor.jordan@noaa.gov>, Kevin Wheeler - NOAA Federal <kevin.wheeler@noaa.gov>, Stuart Levenbach - NOAA Federal <stuart.levenbach@noaa.gov>, Kristine Cherry - NOAA Federal <kristine.cherry@noaa.gov>, Charles Powell - NOAA Federal <charles.powell@noaa.gov>

LEGISLATIVE REFERRAL MEMORANDUM

H.R. 5253

DEADLINE: 11:00 AM Tuesday, April 17, 2018

(b)(5) [Redacted]

[Redacted]

[Redacted]

Thank you.

Chris Hayes

Legislative Affairs Specialist

NOAA's Office of Legislative and Intergovernmental Affairs
U.S. Department of Commerce
Herbert C. Hoover Building

O: [\(202\) 482-1284](tel:(202)482-1284)

C (b)(6) [Redacted]

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--

Zachary G. Goldstein

Chief Information Officer and Director, High Performance Computing and Communications
National Oceanic and Atmospheric Administration

(b) (5)

(b) (5)

(b) (5)

(b) (5)

115TH CONGRESS
2D SESSION

H. R. 5253

To amend section 552(h) of title 5, United States Code, to require agencies provide records to the Director of the Office of Government Information Services.

IN THE HOUSE OF REPRESENTATIVES

MARCH 13, 2018

Mr. FARENTHOLD (for himself and Mr. CARTWRIGHT) introduced the following bill; which was referred to the Committee on Oversight and Government Reform

A BILL

To amend section 552(h) of title 5, United States Code, to require agencies provide records to the Director of the Office of Government Information Services.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Office of Government
5 Information Services Empowerment Act of 2018”.

6 **SEC. 2. FREEDOM OF INFORMATION ACT AMENDMENTS.**

7 Section 552(h) of title 5, United States Code is
8 amended by adding at the end the following new para-
9 graph:

1 “(7) Each agency shall make any record avail-
2 able to the Director of the Office of Government In-
3 formation Services for purposes of carrying out this
4 subsection, upon request of the Director.”.

○

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1a compliant PDF documents, please refer to the Acrobat User Guide. Created PDF documents can be
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Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Monday, April 16, 2018 11:51 AM
To: Robert Swisher - NOAA Federal; Lola Stith - NOAA Affiliate; Robert Hogan
Cc: Dennis Morgan - NOAA Federal; Ed Kearns - NOAA Federal
Subject: Fwd: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])

FYI belo (b)(5)

[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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----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Mon, Apr 16, 2018 at 11:49 AM
Subject: Re: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])
To: Emily Ho - NOAA Affiliate <emily.s.ho@noaa.gov>

Hi Emily,

(b)(5)

[REDACTED]

My recommendation i (b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

(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 16, 2018 at 11:21 AM, Zachary Goldstein - NOAA Federal <zachary.goldstein@noaa.gov> wrote:

fwd from Emily

Hi Mark,

I was out of the office at the end of last week and just saw this. Would you please review and see if you have any comments for us to submit in response, before the 11am deadline tomorrow 4/17?

Best,
Emily

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

From: **Leg Affairs - NOAA Service Account** <leg.affairs@noaa.gov>

Date: Thu, Apr 12, 2018 at 8:34 PM

Subject: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])

To: _HDQ OLA NOAA <OLA.NOAA@noaa.gov>, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>, David Price - NOAA Federal <david.g.price@noaa.gov>, Edward Horton - NOAA Federal <edward.horton@noaa.gov>, Elizabeth McLanahan <elizabeth.mclanahan@noaa.gov>, Jessica Kondel <jessica.kondel@noaa.gov>, Merriam Norris <Merriam.Norris@noaa.gov>, _NOS Policy Division <NOS.Policy@noaa.gov>, Brianne Smith - NOAA Federal <Brianne.Smith@noaa.gov>, Janice Sessing <Janice.Sessing@noaa.gov>, Glenn Tallia - NOAA Federal <Glenn.E.Tallia@noaa.gov>, Chad Wagner - NOAA Federal <chad.wagner@noaa.gov>, Chief of Staff OMAO - NOAA Service Account <OMAO.COS@noaa.gov>, Eric Myers - NOAA Federal <eric.myers@noaa.gov>, Gregory Raymond - NOAA Federal <gregory.raymond@noaa.gov>, Micah Effron - NOAA Federal <micah.effron@noaa.gov>, Michelle Reed <michelle.reed@noaa.gov>, nesdis.cfocao.management@noaa.gov, nesdis.executive.affairs@noaa.gov, _NWS Congressional Affairs Unknown <nws.congressionalaffairs@noaa.gov>, Peter Oppenheimer <peter.oppenheimer@noaa.gov>, Adam Dilts - NOAA Federal <adam.dilts@noaa.gov>, Erik Noble - NOAA Federal <erik.noble@noaa.gov>, Kenneth Bailey - NOAA Federal <kenneth.bailey@noaa.gov>, Jeff Dillen <jeff.dillen@noaa.gov>, Leslie Kinnas - NOAA Affiliate <leslie.kinnas@noaa.gov>, _OAR Congressional Analysis Relations Division <oar.hq.card@noaa.gov>, Rachel Fontana - NOAA Affiliate <rachel.fontana@noaa.gov>, Samantha Guidon - NOAA Affiliate <samantha.guidon@noaa.gov>, Stephanie Altman - NOAA Federal <stephanie.altman@noaa.gov>, Zachary Goldstein - NOAA Federal

<zachary.goldstein@noaa.gov>, Chris Hayes - NOAA Federal <chris.hayes@noaa.gov>, Tanya Dobrzynski - NOAA Federal <tanya.dobrzynski@noaa.gov>, Wendy Lewis - NOAA Federal <wendy.lewis@noaa.gov>, Brandon Elsner - NOAA Federal <brandon.elsner@noaa.gov>, Taylor Jordan - NOAA Federal <taylor.jordan@noaa.gov>, Kevin Wheeler - NOAA Federal <kevin.wheeler@noaa.gov>, Stuart Levenbach - NOAA Federal <stuart.levenbach@noaa.gov>, Kristine Cherry - NOAA Federal <kristine.cherry@noaa.gov>, Charles Powell - NOAA Federal <charles.powell@noaa.gov>

LEGISLATIVE REFERRAL MEMORANDUM

H.R. 5253

DEADLINE: 11:00 AM Tuesday, April 17, 2018

(b)(5)
[Redacted]

[Redacted]

[Redacted]

Thank you.

Chris Hayes

Legislative Affairs Specialist

NOAA's Office of Legislative and Intergovernmental Affairs
U.S. Department of Commerce
Herbert C. Hoover Building

O: [\(202\) 482-1284](tel:(202)482-1284)

C (b)(6)

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--

Zachary G. Goldstein
Chief Information Officer and Director, High Performance Computing and Communications
National Oceanic and Atmospheric Administration

Lola Stith - NOAA Affiliate

From: Lola Stith - NOAA Affiliate
Sent: Monday, April 16, 2018 12:19 PM
To: Mark Graff - NOAA Federal
Subject: Re: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])

Hi Mark - Do you have a copy of the attachment?

Lola

On Mon, Apr 16, 2018 at 11:50 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

FYI belo (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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----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Mon, Apr 16, 2018 at 11:49 AM
Subject: Re: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])
To: Emily Ho - NOAA Affiliate <emily.s.ho@noaa.gov>

Hi Emily,

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

My recommendation i (b)(5) [REDACTED]
[REDACTED]

(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) (C)

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Best,
Emily

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Date: Thu, Apr 12, 2018 at 8:34 PM
Subject: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])
To: _HDQ OLA NOAA <OLA.NOAA@noaa.gov>, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>, David Price - NOAA Federal <david.g.price@noaa.gov>, Edward Horton - NOAA Federal <edward.horton@noaa.gov>, Elizabeth McLanahan <elizabeth.mclanahan@noaa.gov>, Jessica Kondel <jessica.kondel@noaa.gov>, Merriam Norris <Merriam.Norris@noaa.gov>, _NOS Policy Division <NOS.Policy@noaa.gov>, Brianne Smith - NOAA Federal <Brianne.Smith@noaa.gov>, Janice Sessing <Janice.Sessing@noaa.gov>, Glenn Tallia - NOAA Federal <Glenn.E.Tallia@noaa.gov>, Chad Wagner - NOAA Federal <chad.wagner@noaa.gov>, Chief of Staff OMAO - NOAA Service Account <OMAO.COS@noaa.gov>, Eric Myers - NOAA Federal <eric.myers@noaa.gov>, Gregory Raymond - NOAA Federal <gregory.raymond@noaa.gov>, Micah Efron - NOAA Federal <micah.EFRON@noaa.gov>, Michelle Reed <michelle.reed@noaa.gov>, nesdis.cfocao.management@noaa.gov, nesdis.executive.affairs@noaa.gov, _NWS Congressional Affairs Unknown <nws.congressionalaffairs@noaa.gov>, Peter Oppenheimer <peter.oppenheimer@noaa.gov>, Adam Dilts - NOAA Federal <adam.dilts@noaa.gov>, Erik Noble - NOAA Federal <erik.noble@noaa.gov>, Kenneth Bailey - NOAA Federal <kenneth.bailey@noaa.gov>, Jeff Dillen <jeff.dillen@noaa.gov>, Leslie Kinnas -

NOAA Affiliate <leslie.kinnas@noaa.gov>, _OAR Congressional Analysis Relations Division <oar.hq.card@noaa.gov>, Rachel Fontana - NOAA Affiliate <rachel.fontana@noaa.gov>, Samantha Guidon - NOAA Affiliate <samantha.guidon@noaa.gov>, Stephanie Altman - NOAA Federal <stephanie.altman@noaa.gov>, Zachary Goldstein - NOAA Federal <zachary.goldstein@noaa.gov>, Chris Hayes - NOAA Federal <chris.hayes@noaa.gov>, Tanya Dobrzynski - NOAA Federal <tanya.dobrzynski@noaa.gov>, Wendy Lewis - NOAA Federal <wendy.lewis@noaa.gov>, Brandon Elsner - NOAA Federal <brandon.elsner@noaa.gov>, Taylor Jordan - NOAA Federal <taylor.jordan@noaa.gov>, Kevin Wheeler - NOAA Federal <kevin.wheeler@noaa.gov>, Stuart Levenbach - NOAA Federal <stuart.levenbach@noaa.gov>, Kristine Cherry - NOAA Federal <kristine.cherry@noaa.gov>, Charles Powell - NOAA Federal <charles.powell@noaa.gov>

LEGISLATIVE REFERRAL MEMORANDUM

H.R. 5253

DEADLINE: 11:00 AM Tuesday, April 17, 2018

(b)(5)
[Redacted]

(b)(5)
[Redacted]

[Redacted]

Thank you.

Chris Hayes

Legislative Affairs Specialist

NOAA's Office of Legislative and Intergovernmental Affairs

U.S. Department of Commerce

Herbert C. Hoover Building

O: [\(202\) 482-1284](tel:2024821284)

C (b)(6)

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--

Zachary G. Goldstein

Chief Information Officer and Director, High Performance Computing and Communications

National Oceanic and Atmospheric Administration

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6)

lola.m.stith@noaa.gov

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Monday, April 16, 2018 12:48 PM
To: Lola Stith - NOAA Affiliate
Cc: Dennis Morgan - NOAA Federal
Subject: Re: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])
Attachments: HR 5253 OGIS Empowerment Act of 2018 Bill Text.pdf; CLEAN_ DOJ views letter_HR 5253 OGIS empowerment Act of 2018 117143.docx

Yes--here you go, including the DOJ views on the bill as well. Looping in Dennis to close the loop on the Data Call.

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 16, 2018 at 12:18 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:
Hi Mark - Do you have a copy of the attachment?

Lola

On Mon, Apr 16, 2018 at 11:50 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

FYI belo (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: **Mark Graff - NOAA Federal** <mark.graff@noaa.gov>

Date: Mon, Apr 16, 2018 at 11:49 AM

Subject: Re: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])

To: Emily Ho - NOAA Affiliate <emily.s.ho@noaa.gov>

Hi Emily,

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

My recommendation is (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 (O)
(b)(6) [Redacted] (C)

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On Mon, Apr 16, 2018 at 11:21 AM, Zachary Goldstein - NOAA Federal <zachary.goldstein@noaa.gov> wrote:

fwd from Emily

Hi Mark,

I was out of the office at the end of last week and just saw this. Would you please review and see if you have any comments for us to submit in response, before the 11am deadline tomorrow 4/17?

Best,
Emily

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

From: **Leg Affairs - NOAA Service Account** <leg.affairs@noaa.gov>

Date: Thu, Apr 12, 2018 at 8:34 PM

Subject: Comments by 11am 4/17: DOJ Views Letter on H.R. 5253, the Office of Government Information Services (OGIS) Empowerment Act of 2018 (LRM [RD-115-217])

To: _HDQ OLA NOAA <OLA.NOAA@noaa.gov>, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>, David Price - NOAA Federal <david.g.price@noaa.gov>, Edward Horton - NOAA Federal <edward.horton@noaa.gov>, Elizabeth McLanahan <elizabeth.mclanahan@noaa.gov>, Jessica Kondel <jessica.kondel@noaa.gov>, Merriam Norris <Merriam.Norris@noaa.gov>, _NOS Policy Division <NOS.Policy@noaa.gov>, Brianne Smith - NOAA Federal <Brianne.Smith@noaa.gov>, Janice Sessing <Janice.Sessing@noaa.gov>, Glenn Tallia - NOAA Federal <Glenn.E.Tallia@noaa.gov>, Chad Wagner - NOAA Federal <chad.wagner@noaa.gov>, Chief of Staff OMAO - NOAA Service Account <OMAO.COS@noaa.gov>, Eric Myers - NOAA Federal <eric.myers@noaa.gov>, Gregory Raymond - NOAA Federal <gregory.raymond@noaa.gov>, Micah Efron - NOAA Federal <micah.effron@noaa.gov>, Michelle Reed <michelle.reed@noaa.gov>, nesdis.cfocao.management@noaa.gov, nesdis.executive.affairs@noaa.gov, _NWS Congressional Affairs Unknown <nws.congressionalaffairs@noaa.gov>, Peter Oppenheimer <peter.oppenheimer@noaa.gov>, Adam Dilts - NOAA Federal <adam.dilts@noaa.gov>, Erik Noble - NOAA Federal <erik.noble@noaa.gov>, Kenneth Bailey - NOAA Federal <kenneth.bailey@noaa.gov>, Jeff Dillen <jeff.dillen@noaa.gov>, Leslie Kinnas - NOAA Affiliate <leslie.kinnas@noaa.gov>, _OAR Congressional Analysis Relations Division <oar.hq.card@noaa.gov>, Rachel Fontana - NOAA Affiliate <rachel.fontana@noaa.gov>, Samantha Guidon - NOAA Affiliate <samantha.guidon@noaa.gov>, Stephanie Altman - NOAA Federal <stephanie.altman@noaa.gov>, Zachary Goldstein - NOAA Federal <zachary.goldstein@noaa.gov>, Chris Hayes - NOAA Federal <chris.hayes@noaa.gov>, Tanya Dobrzynski - NOAA Federal <tanya.dobrzynski@noaa.gov>, Wendy Lewis - NOAA Federal <wendy.lewis@noaa.gov>, Brandon Elsner - NOAA Federal <brandon.elsner@noaa.gov>, Taylor Jordan - NOAA Federal <taylor.jordan@noaa.gov>, Kevin Wheeler - NOAA Federal <kevin.wheeler@noaa.gov>, Stuart Levenbach - NOAA Federal <stuart.levenbach@noaa.gov>, Kristine Cherry - NOAA Federal <kristine.cherry@noaa.gov>, Charles Powell - NOAA Federal <charles.powell@noaa.gov>

LEGISLATIVE REFERRAL MEMORANDUM

H.R. 5253

DEADLINE: 11:00 AM Tuesday, April 17, 2018

(b)(5)
[Redacted content]

(b)(5)

Thank you.

Chris Hayes

Legislative Affairs Specialist

NOAA's Office of Legislative and Intergovernmental Affairs

U.S. Department of Commerce

Herbert C. Hoover Building

O: [\(202\) 482-1284](tel:(202)482-1284)

C (b)(6)

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--

Zachary G. Goldstein

Chief Information Officer and Director, High Performance Computing and Communications

National Oceanic and Atmospheric Administration

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

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

lola.m.stith@noaa.gov

(b) (5)

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(b) (5)

115TH CONGRESS
2D SESSION

H. R. 5253

To amend section 552(h) of title 5, United States Code, to require agencies provide records to the Director of the Office of Government Information Services.

IN THE HOUSE OF REPRESENTATIVES

MARCH 13, 2018

Mr. FARENTHOLD (for himself and Mr. CARTWRIGHT) introduced the following bill; which was referred to the Committee on Oversight and Government Reform

A BILL

To amend section 552(h) of title 5, United States Code, to require agencies provide records to the Director of the Office of Government Information Services.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Office of Government
5 Information Services Empowerment Act of 2018”.

6 **SEC. 2. FREEDOM OF INFORMATION ACT AMENDMENTS.**

7 Section 552(h) of title 5, United States Code is
8 amended by adding at the end the following new para-
9 graph:

1 “(7) Each agency shall make any record avail-
2 able to the Director of the Office of Government In-
3 formation Services for purposes of carrying out this
4 subsection, upon request of the Director.”.

○

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Jean Apedo - NOAA Federal

From: Jean Apedo - NOAA Federal
Sent: Thursday, April 19, 2018 6:49 AM
To: Mark.Graff@noaa.gov
Cc: Sarah.Brabson@noaa.gov
Subject: FW: NOAA1101 PTA for Signature
Attachments: SSA AA04 - PTA (FY18)-Approved.pdf

Good morning Mark,
Please find attached NOAA1101 PTA for your review and signature.
Thank you.

From: Joseph Smith - NOAA Federal [mailto:joseph.c.smith.iii@noaa.gov]
Sent: Wednesday, April 18, 2018 3:07 PM
To: Jean Apedo - NOAA Federal; Hadona Diep - NOAA Affiliate
Subject: Fwd: NOAA1101 PTA for Signature

As requested.

Thanks,
Joe

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

From: Kim Darling - NOAA Federal <kim.darling@noaa.gov>
Date: Wed, Apr 18, 2018 at 2:58 PM
Subject: Re: NOAA1101 PTA for Signature
To: Joseph Smith - NOAA Federal <joseph.c.smith.iii@noaa.gov>
Cc: John Shore - NOAA Affiliate <john.shore@noaa.gov>

Here you go . . .

Kimberly A. Darling
Director, Finance Office/Comptroller
National Oceanic and Atmospheric Administration
20020 Century Blvd.
Germantown, MD 20874
(301) 444-2806

Mission: Provide strategic, financial, and operational leadership to NOAA through committed teamwork and customer service.

Vision: Be a strategic partner for our internal and external stakeholders.

On Wed, Apr 18, 2018 at 2:38 PM, Joseph Smith - NOAA Federal <joseph.c.smith.iii@noaa.gov> wrote:
Hi Kim,

I just received the attached PTA for your signature as Co-AO. It has been reviewed and signed by me, Jean

Apedo (OCIO ITSO), and Doug Perry.

Many thanks,
Joe

--

Joseph C. Smith III

Director, DOC/NOAA Information Technology Center

--

Joseph C. Smith III

Director, DOC/NOAA Information Technology Center

**U.S. Department of Commerce
NOAA**



**Privacy Threshold Analysis
for the
Information Technology Center (ITC) NOAA1101**

U.S. Department of Commerce Privacy Threshold Analysis

Information Technology Center (ITC) NOAA1101

Unique Project Identifier: 006-48-01-01-01-3801-00

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 NOAA1101 General Support System (GSS), located at 1221 Caraway Court; Suite 1020; Largo, Maryland 20774, is an interconnected set of information resources under the management and control of Service Delivery Division (SDD) within the NOAA Office of the Chief Information Officer (CIO). The NOAA1101 GSS includes hardware, software, information, data, applications, communications, facilities, and people.

NOAA1101 GSS provides Infrastructure As A Service (IAAS), Data Center colocation, and Application Support services that are instrumental to obtaining the objectives of the President's Management Agenda; achieving the goals of the Office of Management and Budget for effective and efficient Government; and NOAA's goal for excellence in the technical operational support of NOAA's financial, management, and administrative systems. Support activities of the GSS include direct, technical, and operational support of financial and administrative systems.

The NOAA1101 GSS boundary encompasses the NOAA instance of Commerce Business System (CBS), CBS Support Systems, Grants Online (GOL), the Economic Development Administration's (EDA's) Revolving Loan Fund Management System (RLFMS) and Operations Planning and Control System (OPCS); and various other minor administrative and management applications.

The NOAA1101 GSS includes multiple interconnections with various NOAA line/staff offices such as The National Weather Service; NOAA Fisheries; and The Office of Law Enforcement. Interconnections with other government agencies and external entities also exist. These include: the US Department of the Treasury, US Department of Agriculture (USDA); Commercial Banking Institutions such as JP Morgan-Chase/MasterCard; and Carlson Wagonlit Travel (CWT) SatoTravel.

The CBS and GOL systems are documented as subsystems within NOAA1101 and are identified as FISMA children of the GSS.

The NOAA1101 GSS has been identified as a High Value Asset by the DOC Office of Cyber Security due to the Critical Systems Management Information it contains. The operational support of these systems is a critical factor in the functionality and benefit of these systems to NOAA employees and consequently to the achievement of NOAA's mission.

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, and there is not a SAOP approved Privacy Impact Assessment. *Continue to answer questions and complete certification.*
- This is an existing information system in which changes do not create new privacy risks, and there is a SAOP approved Privacy Impact Assessment (version 01-2015 or later). *Continue to answer 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 NOAA1101 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 NOAA1101 and as a consequence of this non-applicability, a PIA for this IT system is not necessary.

Name of System Owner (SO): Joseph C. Smith III

Signature of ISSO or SO:  Digitally signed by SMITH.JOSEPH.CLINTON.III.120048 3886 Date: 2018.04.03 10:49:02 -04'00' Date: 4/3/2018

Name of Information Technology Security Officer (ITSO): Jean Apedo

Signature of ITSO: APEDO.JEAN.1188076064 Digitally signed by APEDO.JEAN.1188076064 DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=APEDO.JEAN.1188076064 Date: 2018.04.17 07:34:40 -04'00' Date: 88076064

Name of Authorizing Official (AO): Doug Perry

Signature of AO: PERRY.DOUGLAS.A.1365847270 Digitally signed by PERRY.DOUGLAS.A.1365847270 Date: 2018.04.18 14:07:21 -04'00' Date: 65847270

Name of Co-Authorizing Official (AO): Kim Darling

Signature of AO: DARLING.KIMBERLY.A.1398604373 Digitally signed by DARLING.KIMBERLY.A.1398604373 Date: 2018.04.18 14:58:13 -04'00' Date: 3

Name of Bureau Chief Privacy Officer (BCPO): Mark Graff

Signature of BCPO: _____ Date: _____

FOIA Office - NOAA Service Account

From: FOIA Office - NOAA Service Account
Sent: Thursday, April 19, 2018 3:37 PM
To: Mark Graff - NOAA Federal
Subject: Fwd: Freedom of Information Act Request #DOC-NOAA-2018-000951 FEE WAIVER JUSTIFICATION

FYI

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

From: 50541-48120867@requests.muckrock.com <50541-48120867@requests.muckrock.com>
Date: Tue, Apr 3, 2018 at 10:47 AM
Subject: RE: Freedom of Information Act Request #DOC-NOAA-2018-000951
To: foia@noaa.gov

National Oceanic and Atmospheric Administration
FOIA Office
Room 10641, SSMC-3
[1315 East West Highway](#)
[Silver Spring, MD 20910](#)-3281

April 3, 2018

This is a follow up to request number DOC-NOAA-2018-000951:

Hello Mr. Graff,

Thank you for your message. I will attempt to address your questions in as efficient a manner as possible.

These records are being requested as part of a journalistic interrogation of the contents of agency "talking point" communications, as well as of the FOIA process by which they're obtained. For many years, I have been a reporter for MuckRock News, an organization that reports on and participates in the public records process and the materials released therefrom; we have a global audience of journalists, academics, historians, federal employees, FOIA officers, and individuals.

I am interested in all emails and other memos and communications referencing the initially-mentioned terms circulated through your agency - in both the Office of Public Affairs and in the agency as a whole. A description would be welcome in order to consider further limitations on this request, though if you consider such a provision outside the scope of this request, other alternatives or an estimate of the associated costs, if applicable, would be appreciated.

If a universal search of agency records isn't possible, please let me know and we can consider how to further limit this request by subject; the rhetoric and direction associated with "talking points" would undoubtedly be enlightening to an American public hoping to understand the operations of this agency and

the workings of the federal government as a whole at this point in the country's development, but I'll await your response on the technological capabilities of the search before expounding upon additional support for this point.

Thank you for your time and help.

Best wishes,
Beryl

Filed via MuckRock.com

E-mail (Preferred): 50541-48120867@requests.muckrock.com

Upload documents directly: https://www.muckrock.com/accounts/agency_login/national-oceanic-and-atmospheric-administration-121/foia-march-madness-2018-agency-talking-points-november-8-2016-march-13-2018-national-oceanic-and-atmospheric-administration-50541/?uuid-login=778d9640-7eac-4e08-9af1-91c4b051a4d8&email=foia%40noaa.gov#agency-reply

Is this email coming to the wrong contact? Something else wrong? Use the above link to let us know.

For mailed responses, please address (see note):

MuckRock News
DEPT MR 50541
[411A Highland Ave](#)
[Somerville, MA 02144-2516](#)

PLEASE NOTE: This request was filed by a MuckRock staff reporter. Also note that improperly addressed (i.e., with the requester's name rather than "MuckRock News" and the department number) requests might be returned as undeliverable.

On March 15, 2018:

03/15/2018 03:13 PM FOIA Request: DOC-NOAA-2018-000951

In reviewing your request for a full waiver of fees, additional information is necessary to determine your eligibility for a fee waiver under 15 CFR 4.11. Specifically, please indicate the intended use of the records being sought, how they will be disseminated, your expertise in extracting, analyzing, and producing a unique work, and who the intended audience is that will receive a significant increased understanding of government activities by disclosure of the records. Additionally, please clarify the scope of the requested records you are seeking. You have asked for a description of the necessary offices that will be tasked with conducting a search. However, any record reflecting the taskings assigned for processing your FOIA request will necessarily post-date the responsive cut-off for records that could be responsive to your request itself. The same is true for any search logs, the search process, or the locations where a search is conducted. Any records created after the commencement of any search will not be responsive to the request for which a search has commenced.

Lastly, please specify the medium you wish to have searched for the phrases you have included, and the subject of the communications with those phrases. If the phrases are being sought as search terms without any nexus to a subject matter or topic, please explain how an unknown subject could be expected to increase the public's understanding of any particular topic of responsive records.

No work will be performed on your request pending your response and the responsive timeframe for responding to your request is tolled.

Mark Graff

NOAA FOIA Officer

On March 15, 2018:

This message is to confirm your request submission to the FOIAonline application: View Request. Request information is as follows: (<https://foiaonline.regulations.gov:443/foia/action/public/view/request?objectId=090004d28185e49f>)

* Tracking Number: DOC-NOAA-2018-000951

* Requester Name: Beryl C. Lipton

* Date Submitted: 03/13/2018

* Request Status: Submitted

* Description: This is a request under the Freedom of Information Act. I hereby request the following records: For the 16-month, 5-day period from Tuesday, November 8, 2016 through Tuesday, March 13, 2018: (SUMMARY) Any and all talking points and similar memorandums, emails, and transcripts providing advice or direction on how to handle the media, media interviews, and statements. ---- (SPECIFICALLY) Please include in your responsive materials any documents, emails, or communications with the following phrases in the title or subject line: TALKING POINTS STMT STATEMENT PRESS STRATEGY

On March 13, 2018:

To Whom It May Concern:

This is a request under the Freedom of Information Act. I hereby request the following records:

For the 16-month, 5-day period from Tuesday, November 8, 2016 through Tuesday, March 13, 2018:

(SUMMARY)

Any and all talking points and similar memorandums, emails, and transcripts providing advice or direction on how to handle the media, media interviews, and statements.

(SPECIFICALLY)

Please include in your responsive materials any documents, emails, or communications with the following phrases in the title or subject line:

TALKING POINTS
STMT
STATEMENT
PRESS STRATEGY

It would be greatly appreciated if materials could be provided on a rolling basis.

1. In the Office of Public Affairs or equivalent division

Please provide first all such materials produced in this agency's Office of Public Affairs or equivalent division, and any representative thereof.

Please also provide all such materials received by this agency's Office of Public Affairs or equivalent division, and any representative thereof.

2. Related to all agency employees

Please also include all employee email communications containing the following phrases:

TALKING POINTS
STMT
STATEMENT
PRESS STRATEGY

Alternative Response to 2:

If processing of this portion of this request would require its distribution to another or multiple other offices, it would be greatly appreciated if a response to this request would contain a description of the necessary offices to be tasked, the process by which the search will be conducted, and an estimate of the time and fees to be incurred. Such a description will allow us to better understand the parameters of this FOIA office's ability to respond to this request as worded and will better enable us to reorganize and limit it as appropriate.

Additional clarification:

This request is not intended for materials regarding one particular subject or event during this period.

If a different search procedure will be required dependent on segment of time covered, it would be greatly appreciated if a response could contain a description of the necessary difference in approach by time period (for example, if file keeping procedures have changed at some point in the last year and a half or if particular materials have been moved to another location).

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires.

Sincerely,

Beryl Lipton

Filed via MuckRock.com

E-mail (Preferred): 50541-48120867@requests.muckrock.com

Upload documents directly: https://www.muckrock.com/accounts/agency_login/national-oceanic-and-atmospheric-administration-121/foia-march-madness-2018-agency-talking-points-november-8-2016-march-

[13-2018-national-oceanic-and-atmospheric-administration-50541/?uuid-login=778d9640-7eac-4e08-9af1-91c4b051a4d8&email=foia%40noaa.gov#agency-reply](https://www.foia.gov/13-2018-national-oceanic-and-atmospheric-administration-50541/?uuid-login=778d9640-7eac-4e08-9af1-91c4b051a4d8&email=foia%40noaa.gov#agency-reply)

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MuckRock News

DEPT MR 50541

[411A Highland Ave](#)

[Somerville, MA 02144](#)-2516

PLEASE NOTE: This request was filed by a MuckRock staff reporter. Also note that improperly addressed (i.e., with the requester's name rather than "MuckRock News" and the department number) requests might be returned as undeliverable.

Torczon, Andrea (Federal)

From: Torczon, Andrea (Federal)
Sent: Friday, April 20, 2018 9:34 AM
To: Graff, Mark (Federal)
Subject: FOIA Appeal
Attachments: Appeal DOC-OS-2018-001045.pdf; Re FOIA Request DOC NOAA 2018 000615 (Mr. Crothers).pdf

Mark,

I have been assigned to review the attached appeal concerning a “no records” response for Request # DOC-NOAA-2018-000615.

I have some questions about the search. Please let me know the proper contact to discuss this request.

Thank you.

Andrea

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Appeal Details

Status : Assignment Determination

Due Date : 04/25/2018

Request Type : FOIA

17

Submitted

Evaluation

Assignment

Processing

Closed

Appeal Details

Tracking Number : DOC-OS-2018-001045

Submitted Date : 03/28/2018

Requester : Gary M. Crothers

Received Date : 03/28/2018

Organization : Small-Medium

Last Assigned Date : 04/19/2018

Requester Has Yes

Account :

Submission Details

Appeal Handling

Requester Info Available to the Public :

Appeal Received : Yes

Received Date : 03/28/2018

Appeal Track :

Acknowledgement 

Sent Date:

Fee Category : N/A

5 Day Notifications:

Based on Fee Waiver :

Litigation :

Based on Expedited Processing :

Basis for Appeal

Short Description :

As suggested by NOAA's FOIA office when I contacted them to inquire about this "No records" result, I contacted the DOC IG with a FOIA request to see if they had any records on this matter. They informed me that they did see the referral letter on file, and as such, it seemed to them that there should be records available from NOAA on this matter. They suggested I appeal this request and request that NOAA "look harder" to find the relevant records.



Basis Available to the Public :

Has Basis Been Modified?

Attached Supporting Files

Attachments Available to the

Public :

Attached File	Type	Size (MB)	Remove
<i>DOC OIG Referral 17-0688-N.png</i>	PNG Image	0.05	
<i>Re FOIA Request DOC NOAA 2018 000615 (Mr. Crothers).pdf</i>	PDF	0.12	

Upload Supporting Files

No attachments have been added.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
CHIEF ADMINISTRATIVE OFFICER

MAR 08 2018

Gary M. Crothers
12024 Midlake Dr.
Dallas, TX 75218

Re: FOIA Request DOC-NOAA-2018-000615

Dear Mr. Crothers:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on January 6, 2018, in which you requested:

"I am requesting the Inspector General Report composed as a result of DOC OIG Referral 17-0688-N. I filed allegations that triggered this IG report process under the Whistleblower Act, I am the Whistleblower in this matter under federal law, and my allegations included allegations that NOAA consciously and with malice of forethought, sought to abuse it's jurisdiction to deprive me of my federally recognized property rights in the matter of Kohala Coast Enterprise v. Unidentified Shipwrecked Vessel, as such, I believe the law entitles me to see all the information and reports that the investigation yielded, or provide with with a darn good reason as to why not."

After searching our files, we were unable to locate any records that are responsive to your request.

Although no records were located during our search, you have the right to appeal a "no document found" response. 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 Employment, Litigation and Information
U.S. Department of Commerce
Office of the General Counsel, Room 5896
1401 Constitution Ave. NW
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov 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, 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

E-mail: 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 Floyd Spriggs at Floyd.Spriggs@noaa.gov or by phone at 301-628-4126 or the NOAA FOIA Public Liaison Robert Swisher at 301-628-5755. Please refer to your FOIA request tracking number DOC-NOAA-2018-000536 when contacting us.

Sincerely,

A handwritten signature in blue ink, appearing to read "Edward C. Horton". The signature is stylized and written in a cursive-like font.

Edward C. Horton

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, April 24, 2018 11:05 AM
To: Samuel Dixon
Subject: Re: [Non-DoD Source] NOAA Consultation # 2017-000170

Negative--sorry, man, I was presenting at the OLE FOIA Training.

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 24, 2018 at 9:52 AM, Samuel Dixon <samuel.dixon@noaa.gov> wrote:

Any chance you can jump on this call at 10:00?

Thanks,

Sam

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

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

From: Carter, Carmen (b)(6)
Date: Tue, Apr 24, 2018 at 6:38 AM
Subject: RE: [Non-DoD Source] NOAA Consultation # 2017-000170
To: Samuel Dixon <samuel.dixon@noaa.gov>

Good morning, Sam – would you please call me at 10AM today so that we can go over my comments?

Carmen

Carmen Smith Carter

CG-JAG Information Law Attorney

Office: 202-372-3847

Wednesdays: 301-518-5911

From: Samuel Dixon <samuel.dixon@noaa.gov>

Sent: Friday, April 20, 2018 2:43 PM

To: Carter, Carmen (b)(6)

Subject: Re: [Non-DoD Source] NOAA Consultation # 2017-000170

Hi Carmen,

Do you have any free time next week to chat about this FOIA consultation we did with you. We are still having issues making sense of the comments you gave.

Thanks,

Sam

Samuel Dixon

NMFS Assistant FOIA Liaison

Contractor - IBSS Corp

(301) 427-8739

samuel.dixon@noaa.gov

On Fri, Mar 9, 2018 at 9:20 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Dixon – please see attached email to Mark Graff.

Carmen

Carmen Smith Carter

CG-JAG Information Law Attorney

Office: 202-372-3847

Wednesdays: 301-518-5911

From: Samuel Dixon [mailto:samuel.dixon@noaa.gov]

Sent: Friday, March 9, 2018 9:01 AM

To: Carter, Carmen (b)(6) Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Subject: [Non-DoD Source] NOAA Consultation # 2017-000170

Hi Carmen,

You sent some responsive records back to NOAA after consultation for this FOIA request but the accellion link has expired. Do you mind resending them?

Thanks,

Samuel Dixon

NMFS Assistant FOIA Liaison

*Contractor - IBSS Corp
(301) 427-8739
samuel.dixon@noaa.gov*

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

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

To: "Carter, Carmen" (b)(6)

Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

Bcc:

Date: Tue, 30 Jan 2018 12:48:00 +0000

Subject: [Non-DoD Source] Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

Good Morning,

Thank you for the consultation review (b)(5)

. Very 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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On Tue, Jan 30, 2018 at 6:52 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011

(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language (b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

■ [REDACTED]
[REDACTED]

Detailed review comments:

■ [REDACTED]
[REDACTED]

■ [REDACTED]
[REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]
[REDACTED]

■ [REDACTED]

■ [REDACTED]
[REDACTED]

■ [REDACTED]

■ [REDACTED]

(b)(6) [Redacted]

[Redacted]

[Redacted]

(b)(6) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

CG-0942 Office of Information and Intelligence Law

[202-372-3847](tel:202-372-3847)

Wednesdays/Telework: [301-518-5911](tel:301-518-5911)

document is pre-decisional in nature and qualifies as an inter-agency/intra-agency document containing deliberative process material. This document contains confidential attorney-client communications relating to a legal matter for which the client has sought professional advice. Under exemption 5 of section (b) of 5 U.S.C. § 552 (Freedom of Information Act), this material is EXEMPT FROM RELEASE TO THE PUBLIC.

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

From: HQS-SMB-FOIA <EFOIA@uscg.mil>

To: "Carter, Carmen" (b)(6)

Cc: "Rice, Lisa M CDR" (b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

Good afternoon,

The attached consultation has been assigned to your office for processing and direct response to Mr. Mark Graff (mark.graff@noaa.gov) of NOAA under consultation number 2018-CGCO-00011 . Please provide your final response by January 31, 2018 . Please provide CG-611 with a copy of your final response letter via EFOIA@uscg.mil <<mailto:EFOIA@uscg.mil>> so that the request may be closed in the system.

Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <<mailto:EFOIA@uscg.mil>>

Telephone:

Samuel Dixon

From: Samuel Dixon
Sent: Tuesday, April 24, 2018 9:52 AM
To: Mark Graff - NOAA Federal
Subject: Fwd: [Non-DoD Source] NOAA Consultation # 2017-000170

Any chance you can jump on this call at 10:00?

Thanks,

Sam

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

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

From: Carter, Carmen (b)(6)
Date: Tue, Apr 24, 2018 at 6:38 AM
Subject: RE: [Non-DoD Source] NOAA Consultation # 2017-000170
To: Samuel Dixon <samuel.dixon@noaa.gov>

Good morning, Sam – would you please call me at 10AM today so that we can go over my comments?

Carmen

Carmen Smith Carter

CG-JAG Information Law Attorney

Office: 202-372-3847

Wednesdays: 301-518-5911

From: Samuel Dixon <samuel.dixon@noaa.gov>
Sent: Friday, April 20, 2018 2:43 PM
To: Carter, Carmen (b)(6)
Subject: Re: [Non-DoD Source] NOAA Consultation # 2017-000170

Hi Carmen,

Do you have any free time next week to chat about this FOIA consultation we did with you. We are still having issues making sense of the comments you gave.

Thanks,

Sam

Samuel Dixon

NMFS Assistant FOIA Liaison

*Contractor - IBSS Corp
(301) 427-8739
samuel.dixon@noaa.gov*

On Fri, Mar 9, 2018 at 9:20 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Dixon – please see attached email to Mark Graff.

Carmen

Carmen Smith Carter

CG-JAG Information Law Attorney

Office: 202-372-3847

Wednesdays: 301-518-5911

From: Samuel Dixon [mailto:samuel.dixon@noaa.gov]

Sent: Friday, March 9, 2018 9:01 AM

To: Carter, Carmen (b)(6) Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Subject: [Non-DoD Source] NOAA Consultation # 2017-000170

Hi Carmen,

You sent some responsive records back to NOAA after consultation for this FOIA request but the accellion link has expired. Do you mind resending them?

Thanks,

Samuel Dixon

NMFS Assistant FOIA Liaison

Contractor - IBSS Corp
(301) 427-8739
samuel.dixon@noaa.gov

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

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

To: "Carter, Carmen" (b)(6)

Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

Bcc:

Date: Tue, 30 Jan 2018 12:48:00 +0000

Subject: [Non-DoD Source] Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

Good Morning,

Thank you for the consultation review (b)(5)

. Very 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.

On Tue, Jan 30, 2018 at 6:52 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011

(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language (b)(5)

[Redacted]

[Redacted]

[Redacted]

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

[Redacted]

ONE [REDACTED]

Detailed review comments:

ONE [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ONE [REDACTED]

[REDACTED]

[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Respectfully,

Carmen

Carmen Smith Carter
USCG Information Law Attorney
CG-0942 Office of Information and Intelligence Law

[202-372-3847](tel:202-372-3847)

Wednesdays/Telework: [301-518-5911](tel:301-518-5911)

A Coast Guard Attorney prepared this document for INTERNAL GOVERNMENT USE ONLY. This document is pre-decisional in nature and qualifies as an inter-agency/intra-agency document containing deliberative process material. This document contains confidential attorney-client communications relating to a legal matter for which the client has sought professional advice. Under exemption 5 of section (b) of 5 U.S.C. § 552 (Freedom of Information Act), this material is EXEMPT FROM RELEASE TO THE PUBLIC.

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

From: HQS-SMB-FOIA <EFOIA@uscg.mil>

To: "Carter, Carmen" (b)(6)

Cc: "Rice, Lisa M CDR" (b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

Good afternoon,

The attached consultation has been assigned to your office for processing and direct response to Mr. Mark Graff (mark.graff@noaa.gov) of NOAA under consultation number 2018-CGCO-00011 . Please provide your final response by January 31, 2018 . Please provide CG-611 with a copy of your final response letter via EFOIA@uscg.mil <mailto:EFOIA@uscg.mil> so that the request may be closed in the system.

Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

Telephone:

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, April 24, 2018 3:52 PM
To: Stacey Nathanson - NOAA Federal
Subject: ERF Request and Complaint
Attachments: ERF NMFS FOIA 12-6-16 (1).pdf; ERF, Complaint.pdf

Here it is--

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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ENVIRONMENTAL ADVOCATES

ATTORNEYS AT LAW

5135 ANZA STREET
SAN FRANCISCO, CA 94121
(415) 533-3376

Fax: (415) 358-5695

E-mail: csproul@enviroadvocates.com
christopherwhudak@gmail.com

December 6, 2016

*Via Electronic Mail through FOIAonline**

<https://foiaonline.regulations.gov>

Ana Liza S. Malabanan
Regional FOIA Coordinator of
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
West Coast Region
501 West Ocean Blvd
Long Beach, CA 90802-4213
E-mail: ana.liza.malabanan@noaa.gov

National Marine Fisheries Service
National Oceanic and Atmospheric Administration
Public Reference Facility (OFA56)
1315 East West Highway (SSMC3)
Room 10730
Silver Spring, Maryland 20910
E-mail: FOIA@noaa.gov

Re: FOIA Request

To Whom It May Concern,

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and relevant Department of Commerce, National Marine Fisheries Service (“NMFS”) regulations, Ecological Rights Foundation (EcoRights’) (via counsel), hereby requests that NMFS provide all responsive records (“documents”) that are in the files maintained by NMFS personnel or offices on the date that NMFS staff conducts their searches for the documents responsive to this request.¹

Definitions

¹ See *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983); *Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002); *Oregon Natural Desert Ass'n v. Gutierrez*, 419 F. Supp. 2d 1284, 1288 (D. Or. 2006) (federal agencies must release all documents in their possession through the date they conduct the review of their files for documents responsive to FOIA requests).

1. The term "You" or "Your" as used herein refers to the NATIONAL MARINE FISHERIES SERVICE ("NMFS"), PENNY PRITZKER, as Secretary of Commerce, and/or any person acting or purporting to act on their behalf.
2. The term "document" or "documents" as used herein means all written, typewritten, drawn or printed material or record of any type or description and all information kept or recorded on magnetic or electronic media, including, without limitation, correspondence, letters, agreements, contracts, memoranda of agreement or understanding, electronic mail (including both messages sent and received from NMFS personnel), telegrams, inter- and intra-office communications, forms, reports, studies, working papers, handwritten or other notes, phone records, logs, diaries, minutes, spreadsheets, computation sheets, data sheets, transcripts, drawings, sketches, plans, leases, invoices, index cards, checks, check registers, maps, charts, graphs, bulletins, circulars, pamphlets, notices, summaries, books, photographs, sound recordings, videotapes, rules, photocopied or computer-related materials, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations of them, and all forms of written or recorded matter to which You have access or of which You have any knowledge, or copies of such documents where originals are not available. The terms "document" or "documents" includes all matter that relates in whole or in part to the subject referred to in this request. Where a document has been prepared in several copies that are not identical, or where, by reason of subsequent modification, addition or notation, they are no longer identical, each non-identical copy shall be considered a separate document. Handwritten or other notations of any kind on a copy render it a non-identical copy.
3. The term "related to" as used herein includes comprising, constituting, containing, evidencing, setting forth, summarizing, alluding to, responding to, commenting upon, discussing, supporting, refuting, showing, disclosing, explaining, mentioning, analyzing, recording, reflecting upon, or characterizing, either directly or indirectly, in whole or in part.
4. The term "Stockdale Memo" means the June 11, 2013 Memorandum, subject ESA Guidance, from Corps Chief Counsel, Earl Stockdale, to all Corps counsel, HQ, Dist, Center, Lab, and FOA Offices [attached as Exhibit 1 for your reference].
5. The term "Chris Yates email" refers to the July 24, 2014 email from Chris Yates, NOAA Federal, subject: Fwd:Response to COE Stockdale memo [attached as Exhibit 2 for your reference]..
6. The term "draft Englebright concurrence letter" refers to the draft letter to the Corps entitled "Endangered Species Act Section 7(a)(2) Concurrence Letter for the U.S. Army Corps of Engineers' (Corps) Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River" [attached as Exhibit 3 for your reference].
7. The term "unauthorized take" means take that is prohibited by section 9 of the Endangered Species Act.

The foregoing definitions, used below in quotation marks, refer to the terms as defined above.

Requests for Documents

EcoRights requests that "You" please provide the following "documents":

1. Any and all "documents" "related to" the "Chris Yates email" concerning input he, and any NMFS West Coast Region staff provided to NOAA HQ on the impact of the "Stockdale Memo." This request is only for the input on the impact of the "Stockdale Memo" that Chris Yates provided to NOAA HQ and the input on the impact of the "Stockdale Memo" the NMFS West Coast Region staff provided to NOAA HQ and is not a broader request for other documents related to the "Stockdale memo." This request is only for "documents" generated on or prior to July 24, 2014.
2. Any documents to or from NMFS staff Chris Kiefer "related to" the "draft Englebright concurrence letter."
3. Any and all NOAA Fisheries "documents" from January 1, 2000 to the present, in the possession of any NOAA Fisheries Office, Department, and/or Division, including any NOAA law enforcement division, "related to" whether any entities or individuals may have caused or did cause, or may be causing, or are causing "unauthorized take" of threatened or endangered anadromous fish in the Yuba River at, or in the vicinity of, Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, and the Hallwood-Cordua Diversion including but not limited to any and all "documents" generated by, sent by, or received by NMFS Law Enforcement agent, Don Tanner.

15 C.F.R. section 4.6(b) requires NMFS to issue a written determination to EcoRights within twenty working days that this request was received and logged in by NMFS stating which of the requested records will, and which will not, be released and the reason for any denial of any portion of this request. As provided by 15 C.F.R. section 4.6(c), NMFS may extend this obligation by furnishing written notice to the requestor as soon as practicable stating the reasons for such extension and the date by which the office expects to be able to issue a determination. The period may be so extended only when absolutely necessary, only for the period required, and only when one or more of the following unusual circumstances require the extension: (1) there is a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (2) there is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or (3) there is a need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of NMFS.

EcoRights requests that to the extent that NMFS can do so, EcoRights be furnished with electronic copies of the above documents in lieu of paper copies (to minimize the expense and burden of copying). EcoRights points out that FOIA requires NMFS to provide copies of requested documents "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B).

We request that NMFS provide electronic copies of its response to this request, as well as any responsive documents that NMFS is able to transmit via e-mail, to Christopher Hudak and Christopher Sproul and I at the following e-mail addresses:

Christopher Hudak: christopherwhudak@gmail.com
Christopher Sproul: csroul@enviroadvocates.com

Please send any documents that must be sent via regular mail to the following address:

Christopher Hudak
Christopher Sproul
Environmental Advocates
5135 Anza St.
San Francisco, California, 94121

Your staff may contact me at (510) 502-5742 or christopherwhudak@gmail.com to further discuss this request. Thank you for your prompt attention to this matter.

Sincerely,

Christopher Hudak
Attorney for Ecological Rights Foundation

Encl.: Attachment 1 (Fee Waiver Request)

Pursuant to 5 U.S.C. section 552(a)(4)(A)(iii) and 15 C.F.R. section 4.11(k), EcoRights hereby requests a fee waiver for all copying costs, mailing costs, and other costs related to locating and tendering the documents, in accord with the attached fee waiver statement.

1 Christopher Sproul (State Bar No. 126398)
ENVIRONMENTAL ADVOCATES
2 5135 Anza Street
San Francisco, California 94121
3 Telephone: (415) 533-3376
Facsimile: (415) 358-5695
4 Email: csproul@enviroadvocates.com

5 Patricia Linn (State Bar No. 253015)
Law Office of Patricia Linn
6 115 Oakdale Avenue
Mill Valley, CA 94941
7 Telephone: (415) 388-2303
Email: patricialinn19@gmail.com

8 Fredric Evenson (State Bar No. 198059)
Law Offices of Fredric Evenson
9 109 Quarry Lane
Santa Cruz, CA 95060
10 Telephone: (831) 454-8216
Facsimile: (415) 358-5695
11 Email: ecorights@earthlink.net

12 Attorneys for Plaintiff
ECOLOGICAL RIGHTS FOUNDATION

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

17 ECOLOGICAL RIGHTS FOUNDATION, a
18 non-profit corporation,
19 Plaintiff,

20 v.

21 NATIONAL MARINE FISHERIES SERVICE,
22 Defendant.
23
24

Civil Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

25
26
27
28

1 Ecological Rights Foundation (“EcoRights”) alleges as follows:

2 **INTRODUCTION**

3 1. EcoRights brings this action under the Freedom of Information Act ("FOIA"), which allows
4 an aggrieved party to seek relief when documents are unlawfully withheld, and authorizes a reviewing
5 court to enjoin the agency from withholding records and to order the production of any agency records
6 improperly withheld from the complainant. 5 U.S.C. § 552(a)(4)(B). EcoRights seeks declaratory and
7 injunctive relief for FOIA violations by the National Marine Fisheries Service ("NMFS"). At issue in
8 this case is a FOIA request to NMFS seeking documents related to NMFS West Coast Region's
9 Endangered Species Act ("ESA") Section 7 consultations with the Army Corps of Engineers ("Corps")
10 and NMFS's regulatory oversight of Corps operations and infrastructure on the Yuba River that
11 adversely impact spring run Chinook salmon, steelhead trout, and green sturgeon which are listed as a
12 threatened species under the ESA. EcoRights alleges that NMFS: 1) failed to provide a final
13 determination for EcoRights' administrative appeal within statutory time limits; 2) improperly withheld
14 information not subject to specific, enumerated exemptions; 3) failed to provide legally adequate
15 explanations for the withholding of requested information; 4) failed to promptly release non-exempt
16 information responsive to EcoRight's FOIA request; 5) failed to segregate and release non-exempt
17 information; and 6) failed to perform a reasonable, legally adequate search for responsive records.

18 **JURISDICTION**

19 2. This Court has subject matter jurisdiction under 5 U.S.C. section 552(a)(4)(B), which allows an
20 aggrieved party to seek relief when records are unlawfully withheld, and authorizes a reviewing court to
21 enjoin the agency from withholding records and to order the production of any agency records
22 improperly withheld from the complainant.

23 3. This Court has personal jurisdiction over NMFS and its officials because NMFS, a branch of
24 the National Oceanic and Atmospheric Administration ("NOAA"), is an agency of the federal
25 government operating within the United States.

1 **VENUE**

2 4. Venue in the United States District for the Northern District of California is proper under
3 5 U.S.C. section 552(a)(4)(B) because the complainant has its principal place of business in the Northern
4 District, and many of the records sought by complainants are most likely situated in the NMFS and
5 NOAA offices located within the Northern District.

6 **INTRADISTRICT ASSIGNMENT**

7 5. Intradistrict assignment of this matter to the San Francisco Division of the Court is appropriate
8 pursuant to Civil Local Rule 3-2(d) because EcoRights’ principal place of business is located in
9 Garberville, California.

10 **THE PARTIES**

11 6. Ecological Rights Foundation ("EcoRights") is a non-profit, public benefit corporation,
12 organized under the laws of the State of California, devoted to furthering the rights of all people to a
13 clean, healthful and biologically diverse environment. To further its environmental advocacy goals,
14 EcoRights actively seeks federal and state agency implementation of state and federal wildlife-related
15 laws, and as necessary, directly initiates enforcement actions on behalf of itself and its members.

16 7. Defendant NMFS, a division of the Department of Commerce, is the agency of the United
17 States Government responsible for administering and implementing the ESA for anadromous fisheries
18 and generally is responsible for the stewardship of the nation's living marine resources and their habitat.

19 **STATUTORY BACKGROUND**

20 8. FOIA requires that an agency disclose records to any person except where the records fall
21 under a specifically enumerated exemption. 5 U.S.C. § 552. The courts have emphasized the narrow
22 scope of these exemptions and “the strong policy of the FOIA that the public is entitled to know what its
23 government is doing and why.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C.
24 Cir. 1980).

25 9. FOIA requires that an agency, upon any request for records, shall make the records available
26 promptly. 5 U.S.C. § 552(a)(3)(A). An agency shall make a determination whether to comply with a
27 request within twenty (20) business days after the receipt of the request and shall immediately notify the

1 party making the request of such determination, the reasons for the determination, and the party's right
2 to appeal. 5 U.S.C. § 552(a)(6)(A)(i). In unusual circumstances, the agency may extend the time for the
3 determination, for no more than ten (10) days, by written notice to the party, specifying the reasons for
4 the extension and the date on which the determination is expected to be sent. 5 U.S.C. § 552(a)(6)(B)(i).

5 10. Federal agencies are under a duty to conduct a reasonable search for records responsive to a
6 party's request using methods that can be reasonably expected to produce the information requested to
7 the extent they exist. 5 U.S.C. § 522(a)(3)(C).

8 11. When an agency decides to withhold records under a claim of exemption it must notify the
9 person making such request of such determination and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i).
10 Government agencies bear the burden of proof to show that any withheld documents are exempt from
11 the duty to disclose. 5 U.S.C. § 522(a)(4)(B).

12 12. 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). If an agency does not respond
15 within the FOIA time limits, a party will be deemed to have exhausted its administrative remedies.
16 5 U.S.C. § 552(a)(6)(C)(i).

17 13. On June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016. The
18 Act made significant amendments to FOIA, effective as of enactment on June 30, 2016. 5 U.S.C. § 522,
19 § 6; OIP Summary of the FOIA Improvement Act of 2016. The amendments include changes to the
20 standard by which NMFS must evaluate withholdings. The FOIA Improvement Act of 2016 dictates that
21 agencies shall withhold information only if disclosure would harm an interest protected by an exemption
22 – what is referred to as the “foreseeable harm standard.” 5 U.S.C. § 552(a)(8)(A)(i); OIP Summary of
23 the FOIA Improvement Act of 2016.

24 14. Additionally, FOIA requires an agency to consider partial disclosure whenever the agency
25 determines that a full disclosure of a requested record is not possible and to take reasonable steps
26 necessary to segregate and release nonexempt information. 5 U.S.C. § 552(a)(8)(A).

1 15. An agency's process for dealing with FOIA requests constitutes "withholding" if its net effect
2 is significantly to impair the requester's ability to obtain the records or significantly increase the amount
3 of time he or she must wait to obtain them. *McGehee, III v. Central Intelligence Agency*, 697 F.2d 1095,
4 1110 (D.C. Cir. 1983), *vacated in part on other grounds*, 711 F.2d 1076 (1983).

5 FACTUAL BACKGROUND

6 **NMFS's Response to EcoRights' December 6, 2016 FOIA Request**

7 16. On December 6, 2016 EcoRights, via counsel, sent a FOIA request to NMFS seeking three
8 categories of documents: 1) documents containing input NMFS West Coast Region staff provided to
9 NOAA headquarters detailing the impacts of an Army Corps of Engineers ("Corps") memo known as
10 the Stockdale Memo. The Stockdale Memo laid out strict guidelines limiting Corps ESA Section 7
11 consultations with NMFS and the U.S. Fish and Wildlife Service; 2) documents to or from NMFS
12 counsel Chris Kiefer related to a draft letter from NMFS to the Corps entitled "Endangered Species Act
13 Section 7(a)(2) Concurrence Letter for the U.S. Army Corps of Engineers' (Corps) Ongoing Operation
14 and Maintenance of Englebright Dam and Reservoir on the Yuba River;" and 3) documents in the
15 possession of any NOAA Fisheries Office, Department and/or Division, including any NOAA law
16 enforcement division, related to whether any entities or individuals are causing or have caused
17 unauthorized take of threatened or endangered fish species in the Yuba River in the vicinity of
18 Englebright Dam and Daguerre Point Dam.

19 17. On December 14, 2016 NMFS sent a letter to EcoRights counsel, Christopher Hudak,
20 acknowledging receipt of the request on December 12, 2016 and assigning it tracking number DOC-
21 NOAA-2017-000257. The acknowledgement letter stated that NMFS was extending the time for its
22 response by ten business days because the agency needed to search for and collect the requested records
23 from field facilities or other establishments separate from the office processing the request.

24 18. On February 13, 2017 NMFS sent EcoRights its final determination partially granting and
25 partially denying EcoRights' request. NMFS stated it had located 309 documents responsive to the
26 request and had released 239 of these documents in their entirety, via FOIAonline. Fifty-four documents
27

1 were partially withheld under attorney work product, attorney client privilege, deliberative process
2 exemptions pursuant to 5 U.S.C. 552(b)(5) ("Exemption 5") and the right to privacy exemption pursuant
3 to 5 U.S.C. § 552(b)(6) ("Exemption 6"). The final determination also stated that 16 documents that had
4 originated from other agencies were referred to those agencies for release determination and direct
5 response to EcoRights.

6 19. On March 10, 2017 EcoRights timely appealed NMFS's final determination to the Office of
7 the General Counsel of the Department of Commerce ("DOC Counsel"). EcoRights' administrative
8 appeal contended that NMFS: 1) had failed to make a reasonable search for responsive documents; 2)
9 had improperly withheld documents under vague and unjustified claims of deliberative process and
10 attorney-client privilege exemptions; 3) had withheld information with no exemption claim; 4) had not
11 shown the existence of foreseeable harm to an interest protected by Exemptions 5 and 6 that would
12 permit the agency to withhold information under these exemptions; and 5) had failed to segregate factual
13 material and make partial disclosures where possible.

14 20. EcoRights' appeal contended NMFS's search was inadequate because none of the documents
15 NMFS had released were from the NOAA Office of Law Enforcement ("OLE") although EcoRights had
16 specifically asked for OLE documents and EcoRights had reason to know that at least one OLE agent
17 had responsive documents.

18 21. The 20 business days deadline for NMFS to provide its final determination for EcoRights'
19 appeal was April 7, 2017.

20 22. On July 18, 2017 NMFS posted to FOIAonline two redacted emails, apparently from the
21 OLE. EcoRights was not notified that NMFS had released these two OLE documents on FOIAonline.
22 The two emails had information redacted pursuant to Exemption 6 and Exemption 7 (5 U.S.C. §
23 552(b)(7)(C)).

24 23. On October 2, 2017 EcoRights' counsel sent an email to NMFS FOIA officers and the DOC
25 Counsel's office requesting an update on the status of the appeal. The DOC Counsel and NMFS did not
26 respond.

1 24. On October 25, 2017 EcoRights' counsel sent another email to NMFS FOIA officers and the
2 DOC Counsel's office which requested that NMFS provide the final appeal determination by November
3 3, 2017 and warned that if the determination was not provided by that date EcoRights might seek
4 judicial relief.

5 25. On October 30, 2017 Michael Bogomolny, Acting Chief, Information Law Division, of the
6 DOC Counsel's Office responded to EcoRights' October 25, 2017 request and stated that he expected
7 EcoRights would have the appeal determination "this week." However, the DOC Counsel's office did
8 not provide the appeal determination that week.

9 26. On January 31, 2018 Ecorights' counsel sent another email to the DOC Counsel's office
10 requesting a status update. Mr. Bogomolny responded that same day and stated he would provide "a full
11 status update before the end of the week." However, he did not. Instead, on February 2, 2018 he sent yet
12 another email stating he was "committing to releasing a final determination of the appeal in this matter
13 next week." However he did not release the determination that week.

14 27. As of the date of this Complaint the DOC Counsel has not released the appeal final
15 determination and it is 309 days overdue.

16 **FIRST CLAIM FOR RELIEF**
17 **NMFS Violation of FOIA**
18 **5 U.S.C. §§ 552(a)(6)(ii) and 552(a)(3)(A)**
19 **Request for Declaratory Relief**

20 28. EcoRights reasserts and realleges paragraphs 1 through 27 above.

21 29. NMFS has violated 5 U.S.C. § 552(a)(6)(A)(ii) by failing to provide a final determination
22 for EcoRights' appeal within 20 business days after receipt of the appeal. EcoRights timely submitted
23 the appeal on March 10, 2017. FOIA required NMFS to provide its appeal determination by April 7,
24 2017. However, NMFS did not provide the determination by April 7, 2017 and as of the date of this
25 Complaint the appeal determination is 309 days overdue.

26 30. EcoRights has constructively exhausted its administrative remedies given NMFS's failure to
27 provide its appeal determination within FOIA's statutory time limits. 5 U.S.C. § 552(a)(6)(C)(i).

SECOND CLAIM FOR RELIEF

NMFS Violation of FOIA

5 U.S.C. §§ 552(a)(8)(A), 552(a)(6)(A)(i) and 552(a)(3)(A)

Request for Declaratory Relief and Injunction to Compel NMFS to Comply with FOIA Requirement to Release Documents Unless a Valid Exemption Applies

31. EcoRights reasserts and realleges paragraphs 1 through 30 above.

32. NMFS has violated 5 U.S.C. §§ 552(a)(8)(A) by withholding documents under invalid and unjustified claims of exemption under 5 U.S.C. §§ 552(b)(5), (b)(6), and b(7)(C). NMFS may not withhold documents unless foreseeable harm will occur to an interest protected by an enumerated exemption. 5 U.S.C. §§ 552(a)(8)(A)(i). NMFS has not shown that such foreseeable harm exists. NMFS has also violated 5 U.S.C. §§ 552(a)(8)(A)'s mandate that NMFS segregate and release non-exempt information. NMFS has redacted the entire substantive contents of 67 pages of information under attorney-client privilege and deliberative process exemptions without an adequate showing that NMFS attempted to segregate and release the non-exempt information in these pages.

33. NMFS has also violated FOIA by failing to comply with the 5 U.S.C. § 552(a)(6)(A)(i) requirement that the agency provide enough information, presented with sufficient detail, clarity, and verification, so that the requester can fairly determine what has not been produced and why. Exemptions are read narrowly and NMFS bears the burden of proving exemptions apply, which it has failed to do. 5 U.S.C. § 552(a)(4)(b). NMFS has failed to identify the specific exemption claimed for several documents that were redacted. Several documents identify Exemption 5 as the exemption claimed. However Exemption 5 could mean attorney work product, attorney-client privilege, or deliberative process. One document is redacted without any basis for the withholding identified.

34. NMFS's improper withholding of nonexempt documents also violates 5 U.S.C. § 552(a)(3)(A)'s mandate that requested records be promptly released unless they fall within one of FOIA's specifically enumerated disclosure exemptions. It has been eleven months since EcoRights submitted its appeal. Except for two redacted emails released 18 weeks after the appeal (not promptly), NMFS continues to withhold documents, without justifying they are exempt from disclosure.

THIRD CLAIM FOR RELIEF

NMFS Violation of FOIA

5 U.S.C. §§ 552(a)(3)(c)

Request for Declaratory Relief and Injunction to Compel NMFS to Perform a Reasonable Search

35. EcoRights reasserts and realleges paragraphs 1 through 34 above.

36. NMFS has violated 5 U.S.C. § 552(a)(3)(C) by failing to conduct a reasonable, legally adequate search for records responsive to EcoRights request. NMFS's search was inadequate because none of the documents NMFS initially released were from the OLE although EcoRights had specifically asked for OLE documents and EcoRights had reason to know that at least one OLE agent had responsive documents. After EcoRights submitted its appeal, NMFS released two emails, one apparently to an OLE agent and one apparently from an OLE agent. EcoRights makes these assumptions because the names of the sender and recipient have been redacted under Exemptions 6 and 7. The emails concern take of listed salmon and steelhead in the Yuba River. One of the emails indicates the OLE is likely to have more documents responsive to EcoRights' request, but NMFS failed to locate them because of its inadequate search.

PRAYER FOR RELIEF

WHEREFORE, EcoRights seeks the following relief:

a. A declaratory judgment pursuant to 5 U.S.C. § 552 declaring that NMFS violated FOIA by failing to provide the final determination for EcoRights' appeal in accordance with FOIA's statutory deadline;

b. A declaratory judgment that NMFS' failure to provide the appeal determination within the statutory deadline and produce non-exempt records promptly as required by FOIA constitutes illegal withholding of records;

c. A declaratory judgment pursuant to 5 U.S.C. § 552 that NMFS violated FOIA by: improperly withholding records that are not exempt from disclosure; failing to adequately explain how and why withheld information falls within a particular exemption; failing to adequately explain how disclosure would foreseeably harm interests protected by claimed exemptions; and failing to segregate and disclose non-exempt requested information;

1 d. A declaratory judgment that NMFS failed to perform a reasonable, legally adequate search for
2 documents responsive to EcoRight's request;

3 e. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) ordering NMFS to: 1) conduct a
4 reasonable, legally adequate search for records responsive to EcoRights' FOIA request within 20 days;
5 2) produce all non-exempt records in NMFS' possession responsive to EcoRights FOIA request within
6 30 days; and 3) provide EcoRights with a detailed, legally adequate explanation for the withholding of
7 any information responsive to Ecorights FOIA request within 30 days;

8 f. An award of attorneys fees and costs to EcoRights pursuant to 5 U.S.C. § 552(a)(4)(E); and

9 g. Such other and further relief as this Court deems just and proper.

10 **DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

11 Based on EcoRights' knowledge to date, pursuant to Civil Local Rule 3-15, the undersigned
12 certifies that, as of this date, other than the named parties, there is no such interest to report.

13
14 Respectfully Submitted,

15 Dated: February 10, 2018

16
17 By: Patricia Linn
18 Patricia Linn
19 *Counsel for Ecological Rights Foundation*
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JS-CAND 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS-CAND 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 in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS Ecological Rights Foundation</p> <p>(b) County of Residence of First Listed Plaintiff Humboldt (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) Patricia Linn, Law Office of Patricia Linn, 115 Oakdale Ave., Mill Valley, CA 94941 (415) 388-2303; additional attorney information is attached</p>	<p>DEFENDANTS National Marine Fisheries Service</p> <p>County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input checked="" type="checkbox"/> 2 U.S. Government Defendant <input type="checkbox"/> 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)</p> <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th></th> <th>PTF</th> <th>DEF</th> <th></th> <th>PTF</th> <th>DEF</th> </tr> </thead> <tbody> <tr> <td>Citizen of This State</td> <td><input type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td><input type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </tbody> </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
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IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
110 Insurance	PERSONAL INJURY 310 Airplane 315 Airplane Product Liability 320 Assault, Libel & Slander 330 Federal Employers' Liability 340 Marine 345 Marine Product Liability 350 Motor Vehicle 355 Motor Vehicle Product Liability 360 Other Personal Injury 362 Personal Injury -Medical Malpractice	PERSONAL INJURY 365 Personal Injury - Product Liability 367 Health Care/Pharmaceutical Personal Injury Product Liability 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY 370 Other Fraud 371 Truth in Lending 380 Other Personal Property Damage 385 Property Damage Product Liability PRISONER PETITIONS HABEAS CORPUS 463 Alien Detainee 510 Motions to Vacate Sentence 530 General 535 Death Penalty OTHER 540 Mandamus & Other 550 Civil Rights 555 Prison Condition 560 Civil Detainee-Conditions of Confinement	625 Drug Related Seizure of Property 21 USC § 881 690 Other LABOR 710 Fair Labor Standards Act 720 Labor/Management Relations 740 Railway Labor Act 751 Family and Medical Leave Act 790 Other Labor Litigation 791 Employee Retirement Income Security Act IMMIGRATION 462 Naturalization Application 465 Other Immigration Actions	422 Appeal 28 USC § 158 423 Withdrawal 28 USC § 157 PROPERTY RIGHTS 820 Copyrights 830 Patent 835 Patent-Abbreviated New Drug Application 840 Trademark SOCIAL SECURITY 861 HIA (1395ff) 862 Black Lung (923) 863 DIWC/DIWW (405(g)) 864 SSID Title XVI 865 RSI (405(g)) FEDERAL TAX SUITS 870 Taxes (U.S. Plaintiff or Defendant) 871 IRS-Third Party 26 USC § 7609	375 False Claims Act 376 Qui Tam (31 USC § 3729(a)) 400 State Reapportionment 410 Antitrust 430 Banks and Banking 450 Commerce 460 Deportation 470 Racketeer Influenced & Corrupt Organizations 480 Consumer Credit 490 Cable/Sat TV 850 Securities/Commodities/Exchange 890 Other Statutory Actions 891 Agricultural Acts 893 Environmental Matters 895 Freedom of Information Act 896 Arbitration 899 Administrative Procedure Act/Review or Appeal of Agency Decision 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-Transfer 8 Multidistrict Litigation-Direct File

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:
 violations of Freedom of Information Act

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. 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 Local Rule 3-2)
 (Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE 02/10/2018 SIGNATURE OF ATTORNEY OF RECORD *Patricia Linn*

ADDITIONAL ATTORNEYS

Christopher Sproul (State Bar No. 126398)
ENVIRONMENTAL ADVOCATES
5135 Anza Street
San Francisco, California 94121
Telephone: (415) 533-3376
Facsimile: (415) 358-5695
Email: csproul@enviroadvocates.com

Fredric Evenson (State Bar No. 198059)
Law Offices of Fredric Evenson
109 Quarry Lane
Santa Cruz, CA 95060
Telephone: (831) 454-8216
Facsimile: (415) 358-5695
Email: ecorights@earthlink.net

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, April 24, 2018 4:02 PM
To: Stacey Nathanson - NOAA Federal
Subject: SGM v. NOAA
Attachments: SGM Complaint.pdf; SGM Original FOIA Request.pdf

Here you go--

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.

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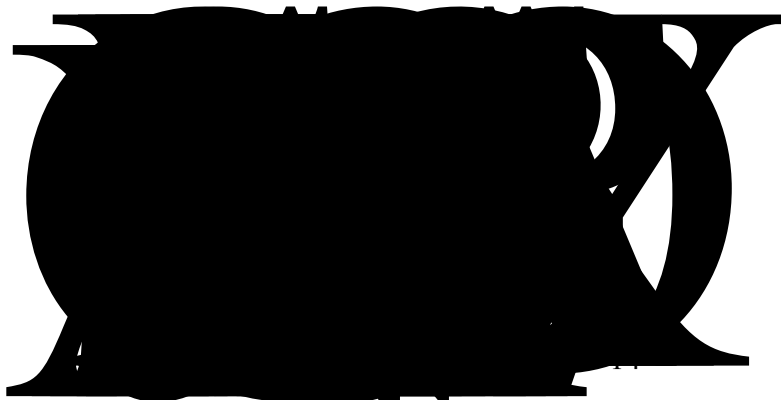
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Respectfu

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davebahr@mindspring.com



CIVIL COVER SHEET

JS-44 (Rev. 7/13 DC)

I. (a) PLAINTIFFS Stop Geoengineering Minnesota (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF 88888 (EXCEPT IN U.S. PLAINTIFF CASES)	DEFENDANTS U.S. DEPARTMENT OF COMMERCE COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY) <small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small>																												
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) David A. Bahr, Bahr Law Offices, P.C. 1035 1/2 Monroe St. Eugene, OR 97402 (541) 556-6439	ATTORNEYS (IF KNOWN) 																												
II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY) <table style="width: 100%; border: none;"> <tr> <td><input type="radio"/> 1 U.S. Government Plaintiff</td> <td><input type="radio"/> 3 Federal Question (U.S. Government Not a Party)</td> </tr> <tr> <td><input checked="" type="radio"/> 2 U.S. Government Defendant</td> <td><input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)</td> </tr> </table>	<input type="radio"/> 1 U.S. Government Plaintiff	<input type="radio"/> 3 Federal Question (U.S. Government Not a Party)	<input checked="" type="radio"/> 2 U.S. Government Defendant	<input type="radio"/> 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) FOR DIVERSITY CASES ONLY! <table style="width: 100%; border: none;"> <thead> <tr> <th></th> <th>PTF</th> <th>DFT</th> <th></th> <th>PTF</th> <th>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
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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)

<input type="radio"/> A. Antitrust <input type="checkbox"/> 410 Antitrust	<input type="radio"/> B. Personal Injury/Malpractice <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 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input type="radio"/> C. Administrative Agency Review <input type="checkbox"/> 151 Medicare Act <u>Social Security</u> <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)) <u>Other Statutes</u> <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input type="radio"/> D. Temporary Restraining Order/Preliminary Injunction Any nature of suit from any category may be selected for this category of case assignment. *(If Antitrust, then A governs)*
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E. General Civil (Other) OR **F. Pro Se General Civil**

<u>Real Property</u> <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 <u>Personal Property</u> <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	<u>Bankruptcy</u> <input type="checkbox"/> 422 Appeal 27 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <u>Prisoner Petitions</u> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Conditions <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement <u>Property Rights</u> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <u>Federal Tax Suits</u> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	<u>Forfeiture/Penalty</u> <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <u>Other Statutes</u> <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization	<input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <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 <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)
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<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) <i>*(If pro se, select this deck)*</i>	<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) <i>*(If pro se, select this deck)*</i>	<input type="radio"/> J. Recovery of Defaulted Student Loan (excluding veterans) <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

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 Plaintiff challenges Defendant's failure to respond to record request and appeal in manner required by FOIA.

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: 9/21/17	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.

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

Stop Geoengineering Minnesota

Plaintiff

v.

U.S. Department of Commerce

Defendant

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Civil Action No. 1:17-cv-1930

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 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:

David A. Bahr, Bahr Law Offices, P.C.
1035 1/2 Monroe St.
Eugene, OR 97402
(541) 556-6439

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: _____

Signature of Clerk or Deputy Clerk

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

Stop Geoengineering Minnesota

Plaintiff

v.

U.S. Department of Commerce

Defendant

Civil Action No. 1:17-cv-1930

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

U.S. Attorney General, Jefferson Sessions
950 Pennsylvania Avenue
NW, Washington, D.C. 20530-0001

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:

David A. Bahr, Bahr Law Offices, P.C.
1035 1/2 Monroe St.
Eugene, OR 97402
(541) 556-6439

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: _____

Signature of Clerk or Deputy Clerk

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

Stop Geoengineering Minnesota

Plaintiff

v.

U.S. Department of Commerce

Defendant

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Civil Action No. 1:17-cv-1930

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA
555 4th Street, 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:

David A. Bahr, Bahr Law Offices, P.C.
1035 1/2 Monroe St.
Eugene, OR 97402
(541) 556-6439

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: _____

Signature of Clerk or Deputy Clerk

LAW OFFICES OF BRIAN GAFFNEY, A Professional Corporation
446 Old County Road, Suite 100-310
Pacifica, California 94044
(650) 219 3187 Phone
brian@gaffneylegal.com

March 10, 2017

Via U.S. Mail and Email

Department of Commerce
Departmental FOIA Office
14th and Constitution Avenue NW.
Mail Stop A300
Washington, DC 20230
EFoia@doc.gov

**Re: Freedom of Information Act Request
Fee Waiver Requested**

Dear Sir/Madam,

Records Requested

Pursuant to the Freedom of Information Act, through this office Stop Geoengineering Minnesota (“SGM”), requests all records¹ from January 1, 2015 to the present discussing, documenting, memorializing, or otherwise concerning:

- (1) weather modification within the Weather Service Organization Workforce Analysis;
- (2) the reason for adoption of the confidentiality provision of the “Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams” a copy of which is attached hereto;

Fee Waiver Requested

Stop Geoengineering Minnesota (“SGM”) requests that the Department of Commerce waive any applicable fees because disclosure meets the statutory standard for waiver of fees in that it is “in the public interest because furnishing the information can be considered as primarily benefitting the general public,” 5 U.S.C. § 552(a)(4)(A). SGM is a project of the non-profit Minnesota Natural Health Coalition. SGM is itself a non-profit entity whose purpose is to

¹ “Records,” includes all documents, correspondence, including email; agency guidelines and policies; memoranda; agency Memoranda of Understanding; notices, comments, and responses to comments; biological, scientific, and other studies; reports; environmental analyses; surveys; timelines; charts; graphs; maps; analyses; data; meeting minutes and agendas; distribution lists; notes and transcripts of meetings and conversations; and any other relevant information, **whether in hard copy or electronic/computer format.**

educate the public about how geoengineering and weather modification can impact public health. SGM has no intention to use the information sought in furtherance of any commercial interest.

(1) The Subject of the Request. The requested records concern the activities of the Department of Commerce and other government agencies regarding weather modification. The subject matter of this request therefore involves information that will significantly contribute to the public's understanding of the government's operations and activities in regards to weather modification.

(2) The Informative Value of the Information to Be Disclosed. The requested records are likely to contribute to an understanding of government operations or activities. The Department of Commerce is involved in weather modification activities and research. The requested records will provide insight into the Department of Commerce's process for implementing and regulating weather modification. Many of the requested records may contain information that is not currently available to the general public; therefore, release of the requested records would represent a significant new contribution to the public domain. For these reasons, the requested records will be highly informative in relation to the subject matter of the request, and will further public understanding.

(3) Contribution to General Public Understanding. SGM's mission is to educate the public about how geoengineering and weather modification can impact public health. SGM makes this request for the purposes of providing information about governmental activities and standards, including those of Department of Commerce, to concerned members of the public. SGM is interested in the requested records because they will likely help SGM and the public better understand the methods and procedures which the Department of Commerce has for implementing and regulating weather modification.

(4) The Significance of the Contribution to Public Understanding. The requested records are likely to contribute significantly to public understanding of government operations or activities. SGM will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. SGM regularly informs, educates and counsels the public regarding weather modification and government involvement in implementing and regulating weather modification. The subject of this FOIA request will be used to contribute to one or more of the following: public presentations, news stories contributed to or written by SGM volunteers and/or members, and/or websites (<http://www.minnesotanaturalhealth.org/stopgeoengineeringmn.html> and <http://stopgeoengineeringmn.squarespace.com>). Exactly which of these uses of the information addressed in this FOIA request will be determined after complete review of the requested material. SGM's members, volunteers, and counsel bring a broad range of expertise, skills, and familiarity with weather modification that will enable SGM to review and understand the responsive records and to supply this information in a coherent and understandable way to the general public and the media. SGM can draw on scientists, attorneys, and others to review and summarize this information. SGM certainly has the necessary qualifications relevant to any use of the records that may come about upon reviewing them. SGM's contribution to the public understanding, as compared to the level of understanding prior to disclosure, as well as SGM's

intent to inform the public, are well established. Moreover, many of the records requested may not have been publicly released to date. A requester is likely to contribute significantly to the public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government. 132 Cong. Rec. H9464 (Reps. English and Kindness).

(5) The Existence and Magnitude of a Commercial Interest. SGM has no commercial interest that would be furthered by the requested disclosure. SGM is a non-profit entity and requests the information to further its scientific, legal, and educational efforts. The FOIA fee waiver amendments of 1986 were designed specifically to allow nonprofit, public interest groups, such as SGM, access to government records without the payment of fees. FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters.

Department of Commerce Response

Please submit responsive records, along with an index for any records withheld that clearly identifies the basis for withholding, to the letterhead address above. Please segregate any records you determine are exempt and provide the remainder and the reasons for not providing all of the responsive records.

The basic time limit for responding to FOIA requests is twenty work days. See 5 U.S.C. § 552(a)(6)(A). This time limit can be extended under certain limited circumstances for at most an additional ten working days. *See id.* at § 552(a)(6)(B).

Please provide all responsive documents that are in the files maintained by Department of Commerce personnel or offices on the date that Department of Commerce staff conducts their searches for the documents responsive to this request.¹ **SGM requests that to the extent that the Department of Commerce can do so, it furnish electronic copies of the above documents in lieu of paper copies (to minimize the expense and burden of copying).** 5 U.S.C. § 552(a)(3)(B) (note, as amended in 1996 FOIA mandates that “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.”)

Please contact this office if you have any questions regarding the scope of this request, the nature of the records sought, or any other aspect of this request. I look forward to hearing from you.

By signing below, I certify that the reasons provided for a fee waiver are true and correct.

Sincerely,



Brian Gaffney

¹ See *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983); *Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002); *Oregon Natural Desert Ass'n v. Gutierrez*, 419 F. Supp. 2d 1284, 1288 (D. Or. 2006) (federal agencies must release all documents in their possession through the date they conduct the review of their files for documents responsive to FOIA requests).

Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams

The National Weather Service (NWS) Operations and Workforce Analysis (OWA) project is supported by four “Core Teams” that are each focused on one of the following topics:

- Communications and stakeholder engagement
- Organizational structure
- Operating model (including Impact-based Decision Support Services or IDSS)
- Workforce analysis

The membership of the Core Teams include NWS employees from across the organization who were approved for participation by NWS leadership. They also include National Weather Service Employees Organization (NWSEO) bargaining unit members who were recommended by NWSEO for each workstream. McKinsey & Company, which is working as an independent third-party consultant for NWS, is also participating on the teams. The Core Teams will provide essential support to the overall OWA project. This charter will establish the scope of activities and responsibilities of the Core Teams.

The main activities of the Core Teams are to:

1. **Support the Operations and Workforce Committee (OWC)**¹ in reviewing project analyses, developing and assessing options for the OWA, and answering questions or replying to requests for additional information.
2. **Assist and collaborate** with NWS OWA project leadership and McKinsey as they conduct their assessment of the NWS to ensure a collaborative and customized approach while preserving objectivity and independence. This collaboration could include participation in data calls, working groups, and/or research, and through providing guidance on action steps to take leading up to OWC² meetings.
3. **Augment and support** the data, information, perspectives, and ideas collected through application of individual expertise, experience, and insights (e.g., adding the perspective of Weather Forecast Offices, recommending subject matter experts (SME) for specific topics).
4. **Review and engage** on McKinsey's methodologies, insights, results and recommendations for accuracy and suggest changes if needed. To ensure an unbiased assessment, McKinsey will have final determination on the content presented to the OWC but it will be developed in a joint and collaborative effort with the Core Teams and subject matter experts.

Expectations for each member of the Core Teams include the following (may be adapted as needed, and notice will be given to ensure awareness and agreement with any changes):

- **Confidentiality: Core Team members, consultants, and SMEs are expected to maintain at all times the highest level of privacy and confidentiality regarding all information and materials shared as part of the OWA project, including initial findings and of all Core Team discussions, unless otherwise indicated (e.g., to share an approved project update that is intended to reach all NWS staff). Any interim reports or materials are considered to be**

¹ The National Weather Service (NWS) Executive Council (EC) established the NWS Operations and Workforce Committee (OWC) for the purposes of providing guidance to and making decisions on the OWA project.

drafts and are not to be shared beyond the Core Team and any consultants or SMEs who are providing independent advice. Core Team members will indicate their understanding of this requirement by signing this Charter. Consultants and SMEs will be covered as appropriate by separate non-disclosure agreements.

- **Commitment:** Core Team members are expected to fully participate in regular team meetings (in person or as conference calls, depending on location); in addition they are responsible for completing document reviews, communication steps. and other actions between meetings.
- **Role:** Core Team members are critical to the OWA in contributing insights in their areas of expertise, conducting analyses of surveys and interviews and generating input / data / that can inform the options and reports that McKinsey provides to the OWC.
- **Scope:** The Core Team activities are pre-decisional, only. In this capacity Core Team members provide input / data / guidance, serving a critical role as action-oriented groups such that when decisions are made (e.g., the approval of language for a survey or information for the website), the teams will be responsible for next steps.
- **Support:** The Core Teams will call on and engage with a cohort of Subject Matter Experts (SMEs) within the organization when needed to address specific questions, analyses or provide other expert insight
- **Duration:** The Core Teams will be in place through Phase II of the OWA project and will be considered for extended participation Phase III based on availability, interest and relevance to their area of expertise. Phase II will extend through approximately mid-October of 2015.

If you, or another Core Team member, have any questions or concerns about the Core Team Charter or other aspects of your participation, please contact Joanne Swanson Kagan, NWS OWA Project leader, at joanne.swanson@noaa.gov; Direct: 301-427-9066 or Cell: 240-393-0415. Thank you for your service to this project.

I have reviewed the Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams, and I confirm that I will strictly maintain the confidentiality of all information in accordance with the Charter.

Name	Signature	Date
_____	_____	_____
_____	_____	_____
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_____	_____	_____
_____	_____	_____
_____	_____	_____

From: i360Gov Knowledge Center
Sent: Tuesday, April 24, 2018 10:39 PM
To: mark.graff@noaa.gov
Subject: This Week's Complimentary Papers and Webinars for Government Professionals

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i360Gov: Knowledge Is Key



i360Gov: Knowledge Is Key

Tuesday, April 24th, 2018



Policy & Technology. News & Analysis.



Webinars

Accelerating Agency IT Modernization

The White House's American Technology Council and Office of American Innovation on modernizing federal technology published specific recommendations to jumpstart a new wave of modernization efforts by accelerating cloud adoption, consolidating networks and prioritizing key applications for needed upgrades.

Now the daunting task of implementing these recommendations sits within agencies, and it is not a one size fits all proposition. Where do they begin to successfully move away from expensive legacy infrastructure? How do they transition to a more secure, agile, and cost-effective technology ecosystem, much of which will be supported by shared services?

Join i360Gov and senior level technology leaders from government and industry as we provide an overview of current initiatives and solutions to the many IT modernization challenges agencies face, such as:

- Maintenance that often requires immediate attention and runs the risk of breaking integrations and upgrades
- Legacy solutions that are unable to properly communicate between on-premises, mobile, and the cloud
- Citizen facing services not designed for today's technology environment

You will also learn about Identity, the hidden accelerator to IT modernization, and how by creating a single solution for identity, agencies can speed up digital and cloud programs that will enable you to:

- Reduce costs and architecture complexity
- Securely connect any employee, vendor, partner or citizen to any resource, on premise or in the cloud
- Make administrators self-sufficient and decrease reliance on customization

- Scale seamlessly as you move services into the cloud

Webinar Presenters

- Dr. Ronald Ross, Computer Scientist, NIST Fellow
- David Hogue, Technical Director, Cybersecurity Threat Operations Center, NSA
- Joe Diamond, Director, Cybersecurity Strategy, Okta

Archive now available for viewing!

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Whitepapers

Whitepaper: Mastering Risk with "Data-Driven GRC"

Today's emerging risk landscape is rapidly changing. Risk now has the attention of top executives because it can shift quickly and emerge in entirely new forms. As a result, government organizations are acknowledging a need to provide more risk coverage at lower cost (measured in both time and currency), which is driving re-inventions of methodology and technology applications in the risk landscape.

"Data Driven GRC" represents a consolidation of methodologies, both functional and technological, that dramatically enhance the opportunity to address emerging risk landscapes and, in turn, maximize the reliability of organizational performance.

Download this whitepaper to uncover the key opportunities in risk and organizational performance management, and learn how to build an integrated, data-driven governance, risk and compliance process that optimizes the value of audit and risk management activities and investments in supporting tools and techniques.

This publication highlights:

- Technology deficiencies in the Three Lines of Defense
- Data-driven methodology for GRC-related processes
- 7-step GRC technology checklist
- A "value delivered" technology maturity model for functional leaders across all lines of defense

Fortifying performance management with data-driven GRC

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eBook: How to combat government fraud, waste and abuse:

A focus on government programs

It's no secret that **fraud, waste and abuse in all levels of governments is a problem**—and a big one. To some extent it is not surprising. Just think about the sheer number of different types of entitlement, healthcare and grant programs that exist at federal, state/provincial and local levels. Not to mention the complexity of the eligibility rules surrounding them. Trillions of dollars of payments are made to hundreds of millions of recipients. And similar size sums are collected from similar numbers of taxpayers. Inevitably, mistakes will be made. Just as inevitably, some people are going to abuse the system and make fraudulent claims and evade taxes.

Government activities and programs at all levels are so comprehensive and cover so many areas, often overlapping between levels, that **the potential for different types of fraud, waste, and abuse seems almost unlimited**.

This eBook will cover:

- Fraud prevention **across various government programs and payment areas**
- **Five applications of technology** and how technology can make a real difference in the ongoing challenge of keeping fraud,

waste and abuse under control

- How to use **Human Data** as an effective method to fight fraud

The **logical steps in an overall approach** to addressing the problem

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eBook: What you don't know can hurt you:

Mining government data to fix issues, validate business processes, mitigate risk and improve financial statement reporting

Governments face unprecedented challenges today. To navigate this era of increased accountability under reduced resources, you are expected to focus relentlessly on operational efficiency, cost effectiveness, productivity, service and innovation.

And that's not all.

Scrutiny of public agencies is at an all-time high around the world. Today's public servant is expected to know their business processes, identify and close the loop on red flags, transparently document and manage workflow, and collaborate with management and stakeholders in order to maintain full accountability to the taxpaying public and the lawmakers that represent them.

This 18-page eBook explores how government departments can leverage specialized risk and control analytics from ACL to:

- identify and mitigate risks, including improper payments
- identify opportunities for cost savings
- improve financial statement reporting
- stop fraud, waste, and abuse

Learn from the experts on how to "listen to your data." These tips will help you self-scrutinize for audit-readiness, fix issues quickly and build a stronger, more fiscally robust, more effective department.

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How to combat government fraud, waste and abuse

It is no secret that government bodies around the world face an enormous problem in fraud, waste, and abuse, often taking place within government programs such as unemployment insurance, healthcare, and social security. Others take place within major contract procurement systems for the military, transportation infrastructure, and education. **Improper payments can occur in a wide range of ways and in the vast majority of systems**

Even in the most complex system with many millions of transactions and massive monetary amounts involved, **a data trail of every instance of any improper payment exists in some way or another.** This is where technology, specifically data analysis software, has a critical role to play.

By analyzing entire populations of transactions and associated data to look for a variety of indicators of fraud, waste, and abuse, data analysis can identify where problems have occurred. Once the nature, extent, and details of the problems are known, it is then **possible to address them and plan to prevent their recurrence.**

This eBook will show you how to use technology to effectively combat government fraud, waste and abuse today.

Sponsored by ACL.

Download Now | Share:

eBook: The government finance leader's guide to balancing risk and performance

As a government finance leader, you have two big responsibilities: **ensuring the integrity of public funds and protecting the reputation of your organization**. Your role is fundamentally about maximizing the value of public funds, preventing fraud, promoting long-term economic stability and ensuring the public has financial transparency into your organization.

Understanding the gaps in your ERP system controls is the key to helping you maximize performance and ensure you are adhering to the highest levels of integrity over public funds. This guide will help you manage financial risk, prevent fraud, and maximize the value of taxpayer money. Delve into what controls are effective and the five common performance hacks that will lead to reduced risk and enhanced financial performance.

This publication highlights:

- How to illuminate risks in finance and accounting systems
- The top 5 performance hacks to improving your payroll and expense system, including interrogating general ledger and journal entries, and implementing a whistleblower program
- A technology buying guide for risk and control management and analytics monitoring

Ways to close the gaps in your ERP system

*Sponsored by **ACL**.*

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Invisible Data Center Infrastructure

To better understand the benefits of invisible data center infrastructure, think about the evolution of currency. In the past, we primarily relied on cash for monetary transactions. But you can only carry so much cash at one time – wallets and pockets are only so deep. And changing exchange rates for different currencies presented another frustrating and time-consuming obstacle.

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Cloud First, but Not Always

There is a lot to consider when planning a cloud strategy as it is not always the right option for government agencies. Some applications should be moved to the cloud earlier, some can reasonably be deferred, while others may never need to be in the cloud.

Private companies tend to use the cloud more than government agencies, and there are “lessons learned” from these companies that agencies can apply. Government has been slow to move towards the cloud - and for good reason. They have many questions around risk/reward, efficiencies, access, availability, and more.

Download to learn how governments can leverage private companies’ best practices and discover recommendations on making the right cloud computing decisions.

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Whitepaper: The 7 dangers of document based auditing

The use of word documents and spreadsheets as the primary vehicles for capturing and documenting governance, risk, and compliance procedures is often the go-to solution. But, it significantly impedes the ability for business units to work efficiently, expedite quality assurance processes, maintain durable data integrity, and deliver meaningful data insights. With new processes and technology, this situation has improved, but only marginally, as many technology solutions effectively take relevant, necessary information and turn it into “dark data”.

When information is trapped inside documents and spreadsheets, it effectively becomes “dark data”: impossible to search, reference,

analyze, export, report on or access on mobile devices. These are all key demands of today's business functions —and for data intelligence to support insights and decision making.

In this white paper, you will learn:

- The problem with hosting processes and procedures in documents and the destructive effects of dark data
- How to best avoid dark data and understand the need for digital evidence
- How high functioning teams are moving away from inter-linked documents and spreadsheets, to properly structured databases to unlock the value of data analytics
- When you should avoid document-embedded metadata

How to make primary critical documentation information available for queries

Sponsored by ACL.

Download Now | Share:

E-Signatures: How to improve service, reduce cost and increase auditability in government

If you are interested in learning how the US Army, GSA, State of Vermont, USDA and others have improved efficiency, contained cost and increased auditability with e-signatures, this Guide is for you. This ebook gives an introduction to electronic signatures for all levels of government and how the technology is transforming government processes.

E-Book highlights:

- The history of e-signatures in government
- Terminology
- Adoption trends
- How it works (support for mobile and identity management)
- Security best practices

Download this complimentary ebook now.

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Unlock the Power of Now

Data storage is a constant balancing act for most organizations. Underestimate your needs and day-to-day performance can be severely hampered but buy too much capacity and you can tie up valuable capital.

Red River's Storage Capacity on Demand with Dell/EMC is the adaptable, affordable, fully-customizable solution you've been waiting for. With Storage Capacity on Demand, you can instantly cope with any unexpected increases in storage requirements and pay for exactly what you need, when you need it.

Learn more about how Red River and Dell/EMC can deliver the flexible storage you need with our latest ViewPoint, The Power of Now.

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Download Now | Share:

Can you weather the storm of a cyber attack?

For most organizations, the question is not if a data breach will occur but when. In 2016, 4,149 data breaches were reported, exposing an all-time high of roughly 4.3 billion records.

It isn't enough to guard against an attack – you need to plan for the worst-case scenario. DellEMC and Red River deliver a new

incident response solution, which utilizes an air gap to create an isolated recovery zone. As your last line of defense, our solution can:

- Isolate mission-critical data
- Replicate data and workflows
- Perform integrity checks and alerts
- Speed recovery time

Learn more about how Dell EMC and Red River can help you prepare for your worst day and get you on the road to recovery in our new ebook: Can you weather the storm of a cyber attack?

Download the ebook

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eBook: Five Reasons You Should Be Thinking Flash

All-Flash storage is transforming storage architecture and revolutionizing the enterprise data center. And, with prices dropping fast, Flash is now in easy reach of agencies under tight budget constraints.

With this eBook from Red River and NetApp, you'll learn the Five Reasons You Should be Thinking Flash, along with:

- How Flash delivers more speed, capacity and responsiveness
- Why IT departments are using Flash to suit a wider variety of workloads and performance demands
- When Flash became a cost-effective option that delivers significant total cost of ownership savings
- What you can do to capitalize on Flash's lightning fast, always-on cost-saving capabilities

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Expand Capabilities and Push Boundaries – Without Risk.

Red River and Dell EMC can help you reimagine the possibilities with leading-edge technology services and expertise in our Innovation Center in Austin, TX. A sandbox environment for testing, development, training and integration, the secure lab environment enables every application, technology and business function to be fully vetted, without the cost of infrastructure or staff.

Without risk, organizations can expand capabilities such as:

- Move to the Cloud
- Establish disaster recovery
- Enhance business continuity
- Ensure interoperability
- Meet highly unique mission demands

Download our latest datasheet to learn more what the Red River Innovation Center, powered by Dell EMC technology, can do for you.

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The Next Generation Data Center

Now is the time to ensure your data center is optimized with the latest technologies and a flexible financial model that fits your organization's changing needs. ViON has partnered with DELL EMC and Nutanix to provide exactly what you need, when you need it. With our Data Center as-a-Service, you get the latest technology and highest level of service and support accelerate your modernization efforts and reduce costs.

Download this Data Center as-a-Service infographic to learn more.

Sponsored by *Dell EMC, Nutanix and Vion.*

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TCO Analysis Comparing Private and Public Cloud Solutions for Running Enterprise Workloads Using the 5Cs Framework

Is your agency in the midst of a digital transformation journey? Are you assessing the value your agency is able to extract from data? Is there a new executive mandate to embrace data-driven decision making? If you answered "yes" to any of these questions, your agency is among the majority of those in the midst of looking for agile, reliable, and flexible infrastructure to support your digital transformation initiatives in a cost-efficient manner. Organizations are looking for a structured methodology to help decide the right deployment model and location that helps accelerate their pace of innovation, improve customer experience, and gain competitive edge.

IDC recommends using a holistic approach to determine deployment location for applications to meet enterprise SLAs.

In this white paper, IDC describes the business and technical considerations and provides a framework for choosing the appropriate cloud (on-premises private cloud or off-premises public cloud) solution for deployment of customer workloads. It draws upon IDC research, customer interviews, and analysis of vendor offerings.

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2017 Email Fraud Report

ValiMail's analysis of the most popular 1 million global domains shows that most domain owners have not attempted to implement fraud protection through the latest and most complete form of protection, DMARC. Of those that have attempted only 23 percent are actually achieving protection from fraud.

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Public Safety & Social Media

Public Records Policies & Best Practices

Regardless of how your public safety agency plans to use social media, there are two things to keep in mind. The first is that using social media for public safety is not traditional. Social media is an open and instant means of communication, but it is also subject to higher standards and internal policies. What passes for simple commentary in the "civilian world," could lead to heavy scrutiny and disciplinary action by agency leaders when the same comment is made by a public employee.

The second is that every piece of content your agency creates on social media is considered a matter of public record, and may be used in response to an open records request. This report will analyze these two points, and provide you with the tools needed to create and maintain a social media presence that acts as a supporting extension of your public safety efforts.

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Bringing you the ultimate Cloud solution

When it comes to cloud solutions, typically you have to decide what's more important: security or flexibility. But in today's world you

need to be nimble to drive innovation and respond to the needs of the business, and guard against ever-increasing threats.

Now there's a way to get the flexibility you want without sacrificing the security you need.

Thanks to a partnership by industry leaders Palo Alto Networks, VMware and Red River, organizations can fully realize the agility, efficiency and cost benefits of a cloud environment while ensuring it is protected by next-generation security policies.

Learn more about how Red River, Palo Alto Networks and VMare in our new ebook: *Flexible & Secure: A Partnership that Delivers the Ultimate Cloud Solution*

Sponsored by Palo Alto Networks, Red River and VMware.

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The Public Sector Guide to Social Media Strategy & Policy

The widespread adoption of social media across public agencies is creating new possibilities for public outreach and media relationships. But to be heard above the noise on social networks like LinkedIn, Facebook and Twitter requires a smart strategy and thoughtful policies.

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What you don't know can hurt you: Mining government data to fix issues, validate business processes, mitigate risk and improve financial statement reporting

Abstract: Governments face unprecedented challenges today. To navigate this era of increased accountability under reduced resources, you are expected to focus relentlessly on operational efficiency, cost effectiveness, productivity, service and innovation.

And that's not all.

Scrutiny of public agencies is at an all-time high around the world. Today's public servant is expected to know their business processes, identify and close the loop on red flags, transparently document and manage workflow, and collaborate with management and stakeholders in order to maintain full accountability to the taxpaying public and the lawmakers that represent them.

This 18-page eBook explores how government departments can leverage specialized risk and control analytics from ACL to:

- identify and mitigate risks, including improper payments
- identify opportunities for cost savings
- improve financial statement reporting
- stop fraud, waste, and abuse

Learn from the experts on how to "listen to your data." These tips will help you self-scrutinize for audit-readiness, fix issues quickly and build a stronger, more fiscally robust, more effective department.

Sponsored by ACL.

Download Now | Share:

How to combat government fraud, waste and abuse: A focus on government programs

It's no secret that fraud, waste and abuse in all levels of governments is a problem—and a big one. To some extent it is not surprising. Just think about the sheer number of different types of entitlement, healthcare and grant programs that exist at federal, state/provincial and local levels. Not to mention the complexity of the eligibility rules surrounding them. Trillions of dollars of payments are made to hundreds of millions of recipients. And similar size sums are collected from similar numbers of taxpayers. Inevitably, mistakes will be made. Just as inevitably, some people are going to abuse the system and make fraudulent claims and evade taxes.

Government activities and programs at all levels are so comprehensive and cover so many areas, often overlapping between levels,

that the potential for different types of fraud, waste, and abuse seems almost unlimited.

This eBook will cover:

- Fraud prevention across various government programs and payment areas
- Five applications of technology and how technology can make a real difference in the ongoing challenge of keeping fraud, waste and abuse under control
- How to use Human Data as an effective method to fight fraud
- The logical steps in an overall approach to addressing the problem

Sponsored by *ACL*.

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The Public Sector Guide to Text Messaging Policy and Retention

Learn the practical steps that will help your organization develop a text message policy and retention strategy to protect against the risk involved with use of this popular, universal form of communication. It also outlines smart text records management practices so you'll be better prepared to respond to open records requests or other e-discovery needs when they arise.

Download this guide to learn:

- Text message record management best practices
- How to craft a text message policy for your organization
- How records management technology helps meet your state's open records laws

Sponsored by *Smarsh*.

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The DMARC Challenge for Federal Agencies

Combining original research and actionable advice this report contains:

- Data on how well all 1315 government and 65 military domains are doing with DMARC
- Data on SPF usage in government and military domains
- Risks of failing to deploy DMARC fully
- How DMARC works and why it's essential
- Data on the growing global support for DMARC
- Challenges federal agencies need to be aware of in implementing DMARC

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Healthcare Just Got More Secure

While most healthcare organizations recognize that networked medical devices can revolutionize patient care, they often lack the resources and expertise needed to secure their devices. But with Red River, healthcare organizations don't have to worry about threat detection. Instead, they can focus on what they know best—the patients.

Secure your devices and protect your infrastructure and utility systems with help from Red River's Medical Device Isolation Architecture experts. In this datasheet, learn how to:

- Identify, classify and register all devices that connect to the network
- Align your medical device procurement strategy to identify and mitigate gaps before the device operation begins
- Implement an integrated security solution with automation to detect threats faster
- Improve risk management focused on patient care by analyzing and correlating IoT security data to inform stakeholders of risks

- Continuously monitor network access, network behavior and vulnerabilities

Download our Medical Device Isolation Architecture Overview to learn more.

Sponsored by *Cisco and Red River.*

Download Now | Share:

Reducing the burden of FOIA

Responding to open records requests comes with the territory when you work for a government agency. Unfortunately, many struggle with compiling and producing the requested information in a timely manner. In this three-part series, Smarsh provides you with knowledge to help reduce the burden of responding to record requests, and to stay compliant with the Freedom of Information Act (FOIA) and state and local open records laws.

Sponsored by *Smarsh.*

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Public Safety Departments & Text Messaging

Simplify Public Records with Policies and Procedures

Text messaging for business purposes is on the rise. In fact, 80 percent of respondents from a 2015 Instantly/RingCentral study are using text messaging for business purposes, and 15 percent said more than half of their texts are sent or received for business purposes.¹ Although text messaging is the most popular cell phone feature, there are certain guidelines and considerations that public safety agencies should be aware of when allowing employees to communicate by text. One such consideration is the role text messages could play in open records requests, eDiscovery, and litigious events.

In this report, we examine how public safety agencies can create policies that allow for compliant use of SMS/text messaging, and how to retain and archive those communications for a more efficient response to open records requests.

Sponsored by *Smarsh.*

Download Now | Share:

5 Actions to take for an Airtight Mobile Use Strategy in Government

Enable text messaging and reduce your organization's legal and open-records risk around mobile communications.

Many government employees and their colleagues prefer texting as a tool to conduct business because it's simply faster and easier. FOIA laws require all electronic communications used for business to be archived and supervised. It doesn't matter whether an employee uses his/her personal or government-issued cell phone. Both are fair game.

In this guide we'll provide five actions for public sector organizations to build an airtight mobile use strategy. Learn about device scenarios, policy creation, mobile device management, and the archiving process.

Sponsored by *Smarsh.*

Download Now | Share:

Lessons in Archiving for Public Sector Agencies

In this three-part e-book, Don DeLoach, former Chief Information Officer for City of Tallahassee and consultant to local government firms, walks public sector organizations through the key elements needed to respond quickly and accurately to open records requests: identifying what information needs to be retained and archived, best practices and procedures for retaining communications, finding and implementing an automated solution, and the important roles stakeholders play in the records response process.

Sponsored by *Smash*.

Download Now | Share:

eBook: Five Reasons You Should Be Thinking Flash

All-Flash storage is transforming storage architecture and revolutionizing the enterprise data center. And, with prices dropping fast, Flash is now in easy reach of agencies under tight budget constraints.

With this eBook from Red River and Dell-EMC, you'll learn the Five Reasons You Should be Thinking Flash, along with:

- How Flash delivers more speed, capacity and responsiveness
- Why IT departments are using Flash to suit a wider variety of workloads and performance demands
- When Flash became a cost-effective option that delivers significant total cost of ownership savings
- What you can do to capitalize on Flash's lightning fast, always-on cost-saving capabilities

Sponsored by *Dell EMC and Red River*.

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A Faster Path to Cloud

With VSPEX and Red River, nothing stands in the way of the cost savings, extreme flexibility and opportunities for innovation that Cloud provides. The latest eBook from the experts at Red River charts a faster path to Cloud with Dell-EMC VSPEX Cloud architectures and hyper-converged infrastructure.

This eBook will show you how to:

- Take the complexity out of Cloud with a complete Cloud architecture customized to your unique infrastructure and application needs.
- Determine the right type of Cloud, be it Public, Private or Hybrid
- Drastically shorten Cloud provisioning with either VSPEX Reference Architectures or VSPEX BLUE Hyper-Converged Infrastructure
- Maximize flexibility with right-sized infrastructure, servers and network from the start
- Take control by automating provisioning and Cloud management tasks to enable operational simplicity and reduce risk

Sponsored by *Dell EMC and Red River*.

Download Now | Share:

Build Your Cloud Strategy with Confidence

Organizations are under immense pressure to get to the cloud now. But with tight budgets, limited resources and concerns about security and control, cloud remains out of reach for many.

In this eBook from ViON and NetApp, you'll learn how to Build Your Cloud Strategy with Confidence and use a cloud-based business model to:

- Experience freedom and flexibility using operational vs. capital funds to break free from traditional procurement constraints
- Avoid over purchasing IT resources and infrastructure
- Access best-in-class IT infrastructure, either on-premise or off, and pay only for the services you use, when you use them
- Empower security and control with ViON's unique on-prem private cloud and Anything-As-A-Service financial model
- Rapidly expand capabilities and free resources to focus on mission-critical demands

As a Veteran-owned, privately-held company with over 15 years of experience delivering cloud-based solutions, including on-premises private cloud for the Federal government, and superior expertise in XaaS models, ViON is the perfect partner to help start smart with cloud and XaaS. Discover how you can Build Your Cloud Strategy with Confidence by filling out the fields below to download this essential eBook now.

Sponsored by *NetApp and Vion.*

Download Now | Share:

The Real Costs of Building vs. Buying Data Analytics Capabilities

Companies that leverage big data analytics outperform their competitors by 20% or more and big data can help businesses realize a potential increase of 60% operating margins. But what's the best way to efficiently add these capabilities? Compare the benefits of building or buying your data analytics solution to determine which option best fits your needs in the new whitepaper from the experts at ViON and IBM. The paper evaluates all the factors associated with this decision that impact your organization including:

- Up-front costs associated with design, coding, testing, documentation as well as resource allocation
- Typical timelines for implementing a solution and an analysis of time-to-value
- Maintenance costs and considerations to ensure optimal operation after launching your solution

Get this new whitepaper now to understand your options for implementing data analytics capabilities and how you can best support your organization.

Sponsored by *IBM and Vion.*

Download Now | Share:

Public Sector Text Messaging Scandals and 3 Major Tips to Avoid Them

Being in the public eye is difficult. Just ask any celebrity. Everything they do or say can cause quite the stir, and anything they do serves as fodder for the court of public opinion. Similar rules and judgment—befalls employees of local and state government agencies. The only difference is their public notoriety often comes on the back of an embarrassing scandal. Download this guide to examine 3 recent government text message scandals, and proactive ways to avoid them.

Sponsored by *Smarsh.*

Download Now | Share:

The Government Social Media Survival Guide

For public sector organizations, interacting with the community is an absolute necessity. Social media not only makes it easy to communicate instantly — it can also establish your agency as a go-to resource for news, alerts, and emergency instructions.

The Government Social Media Survival Guide from Smarsh walks you through the essential steps to create an approachable, engaging relationship with your community through social media.

Download this complimentary guide now.

Sponsored by *Smarsh.*

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melissa kang - NOAA Affiliate

From: melissa kang - NOAA Affiliate
Sent: Thursday, May 3, 2018 10:16 AM
To: Roxie Allison-Holman - NOAA Federal
Cc: Denise Hamilton - NOAA Federal; Mark Graff - NOAA Federal
Subject: Re: Clearance Req'd 5/2/18
Attachments: FOIA 2017 000790 IR Letter (Fifth Interim).doc

Hi Roxie,

(b)(5)

Let me know your thoughts since tomorrow is the due date.

Thank you as always!

Very Respectfully,

Melissa R. Kang
NOAA/National Weather Service
Contractor with Syneren Technologies Corporation
Office of the Chief Financial Officer (CFO2)
Office: 301.427.6936
Melissa.R.Kang@noaa.gov

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On Wed, May 2, 2018 at 11:59 AM, melissa kang - NOAA Affiliate <melissa.r.kang@noaa.gov> wrote:

(b)(5)

Very Respectfully,

Melissa R. Kang
NOAA/National Weather Service
Contractor with Syneren Technologies Corporation
Office of the Chief Financial Officer (CFO2)
Office: 301.427.6936
Melissa.R.Kang@noaa.gov

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On Wed, May 2, 2018 at 11:19 AM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

OK. I understand, Meliss (b)(5)
[REDACTED]
[REDACTED]?

On Wed, May 2, 2018 at 10:37 AM melissa kang - NOAA Affiliate <melissa.r.kang@noaa.gov> wrote:
Hi Roxie,

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

Very Respectfully,

Melissa R. Kang
NOAA/National Weather Service
Contractor with Syneren Technologies Corporation
Office of the Chief Financial Officer (CFO2)
Office: 301.427.6936
Melissa.R.Kang@noaa.gov

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On Wed, May 2, 2018 at 10:18 AM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

Hi Melissa!

I believe the FOIA Office handles fee waiver determinations. I am copying Mark, Lola and the FOIA Office.

On Wed, May 2, 2018 at 9:15 AM melissa kang - NOAA Affiliate <melissa.r.kang@noaa.gov> wrote:
Hi Roxie,

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

Thanks!

Very Respectfully,

Melissa R. Kang
NOAA/National Weather Service
Contractor with Syneren Technologies Corporation
Office of the Chief Financial Officer (CFO2)
Office: 301.427.6936
Melissa.R.Kang@noaa.gov

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On Tue, May 1, 2018 at 4:26 PM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

(b)(5) [Redacted]

..all records from January 1, 2015 to the present discussing, documenting, memorializing, or otherwise concerning: (1) weather modification within the Weather Service Organization Workforce Analysis; (2) the reason for adoption of the "Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams" a copy of which is attached.

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted] Is that correct?

On Tue, May 1, 2018 at 4:01 PM, melissa kang - NOAA Affiliate <melissa.r.kang@noaa.gov> wrote:
Hi Roxie,

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

Let me know if you have any questions. Thank you for your support and understanding in this matter.

Very Respectfully,

Melissa R. Kang
NOAA/National Weather Service
Contractor with Syneren Technologies Corporation
Office of the Chief Financial Officer (CFO2)
Office: 301.427.6936
Melissa.R.Kang@noaa.gov

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attachments).

On Tue, May 1, 2018 at 12:54 PM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

Melissa, I will try to review some of the documents this afternoon.

On Tue, May 1, 2018 at 11:08 AM melissa kang - NOAA Affiliate <melissa.r.kang@noaa.gov> wrote:
Hi Roxie,

We noticed you're out of the office at a conference this week and we also have a deadline for another interim release for FOIA 2017 000790 this Friday (b)(5)

[REDACTED]

Thank you for your continued support!

Very Respectfully,

Melissa R. Kang
NOAA/National Weather Service
Contractor with Syneren Technologies Corporation
Office of the Chief Financial Officer (CFO2)
Office: 301.427.6936
Melissa.R.Kang@noaa.gov

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--

Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
301-628-1625

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Roxie Allison-Holman
Attorney

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(b) (5)

(b) (5)

melissa kang - NOAA Affiliate

From: melissa kang - NOAA Affiliate
Sent: Thursday, May 3, 2018 11:40 AM
To: Roxie Allison-Holman - NOAA Federal
Cc: Denise Hamilton - NOAA Federal; Mark Graff - NOAA Federal
Subject: Re: Clearance Req'd 5/2/18
Attachments: FOIA 2017 000790 IR Letter (Fifth Interim).doc

Thanks, Roxie!

Very Respectfully,

Melissa R. Kang
NOAA/National Weather Service
Contractor with Syneren Technologies Corporation
Office of the Chief Financial Officer (CFO2)
Office: 301.427.6936
Melissa.R.Kang@noaa.gov

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On Thu, May 3, 2018 at 11:30 AM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

(b)(5) [REDACTED].

On Thu, May 3, 2018 at 11:29 AM Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

Hi Melissa!

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

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

On Thu, May 3, 2018 at 10:16 AM melissa kang - NOAA Affiliate <melissa.r.kang@noaa.gov> wrote:
Hi Roxie,

I've attached a drafted 5th interim release letter for your review (b)(5) [REDACTED]
[REDACTED]

(b)(5)

Thank you as always!

Very Respectfully,

Melissa R. Kang
NOAA/National Weather Service
Contractor with Syneren Technologies Corporation
Office of the Chief Financial Officer (CFO2)
Office: 301.427.6936
Melissa.R.Kang@noaa.gov

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On Wed, May 2, 2018 at 11:59 AM, melissa kang - NOAA Affiliate <melissa.r.kang@noaa.gov> wrote:

That I do not know (b)(5)

[Redacted]
[Redacted]
[Redacted] ?

Very Respectfully,

Melissa R. Kang
NOAA/National Weather Service
Contractor with Syneren Technologies Corporation
Office of the Chief Financial Officer (CFO2)
Office: 301.427.6936
Melissa.R.Kang@noaa.gov

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On Wed, May 2, 2018 at 11:19 AM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

OK. I understand, Meliss (b)(5)

[Redacted] ?

On Wed, May 2, 2018 at 10:37 AM melissa kang - NOAA Affiliate <melissa.r.kang@noaa.gov> wrote:

Hi Roxie,

(b)(5)

[Redacted]
[Redacted]

Very Respectfully,

Melissa R. Kang
NOAA/National Weather Service
Contractor with Syneren Technologies Corporation
Office of the Chief Financial Officer (CFO2)
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Melissa.R.Kang@noaa.gov

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Hi Roxie,

(b)(5)
[Redacted]

Thanks!

Very Respectfully,

Melissa R. Kang
NOAA/National Weather Service
Contractor with Syneren Technologies Corporation
Office of the Chief Financial Officer (CFO2)
Office: 301.427.6936
Melissa.R.Kang@noaa.gov

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On Tue, May 1, 2018 at 4:26 PM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

(b)(5)
[Redacted]

..all records from January 1, 2015 to the present discussing, documenting, memorializing, or otherwise concerning: (1) weather modification within the Weather Service Organization Workforce Analysis; (2) the reason for adoption of the "Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams" a copy of which is attached.

(b)(5)

On Tue, May 1, 2018 at 4:01 PM, melissa kang - NOAA Affiliate <melissa.r.kang@noaa.gov> wrote:
Hi Roxie,

(b)(5)

(b)(5)

Let me know if you have any questions. Thank you for your support and understanding in this matter.

Very Respectfully,

Melissa R. Kang

NOAA/National Weather Service
Contractor with Syneren Technologies Corporation
Office of the Chief Financial Officer (CFO2)
Office: 301.427.6936
Melissa.R.Kang@noaa.gov

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On Tue, May 1, 2018 at 12:54 PM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

Melissa, I will try to review some of the documents this afternoon.

On Tue, May 1, 2018 at 11:08 AM melissa kang - NOAA Affiliate <melissa.r.kang@noaa.gov> wrote:
Hi Roxie,

We noticed you're out of the office at a conference this week and we also have a deadline for another interim release for FOIA 2017 000790 this Friday (b)(5)

Thank you for your continued support!

Very Respectfully,

Melissa R. Kang

NOAA/National Weather Service
Contractor with Syneren Technologies Corporation

Office of the Chief Financial Officer (CFO2)

Office: 301.427.6936

Melissa.R.Kang@noaa.gov

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Roxie Allison-Holman

Attorney

NOAA GC for Weather, Satellites and Research

301-628-1625

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Roxie Allison-Holman

Attorney

NOAA GC for Weather, Satellites and Research

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Roxie Allison-Holman

Attorney

NOAA GC for Weather, Satellites and Research

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Roxie Allison-Holman
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(b) (5)

(b) (5)

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Thursday, May 3, 2018 6:47 PM
To: Stephen Lipps - NOAA Federal; Holmes, Colin; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal; Robert Hogan; _DUS Staff; Tanya Dobrzynski - NOAA Federal; Stuart Levenbach - NOAA Federal; Kevin Wheeler - NOAA Federal; Brandon Elsner - NOAA Federal; Taylor Jordan - NOAA Federal; Erik Noble - NOAA Federal; Wendy Lewis - 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; Lawrence Charters - NOAA Federal; Allison Soussi-Tanani - NOAA Federal; Bogomolny, Michael (Federal); Roxie Allison-Holman - NOAA Federal; John Almeida - NOAA Federal; Michael Weiss - NOAA Federal; Maria Williams - NOAA Federal; Shawn Martin - NOAA Federal; Kathryn Kempton - NOAA Federal; Ed Kearns - NOAA Federal; Cheryl Scannell - NOAA Federal; Devin Brakob - NOAA Federal; _OCIO GPD; Darone Jones - NOAA Federal; Christina Storz - NOAA Federal
Subject: Weekly FOIA Incoming and High Visibility Requests
Attachments: NRDC v. DOI and DOC Original Complaint.pdf; Original NRDC FOIA Request re EO 13795.pdf; Weekly FOIA Incoming and High Visibility Requests 4.26.18 to 5.2.18.xls.xlsx

Good Afternoon,

Attached is the weekly report.

One request was submitted from Earth Island Institute seeking all permits for dolphin species in captivity. (DOC-NOAA-2018-001289). Additionally, a request was submitted from PETA seeking records of inspections for evaluations, provided by the Mexican Secretaria de Agricultura's Recursos Hidraulicos pertaining to Yupik, the polar bear held at the Morelia Zoo. (DOC-NOAA-2018-001292). Lastly, a request was submitted by E&E News seeking a copy of the report done by outside auditors in 2017 that looked into the safety record of NOAA's program dealing with at-sea monitors and observers. (DOC-NOAA-2018-001290).

In litigation, NOAA is reviewing records for responsiveness for a release to be issued in the NRDC v. DOI case. The original request sought all records regarding meetings attended by Wilbur Ross or Earl Comstock relating to EO 13795 National Monument designations. A copy of the complaint and underlying request are attached for reference.

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 SOUTHERN DISTRICT OF NEW YORK

<hr/>)	
NATURAL RESOURCES DEFENSE))	
COUNCIL, INC.,))	
))	
Plaintiff,))	
v.))	
))	
U.S. DEPARTMENT OF THE INTERIOR))	Civil Action No. 18-cv-650
))	
and))	
))	
U.S. DEPARTMENT OF COMMERCE,))	
))	
Defendants.))	
<hr/>)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff Natural Resources Defense Council, Inc. (NRDC or Plaintiff), brings this case to compel Defendants, the U.S. Department of the Interior (Interior Department) and the U.S. Department of Commerce (Commerce Department) (collectively, Defendants), to disclose records relating to the agencies’ reviews of certain national monuments.

2. Over the course of the past year, Defendants have conducted controversial “reviews” of at least twenty-seven national monuments established by former Presidents Clinton, G.W. Bush, and Obama—including the Bears Ears National Monument in Utah, the Grand Staircase-Escalante National Monument in

Utah, and the Northeast Canyons and Seamounts Marine National Monument in the Atlantic Ocean—for the purpose of making recommendations to the President about whether to preserve those monuments, or to dismantle them and open them to industrial resource extraction and other destructive uses. Despite an outpouring of popular support for preserving existing national monuments, the President has already acted to revoke national monument protections for huge swaths of Bears Ears and Grand Staircase-Escalante.

3. In September and October 2017, NRDC sought production under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, of records relating to the agencies' review processes. As explained below, NRDC sought records relating to the public comments that Defendants received, the meetings and communications Defendants' leadership had with non-governmental individuals and entities (including industry groups), and the criteria by which Defendants weighed the information they gathered. NRDC, its members, and the American public at large have a right to know who is influencing the federal government's decisions about the fate of these iconic American lands and waters.

4. FOIA required Defendants to respond within twenty business days. Yet Defendants did not respond substantively by that deadline, and they still have not done so. Their failure to timely disclose the requested records violates FOIA.

5. NRDC seeks a declaration that Defendants violated FOIA by failing to provide a final determination by the statutory deadline as to whether they will comply with NRDC's requests, and by failing to produce any responsive documents

promptly thereafter. NRDC seeks an injunction ordering that Defendants disclose, without further delay, all non-exempt, responsive records and portions of records to NRDC. NRDC also seeks a declaration that, pursuant to FOIA, it is entitled to a fee waiver in connection with its FOIA requests to the Interior Department.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 552(a)(4)(B) (FOIA).

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

THE PARTIES

8. Plaintiff NRDC is a national nonprofit advocacy organization with hundreds of thousands of members nationwide. On behalf of its members, NRDC engages in research, advocacy, public education, and litigation to protect public health and the environment. NRDC has a long history of disseminating information of public interest, including information obtained from FOIA requests.

9. Defendant Interior Department is an agency within the meaning of 5 U.S.C. §§ 551(1) and 552(f)(1), and it has possession or control of documents NRDC seeks. The Office of the Secretary of the Interior is a component of the Interior Department.

10. Defendant Commerce Department is an agency within the meaning of 5 U.S.C. §§ 551(1) and 552(f)(1), and it has possession or control of documents

NRDC seeks. The Office of the Secretary of Commerce is a component of the Commerce Department.

STATUTORY AND REGULATORY FRAMEWORK

11. FOIA requires federal agencies to release records to the public upon request, unless one of nine statutory exemptions from disclosure applies. 5 U.S.C. § 552(a)-(b).

12. Within twenty business days of an agency's receipt of a FOIA request, the agency must "determine . . . whether to comply" with the request. *Id.* § 552(a)(6)(A)(i); *see also* 43 C.F.R. § 2.16(a) (Interior FOIA regulation); 15 C.F.R. § 4.6(b) (Commerce FOIA regulation). The agency must "immediately notify" the requester of "such determination and the reasons therefor." 5 U.S.C. § 552(a)(6)(A)(i)(I); 43 C.F.R. § 2.21(b) (requiring Interior Department to "immediately" send a written acknowledgement and tracking number if a request will take longer than ten workdays to process).

13. Once an agency determines that it will comply with a FOIA request, it must "promptly" release responsive, non-exempt records to the requester. 5 U.S.C. § 552(a)(6)(C)(i); *see also* 43 C.F.R. § 2.22(c) (Interior FOIA regulation); 15 C.F.R. § 4.7(c) (Commerce FOIA regulation).

14. In "unusual circumstances," an agency may extend the twenty-day time limit for responding to a FOIA request by up to ten working days. 5 U.S.C. § 552(a)(6)(B)(i); *see also* 43 C.F.R. § 2.19(a)(1) (Interior FOIA regulation); 15 C.F.R. § 4.6(b) (Commerce FOIA regulation).

15. The agency must provide requested records at no or reduced cost “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45(a) (Interior FOIA regulation);

15 C.F.R. § 4.11(l) (Commerce FOIA regulation).

16. If the agency fails to notify the requester of its determination within the statutory time limit, the requester is “deemed to have exhausted his administrative remedies” and may immediately file suit. 5 U.S.C. § 552(a)(6)(C)(i).

17. FOIA grants federal district courts authority to “enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

FACTS

18. On April 26, 2017, President Donald J. Trump issued Executive Order 13,792, titled “Review of Designations Under the Antiquities Act,” which directed Secretary of the Interior Ryan Zinke to conduct a review of twenty-seven national monuments created by President Trump’s predecessors. Exec. Order 13,792, 82 Fed. Reg. 20,429 (Apr. 26, 2017). The Executive Order directed Secretary Zinke to provide “recommendations for such Presidential actions, legislative proposals, or other actions consistent with the law as the Secretary may consider appropriate” to

“balance the protection of . . . objects against the appropriate use of Federal lands and the effects on surrounding lands and communities.” *Id.*

19. Two days later, on April 28, 2017, President Trump issued another executive order, this one titled “Implementing an America-First Offshore Energy Strategy.” Exec. Order 13,795, 82 Fed. Reg. 20,815 (April 28, 2017). The order, among other things, directed Secretary of Commerce Wilbur Ross to review marine national monuments and national marine sanctuaries that had been designated or expanded within the previous ten years. The executive order required the Secretary of Commerce to “report the results of the review” within 180 days. *Id.*

20. The Interior Department and the Commerce Department subsequently accepted public comments regarding the covered national monuments and marine sanctuaries. *See* 82 Fed. Reg. 22,016 (May 11, 2017) (Interior review); 82 Fed. Reg. 28,827 (June 26, 2017) (Commerce review). On information and belief, Secretaries Zinke and Ross and other agency officials also met with a variety of stakeholders, including representatives of industry groups expressing interest in commercial exploitation of the national monuments and marine sanctuaries under review.

21. On information and belief, Defendants collectively received over three million public comments during their review period, and the overwhelming majority of those comments called on Defendants and the Trump Administration to preserve existing national monuments and marine sanctuaries.

22. Plaintiff NRDC submitted comments to the Interior and Commerce Departments in support of national monuments in general, and in support of Bears

Ears National Monument, Grand Staircase-Escalante National Monument, and Northeast Canyons and Seamounts Marine National Monument in particular. In addition, tens of thousands of NRDC's individual members submitted comments to the Interior and Commerce Departments in support of national monuments and marine sanctuaries.

23. On August 24, 2017, Interior Secretary Zinke submitted his final report to the President. Neither Secretary Zinke nor President Trump released the report publicly at the time, but national news reporters obtained what appears to be a leaked copy of the report, and Secretary Zinke released a substantially similar version to the public on December 5, 2017. Both versions of the Interior report recommended that the President unilaterally revoke or substantially weaken protections for several national monuments, including the Bears Ears National Monument, the Grand Staircase-Escalante National Monument, and the Northeast Canyons and Seamounts Marine National Monument.

24. On October 25, 2017, Secretary Ross's report describing the results of the Commerce review was due to be completed and submitted to the President. To date, neither Secretary Ross nor any other government official has released the Commerce report publicly.

25. On December 4, 2017, President Trump issued two proclamations dismantling Bears Ears National Monument and Grand Staircase-Escalante National Monument. President Trump and other federal officials have indicated that additional proclamations dismantling other national monuments would follow.

26. The American public has a strong interest in understanding the Interior and Commerce Departments' monument review processes and the basis for the Secretaries' reports and recommendations to the President. That includes understanding the criteria by which Interior and Commerce Department officials reviewed, weighed, or discounted the public comments they received; the contents of those comments; and the identities of industry representatives with whom Interior and Commerce Department officials met and the contents of those meetings.

27. The Interior and Commerce Departments' reviews of national monuments and marine sanctuaries have generated intense, widespread, and sustained public interest and concern. NRDC and its members are particularly keenly interested in these review processes and their outcomes. Yet, despite the public's desire for transparency and input into the Administration's review process, Defendants have made very little information publicly available about their information-gathering and review processes.

28. To better inform the American public at large, and NRDC members in particular, about a topic of intense public concern, NRDC submitted the following FOIA requests to the Interior Department and the Commerce Department.

NRDC's first FOIA request to the Interior Department

OS-2017-01247

29. According to the Regulations.gov website, the Interior Department received more than 2.8 million public comments through its online portal relating to the Department's national monument review. Only 782,460 comments—less than a

third of the total count of online submissions—were made publicly available online as of the close of the comment period. The Regulations.gov website notes that “agencies may choose to redact, or withhold, certain submissions . . . such as those containing private or proprietary information . . . or duplicate/near duplicate examples of a mass-mail campaign.”

30. Interior Secretary Zinke’s report to President Trump acknowledged that the public “[c]omments received were overwhelmingly in favor of maintaining existing monuments.” Memorandum for the President from Secretary Zinke, “Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act” at 3 (Aug. 24, 2017). Secretary Zinke nevertheless opined that the overwhelming public support for national monuments reflected not genuine popular will, but rather, in his words, “a well-orchestrated national campaign organized by multiple organizations.” *Id.* The report went on to dismiss what it called “form comments associated with NGO-organized campaigns, which far outnumbered individual comments,” opining that “[t]oo often it is the local stakeholders who lack the organization, funding, and institutional support to compete with well-funded NGOs.” *Id.* at 3, 8.

31. On September 22, 2017, in an effort to better understand the Interior Department’s review process and the information underlying Secretary Zinke’s report and recommendations, NRDC submitted a FOIA request to the Interior Department. *See Exhibit A.*

32. NRDC's request sought the following records:
- a. "Any and all comments the [Interior] Department received on or after April 26, 2017 (whether via online submission, by mail, or by any other means) that relate to national monuments, and that are not among the 782,460 comments publicly available on the Regulations.gov website. This includes but is not limited to comments that include "private or proprietary information" or that are considered "duplicate/near duplicate examples of a mass-mail campaign." If you determine that any such comments (or any portions thereof) are exempt from disclosure, please produce a detailed ledger explaining the basis for each withheld comment or portion thereof.
 - b. "Any and all records created or transmitted on or after April 26, 2017, that contain or relate to the Department's or the Secretary's directives, policies, standards, or procedures for reviewing or analyzing public comments relating to national monuments.
 - c. "Any and all records created or transmitted on or after April 26, 2017, that contain or relate to the Department's or the Secretary's review of, assessment of, or findings about public comments relating to national monuments.
 - d. "Any and all records created or transmitted on or after April 26, 2017, that contain or relate to the Department's or the Secretary's inquiry into or findings about "NGO-organized campaigns" relating to the

Department's monument review, or directions or instructions concerning such inquiry or findings.

- e. "Any and all records created or transmitted on or after April 26, 2017, that contain or relate to the basis for the Secretary's statement that there was "a well-orchestrated national campaign organized by multiple organizations" to submit public comments.
- f. "Any records created or transmitted by the Department (or any official or staff-member thereof) on or after April 26, 2017, that relate to the Natural Resources Defense Council (NRDC)." *Id.*

33. NRDC explained that, for purposes of its request, the term "records" is consistent with the meaning of the term under FOIA, including "documents of any kind, including electronic as well as paper documents, e-mails, memoranda, letters, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), reports, summaries, notes, meeting notes or minutes, text messages, and any other compilations of data from which information can be obtained." *Id.*

34. NRDC also requested that the Interior Department waive any fees for the search and production of the requested records. NRDC is entitled to a waiver of all fees pursuant to FOIA's fee waiver provisions and the agency's regulations. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a).

35. NRDC submitted its request to the Interior Department's Office of the Secretary via the Interior Department's online FOIA portal, in accordance with the agency's FOIA regulations and guidance.

36. The Interior Department's online portal sent NRDC an automated e-mail response acknowledging receipt of the request on September 22, 2017.

37. The Interior Department's response was due within twenty business days of the request—i.e., by October 23, 2017. *See* 5 U.S.C. § 552(a)(6)(A)(i). NRDC received no response of any kind by that date.

38. On October 24, 2017—the day after FOIA's statutory deadline had run—a FOIA Officer from the Interior Department's Office of the Secretary e-mailed an acknowledgement letter to NRDC's counsel. That letter stated that NRDC's "request was received in the Office of the Secretary FOIA office on September 22, 2017, and assigned control number OS-2017-01247."

39. The letter further stated: "Because we will need to consult with one or more bureaus of the Department in order to properly process your request, the Office of the Secretary FOIA office is taking a 10-workday extension under 43 C.F.R. § 2.19. For the same reason, we are placing your request under the 'Complex' processing track. *See* 43 C.F.R. § 2.15."

40. Finally, the letter stated that the Interior Department had "classified [NRDC's] request as an 'other-use request.'" Seeking clarification, NRDC's counsel asked the FOIA Officer by e-mail whether this meant the Interior Department had denied NRDC's fee waiver request. In an e-mail dated November 1, 2017, the FOIA Officer responded: "It is not a denial of your fee waiver request. We are waiting to determine if a fee waiver i[s] necessary depending on whether there will be any fees."

41. NRDC never received any further communications from the Interior Department relating to its FOIA request.

42. Even accounting for the belated ten-day extension, the Interior Department's response was due on November 7, 2017.

43. To date, the Interior Department still has not substantively responded to NRDC's FOIA request, produced any responsive records, claimed any exemptions, or made a determination on NRDC's fee waiver request.

NRDC's second FOIA request to the Interior Department

OS-2018-00232

44. On October 29, 2017, NRDC submitted a second FOIA request to the Interior Department, this time seeking records relating to meetings between Secretary Zinke or other Interior Department leadership and outside groups or individuals regarding national monuments. *See* Exhibit B.

45. Specifically, NRDC sought the following records:

- a. "[A]ny and all records in the possession, custody, or control of the [Interior] Department . . . that pertain to meetings on or after January 20, 2017, attended by Secretary Ryan Zinke, Scott Hommel, Lori Mashburn, James Cason, Doug Domenech, and/or Downey Magallanes, relating to any national monument and/or to the Department's review of national monuments under Executive Order No. 13792, including:
- b. "Any calendar entries, invitations, itineraries, or communications referencing such meetings;

- c. “Any agendas, minutes, attendee lists, or presentations relating to such meetings;
- d. “Any records of individuals who attended these meetings or accompanied the above-named officials on any of these occasions, excluding current career federal employees;
- e. “Any briefings, summaries, or materials prepared or transmitted in relation to such meeting, whether before, during, or after the meeting itself; and
- f. “Any notes taken by any federal employee, including the above-named officials.” *Id.*

46. NRDC explained that, for purposes of its request, the term “records” is consistent with the meaning of the term under FOIA, including “documents of any kind, including electronic and paper documents, emails, memoranda, letters, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), reports, summaries, notes, meeting notes or minutes, text messages, and any other compilations of data from which information can be obtained.” *Id.*

47. NRDC also requested that the Interior Department waive any fees for the search and production of the requested records. NRDC is entitled to a waiver of all fees pursuant to FOIA’s fee waiver provisions and the agency’s regulations. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a).

48. NRDC submitted its request to the Interior Department's Office of the Secretary via the Interior Department's online FOIA portal, in accordance with the agency's FOIA regulations and guidance.

49. The Interior Department's online portal sent NRDC an automated e-mail response acknowledging receipt of the request on October 29, 2017.

50. The Interior Department's response was due within twenty business days of the request—i.e., by November 28, 2017. *See* 5 U.S.C. § 552(a)(6)(A)(i).

51. On November 21, 2017, a FOIA Officer from the Interior Department's Office of the Secretary e-mailed an acknowledgement letter to NRDC's counsel. That letter stated that NRDC's "request was received in the Office of the Secretary FOIA office on October 29, 2017, and assigned control number OS-2018-00232."

52. The letter further stated: "Because we will need to consult with one or more bureaus of the Department in order to properly process your request, the Office of the Secretary FOIA office is taking a 10-workday extension under 43 C.F.R. § 2.19. For the same reason, we are placing your request under the 'Complex' processing track. *See* 43 C.F.R. § 2.15."

53. Finally, the letter stated that the Interior Department had "classified [NRDC's] request as an 'other-use request,'" and went on to explain: "[W]e are in the process of determining whether or not your entitlements are sufficient to enable us to process your request, or if we will need to issue a formal determination on your request for a fee waiver."

54. NRDC never received any further communications from the Interior Department relating to its FOIA request.

55. Accounting for a ten-day extension, the Interior Department's response was due on December 12, 2017.

56. To date, the Interior Department still has not substantively responded to NRDC's FOIA request, produced any responsive records, claimed any exemptions, or made a determination on NRDC's fee waiver request.

NRDC's FOIA request to the Commerce Department

DOC-IOI-2018-000178

57. Also on October 29, 2017, NRDC submitted a FOIA request to the Commerce Department, seeking records relating to meetings between Secretary Ross or another member of the Commerce Department's leadership and outside groups or individuals regarding national marine monuments or sanctuaries. *See* Exhibit C.

58. Specifically, NRDC requested the following records:

- a. "[A]ny and all records in the possession, custody, or control of the [Commerce] Department . . . that pertain to meetings on or after January 20, 2017, attended by Secretary Wilbur Ross and/or Earl Comstock, relating to any national marine sanctuary or marine national monument and/or to the Department's review of national marine sanctuaries and monuments under Executive Order No. 13795, including:

- b. “Any calendar entries, invitations, itineraries, or communications referencing such meetings;
- c. “Any agendas, minutes, attendee lists, or presentations relating to such meetings;
- d. “Any records of individuals who attended these meetings or accompanied Secretary Ross or Mr. Comstock on any of these occasions, excluding current career federal employees;
- e. “Any briefings, summaries, or materials prepared or transmitted in relation to such meeting, whether before, during, or after the meeting itself; and
- f. “Any notes taken by any federal employee, including Secretary Ross or Mr. Comstock.” *Id.*

59. NRDC explained that, for purposes of its request, the term “records” is consistent with the meaning of the term under FOIA, including “documents of any kind, including electronic as well as paper documents, e-mails, memoranda, letters, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), reports, summaries, notes, meeting notes or minutes, text messages, and any other compilations of data from which information can be obtained.” *Id.*

60. In its request, NRDC requested that the Commerce Department waive any fees for the search and production of the requested records, pursuant to FOIA’s and the agency’s fee waiver provisions. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.11(*l*).

61. NRDC submitted its request to the Commerce Department's Office of the Secretary via the federal government's online FOIA portal, in accordance with the agency's FOIA regulations and guidance.

62. The federal government's online FOIA portal sent NRDC an automated e-mail response acknowledging receipt of the request on October 29, 2017, and assigning it tracking number # DOC-OS-2018-000178.

63. On October 31, 2017, NRDC's counsel received another e-mail from the federal government's online FOIA portal advising that the request's tracking number had been changed to # DOC-IOS-2018-000178.

64. The Commerce Department's response was due within twenty business days of the request—i.e., by November 28, 2017. *See* 5 U.S.C. § 552(a)(6)(A)(i).

65. On November 14, 2017, the Commerce Department sent NRDC's counsel an e-mail advising that NRDC's fee waiver request had been "fully granted." Exhibit K. The Commerce Department did not respond substantively to NRDC's FOIA request by the statutory deadline, however.

66. To date, the Commerce Department still has not substantively responded to NRDC's FOIA request, produced any responsive records, or claimed any exemptions.

* * *

67. NRDC seeks a declaration that Defendants have violated the FOIA by failing to respond to NRDC's FOIA requests and failing to promptly release all responsive, non-exempt records. NRDC also seeks an injunction ordering Defendants to provide the requested records without further delay.

68. NRDC brings this action on behalf of itself and its members. NRDC and its members have been and continue to be injured by Defendants' failure to provide responsive records. The requested relief will redress these injuries.

CLAIM FOR RELIEF

COUNT ONE

5 U.S.C. § 552(a) (FOIA)

All Defendants

69. NRDC incorporates by reference all preceding paragraphs.

70. NRDC has a statutory right under FOIA to the records it seeks.

71. Defendants have violated their statutory duties under FOIA, 5 U.S.C. § 552(a), and the applicable implementing regulations, to release all non-exempt, responsive records to NRDC. Defendants have identified no basis, let alone any valid basis, for withholding or partially withholding the records that are responsive to NRDC's FOIA requests.

72. NRDC is entitled to all non-exempt responsive documents at no cost because disclosure of the requested records would contribute significantly to public understanding and is not primarily in NRDC's commercial interest. 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a); 15 C.F.R. § 4.11(l).

73. NRDC is being harmed by Defendants' unlawful withholding of the requested records, and it will continue to be harmed unless Defendants are compelled to comply with FOIA's statutory requirements.

REQUEST FOR RELIEF

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

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

B. Declare that Defendant Interior Department has violated FOIA by failing to make a determination as to NRDC's fee waiver requests;

C. Order Defendants to release to NRDC, without further delay and at no cost to NRDC, all responsive, non-exempt records in their possession, custody, or control;

D. If either Defendant contends that any responsive records are exempt or partially exempt from disclosure under FOIA, order that Defendant to produce a log identifying any such records or parts thereof and the basis for the withholdings, and require Defendant to prove that its decision to withhold or redact any such records is justified by law;

E. Order Defendant Interior Department to grant NRDC's fee waiver in full;

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

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

Dated: January 24, 2018

Respectfully submitted,

/s/ Nancy S. Marks

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Counsel for NRDC

Exhibit C

NRDC

October 29, 2017

Via online submission

Department of Commerce
FOIA Officer

**Re: FOIA Request for Records Relating to Meetings Relating
to National Marine Sanctuaries and Monuments**

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and applicable Department of Commerce regulations, 15 C.F.R. § 4.1-4.11.

I. Description of Records Sought

Please produce any and all records in the possession, custody, or control of the Department of Commerce (“the Department”) that pertain to meetings on or after January 20, 2017, attended by Secretary Wilbur Ross and/or Earl Comstock, relating to any national marine sanctuary or marine national monument and/or to the Department’s review of national marine sanctuaries and monuments under Executive Order No. 13795, including:

- Any calendar entries, invitations, itineraries, or communications referencing such meetings;
- Any agendas, minutes, attendee lists, or presentations relating to such meetings;
- Any records of individuals who attended these meetings or accompanied Secretary Ross or Mr. Comstock on any of these occasions, excluding current career federal employees;
- Any briefings, summaries, or materials prepared or transmitted in relation to such meeting, whether before, during, or after the meeting itself; and
- Any notes taken by any federal employee, including Secretary Ross or Mr. Comstock.

For purposes of this request, the term “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, memoranda, letters, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), reports, summaries, notes, meeting notes or minutes, text messages, and any other compilations of data from which information can be obtained.

Under FOIA, you are obligated to provide 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.”). We request that you provide the responsive records in electronic .pdf format without “profiles” or “embedded files.” Please do not provide the records in a single or “batched” .pdf file. To the extent that a subset of the requested records is readily available, please provide that subset immediately while you continue to search for additional records to complete your response.

If you decide to invoke any FOIA exemptions in response to this request, please include in your response sufficient information for us to assess the basis for the exemption(s), including any interest(s) that would be harmed by release. Please include a detailed ledger which includes (1) basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and (2) complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to 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 any requested records are exempt from disclosure, the FOIA requires that you produce any reasonably segregable non-exempt portions within the statutory time limit. *See* 5 U.S.C. § 552(b). *See, e.g., Gatore v. U.S. Dep’t of Homeland Sec.*, 177 F. Supp. 3d 46, 53 (D.D.C. 2016); *Gosen v. U.S. Citizenship & Immigration Servs.*, 118 F. Supp. 3d 232, 243-44 (D.D.C. 2015).

Please produce the records on a rolling basis. The Department’s search for or deliberations concerning certain records should not delay the production of others that the Department has already retrieved and elected to produce. *See generally* 15 C.F.R. § 4.7. If the Department takes the position that any of these records are publicly available, please indicate where each of them may be found.

II. Request for a Fee Waiver

NRDC asks that the Department waive any fee it would otherwise charge for the search and production of the records described above. FOIA provides that a requester is entitled to a fee waiver when “disclosure of the information is in the public interest because it [A] is likely to contribute significantly to public understanding of the operations or activities of the government and [B] is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 15 C.F.R. § 4.11(l). The disclosure NRDC seeks here meets both these requirements.

A. Disclosure is likely to contribute significantly to public understanding of the operations or activities of the government

First, the disclosure requested here is “likely to contribute significantly to public understanding of the operations or activities of the government,” 5 U.S.C. § 552(a)(4)(A)(iii), based on the following factors. *See* 15 C.F.R. § 4.11(l)(2)(i)-(iv) (describing factors to be considered).

1. Subject of the request (15 C.F.R. § 4.11(l)(2)(i))

The requested records directly concern “the operations or activities of the Government.” 15 C.F.R. § 4.11(l)(2)(i). The records pertain to the Department’s “review of all designations and expansions of National Marine Sanctuaries, and of all designations and expansions of Marine National Monuments under the Antiquities Act of 1906 . . . designated or expanded within the 10-year period prior to the date of this order” and the Department’s resulting report. Executive Order No. 13795, section 4(b)(i)-(ii). Disclosure of the records will provide context for the Department’s report and help the public to evaluate the Department’s recommendations and whatever actions the President, Congress, or other federal government officials take with respect to the affected sanctuaries and monuments.

2. Informative value of the information to be disclosed (15 C.F.R. § 4.11(l)(2)(ii))

Disclosure of the requested records is “likely to contribute’ to an understanding of Government operations or activities.” 15 C.F.R. § 4.11(l)(2)(ii). The records are relevant to the Department’s review of national marine sanctuaries and monuments, and therefore they are likely to be “meaningfully informative” in providing context for the Department’s report and for any actions the Administration may take with respect to those sanctuaries or monuments. *Id.* Because the Department’s review has

attracted broad public attention (as explained below), and because the requested records have not previously been made available, disclosure will “contribute’ to an increased public understanding of those operations or activities.” *Id.*

**3. Contribution to public understanding of the subject
(15 C.F.R. § 4.11(l)(2)(iii))**

Because NRDC is a “representative of the news media,” as explained in Part III below, the Department must presume that this disclosure is likely to contribute to public understanding of the subject of the disclosure. 15 C.F.R. § 4.11(l)(2)(iii). However, even if NRDC were not a media requester, NRDC satisfies the requirement that disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.” *Id.*

NRDC does not seek the requested records for its own benefit. Rather, it seeks the records to provide new information to the public about the Department’s review process and its resulting report and recommendations. Disclosure of this information will make possible a more complete public understanding of the federal government’s decision-making process and intentions regarding the national marine sanctuaries and monuments at issue. *See* 15 C.F.R. § 4.11(l)(2)(iii) (requiring requester to show that disclosure 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”). There is more than a reasonable likelihood that disclosure of the requested records will significantly increase public understanding of the government’s review process and actions among a broad audience of interested people. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

NRDC has both the ability and the intent to disseminate the information obtained through this request “in a manner that will be informative to the understanding of a reasonably broad audience of persons interested in the subject.” 43 C.F.R. § 2.48(a)(2)(iv); *see also id.* § 2.48(a)(2)(v) (considering requester’s “ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject”). NRDC has more than two million members and online activists, tens of thousands of whom have responded to action alerts relating to the Department’s monument review in particular. And, as detailed below, NRDC has extensive communications capabilities and a proven history of disseminating information of public interest, including information obtained from FOIA requests. NRDC has both the capability and the intent to broadly disseminate the information it seeks here to its members and to the

general public, thereby contributing to a better general understanding of the Department's review process and its ultimate findings.

NRDC uses numerous modes of communication to disseminate information to its members and to the public at large. These include:

- (1) NRDC's website (<http://www.nrdc.org>), which is updated daily and draws approximately 1.7 million page views and 1.5 million unique page views per month, and which features NRDC staff blogs, original reporting on environmental news stories, and in-depth analyses on topics of public interest;
- (2) NRDC's Activist email list, which includes more than 2.4 million subscribers who receive regular communications on urgent environmental issues;
- (3) *NRDC Insider* (<http://www.nrdc.org/newsletter>), a monthly electronic environmental newsletter distributed by email to more than 1.47 million subscribers;
- (4) NRDC's Facebook page, with 909,921 likes and 872,632 followers;
- (5) NRDC's Twitter handle, with 274,922 followers;
- (6) NRDC's Instagram feed, with 111,024 followers;
- (7) NRDC's YouTube channel (<https://www.youtube.com/user/NRDCflix>), with 21,050 subscribers; and
- (8) online media outlets like Medium (<https://medium.com/natural-resources-defense-council>) and Huffington Post (<http://www.huffingtonpost.com/topic/natural-resources-defense-council>).

NRDC also publishes legal and scientific analyses, policy documents, and reports; issues press releases; and directs and produces movies (including *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*). NRDC has more than fifty staff members dedicated to communications work.

In addition, NRDC employees and representatives are widely quoted in the news media; participate in interviews on television, radio, and web broadcasts; appear at conferences; provide congressional testimony; and contribute articles and op-eds to numerous national newspapers, magazines, academic journals, and books. *See, e.g.,* Zoe Carpenter, *After Promising a "Fair Hearing" on Monuments, Secretary Zinke Shuts Out the Public*, THE NATION (May 18, 2017) (quoting NRDC Land and Wildlife Program Director

Sharon Buccino); Op-Ed, *Don't Take Bears Ears Away from Us*, SALT LAKE TRIBUNE (May 6, 2017) (contributed by NRDC trustee Robert Redford); Research Article, *The Requirement To Rebuild U.S. Fish Stocks: Is It Working?* MARINE POLICY (July 2014) (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell); Transcript, *Conservationists Call for Quiet: The Ocean Is Too Loud*, ALL THINGS CONSIDERED (July 28, 2013) (featuring NRDC Marine Mammal Protection Program Director Michael Jasny); Testimony of Johanna Wald, NRDC Senior Attorney, before the U.S. Senate Committee on Energy and Natural Resources, Hearing on the California Desert Protection Act of 2010 (May 20, 2010).

NRDC's legal and scientific experts routinely analyze information obtained through FOIA and use it to inform the public about a variety of environmental issues. *See, e.g.*, Theo Spencer, *The Fight to Stop a Strip Mine Near Bryce Canyon: A History*, NRDC Blog (June 5, 2017) (analyzing documents obtained through partner organization's FOIA request regarding a proposed expansion of an open pit strip mine in Utah); Kevin Bogardus *et al.*, "Homework Assignment": *How Pebble Lobbied Trump's EPA*, E&E NEWS (June 8, 2017) (quoting NRDC staff discussing results of a FOIA seeking communications between EPA and Pebble Mine developers); Tom Neltner *et al.*, *Generally Recognized as Secret: Chemicals Added to Food in the United States*, NRDC Report (2014) (analyzing FOIA documents relating to potentially unsafe chemicals added to food); Carmen Cordova, *Playing Chicken with Antibiotics*, NRDC Issue Brief (2014) (describing FDA records, obtained through FOIA, which show widespread violations of the agency's safety standards for antibiotic feed additives); Dan Flynn, *NRDC Releases FSIS Inspection Reports on Foster Farms*, FOOD SAFETY NEWS (Sept. 12, 2014) (reporting on documents NRDC obtained through FOIA relating to safety violations by poultry company, and linking to the documents); Mae Wu *et al.*, *Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, NRDC Report (2010) (analyzing White House documents obtained through FOIA and from other sources to inform the public about EPA's decision not to protect wildlife and workers from the pesticide atrazine).

In sum, NRDC has a proven ability to digest, synthesize, and disseminate information obtained through FOIA to a broad audience of interested persons. NRDC's more than two million members and activists, when combined with the members of the general public who read NRDC's communications online and in the news media, clearly constitute "a reasonably broad audience of persons interested in the subject." 15 C.F.R. § 4.11(l)(2)(iii). NRDC intends to disseminate any newsworthy information in the released records to this large audience in a manner that will

meaningfully enhance the public's understanding of the federal government's decision-making process. NRDC does not seek records that have been previously disclosed to the public. *See id.* Disclosure may therefore confirm, clarify, or contradict documents or statements in the public domain or actions taken by the federal government, and it will enable the public to better evaluate the federal government's actions.

4. Significance of the contribution to public understanding (15 C.F.R. § 4.11(l)(2)(iv))

Finally, the records requested will shed significant light on a matter of considerable public interest and concern. *See* 15 C.F.R. § 4.11(l)(2)(iv).

The American public has demonstrated a strong interest in the Department's review of national marine sanctuaries and monuments. According to the Regulations.gov website, nearly 100,000 non-duplicative public comments relating to the Department's review of national marine sanctuaries and monuments were submitted online. *See* <https://www.regulations.gov/docket?D=NOAA-NOS-2017-0066> (last visited Sept. 29, 2017). The Department's review has also prompted many letters to the editor and op-eds, widespread social media activism, and numerous media reports in local and national publications. *See, e.g.,* Guy Kovner, *Marine Sanctuaries that Protect California Coast Get Strong Public Support, Conservationists Say*, THE PRESS-DEMOCRAT (Aug. 17, 2017); Zack Klyver, *Op-Ed: Marine Monument Vital for a Healthy, Bountiful Ocean*, BANGOR DAILY NEWS (Aug. 3, 2017); David Helvarg, *Op-Ed: Time Is Running Out to Stop Trump From Opening California Marine Sanctuaries to Oil Drilling*, LOS ANGELES TIMES (July 7, 2017); Marine Conservation Institute, *Blog: Analysis Shows Overwhelming Public Support for Marine Monuments and Sanctuaries* (Aug. 15, 2017), at <https://blog.marine-conservation.org/2017/08/overwhelming-support-for-marine-monuments-and-sanctuaries.html>.

Despite this strong showing of public interest and concern, very little information is publicly available about the Department's information-gathering and review process. Disclosure of the requested records concerning the Department's meetings with outside individuals and groups will significantly contribute to public understanding of the Department's review process. Disclosure will also provide valuable context for understanding the Department's report, and will enable the public more effectively to evaluate the legal and factual bases for the Department's assertions and recommendations.

For these reasons, NRDC has met the first prerequisite for a fee waiver request under the FOIA.

B. Disclosure is not primarily in NRDC's commercial interest

Second, NRDC has no commercial interests that would be furthered by the requested disclosure. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.11(l)(1)(ii). Therefore, it satisfies the second prerequisite for a fee waiver request under the FOIA.

NRDC is a not-for-profit organization. It does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted); *see also Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (recognizing that “[the fee 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 particular those from journalists, scholars and nonprofit public interest groups.” (internal quotation marks omitted)). Requesters wish to serve the public by reviewing, analyzing, and disseminating newsworthy and presently non-public information about the federal government's decision-making process with respect to national marine sanctuaries and monuments, and this is precisely the sort of “investigation[]” of “governmental choices and highlighting [of] possible abuses” for which the fee waiver was enacted. *Better Gov't Ass'n*, 780 F.2d at 93.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to NRDC's role of educating its members, activists, and the general public. NRDC has no commercial interest in the disclosure of the records, and it will realize no commercial benefit or profit from the disclosure of the requested records. For these reasons, NRDC is entitled to a fee waiver under the FOIA.

III. Request for a Reduction of Fees

In the alternative, even if the Department denies NRDC's fee waiver request, NRDC qualifies as a “representative of the news media” that is entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and applicable regulations, 15 C.F.R. § 4.11(c), (d); *see also id.* § 4.11(b)(6) (defining “[r]epresentative of the news media”).

A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its

editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep’t of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described in detail in Section II above, NRDC publishes original reports and analyses on conservation-related topics on its website, in its newsletter, and in blog posts; it contributes articles and op-eds to a variety of online and print platforms; and it maintains free online libraries of documents, publications, and other information of interest to the general public. These types of publications and media sources constitute news media outlets for purposes of FOIA. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”); *see also* 15 C.F.R. § 4.11(b)(6) (“Examples of news-media entities are . . . publishers of periodicals . . . including news organizations that disseminate solely on the Internet.”).

Public interest organizations performing these sorts of public communication functions “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-89 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union); *see also Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 164 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”).

NRDC intends to review the records it obtains through this FOIA request and, if the information is appropriately newsworthy, to analyze them, synthesize them with information from other sources, and create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of its publications or other suitable media channels. NRDC will not resell the information obtained through this FOIA request to other media organizations. For these reasons, even if the Department denies NRDC’s fee waiver request, it should grant a fee reduction consistent with 5 U.S.C. § 552(a)(4)(A)(ii).

IV. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with the Department's FOIA regulations. *See* 15 C.F.R. § 4.11. Please contact me, however, before doing anything that would cause the fee to exceed \$250. NRDC reserves the right to seek administrative or judicial review of any fee waiver denial.

V. Conclusion

Please email the requested records or, if it is not possible to email, mail a CD of electronic copies of the requested records to me at the address listed below. Please call or email me with any questions. Thank you for your time.

Sincerely,

/s/ Katherine Desormeau
Katherine Desormeau
Natural Resources Defense Council, Inc.
111 Sutter Street, 21st Floor
San Francisco, CA 94104
Tel: (415) 875-6158
kdesormeau@nrdc.org

Tracking Number	Requester	Type
DOC-NOAA-2018-001289	Earth Island Institute	Request

DOC-NOAA-2018-001292 PETA Foundation Request

DOC-NOAA-2018-001290 E&E News Request

DOC-NOAA-2018-001295 Weiss Serota Helfman Cole & Berman, F Request

Track	Submitted	Assigned To	Due
Simple	04/26/2018	Tawand Hodge Tonic	05/30/2018

Simple	04/27/2018	Ellen Sebastian	05/30/2018
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Expedited	04/27/2018	Kelvin James	05/30/2018
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Simple	04/27/2018	Tawand Hodge Tonic	05/30/2018
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Request

1. All permits in existence issued by the National Marine Fisheries Service (NMFS) for dolphin species in captivity (with the exception of *Orcinus orca* (orcas)). This request includes bottlenose dolphins (genus *Tursiops*), Pacific white-sided dolphins (*Lagenorhynchus obliquidens*), belugas (*Delphinapterus leucas*), pilot whales (genus *Globicephala*), and any other dolphin species in captivity (with the exception of orcas).
2. From January 1, 2008, until the present, all medical/veterinary reports about captive dolphins (with the exception of orcas) in non-Federal facilities, including but not limited to: necropsy reports; reports related to the administration of drugs/medicines; records of diseases and infections; reports related to any therapies used (including hormone therapy) and the outcomes; and any other information related to the health of the dolphins in captivity (with the exception of orcas).
3. From January 1, 2000, until the present, all information related to research conducted on captive dolphins (with the exception of orcas) in non-Federal facilities, including but not limited to: registrations for research; research protocols; findings; annual reports; and any other information related to research conducted on captive dolphins (with the exception of orcas) in non-Federal facilities.
4. From January 1, 2008, until the present, all accident or incident reports involving cetaceans in non-Federal facilities, including but not limited to: aggressive behavior reports; reports regarding injuries to humans or other animals; and any other information related to accidents involving cetaceans in non-Federal facilities.
5. All documents related to the beluga whale stranded in Alaska's Cook Inlet in September 2017 (known as "Tyonek") and now housed in SeaWorld San Antonio.

See Supporting Files for Additional Detail

All records, including inspections for evaluations, provided by the Mexican Secretaria de Agricultura's Recursos Hidraulicos pertaining to Yupik, the polar bear held at the Morelia Zoo.

I request that a copy of the report done by outside auditors in 2017 that looked into the safety record of NOAA's program dealing with at-sea monitors and observers.

Please accept this as our official FOIA request to obtain information for a report summary from the National Marine Inventory for Gulf World Marine Park (permit holder). We would like any information pertaining to live animals (dolphins and seals/sea lions).

David Landsman - NOAA Federal

From: David Landsman - NOAA Federal
Sent: Friday, May 4, 2018 7:13 PM
To: Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate
Subject: request for approval of Interim Release for NOAA-2017-001991
Attachments: DOC-NOAA-2017-001991 Signed 2nd Interim FAL.pdf; DOC-NOAA-2017-001991_T_V Margara - NMFS FOIA Tasker_Interim Release 2_signed.pdf

Hi Mark –

For this release (IR2) for NOAA-2017-001991, I believe there should now be a review task in your FOIAonline inbox.

The tasker (approved by GC and PO/RO) and the final action action letter (approved by Deputy AA) have been attached to FOIAonline in the “other correspondence” and also attached here; and the responsive documents have been uploaded.

Let me know if you need anything else to complete your review – I am hoping to get this one complete at your earliest convenience.

Thanks.
David

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[NOAA Restoration Center](#)
[206-526-4720](#) (o)
[\(b\)\(6\)](#) (c)



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

Thomas C. Sullivan
Moseley, Prichard, Parrish, Knight & Jones
501 West Bay Street
Jacksonville, FL 32202

MAY 03 2018

Re: FOIA Request DOC-NOAA-2017-001991

Dear Thomas Sullivan:

This letter is in response to your Freedom of Information Act (FOIA) request, which was received by our office on our office on February 13, 2018.

An initial interim release was provided to you on March 26, 2018.

The National Marine Fisheries Service (NMFS), Office of Habitat Conservation (OHC) has located an additional 14 documents responsive to your request. Enclosed is the second interim response that contains 14 documents with redactions under exemption 5 U.S.C.552(b)(5), which prohibits from disclosure records that contain information concerning communications within or between agencies and are protected by legal privileges.

We are continuing to search for and review records responsive to your request. We will forward any additional material to you as soon as possible.

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@doc.gov, 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, or e-mail subject line.

FOIA appeals posted to the e-mail box, 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 David Landsman at david.landsman@noaa.gov or by phone at 206-526-4720, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,



Samuel D. Rauch III,
Deputy Assistant Administrator
for Regulatory Programs

April 18, 2018

TASK MEMORANDUM FOR: Lead FOIA Coordinator (reassign from OGC)
FROM: NOAA FOIA Office
SUBJECT: FOIA Request No. DOC-NOAA-2017-001991

I am forwarding a copy of the attached FOIA request for your attention. Please follow this procedure:

1. Note the Time Period and Due Date:

The search period date for this FOIA April 27, 2006 to February 5, 2018 or the start date of actual document search. In order to complete this request within the regulatory time-frame, please respond to the requester by **03/20/2018**.

2. Attach Completed FOIA Search Log(s) (See “Correspondence Other” in FO for template)

Search every location that could reasonably contain responsive documents.

3. Assemble Potentially Responsive Records:

Note that potentially responsive records may include emails with attachments, final documents, draft documents, maps, shapefiles, raw data, handwritten notes, informal records, and electronic records.

4. Produce Two Document Sets:

Once assembled, produce two document-sets in electronic format. Mark each identical page from each document-set with a uniquely identifiable number. Maintain one set as an original set. The original documents must have no redactions. Maintain the original document set in an accessible repository for six years.

Use the second document-set to apply FOIA exemptions. **Annotate the FOIA exemptions next to, or over, each redaction.**

As you organize the potentially responsive documents, please identify documents or portions of documents that originated with another office, agency, or bureau. Please refer the documents, or request a consultation, as required by FOIA regulations.

5. Summarize the FOIA Review:

Please check **ALL** appropriate boxes.

Interim Response #2

Final Response

The NMFS FOIA office closed this request due to non-payment of fees, or requester's failure to respond to correspondence or,

Responsive records that have been reviewed at this time can be released in their entirety.

Responsive records (14) in our possession contain segregable exempted material and should be partially withheld. The applicable exemption is noted over all drawn redactions.

Responsive records in our possession contain exempted material and should be withheld in full. The applicable exemption is noted over all drawn redactions and/or listed in the response letter and index.

Responsive records in our possession belonging to another, office, bureau, or federal agency for disclosure determination(s) have been sent to that component for referral or consultation.

Responsive records in our possession are openly available to the public.

A reasonable search was conducted and no responsive records were located.

A foreseeable harm review and analysis was not applicable.

A foreseeable harm review and analysis was completed for documents containing entirely or partially withheld content. Reviewers determined that disclosure of withheld content would result in harm to an interest protected by the statutory exemption(s), or that disclosure is prohibited by law.

Check **all** exemptions that apply to this foreseeable harm review:

(b)(2) Agency Personnel Rules/Practices

(b)(3) Federal Law Prohibits Disclosure

(b)(4) Business Trade and Financial Information

(b)(5) Attorney Work Product/Attorney-Client Privilege/Deliberative Process

(b)(6) Personal Privacy Protection

(b)(7) Law Enforcement Purposes

6. Verify the following items if a Final Response is being made:

Admin Cost tab has been completed (or request is being closed as Failure to Pay Fee or Failure to Clarify Scope).

NMFS FOIA Liaison (or assistant) has been set as first reviewer in the Review tab.

The responsive records have been uploaded to FOIAonline (FO) and properly coded for release type (UR, RR, etc.).

Exemptions used have also been noted in FO next to each record (click the pencil icon).

A FORDEM or Bulk Upload memo is being used in place of the responsive records and has been uploaded to both the Records tab and Other Correspondence.

Search Logs have been properly filled out, signed, and uploaded to Other Correspondence (if search was conducted).

The Final Action Letter (FAL) contains an accurate count of the records being released and describes all exemption(s) being applied to the records.

Draft FAL is uploaded to Other Correspondence.

7. Obtain Signatures to Verify Review:

LANDSMAN.DAVID
D.A.1365838638

Digitally signed by
LANDSMAN.DAVID.A.1365838638
Date: 2018.04.18 14:38:22 -07'00'

Lead Coordinator

Date

SELBERG.CARRIE
E.D.136587213
5

Digitally signed by
SELBERG.CARRIE.D.136587
2135
Date: 2018.04.26 14:55:33
-04'00'

RO/LO Senior Official

Date

STORZ.CHRISTINA.D
EANNA.1081265093

Digitally signed by
STORZ.CHRISTINA.DEANNA.1081265093
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI,
ou=OTHER, cn=STORZ.CHRISTINA.DEANNA.1081265093
Date: 2018.04.20 10:20:39 -04'00'

4/20/2018

*General Counsel

Date

GC was consulted on this response, but did not review documents. GC has no legal objection assuming the information contained in this form is accurate.

GC was consulted and reviewed certain documents containing possible redactions and withholdings. GC has no legal objection to the agency's response for those specific documents.

*** NOTE:** GC review is necessary for any FOIA release that is in litigation or is related to a request in litigation. However, GC signature is not necessary for full releases that do not involve litigation or the threat of litigation.

From: postmaster@DOCGOV.onmicrosoft.com
Sent: Thursday, May 3, 2018 6:47 PM
To: Mark.Graff@noaa.gov
Subject: Undeliverable: Weekly FOIA Incoming and High Visibility Requests
Attachments: details.txt; Weekly FOIA Incoming and High Visibility Requests



Your message to cholmes@doc.gov couldn't be delivered.

cholmes wasn't found at **doc.gov**.

Mark.Graff Action Required	Office 365	cholmes Recipient
Unknown To address		

How to Fix It

The address may be misspelled or may not exist. Try one or more of the following:

- Send the message again following these steps: In Outlook, open this non-delivery report (NDR) and choose **Send Again** from the Report ribbon. In Outlook on the web, select this NDR, then select the link "**To send this message again, click here.**" Then delete and retype the entire recipient address. If prompted with an Auto-Complete List suggestion don't select it. After typing the complete address, click **Send**.
- Contact the recipient (by phone, for example) to check that the address exists and is correct.
- The recipient may have set up email forwarding to an incorrect address. Ask them to check that any forwarding they've set up is working correctly.
- Clear the recipient Auto-Complete List in Outlook or Outlook on the web by following the steps in this article: [Fix email delivery issues for error code 5.1.10 in Office 365](#), and then send the message again. Retype the entire recipient address before selecting **Send**.

If the problem continues, forward this message to your email admin. If you're an email admin, refer to the **More Info for Email Admins** section below.

Was this helpful? [Send feedback to Microsoft](#).

More Info for Email Admins

Status code: 550 5.1.10

This error occurs because the sender sent a message to an email address hosted by Office 365 but the address is incorrect or doesn't exist at the destination domain. The error is reported by the recipient domain's email server, but most often it must be fixed by the person who sent the message. If the steps in the **How to Fix It** section above don't fix the problem, and you're the email admin for the recipient, try one or more of the following:

The email address exists and is correct - Confirm that the recipient address exists, is correct, and is accepting messages.

Synchronize your directories - If you have a hybrid environment and are using directory synchronization make sure the recipient's email address is synced correctly in both Office 365 and in your on-premises directory.

Errant forwarding rule - Check for forwarding rules that aren't behaving as expected.

Forwarding can be set up by an admin via mail flow rules or mailbox forwarding address settings, or by the recipient via the Inbox Rules feature.

Recipient has a valid license - Make sure the recipient has an Office 365 license assigned to them. The recipient's email admin can use the Office 365 admin center to assign a license (Users > Active Users > select the recipient > Assigned License > Edit).

Mail flow settings and MX records are not correct - Misconfigured mail flow or MX record settings can cause this error. Check your Office 365 mail flow settings to make sure your domain and any mail flow connectors are set up correctly. Also, work with your domain registrar to make sure the MX records for your domain are configured correctly.

For more information and additional tips to fix this issue, see [Fix email delivery issues for error code 5.1.10 in Office 365](#).

Original Message Details

Created Date: 5/3/2018 10:46:37 PM
Sender Address: Mark.Graff@noaa.gov
Recipient Address: cholmes@doc.gov
Subject: Weekly FOIA Incoming and High Visibility Requests

Error Details

Reported error: 550 5.1.10 RESOLVER.ADR.RecipientNotFound; Recipient cholmes@doc.gov not found by SMTP address lookup
DSN generated by: CY4PR09MB2134.namprd09.prod.outlook.com

Message Hops

HOP	TIME (UTC)	FROM	TO	WITH	RELAY TIME
1	5/3/2018 10:46:37 PM		10.200.44.82	HTTP	*
2	5/3/2018 10:47:20 PM		mail-qt0-x231.google.com	SMTP	43 sec
3	5/3/2018 10:47:20 PM	mail-qt0-x231.google.com	CY1GCC01FT005.mail.protection.outlook.com	Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA_P384)	*
4	5/3/2018 10:47:21 PM	CY1GCC01FT005.eop-gcc01.prod.protection.outlook.com	MWHPR09CA0023.outlook.office365.com	Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA384)	1 sec
5	5/3/2018 10:47:21 PM	MWHPR09CA0023.namprd09.prod.outlook.com	CY4PR09MB2134.namprd09.prod.outlook.com	Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA384_P256)	*

Original Message Headers

Received: from MWHPR09CA0023.namprd09.prod.outlook.com (2603:10b6:300:80::33) by CY4PR09MB2134.namprd09.prod.outlook.com (2603:10b6:903:8d::13) with Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA384_P256) id 15.20.696.14; Thu, 3 May 2018 22:47:21 +0000
Received: from CY1GCC01FT005.eop-gcc01.prod.protection.outlook.com (2a01:111:f400:7d02::203) by MWHPR09CA0023.outlook.office365.com (2603:10b6:300:80::33) with Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA384) id 15.20.715.18 via Frontend Transport; Thu, 3 May 2018 22:47:21 +0000
Authentication-Results: spf=pass (sender IP is 2607:f8b0:400d:c0d::231) smtp.mailfrom=noaa.gov; doc.gov; dkim=pass (signature was verified) header.d=noaa.gov;doc.gov; dmarc=pass action=none header.from=noaa.gov;
Received-SPF: Pass (protection.outlook.com: domain of noaa.gov designates 2607:f8b0:400d:c0d::231 as permitted sender) receiver=protection.outlook.com; client-ip=2607:f8b0:400d:c0d::231; helo=mail-qt0-x231.google.com;
Received: from mail-qt0-x231.google.com (2607:f8b0:400d:c0d::231) by CY1GCC01FT005.mail.protection.outlook.com (2a01:111:e400:7d00::257) with Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA_P384) id 15.20.696.11 via Frontend Transport; Thu, 3 May 2018 22:47:20 +0000
Received: by mail-qt0-x231.google.com with SMTP id d3-v6so25068253qtp.11 for <cholmes@doc.gov>; Thu, 03 May 2018 15:47:20 -0700 (PDT)
DKIM-Signature: v=1; a=rsa-sha256; c=relaxed/relaxed; d=noaa.gov; s=google; h=mime-version:from:date:message-id:subject:to:cc; bh=32XNhTLx7q9XKgAsNusx7+tNppu8/k/vOUwHR/uCOoY=; b=jZ+6gNjWR+UQ4M40V1sep3xG90E4AIZ7bkVbE8X3IBFrFvVYfxW0o72GUWDM1pKdmg

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d=le100.net; s=20161025;
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Thu, 03 May 2018 15:47:18 -0700 (PDT)

MIME-Version: 1.0
Received: by 10.200.44.82 with HTTP; Thu, 3 May 2018 15:46:37 -0700 (PDT)
From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>Date: Thu, 3 May 2018 18:46:37 -0400

Message-ID: <CAFW6A_5pKkCDby=CfwBbmPU8m9tPf7S2vugLz+NmQE=EWwYcg@mail.gmail.com>Subject: Weekly FOIA Incoming and High Visibility Requests

To: Stephen Lipps - NOAA Federal <stephen.lipps@noaa.gov>, "Holmes, Colin" <cholmes@doc.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>, Robert Hogan <robert.j.hogan@noaa.gov>, _DUS Staff <duso.staff@noaa.gov>, Tanya Dobrzynski - NOAA Federal <tanya.dobrzynski@noaa.gov>, Stuart Levenbach - NOAA Federal <Stuart.levenbach@noaa.gov>, Kevin Wheeler - NOAA Federal <Kevin.Wheeler@noaa.gov>, Brandon Elsner - NOAA Federal <Brandon.Elsner@noaa.gov>, Taylor Jordan - NOAA Federal <Taylor.Jordan@noaa.gov>, Erik Noble - NOAA Federal <erik.noble@noaa.gov>, Wendy Lewis - NOAA Federal <Wendy.Lewis@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>, Lawrence Charters - NOAA Federal <lawrence.charters@noaa.gov>, Allison Soussi-Tanani - NOAA Federal <Allison.Soussi-Tanani@noaa.gov>, "Bogomolny, Michael (Federal)" <MBogomolny@doc.gov>, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov>, John Almeida - NOAA Federal <john.almeida@noaa.gov>, Michael Weiss - NOAA Federal <michael.weiss@noaa.gov>, Maria Williams - NOAA Federal <Maria.Williams@noaa.gov>, Shawn Martin - NOAA Federal <shawn.martin@noaa.gov>, Kathryn Kempton - NOAA Federal <kathryn.kempton@noaa.gov>, Ed Kearns - NOAA Federal <ed.kearns@noaa.gov>, Cheryl Scannell - NOAA Federal <cheryl.scannell@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>, _OCIO GPD <ocio.gpd@noaa.gov>, Darone Jones - NOAA Federal <darone.jones@noaa.gov>, Christina Storz - NOAA Federal <christina.storz@noaa.gov>Content-Type: multipart/mixed; boundary="000000000005ba943056b54fc4e"
Return-Path: mark.graff@noaa.gov
X-EOPAttributedMessage: 0
X-EOPTenantAttributedMessage: 44cf3ec3-840c-4086-b7de-e3bc9a6c2db4:0
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X-MS-TrafficTypeDiagnostic: CY4PRO9MB2134:

Reporting-MTA: dns;CY4PR09MB2134.namprd09.prod.outlook.com
Received-From-MTA: dns;mail-qt0-x231.google.com
Arrival-Date: Thu, 3 May 2018 22:47:21 +0000

Final-Recipient: rfc822;cholmes@doc.gov

Action: failed

Status: 5.1.10

Diagnostic-Code: smtp;550 5.1.10 RESOLVER.ADR.RecipientNotFound; Recipient cholmes@doc.gov
not found by SMTP address lookup

X-Display-Name: Holmes, Colin

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Thu, 3 May 2018 18:46:37 -0400
Subject: Weekly FOIA Incoming and High Visibility Requests
To: Stephen Lipps - NOAA Federal <stephen.lipps@noaa.gov>, "Holmes, Colin" <cholmes@doc.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>, Robert Hogan <robert.j.hogan@noaa.gov>, _DUS Staff <duso.staff@noaa.gov>, Tanya Dobrzynski - NOAA Federal <tanya.dobrzynski@noaa.gov>, Stuart Levenbach - NOAA Federal <Stuart.levenbach@noaa.gov>, Kevin Wheeler - NOAA Federal <Kevin.Wheeler@noaa.gov>, Brandon Elsner - NOAA Federal <Brandon.Elsner@noaa.gov>, Taylor Jordan - NOAA Federal <Taylor.Jordan@noaa.gov>, Erik Noble - NOAA Federal <erik.noble@noaa.gov>, Wendy Lewis - NOAA Federal <Wendy.Lewis@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>, Lawrence Charters - NOAA Federal <lawrence.charters@noaa.gov>, Allison Soussi-Tanani - NOAA Federal <Allison.Soussi-Tanani@noaa.gov>, "Bogomolny, Michael (Federal)" <MBogomolny@doc.gov>, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov>, John Almeida - NOAA Federal <john.almeida@noaa.gov>, Michael Weiss - NOAA Federal <michael.weiss@noaa.gov>, Maria Williams - NOAA Federal <Maria.Williams@noaa.gov>, Shawn Martin - NOAA Federal <shawn.martin@noaa.gov>, Kathryn Kempton - NOAA Federal <kathryn.kempton@noaa.gov>, Ed Kearns - NOAA Federal <ed.kearns@noaa.gov>, Cheryl Scannell - NOAA Federal <cheryl.scannell@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>, _OCIO GPD <ocio.gpd@noaa.gov>, Darone Jones - NOAA Federal <darone.jones@noaa.gov>, Christina Storz - NOAA Federal <christina.storz@noaa.gov>
[NRDC v. DOI and DOC Original Complaint.pdf](#)
[Original NRDC FOIA Request re EO 13795.pdf](#)
[Weekly FOIA Incoming and High Visibility Requests 4.26.18 to 5.2.18.xls.xlsx](#)

Good Afternoon,
Attached is the weekly report.

One request was submitted from Earth Island Institute seeking all permits for dolphin species in captivity. (DOC-NOAA-2018-001289). Additionally, a request was submitted from PETA seeking records of inspections for evaluations, provided by the Mexican Secretaria de Agricultura's Recursos Hidraulicos pertaining to Yupik, the polar bear held at the Morelia Zoo. (DOC-NOAA-2018-001292). Lastly, a request was submitted by E&E News seeking a copy of the report done by outside auditors in 2017 that looked into the safety record of NOAA's program dealing with at-sea monitors and observers. (DOC-NOAA-2018-001290).

In litigation, NOAA is reviewing records for responsiveness for a release to be issued in the NRDC v. DOI case. The original request sought all records regarding meetings attended by Wilbur Ross or Earl Comstock relating to EO 13795 National Monument designations. A copy of the complaint and underlying request are attached for reference.

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 SOUTHERN DISTRICT OF NEW YORK

<hr/>)	
NATURAL RESOURCES DEFENSE))	
COUNCIL, INC.,))	
))	
Plaintiff,))	
v.))	
))	
U.S. DEPARTMENT OF THE INTERIOR))	Civil Action No. 18-cv-650
))	
and))	
))	
U.S. DEPARTMENT OF COMMERCE,))	
))	
Defendants.))	
<hr/>)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff Natural Resources Defense Council, Inc. (NRDC or Plaintiff), brings this case to compel Defendants, the U.S. Department of the Interior (Interior Department) and the U.S. Department of Commerce (Commerce Department) (collectively, Defendants), to disclose records relating to the agencies’ reviews of certain national monuments.

2. Over the course of the past year, Defendants have conducted controversial “reviews” of at least twenty-seven national monuments established by former Presidents Clinton, G.W. Bush, and Obama—including the Bears Ears National Monument in Utah, the Grand Staircase-Escalante National Monument in

Utah, and the Northeast Canyons and Seamounts Marine National Monument in the Atlantic Ocean—for the purpose of making recommendations to the President about whether to preserve those monuments, or to dismantle them and open them to industrial resource extraction and other destructive uses. Despite an outpouring of popular support for preserving existing national monuments, the President has already acted to revoke national monument protections for huge swaths of Bears Ears and Grand Staircase-Escalante.

3. In September and October 2017, NRDC sought production under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, of records relating to the agencies' review processes. As explained below, NRDC sought records relating to the public comments that Defendants received, the meetings and communications Defendants' leadership had with non-governmental individuals and entities (including industry groups), and the criteria by which Defendants weighed the information they gathered. NRDC, its members, and the American public at large have a right to know who is influencing the federal government's decisions about the fate of these iconic American lands and waters.

4. FOIA required Defendants to respond within twenty business days. Yet Defendants did not respond substantively by that deadline, and they still have not done so. Their failure to timely disclose the requested records violates FOIA.

5. NRDC seeks a declaration that Defendants violated FOIA by failing to provide a final determination by the statutory deadline as to whether they will comply with NRDC's requests, and by failing to produce any responsive documents

promptly thereafter. NRDC seeks an injunction ordering that Defendants disclose, without further delay, all non-exempt, responsive records and portions of records to NRDC. NRDC also seeks a declaration that, pursuant to FOIA, it is entitled to a fee waiver in connection with its FOIA requests to the Interior Department.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 552(a)(4)(B) (FOIA).

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

THE PARTIES

8. Plaintiff NRDC is a national nonprofit advocacy organization with hundreds of thousands of members nationwide. On behalf of its members, NRDC engages in research, advocacy, public education, and litigation to protect public health and the environment. NRDC has a long history of disseminating information of public interest, including information obtained from FOIA requests.

9. Defendant Interior Department is an agency within the meaning of 5 U.S.C. §§ 551(1) and 552(f)(1), and it has possession or control of documents NRDC seeks. The Office of the Secretary of the Interior is a component of the Interior Department.

10. Defendant Commerce Department is an agency within the meaning of 5 U.S.C. §§ 551(1) and 552(f)(1), and it has possession or control of documents

NRDC seeks. The Office of the Secretary of Commerce is a component of the Commerce Department.

STATUTORY AND REGULATORY FRAMEWORK

11. FOIA requires federal agencies to release records to the public upon request, unless one of nine statutory exemptions from disclosure applies. 5 U.S.C. § 552(a)-(b).

12. Within twenty business days of an agency's receipt of a FOIA request, the agency must "determine . . . whether to comply" with the request. *Id.* § 552(a)(6)(A)(i); *see also* 43 C.F.R. § 2.16(a) (Interior FOIA regulation); 15 C.F.R. § 4.6(b) (Commerce FOIA regulation). The agency must "immediately notify" the requester of "such determination and the reasons therefor." 5 U.S.C. § 552(a)(6)(A)(i)(I); 43 C.F.R. § 2.21(b) (requiring Interior Department to "immediately" send a written acknowledgement and tracking number if a request will take longer than ten workdays to process).

13. Once an agency determines that it will comply with a FOIA request, it must "promptly" release responsive, non-exempt records to the requester. 5 U.S.C. § 552(a)(6)(C)(i); *see also* 43 C.F.R. § 2.22(c) (Interior FOIA regulation); 15 C.F.R. § 4.7(c) (Commerce FOIA regulation).

14. In "unusual circumstances," an agency may extend the twenty-day time limit for responding to a FOIA request by up to ten working days. 5 U.S.C. § 552(a)(6)(B)(i); *see also* 43 C.F.R. § 2.19(a)(1) (Interior FOIA regulation); 15 C.F.R. § 4.6(b) (Commerce FOIA regulation).

15. The agency must provide requested records at no or reduced cost “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45(a) (Interior FOIA regulation);

15 C.F.R. § 4.11(l) (Commerce FOIA regulation).

16. If the agency fails to notify the requester of its determination within the statutory time limit, the requester is “deemed to have exhausted his administrative remedies” and may immediately file suit. 5 U.S.C. § 552(a)(6)(C)(i).

17. FOIA grants federal district courts authority to “enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

FACTS

18. On April 26, 2017, President Donald J. Trump issued Executive Order 13,792, titled “Review of Designations Under the Antiquities Act,” which directed Secretary of the Interior Ryan Zinke to conduct a review of twenty-seven national monuments created by President Trump’s predecessors. Exec. Order 13,792, 82 Fed. Reg. 20,429 (Apr. 26, 2017). The Executive Order directed Secretary Zinke to provide “recommendations for such Presidential actions, legislative proposals, or other actions consistent with the law as the Secretary may consider appropriate” to

“balance the protection of . . . objects against the appropriate use of Federal lands and the effects on surrounding lands and communities.” *Id.*

19. Two days later, on April 28, 2017, President Trump issued another executive order, this one titled “Implementing an America-First Offshore Energy Strategy.” Exec. Order 13,795, 82 Fed. Reg. 20,815 (April 28, 2017). The order, among other things, directed Secretary of Commerce Wilbur Ross to review marine national monuments and national marine sanctuaries that had been designated or expanded within the previous ten years. The executive order required the Secretary of Commerce to “report the results of the review” within 180 days. *Id.*

20. The Interior Department and the Commerce Department subsequently accepted public comments regarding the covered national monuments and marine sanctuaries. *See* 82 Fed. Reg. 22,016 (May 11, 2017) (Interior review); 82 Fed. Reg. 28,827 (June 26, 2017) (Commerce review). On information and belief, Secretaries Zinke and Ross and other agency officials also met with a variety of stakeholders, including representatives of industry groups expressing interest in commercial exploitation of the national monuments and marine sanctuaries under review.

21. On information and belief, Defendants collectively received over three million public comments during their review period, and the overwhelming majority of those comments called on Defendants and the Trump Administration to preserve existing national monuments and marine sanctuaries.

22. Plaintiff NRDC submitted comments to the Interior and Commerce Departments in support of national monuments in general, and in support of Bears

Ears National Monument, Grand Staircase-Escalante National Monument, and Northeast Canyons and Seamounts Marine National Monument in particular. In addition, tens of thousands of NRDC's individual members submitted comments to the Interior and Commerce Departments in support of national monuments and marine sanctuaries.

23. On August 24, 2017, Interior Secretary Zinke submitted his final report to the President. Neither Secretary Zinke nor President Trump released the report publicly at the time, but national news reporters obtained what appears to be a leaked copy of the report, and Secretary Zinke released a substantially similar version to the public on December 5, 2017. Both versions of the Interior report recommended that the President unilaterally revoke or substantially weaken protections for several national monuments, including the Bears Ears National Monument, the Grand Staircase-Escalante National Monument, and the Northeast Canyons and Seamounts Marine National Monument.

24. On October 25, 2017, Secretary Ross's report describing the results of the Commerce review was due to be completed and submitted to the President. To date, neither Secretary Ross nor any other government official has released the Commerce report publicly.

25. On December 4, 2017, President Trump issued two proclamations dismantling Bears Ears National Monument and Grand Staircase-Escalante National Monument. President Trump and other federal officials have indicated that additional proclamations dismantling other national monuments would follow.

26. The American public has a strong interest in understanding the Interior and Commerce Departments' monument review processes and the basis for the Secretaries' reports and recommendations to the President. That includes understanding the criteria by which Interior and Commerce Department officials reviewed, weighed, or discounted the public comments they received; the contents of those comments; and the identities of industry representatives with whom Interior and Commerce Department officials met and the contents of those meetings.

27. The Interior and Commerce Departments' reviews of national monuments and marine sanctuaries have generated intense, widespread, and sustained public interest and concern. NRDC and its members are particularly keenly interested in these review processes and their outcomes. Yet, despite the public's desire for transparency and input into the Administration's review process, Defendants have made very little information publicly available about their information-gathering and review processes.

28. To better inform the American public at large, and NRDC members in particular, about a topic of intense public concern, NRDC submitted the following FOIA requests to the Interior Department and the Commerce Department.

NRDC's first FOIA request to the Interior Department

OS-2017-01247

29. According to the Regulations.gov website, the Interior Department received more than 2.8 million public comments through its online portal relating to the Department's national monument review. Only 782,460 comments—less than a

third of the total count of online submissions—were made publicly available online as of the close of the comment period. The Regulations.gov website notes that “agencies may choose to redact, or withhold, certain submissions . . . such as those containing private or proprietary information . . . or duplicate/near duplicate examples of a mass-mail campaign.”

30. Interior Secretary Zinke’s report to President Trump acknowledged that the public “[c]omments received were overwhelmingly in favor of maintaining existing monuments.” Memorandum for the President from Secretary Zinke, “Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act” at 3 (Aug. 24, 2017). Secretary Zinke nevertheless opined that the overwhelming public support for national monuments reflected not genuine popular will, but rather, in his words, “a well-orchestrated national campaign organized by multiple organizations.” *Id.* The report went on to dismiss what it called “form comments associated with NGO-organized campaigns, which far outnumbered individual comments,” opining that “[t]oo often it is the local stakeholders who lack the organization, funding, and institutional support to compete with well-funded NGOs.” *Id.* at 3, 8.

31. On September 22, 2017, in an effort to better understand the Interior Department’s review process and the information underlying Secretary Zinke’s report and recommendations, NRDC submitted a FOIA request to the Interior Department. *See Exhibit A.*

32. NRDC's request sought the following records:
- a. "Any and all comments the [Interior] Department received on or after April 26, 2017 (whether via online submission, by mail, or by any other means) that relate to national monuments, and that are not among the 782,460 comments publicly available on the Regulations.gov website. This includes but is not limited to comments that include "private or proprietary information" or that are considered "duplicate/near duplicate examples of a mass-mail campaign." If you determine that any such comments (or any portions thereof) are exempt from disclosure, please produce a detailed ledger explaining the basis for each withheld comment or portion thereof.
 - b. "Any and all records created or transmitted on or after April 26, 2017, that contain or relate to the Department's or the Secretary's directives, policies, standards, or procedures for reviewing or analyzing public comments relating to national monuments.
 - c. "Any and all records created or transmitted on or after April 26, 2017, that contain or relate to the Department's or the Secretary's review of, assessment of, or findings about public comments relating to national monuments.
 - d. "Any and all records created or transmitted on or after April 26, 2017, that contain or relate to the Department's or the Secretary's inquiry into or findings about "NGO-organized campaigns" relating to the

Department's monument review, or directions or instructions concerning such inquiry or findings.

- e. "Any and all records created or transmitted on or after April 26, 2017, that contain or relate to the basis for the Secretary's statement that there was "a well-orchestrated national campaign organized by multiple organizations" to submit public comments.
- f. "Any records created or transmitted by the Department (or any official or staff-member thereof) on or after April 26, 2017, that relate to the Natural Resources Defense Council (NRDC)." *Id.*

33. NRDC explained that, for purposes of its request, the term "records" is consistent with the meaning of the term under FOIA, including "documents of any kind, including electronic as well as paper documents, e-mails, memoranda, letters, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), reports, summaries, notes, meeting notes or minutes, text messages, and any other compilations of data from which information can be obtained." *Id.*

34. NRDC also requested that the Interior Department waive any fees for the search and production of the requested records. NRDC is entitled to a waiver of all fees pursuant to FOIA's fee waiver provisions and the agency's regulations. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a).

35. NRDC submitted its request to the Interior Department's Office of the Secretary via the Interior Department's online FOIA portal, in accordance with the agency's FOIA regulations and guidance.

36. The Interior Department's online portal sent NRDC an automated e-mail response acknowledging receipt of the request on September 22, 2017.

37. The Interior Department's response was due within twenty business days of the request—i.e., by October 23, 2017. *See* 5 U.S.C. § 552(a)(6)(A)(i). NRDC received no response of any kind by that date.

38. On October 24, 2017—the day after FOIA's statutory deadline had run—a FOIA Officer from the Interior Department's Office of the Secretary e-mailed an acknowledgement letter to NRDC's counsel. That letter stated that NRDC's "request was received in the Office of the Secretary FOIA office on September 22, 2017, and assigned control number OS-2017-01247."

39. The letter further stated: "Because we will need to consult with one or more bureaus of the Department in order to properly process your request, the Office of the Secretary FOIA office is taking a 10-workday extension under 43 C.F.R. § 2.19. For the same reason, we are placing your request under the 'Complex' processing track. *See* 43 C.F.R. § 2.15."

40. Finally, the letter stated that the Interior Department had "classified [NRDC's] request as an 'other-use request.'" Seeking clarification, NRDC's counsel asked the FOIA Officer by e-mail whether this meant the Interior Department had denied NRDC's fee waiver request. In an e-mail dated November 1, 2017, the FOIA Officer responded: "It is not a denial of your fee waiver request. We are waiting to determine if a fee waiver i[s] necessary depending on whether there will be any fees."

41. NRDC never received any further communications from the Interior Department relating to its FOIA request.

42. Even accounting for the belated ten-day extension, the Interior Department's response was due on November 7, 2017.

43. To date, the Interior Department still has not substantively responded to NRDC's FOIA request, produced any responsive records, claimed any exemptions, or made a determination on NRDC's fee waiver request.

NRDC's second FOIA request to the Interior Department

OS-2018-00232

44. On October 29, 2017, NRDC submitted a second FOIA request to the Interior Department, this time seeking records relating to meetings between Secretary Zinke or other Interior Department leadership and outside groups or individuals regarding national monuments. *See* Exhibit B.

45. Specifically, NRDC sought the following records:

- a. "[A]ny and all records in the possession, custody, or control of the [Interior] Department . . . that pertain to meetings on or after January 20, 2017, attended by Secretary Ryan Zinke, Scott Hommel, Lori Mashburn, James Cason, Doug Domenech, and/or Downey Magallanes, relating to any national monument and/or to the Department's review of national monuments under Executive Order No. 13792, including:
- b. "Any calendar entries, invitations, itineraries, or communications referencing such meetings;

- c. “Any agendas, minutes, attendee lists, or presentations relating to such meetings;
- d. “Any records of individuals who attended these meetings or accompanied the above-named officials on any of these occasions, excluding current career federal employees;
- e. “Any briefings, summaries, or materials prepared or transmitted in relation to such meeting, whether before, during, or after the meeting itself; and
- f. “Any notes taken by any federal employee, including the above-named officials.” *Id.*

46. NRDC explained that, for purposes of its request, the term “records” is consistent with the meaning of the term under FOIA, including “documents of any kind, including electronic and paper documents, emails, memoranda, letters, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), reports, summaries, notes, meeting notes or minutes, text messages, and any other compilations of data from which information can be obtained.” *Id.*

47. NRDC also requested that the Interior Department waive any fees for the search and production of the requested records. NRDC is entitled to a waiver of all fees pursuant to FOIA’s fee waiver provisions and the agency’s regulations. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a).

48. NRDC submitted its request to the Interior Department's Office of the Secretary via the Interior Department's online FOIA portal, in accordance with the agency's FOIA regulations and guidance.

49. The Interior Department's online portal sent NRDC an automated e-mail response acknowledging receipt of the request on October 29, 2017.

50. The Interior Department's response was due within twenty business days of the request—i.e., by November 28, 2017. *See* 5 U.S.C. § 552(a)(6)(A)(i).

51. On November 21, 2017, a FOIA Officer from the Interior Department's Office of the Secretary e-mailed an acknowledgement letter to NRDC's counsel. That letter stated that NRDC's "request was received in the Office of the Secretary FOIA office on October 29, 2017, and assigned control number OS-2018-00232."

52. The letter further stated: "Because we will need to consult with one or more bureaus of the Department in order to properly process your request, the Office of the Secretary FOIA office is taking a 10-workday extension under 43 C.F.R. § 2.19. For the same reason, we are placing your request under the 'Complex' processing track. *See* 43 C.F.R. § 2.15."

53. Finally, the letter stated that the Interior Department had "classified [NRDC's] request as an 'other-use request,'" and went on to explain: "[W]e are in the process of determining whether or not your entitlements are sufficient to enable us to process your request, or if we will need to issue a formal determination on your request for a fee waiver."

54. NRDC never received any further communications from the Interior Department relating to its FOIA request.

55. Accounting for a ten-day extension, the Interior Department's response was due on December 12, 2017.

56. To date, the Interior Department still has not substantively responded to NRDC's FOIA request, produced any responsive records, claimed any exemptions, or made a determination on NRDC's fee waiver request.

NRDC's FOIA request to the Commerce Department

DOC-IOI-2018-000178

57. Also on October 29, 2017, NRDC submitted a FOIA request to the Commerce Department, seeking records relating to meetings between Secretary Ross or another member of the Commerce Department's leadership and outside groups or individuals regarding national marine monuments or sanctuaries. *See* Exhibit C.

58. Specifically, NRDC requested the following records:

- a. "[A]ny and all records in the possession, custody, or control of the [Commerce] Department . . . that pertain to meetings on or after January 20, 2017, attended by Secretary Wilbur Ross and/or Earl Comstock, relating to any national marine sanctuary or marine national monument and/or to the Department's review of national marine sanctuaries and monuments under Executive Order No. 13795, including:

- b. “Any calendar entries, invitations, itineraries, or communications referencing such meetings;
- c. “Any agendas, minutes, attendee lists, or presentations relating to such meetings;
- d. “Any records of individuals who attended these meetings or accompanied Secretary Ross or Mr. Comstock on any of these occasions, excluding current career federal employees;
- e. “Any briefings, summaries, or materials prepared or transmitted in relation to such meeting, whether before, during, or after the meeting itself; and
- f. “Any notes taken by any federal employee, including Secretary Ross or Mr. Comstock.” *Id.*

59. NRDC explained that, for purposes of its request, the term “records” is consistent with the meaning of the term under FOIA, including “documents of any kind, including electronic as well as paper documents, e-mails, memoranda, letters, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), reports, summaries, notes, meeting notes or minutes, text messages, and any other compilations of data from which information can be obtained.” *Id.*

60. In its request, NRDC requested that the Commerce Department waive any fees for the search and production of the requested records, pursuant to FOIA’s and the agency’s fee waiver provisions. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.11(*l*).

61. NRDC submitted its request to the Commerce Department's Office of the Secretary via the federal government's online FOIA portal, in accordance with the agency's FOIA regulations and guidance.

62. The federal government's online FOIA portal sent NRDC an automated e-mail response acknowledging receipt of the request on October 29, 2017, and assigning it tracking number # DOC-OS-2018-000178.

63. On October 31, 2017, NRDC's counsel received another e-mail from the federal government's online FOIA portal advising that the request's tracking number had been changed to # DOC-IOS-2018-000178.

64. The Commerce Department's response was due within twenty business days of the request—i.e., by November 28, 2017. *See* 5 U.S.C. § 552(a)(6)(A)(i).

65. On November 14, 2017, the Commerce Department sent NRDC's counsel an e-mail advising that NRDC's fee waiver request had been "fully granted." Exhibit K. The Commerce Department did not respond substantively to NRDC's FOIA request by the statutory deadline, however.

66. To date, the Commerce Department still has not substantively responded to NRDC's FOIA request, produced any responsive records, or claimed any exemptions.

* * *

67. NRDC seeks a declaration that Defendants have violated the FOIA by failing to respond to NRDC's FOIA requests and failing to promptly release all responsive, non-exempt records. NRDC also seeks an injunction ordering Defendants to provide the requested records without further delay.

68. NRDC brings this action on behalf of itself and its members. NRDC and its members have been and continue to be injured by Defendants' failure to provide responsive records. The requested relief will redress these injuries.

CLAIM FOR RELIEF

COUNT ONE

5 U.S.C. § 552(a) (FOIA)

All Defendants

69. NRDC incorporates by reference all preceding paragraphs.

70. NRDC has a statutory right under FOIA to the records it seeks.

71. Defendants have violated their statutory duties under FOIA, 5 U.S.C. § 552(a), and the applicable implementing regulations, to release all non-exempt, responsive records to NRDC. Defendants have identified no basis, let alone any valid basis, for withholding or partially withholding the records that are responsive to NRDC's FOIA requests.

72. NRDC is entitled to all non-exempt responsive documents at no cost because disclosure of the requested records would contribute significantly to public understanding and is not primarily in NRDC's commercial interest. 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(a); 15 C.F.R. § 4.11(l).

73. NRDC is being harmed by Defendants' unlawful withholding of the requested records, and it will continue to be harmed unless Defendants are compelled to comply with FOIA's statutory requirements.

REQUEST FOR RELIEF

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

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

B. Declare that Defendant Interior Department has violated FOIA by failing to make a determination as to NRDC's fee waiver requests;

C. Order Defendants to release to NRDC, without further delay and at no cost to NRDC, all responsive, non-exempt records in their possession, custody, or control;

D. If either Defendant contends that any responsive records are exempt or partially exempt from disclosure under FOIA, order that Defendant to produce a log identifying any such records or parts thereof and the basis for the withholdings, and require Defendant to prove that its decision to withhold or redact any such records is justified by law;

E. Order Defendant Interior Department to grant NRDC's fee waiver in full;

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

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

Dated: January 24, 2018

Respectfully submitted,

/s/ Nancy S. Marks

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Counsel for NRDC

Exhibit C

NRDC

October 29, 2017

Via online submission

Department of Commerce
FOIA Officer

**Re: FOIA Request for Records Relating to Meetings Relating
to National Marine Sanctuaries and Monuments**

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and applicable Department of Commerce regulations, 15 C.F.R. § 4.1-4.11.

I. Description of Records Sought

Please produce any and all records in the possession, custody, or control of the Department of Commerce (“the Department”) that pertain to meetings on or after January 20, 2017, attended by Secretary Wilbur Ross and/or Earl Comstock, relating to any national marine sanctuary or marine national monument and/or to the Department’s review of national marine sanctuaries and monuments under Executive Order No. 13795, including:

- Any calendar entries, invitations, itineraries, or communications referencing such meetings;
- Any agendas, minutes, attendee lists, or presentations relating to such meetings;
- Any records of individuals who attended these meetings or accompanied Secretary Ross or Mr. Comstock on any of these occasions, excluding current career federal employees;
- Any briefings, summaries, or materials prepared or transmitted in relation to such meeting, whether before, during, or after the meeting itself; and
- Any notes taken by any federal employee, including Secretary Ross or Mr. Comstock.

For purposes of this request, the term “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, memoranda, letters, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), reports, summaries, notes, meeting notes or minutes, text messages, and any other compilations of data from which information can be obtained.

Under FOIA, you are obligated to provide 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.”). We request that you provide the responsive records in electronic .pdf format without “profiles” or “embedded files.” Please do not provide the records in a single or “batched” .pdf file. To the extent that a subset of the requested records is readily available, please provide that subset immediately while you continue to search for additional records to complete your response.

If you decide to invoke any FOIA exemptions in response to this request, please include in your response sufficient information for us to assess the basis for the exemption(s), including any interest(s) that would be harmed by release. Please include a detailed ledger which includes (1) basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and (2) complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to 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 any requested records are exempt from disclosure, the FOIA requires that you produce any reasonably segregable non-exempt portions within the statutory time limit. *See* 5 U.S.C. § 552(b). *See, e.g., Gatore v. U.S. Dep’t of Homeland Sec.*, 177 F. Supp. 3d 46, 53 (D.D.C. 2016); *Gosen v. U.S. Citizenship & Immigration Servs.*, 118 F. Supp. 3d 232, 243-44 (D.D.C. 2015).

Please produce the records on a rolling basis. The Department’s search for or deliberations concerning certain records should not delay the production of others that the Department has already retrieved and elected to produce. *See generally* 15 C.F.R. § 4.7. If the Department takes the position that any of these records are publicly available, please indicate where each of them may be found.

II. Request for a Fee Waiver

NRDC asks that the Department waive any fee it would otherwise charge for the search and production of the records described above. FOIA provides that a requester is entitled to a fee waiver when “disclosure of the information is in the public interest because it [A] is likely to contribute significantly to public understanding of the operations or activities of the government and [B] is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 15 C.F.R. § 4.11(l). The disclosure NRDC seeks here meets both these requirements.

A. Disclosure is likely to contribute significantly to public understanding of the operations or activities of the government

First, the disclosure requested here is “likely to contribute significantly to public understanding of the operations or activities of the government,” 5 U.S.C. § 552(a)(4)(A)(iii), based on the following factors. *See* 15 C.F.R. § 4.11(l)(2)(i)-(iv) (describing factors to be considered).

1. Subject of the request (15 C.F.R. § 4.11(l)(2)(i))

The requested records directly concern “the operations or activities of the Government.” 15 C.F.R. § 4.11(l)(2)(i). The records pertain to the Department’s “review of all designations and expansions of National Marine Sanctuaries, and of all designations and expansions of Marine National Monuments under the Antiquities Act of 1906 . . . designated or expanded within the 10-year period prior to the date of this order” and the Department’s resulting report. Executive Order No. 13795, section 4(b)(i)-(ii). Disclosure of the records will provide context for the Department’s report and help the public to evaluate the Department’s recommendations and whatever actions the President, Congress, or other federal government officials take with respect to the affected sanctuaries and monuments.

2. Informative value of the information to be disclosed (15 C.F.R. § 4.11(l)(2)(ii))

Disclosure of the requested records is “likely to contribute’ to an understanding of Government operations or activities.” 15 C.F.R. § 4.11(l)(2)(ii). The records are relevant to the Department’s review of national marine sanctuaries and monuments, and therefore they are likely to be “meaningfully informative” in providing context for the Department’s report and for any actions the Administration may take with respect to those sanctuaries or monuments. *Id.* Because the Department’s review has

attracted broad public attention (as explained below), and because the requested records have not previously been made available, disclosure will “contribute’ to an increased public understanding of those operations or activities.” *Id.*

**3. Contribution to public understanding of the subject
(15 C.F.R. § 4.11(l)(2)(iii))**

Because NRDC is a “representative of the news media,” as explained in Part III below, the Department must presume that this disclosure is likely to contribute to public understanding of the subject of the disclosure. 15 C.F.R. § 4.11(l)(2)(iii). However, even if NRDC were not a media requester, NRDC satisfies the requirement that disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.” *Id.*

NRDC does not seek the requested records for its own benefit. Rather, it seeks the records to provide new information to the public about the Department’s review process and its resulting report and recommendations. Disclosure of this information will make possible a more complete public understanding of the federal government’s decision-making process and intentions regarding the national marine sanctuaries and monuments at issue. *See* 15 C.F.R. § 4.11(l)(2)(iii) (requiring requester to show that disclosure 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”). There is more than a reasonable likelihood that disclosure of the requested records will significantly increase public understanding of the government’s review process and actions among a broad audience of interested people. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

NRDC has both the ability and the intent to disseminate the information obtained through this request “in a manner that will be informative to the understanding of a reasonably broad audience of persons interested in the subject.” 43 C.F.R. § 2.48(a)(2)(iv); *see also id.* § 2.48(a)(2)(v) (considering requester’s “ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject”). NRDC has more than two million members and online activists, tens of thousands of whom have responded to action alerts relating to the Department’s monument review in particular. And, as detailed below, NRDC has extensive communications capabilities and a proven history of disseminating information of public interest, including information obtained from FOIA requests. NRDC has both the capability and the intent to broadly disseminate the information it seeks here to its members and to the

general public, thereby contributing to a better general understanding of the Department's review process and its ultimate findings.

NRDC uses numerous modes of communication to disseminate information to its members and to the public at large. These include:

- (1) NRDC's website (<http://www.nrdc.org>), which is updated daily and draws approximately 1.7 million page views and 1.5 million unique page views per month, and which features NRDC staff blogs, original reporting on environmental news stories, and in-depth analyses on topics of public interest;
- (2) NRDC's Activist email list, which includes more than 2.4 million subscribers who receive regular communications on urgent environmental issues;
- (3) *NRDC Insider* (<http://www.nrdc.org/newsletter>), a monthly electronic environmental newsletter distributed by email to more than 1.47 million subscribers;
- (4) NRDC's Facebook page, with 909,921 likes and 872,632 followers;
- (5) NRDC's Twitter handle, with 274,922 followers;
- (6) NRDC's Instagram feed, with 111,024 followers;
- (7) NRDC's YouTube channel (<https://www.youtube.com/user/NRDCflix>), with 21,050 subscribers; and
- (8) online media outlets like Medium (<https://medium.com/natural-resources-defense-council>) and Huffington Post (<http://www.huffingtonpost.com/topic/natural-resources-defense-council>).

NRDC also publishes legal and scientific analyses, policy documents, and reports; issues press releases; and directs and produces movies (including *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*). NRDC has more than fifty staff members dedicated to communications work.

In addition, NRDC employees and representatives are widely quoted in the news media; participate in interviews on television, radio, and web broadcasts; appear at conferences; provide congressional testimony; and contribute articles and op-eds to numerous national newspapers, magazines, academic journals, and books. *See, e.g.,* Zoe Carpenter, *After Promising a "Fair Hearing" on Monuments, Secretary Zinke Shuts Out the Public*, THE NATION (May 18, 2017) (quoting NRDC Land and Wildlife Program Director

Sharon Buccino); Op-Ed, *Don't Take Bears Ears Away from Us*, SALT LAKE TRIBUNE (May 6, 2017) (contributed by NRDC trustee Robert Redford); Research Article, *The Requirement To Rebuild U.S. Fish Stocks: Is It Working?* MARINE POLICY (July 2014) (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell); Transcript, *Conservationists Call for Quiet: The Ocean Is Too Loud*, ALL THINGS CONSIDERED (July 28, 2013) (featuring NRDC Marine Mammal Protection Program Director Michael Jasny); Testimony of Johanna Wald, NRDC Senior Attorney, before the U.S. Senate Committee on Energy and Natural Resources, Hearing on the California Desert Protection Act of 2010 (May 20, 2010).

NRDC's legal and scientific experts routinely analyze information obtained through FOIA and use it to inform the public about a variety of environmental issues. *See, e.g.*, Theo Spencer, *The Fight to Stop a Strip Mine Near Bryce Canyon: A History*, NRDC Blog (June 5, 2017) (analyzing documents obtained through partner organization's FOIA request regarding a proposed expansion of an open pit strip mine in Utah); Kevin Bogardus *et al.*, "Homework Assignment": *How Pebble Lobbied Trump's EPA*, E&E NEWS (June 8, 2017) (quoting NRDC staff discussing results of a FOIA seeking communications between EPA and Pebble Mine developers); Tom Neltner *et al.*, *Generally Recognized as Secret: Chemicals Added to Food in the United States*, NRDC Report (2014) (analyzing FOIA documents relating to potentially unsafe chemicals added to food); Carmen Cordova, *Playing Chicken with Antibiotics*, NRDC Issue Brief (2014) (describing FDA records, obtained through FOIA, which show widespread violations of the agency's safety standards for antibiotic feed additives); Dan Flynn, *NRDC Releases FSIS Inspection Reports on Foster Farms*, FOOD SAFETY NEWS (Sept. 12, 2014) (reporting on documents NRDC obtained through FOIA relating to safety violations by poultry company, and linking to the documents); Mae Wu *et al.*, *Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, NRDC Report (2010) (analyzing White House documents obtained through FOIA and from other sources to inform the public about EPA's decision not to protect wildlife and workers from the pesticide atrazine).

In sum, NRDC has a proven ability to digest, synthesize, and disseminate information obtained through FOIA to a broad audience of interested persons. NRDC's more than two million members and activists, when combined with the members of the general public who read NRDC's communications online and in the news media, clearly constitute "a reasonably broad audience of persons interested in the subject." 15 C.F.R. § 4.11(l)(2)(iii). NRDC intends to disseminate any newsworthy information in the released records to this large audience in a manner that will

meaningfully enhance the public's understanding of the federal government's decision-making process. NRDC does not seek records that have been previously disclosed to the public. *See id.* Disclosure may therefore confirm, clarify, or contradict documents or statements in the public domain or actions taken by the federal government, and it will enable the public to better evaluate the federal government's actions.

4. Significance of the contribution to public understanding (15 C.F.R. § 4.11(l)(2)(iv))

Finally, the records requested will shed significant light on a matter of considerable public interest and concern. *See* 15 C.F.R. § 4.11(l)(2)(iv).

The American public has demonstrated a strong interest in the Department's review of national marine sanctuaries and monuments. According to the Regulations.gov website, nearly 100,000 non-duplicative public comments relating to the Department's review of national marine sanctuaries and monuments were submitted online. *See* <https://www.regulations.gov/docket?D=NOAA-NOS-2017-0066> (last visited Sept. 29, 2017). The Department's review has also prompted many letters to the editor and op-eds, widespread social media activism, and numerous media reports in local and national publications. *See, e.g.,* Guy Kovner, *Marine Sanctuaries that Protect California Coast Get Strong Public Support, Conservationists Say*, THE PRESS-DEMOCRAT (Aug. 17, 2017); Zack Klyver, *Op-Ed: Marine Monument Vital for a Healthy, Bountiful Ocean*, BANGOR DAILY NEWS (Aug. 3, 2017); David Helvarg, *Op-Ed: Time Is Running Out to Stop Trump From Opening California Marine Sanctuaries to Oil Drilling*, LOS ANGELES TIMES (July 7, 2017); Marine Conservation Institute, *Blog: Analysis Shows Overwhelming Public Support for Marine Monuments and Sanctuaries* (Aug. 15, 2017), at <https://blog.marine-conservation.org/2017/08/overwhelming-support-for-marine-monuments-and-sanctuaries.html>.

Despite this strong showing of public interest and concern, very little information is publicly available about the Department's information-gathering and review process. Disclosure of the requested records concerning the Department's meetings with outside individuals and groups will significantly contribute to public understanding of the Department's review process. Disclosure will also provide valuable context for understanding the Department's report, and will enable the public more effectively to evaluate the legal and factual bases for the Department's assertions and recommendations.

For these reasons, NRDC has met the first prerequisite for a fee waiver request under the FOIA.

B. Disclosure is not primarily in NRDC's commercial interest

Second, NRDC has no commercial interests that would be furthered by the requested disclosure. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.11(l)(1)(ii). Therefore, it satisfies the second prerequisite for a fee waiver request under the FOIA.

NRDC is a not-for-profit organization. It does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted); *see also Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (recognizing that “[the fee 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 particular those from journalists, scholars and nonprofit public interest groups.” (internal quotation marks omitted)). Requesters wish to serve the public by reviewing, analyzing, and disseminating newsworthy and presently non-public information about the federal government's decision-making process with respect to national marine sanctuaries and monuments, and this is precisely the sort of “investigation[]” of “governmental choices and highlighting [of] possible abuses” for which the fee waiver was enacted. *Better Gov't Ass'n*, 780 F.2d at 93.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to NRDC's role of educating its members, activists, and the general public. NRDC has no commercial interest in the disclosure of the records, and it will realize no commercial benefit or profit from the disclosure of the requested records. For these reasons, NRDC is entitled to a fee waiver under the FOIA.

III. Request for a Reduction of Fees

In the alternative, even if the Department denies NRDC's fee waiver request, NRDC qualifies as a “representative of the news media” that is entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and applicable regulations, 15 C.F.R. § 4.11(c), (d); *see also id.* § 4.11(b)(6) (defining “[r]epresentative of the news media”).

A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its

editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep’t of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described in detail in Section II above, NRDC publishes original reports and analyses on conservation-related topics on its website, in its newsletter, and in blog posts; it contributes articles and op-eds to a variety of online and print platforms; and it maintains free online libraries of documents, publications, and other information of interest to the general public. These types of publications and media sources constitute news media outlets for purposes of FOIA. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”); *see also* 15 C.F.R. § 4.11(b)(6) (“Examples of news-media entities are . . . publishers of periodicals . . . including news organizations that disseminate solely on the Internet.”).

Public interest organizations performing these sorts of public communication functions “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-89 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union); *see also Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 164 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”).

NRDC intends to review the records it obtains through this FOIA request and, if the information is appropriately newsworthy, to analyze them, synthesize them with information from other sources, and create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of its publications or other suitable media channels. NRDC will not resell the information obtained through this FOIA request to other media organizations. For these reasons, even if the Department denies NRDC’s fee waiver request, it should grant a fee reduction consistent with 5 U.S.C. § 552(a)(4)(A)(ii).

IV. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with the Department's FOIA regulations. *See* 15 C.F.R. § 4.11. Please contact me, however, before doing anything that would cause the fee to exceed \$250. NRDC reserves the right to seek administrative or judicial review of any fee waiver denial.

V. Conclusion

Please email the requested records or, if it is not possible to email, mail a CD of electronic copies of the requested records to me at the address listed below. Please call or email me with any questions. Thank you for your time.

Sincerely,

/s/ Katherine Desormeau
Katherine Desormeau
Natural Resources Defense Council, Inc.
111 Sutter Street, 21st Floor
San Francisco, CA 94104
Tel: (415) 875-6158
kdesormeau@nrdc.org

Tracking Number	Requester	Type
DOC-NOAA-2018-001289	Earth Island Institute	Request

DOC-NOAA-2018-001292 PETA Foundation Request

DOC-NOAA-2018-001290 E&E News Request

DOC-NOAA-2018-001295 Weiss Serota Helfman Cole & Berman, F Request

Track	Submitted	Assigned To	Due
Simple	04/26/2018	Tawand Hodge Tonic	05/30/2018

Simple	04/27/2018	Ellen Sebastian	05/30/2018
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Expedited	04/27/2018	Kelvin James	05/30/2018
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Simple	04/27/2018	Tawand Hodge Tonic	05/30/2018
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Request

1. All permits in existence issued by the National Marine Fisheries Service (NMFS) for dolphin species in captivity (with the exception of *Orcinus orca* (orcas)). This request includes bottlenose dolphins (genus *Tursiops*), Pacific white-sided dolphins (*Lagenorhynchus obliquidens*), belugas (*Delphinapterus leucas*), pilot whales (genus *Globicephala*), and any other dolphin species in captivity (with the exception of orcas).
2. From January 1, 2008, until the present, all medical/veterinary reports about captive dolphins (with the exception of orcas) in non-Federal facilities, including but not limited to: necropsy reports; reports related to the administration of drugs/medicines; records of diseases and infections; reports related to any therapies used (including hormone therapy) and the outcomes; and any other information related to the health of the dolphins in captivity (with the exception of orcas).
3. From January 1, 2000, until the present, all information related to research conducted on captive dolphins (with the exception of orcas) in non-Federal facilities, including but not limited to: registrations for research; research protocols; findings; annual reports; and any other information related to research conducted on captive dolphins (with the exception of orcas) in non-Federal facilities.
4. From January 1, 2008, until the present, all accident or incident reports involving cetaceans in non-Federal facilities, including but not limited to: aggressive behavior reports; reports regarding injuries to humans or other animals; and any other information related to accidents involving cetaceans in non-Federal facilities.
5. All documents related to the beluga whale stranded in Alaska's Cook Inlet in September 2017 (known as "Tyonek") and now housed in SeaWorld San Antonio.

See Supporting Files for Additional Detail

All records, including inspections for evaluations, provided by the Mexican Secretaria de Agricultura's Recursos Hidraulicos pertaining to Yupik, the polar bear held at the Morelia Zoo.

I request that a copy of the report done by outside auditors in 2017 that looked into the safety record of NOAA's program dealing with at-sea monitors and observers.

Please accept this as our official FOIA request to obtain information for a report summary from the National Marine Inventory for Gulf World Marine Park (permit holder). We would like any information pertaining to live animals (dolphins and seals/sea lions).

Ryan Mulvey

From: Ryan Mulvey
Sent: Tuesday, May 8, 2018 2:24 AM
To: foia@noaa.gov
Cc: mark.graff@noaa.gov
Subject: RE: Additional Fee Waiver Questions
Attachments: 2018.04.11 NOAA FRA Request Clarification, No. DOC-NOAA-2018-001058.pdf; FOIA Request Clarification, No. DOC-NOAA-2018-001058

Mark,

Thank you for your email. As you likely know, CoA Institute filed an appeal from NOAA's denial of the fee-related requests for FOIA request No. 2018-001058 on April 13, 2018. A few days before that, I sent you a clarification letter regarding the scope of Items 1 and 4 (dated April 11, 2018). I am attaching that letter here, as well as the cover email. I believe our response in the April 11th letter answers your questions concerning Items 1 and 4. Please let me know if you require any further clarification.

Ryan

From: foia@noaa.gov [mailto:foia@noaa.gov]
Sent: Monday, May 07, 2018 11:07 AM
To: Ryan Mulvey <Ryan.Mulvey@causeofaction.org>
Subject: Additional Fee Waiver Questions

05/07/2018 10:38 AM
FOIA Request: DOC-NOAA-2018-001058

Good Morning Mr. Mulvey,

In speaking with DOC, there are additional questions that will need to be answered that directly impact your eligibility for a fee waiver. Specifically, as to items #1 and #4, we needed to determine your continued interest in the records considering the dismissal of the underlying litigation by Cause of Action. A large portion of the records that would be responsive to your request are either part of the public record, or would be non-substantive in informing the public of any activities of the government.

Thank you in advance for your feedback on the scope of the request and the resulting impact on fee waiver eligibility. Best regards,

Mark Graff

NOAA FOIA Officer

CAUSE *of* ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

April 11, 2018

VIA E-MAIL

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
ATTN: Mark Graff, NOAA FOIA Officer
E-mail: foia@noaa.gov / mark.graff@noaa.gov

Re: Freedom of Information Act Request No. NOAA-2018-001058

Dear Mr. Graff:

On March 28, 2018, CoA Institute submitted a Freedom of Information Act (“FOIA”) request to the National Oceanic and Atmospheric Administration (“NOAA”).¹ This request seeks four categories of records concerning NOAA’s response to a Federal Records Act (“FRA”) inquiry by the National Archives and Records Administration (“NARA”), as well as NOAA’s policy of treating all electronic messages created or received through the “chat” function of the agency’s Google-based e-mail platform as categorically “off the record.”² CoA Institute also requested a public interest fee waiver, categorization as a requester of the news media, and expedited processing.³

On April 2, 2018, NOAA denied CoA Institute’s request for expedited processing, indicating that “the records you are seeking primarily involve records regarding the processing of your own prior FOIA request, litigation, and communications with NARA regarding your own . . . allegations.”⁴ NOAA concluded that the requested “records would primarily be for [CoA Institute’s] own benefit, rather than the criteria in 15 [C.F.R. §] 4.6(e) [*sic*].”⁵ Yet NOAA provided no justification for its adverse determination, except to state that CoA Institute did “not satisfy the regulatory threshold for other-than ordinary processing.”⁶ CoA Institute filed an administrative appeal on April 4, 2018.⁷

On April 5, 2018, NOAA denied both CoA Institute’s request for a public interest fee waiver and CoA Institute’s request for treatment as a representative of the news media for fee purposes.⁸ Furthermore—and relevant here—NOAA requested clarification of the scope of CoA Institute’s request. Specifically, NOAA wrote the following:

The first item . . . is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to [CoA Institute’s] FOIA litigation as constituting communications with the Attorney

¹ Letter from CoA Inst. to Nat’l Oceanic & Atmospheric Admin. (Mar. 28, 2018) (on file with CoA Inst.).

² *Id.* at 2.

³ *Id.* at 2–5.

⁴ Letter from Nat’l Oceanic & Atmospheric Admin. to CoA Inst. at 1 (Apr. 2, 2018) (on file with CoA Inst.).

⁵ *Id.* It appears NOAA meant to cite 15 C.F.R. § 4.6(f). Subsection (e) concerns multi-track processing.

⁶ *Id.* at 2.

⁷ Letter from CoA Inst. to Dep’t of Commerce (Apr. 4, 2018) (on file with CoA Inst.).

⁸ Letter from Nat’l Oceanic & Atmospheric Admin. to CoA Inst. (Apr. 5, 2018) (attached as Exhibit 1). CoA Institute intends to appeal these adverse determinations.

General under an agent relationship. Additionally, the fourth item . . . would be, in part, duplicative of the records sought in [CoA Institute's] prior litigated request. Please identify what, if any, records [CoA Institute] seek[s] that would pre-date the submission of [that] previously-litigated request, or whether [CoA Institute] only seek[s] records created following the submission of [the] litigated request (DOC-NOAA-2017-001101).⁹

This letter follows to clarify the scope of Items One and Four.

Item One

Item One seeks “[a]ll communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.”¹⁰ As suggested by the citation to 44 U.S.C. § 3106(a), the scope of Item One is limited to NOAA’s communications with the Department of Justice *in furtherance of NOAA’s efforts to comply with the FRA*. For example, if NOAA sought to initiate action through the Attorney General for the recovery of electronic messages created or received on Google Hangouts, then records of those efforts would be responsive to Item One. By contrast, communications between NOAA and the Assistant U.S. Attorney who represented the agency in litigation against CoA Institute would fall outside the intended scope of Item One.

Item Four

Item Four seeks “all records concerning NOAA’s efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue [in NARA’s inquiry], or to investigate [NOAA’s] formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages.”¹¹ Because the time frame for this request is “July 1, 2017 to the present,” any potentially responsive records that “pre-date” the submission of FOIA Request No. DOC-NOAA-2017-001101 (April 27, 2017), would not be responsive. Moreover, it is unclear how this item is in any way “duplicative.” CoA Institute’s previously-litigated requests sought (1) agency guidance and (2) electronic messages created or received on Google Chat/Hangouts. Here, Item Four seeks records that concern NOAA’s efforts to (1) locate said guidance, (2) retrieve the previously-requested chat messages (as they were the subject of the allegations addressed by NARA), or (3) otherwise react or respond to NARA’s July 17, 2017 inquiry letter.

Conclusion

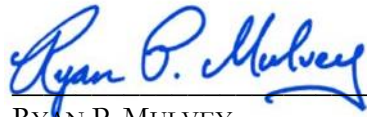
I hope that these clarifications are helpful. If you have any additional questions or require further clarification, please feel free to contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org. Thank you.

⁹ *Id.* at 2.

¹⁰ March 28, 2018 FOIA Request, *supra* note 1, at 2.

¹¹ *Id.*

Sincerely,

A handwritten signature in blue ink that reads "Ryan P. Mulvey". The signature is written in a cursive style with a horizontal line extending to the right from the end of the name.

RYAN P. MULVEY
COUNSEL

EXHIBIT

1



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

April 5, 2018

Attn: Ryan P. Mulvey
Cause of Action Institute
1875 Eye St. NW, Suite 800
Washington, DC 20006

Re: FOIA Request No. DOC-NOAA-2018-001058

Dear Mr./Ms. Mulvey:

This letter responds to your Freedom of Information Act (FOIA) request entered into FOIAonline on March 28, 2018, in which you requested records as follows:

1. All communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.⁹
2. All records reflecting notification by NOAA to the Archivist of the United States or NARA under 44 U.S.C. § 3106 or submission of a report under 36 C.F.R. § 1230.14.
3. All communications between NOAA and NARA concerning Google Chat, Google Hangouts, Skype, or other similar electronic messaging system, including, but not limited to, all communications concerning CoA Institute's allegations, CoA Institute's ongoing FOIA litigation against NOAA,¹⁰ or the July 17, 2017 NARA letter.
4. To the extent not already covered by the above items of this request, all records concerning NOAA's efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue, or to investigate its formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages. Responsive records would include, for example, correspondence between NOAA's FOIA Office or Office of the Chief Administrative Officer and the National Marine Fisheries Service's Greater Atlantic Regional Office or the New England Fishery Management Council.

Pursuant to procedures established in 15 CFR, Part 4.11(k), we rely on the following factors in determining whether the statutory standard for granting a fee waiver has been met:

1. The subject of the requested records must concern identifiable operations or activities of the Federal Government.

2. The disclosable portions of the requested records must be meaningfully informative about Government operations or activities in order to be “likely to contribute” to and increase public understanding of those operations or activities.
3. The disclosure of the requested information must 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. The disclosure of the requested information is likely to contribute “significantly” to the public’s understanding of Government operations or activities.
5. Whether the requester has a commercial interest that would be furthered by the requester.
6. Whether any identified commercial interest of the requester is sufficiently great, in comparison with the public interest in disclosure, such that the disclosure is not primarily in the commercial interest of the requester.

Your fee waiver justification does not satisfy the six factors contemplated in 15 CFR 4.11. The requested records, contrary to your assertions, would not significantly increase the public’s understanding of Government Activities. Rather, the records would, only be the records generated pursuant to your own prior FOIA request and allegations you personally raised with the news media. As such, the interest served through disclosure would primarily be to the benefit of the requester(s), rather than to a segment of interested individuals. Therefore this constitutes a denial of your fee waiver request. Your request will be processed under the “Other” fee category and if applicable, a fee estimate will be sent to you. Additionally, a clarification of the scope of your current request, as written, is required. The first item of your request is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to your FOIA litigation as constituting communications with the Attorney General under an agent relationship. Additionally, the fourth item of your request would be, in part, duplicative of the records sought in your prior litigated request. Please identify what, if any, records you are seeking that would pre-date the submission of your previously-litigated request, or whether you are only seeking records created following the submission of your litigated request (DOC-NOAA-2017-001101).

You have the right to appeal this denial of the FOIA Fee Waiver request. An appeal must be received within 90 calendar days of the date of this response letter by:

Assistant General Counsel for Employment, Litigation, and Information
U.S. Department of Commerce Room 5896
1401 Constitution Ave. NW
Washington, DC 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, or by FOIAonline, if you have an account in FOIAonline, at <https://foiaonline.regulations.gov/foia/action/public/home#>. The appeal should include a copy of the original request and initial denial, if any. The appeal should include a statement of the reasons why the Fee Waiver request should not be denied and why the adverse determination was in error. The appeal letter, the envelope, the e-mail subject line, should be clearly marked "Freedom of Information Act Appeal." The e-mail, FOIAonline, and Office are monitored only on working days during normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday). FOIA appeals posted to the e-mail box, fax

machine, FOIAonline, or Office after normal business hours will be deemed received on the next normal 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.

You also may contact the NOAA FOIA Public Liaison, Robert Swisher, at (301)-628-5755.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers 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

Sincerely,

Mr. Mark Graff
NOAA FOIA Officer

From: Ryan Mulvey <Ryan.Mulvey@causeofaction.org>
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Cc: "foia@noaa.gov" <foia@noaa.gov>
Subject: FOIA Request Clarification, No. DOC-NOAA-2018-001058
Sent: Wed, 11 Apr 2018 23:20:28 +0000
[2018.04.11 CoA Inst. FOIA Request Clarification, No. DOC-NOAA-2018-001058.pdf](#)

Mr. Graff,

I hope that this e-mail finds you well. I have received your recent denial of CoA Institute's fee-related requests for FOIA request No. 2018-001058. In the denial letter you also indicated that the agency required clarification as to the scope of Items One and Four. Please find attached a letter providing the requested clarification. I am happy to discuss this matter further if there is still any ambiguity or confusion.

Kind regards,

Ryan Mulvey

Ryan P. Mulvey | Counsel

Cause of Action Institute
1875 Eye Street NW, Suite 800
Washington, D.C. 20006

(o) 202.400.2729 / (c) (b)(6)

Ryan.Mulvey@causeofaction.org

Admitted to the practice of law in New York State and the District of Columbia



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CAUSE *of* ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

April 11, 2018

VIA E-MAIL

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
ATTN: Mark Graff, NOAA FOIA Officer
E-mail: foia@noaa.gov / mark.graff@noaa.gov

Re: Freedom of Information Act Request No. NOAA-2018-001058

Dear Mr. Graff:

On March 28, 2018, CoA Institute submitted a Freedom of Information Act (“FOIA”) request to the National Oceanic and Atmospheric Administration (“NOAA”).¹ This request seeks four categories of records concerning NOAA’s response to a Federal Records Act (“FRA”) inquiry by the National Archives and Records Administration (“NARA”), as well as NOAA’s policy of treating all electronic messages created or received through the “chat” function of the agency’s Google-based e-mail platform as categorically “off the record.”² CoA Institute also requested a public interest fee waiver, categorization as a requester of the news media, and expedited processing.³

On April 2, 2018, NOAA denied CoA Institute’s request for expedited processing, indicating that “the records you are seeking primarily involve records regarding the processing of your own prior FOIA request, litigation, and communications with NARA regarding your own . . . allegations.”⁴ NOAA concluded that the requested “records would primarily be for [CoA Institute’s] own benefit, rather than the criteria in 15 [C.F.R. §] 4.6(e) [*sic*].”⁵ Yet NOAA provided no justification for its adverse determination, except to state that CoA Institute did “not satisfy the regulatory threshold for other-than ordinary processing.”⁶ CoA Institute filed an administrative appeal on April 4, 2018.⁷

On April 5, 2018, NOAA denied both CoA Institute’s request for a public interest fee waiver and CoA Institute’s request for treatment as a representative of the news media for fee purposes.⁸ Furthermore—and relevant here—NOAA requested clarification of the scope of CoA Institute’s request. Specifically, NOAA wrote the following:

The first item . . . is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to [CoA Institute’s] FOIA litigation as constituting communications with the Attorney

¹ Letter from CoA Inst. to Nat’l Oceanic & Atmospheric Admin. (Mar. 28, 2018) (on file with CoA Inst.).

² *Id.* at 2.

³ *Id.* at 2–5.

⁴ Letter from Nat’l Oceanic & Atmospheric Admin. to CoA Inst. at 1 (Apr. 2, 2018) (on file with CoA Inst.).

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General under an agent relationship. Additionally, the fourth item . . . would be, in part, duplicative of the records sought in [CoA Institute's] prior litigated request. Please identify what, if any, records [CoA Institute] seek[s] that would pre-date the submission of [that] previously-litigated request, or whether [CoA Institute] only seek[s] records created following the submission of [the] litigated request (DOC-NOAA-2017-001101).⁹

This letter follows to clarify the scope of Items One and Four.

Item One

Item One seeks “[a]ll communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.”¹⁰ As suggested by the citation to 44 U.S.C. § 3106(a), the scope of Item One is limited to NOAA’s communications with the Department of Justice *in furtherance of NOAA’s efforts to comply with the FRA*. For example, if NOAA sought to initiate action through the Attorney General for the recovery of electronic messages created or received on Google Hangouts, then records of those efforts would be responsive to Item One. By contrast, communications between NOAA and the Assistant U.S. Attorney who represented the agency in litigation against CoA Institute would fall outside the intended scope of Item One.

Item Four

Item Four seeks “all records concerning NOAA’s efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue [in NARA’s inquiry], or to investigate [NOAA’s] formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages.”¹¹ Because the time frame for this request is “July 1, 2017 to the present,” any potentially responsive records that “pre-date” the submission of FOIA Request No. DOC-NOAA-2017-001101 (April 27, 2017), would not be responsive. Moreover, it is unclear how this item is in any way “duplicative.” CoA Institute’s previously-litigated requests sought (1) agency guidance and (2) electronic messages created or received on Google Chat/Hangouts. Here, Item Four seeks records that concern NOAA’s efforts to (1) locate said guidance, (2) retrieve the previously-requested chat messages (as they were the subject of the allegations addressed by NARA), or (3) otherwise react or respond to NARA’s July 17, 2017 inquiry letter.

Conclusion

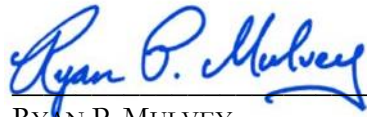
I hope that these clarifications are helpful. If you have any additional questions or require further clarification, please feel free to contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org. Thank you.

⁹ *Id.* at 2.

¹⁰ March 28, 2018 FOIA Request, *supra* note 1, at 2.

¹¹ *Id.*

Sincerely,

A handwritten signature in blue ink that reads "Ryan P. Mulvey". The signature is written in a cursive style with a horizontal line extending to the right from the end of the name.

RYAN P. MULVEY
COUNSEL

EXHIBIT

1



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

April 5, 2018

Attn: Ryan P. Mulvey
Cause of Action Institute
1875 Eye St. NW, Suite 800
Washington, DC 20006

Re: FOIA Request No. DOC-NOAA-2018-001058

Dear Mr./Ms. Mulvey:

This letter responds to your Freedom of Information Act (FOIA) request entered into FOIAonline on March 28, 2018, in which you requested records as follows:

1. All communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.⁹
2. All records reflecting notification by NOAA to the Archivist of the United States or NARA under 44 U.S.C. § 3106 or submission of a report under 36 C.F.R. § 1230.14.
3. All communications between NOAA and NARA concerning Google Chat, Google Hangouts, Skype, or other similar electronic messaging system, including, but not limited to, all communications concerning CoA Institute's allegations, CoA Institute's ongoing FOIA litigation against NOAA,¹⁰ or the July 17, 2017 NARA letter.
4. To the extent not already covered by the above items of this request, all records concerning NOAA's efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue, or to investigate its formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages. Responsive records would include, for example, correspondence between NOAA's FOIA Office or Office of the Chief Administrative Officer and the National Marine Fisheries Service's Greater Atlantic Regional Office or the New England Fishery Management Council.

Pursuant to procedures established in 15 CFR, Part 4.11(k), we rely on the following factors in determining whether the statutory standard for granting a fee waiver has been met:

1. The subject of the requested records must concern identifiable operations or activities of the Federal Government.

2. The disclosable portions of the requested records must be meaningfully informative about Government operations or activities in order to be “likely to contribute” to and increase public understanding of those operations or activities.
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5. Whether the requester has a commercial interest that would be furthered by the requester.
6. Whether any identified commercial interest of the requester is sufficiently great, in comparison with the public interest in disclosure, such that the disclosure is not primarily in the commercial interest of the requester.

Your fee waiver justification does not satisfy the six factors contemplated in 15 CFR 4.11. The requested records, contrary to your assertions, would not significantly increase the public’s understanding of Government Activities. Rather, the records would, only be the records generated pursuant to your own prior FOIA request and allegations you personally raised with the news media. As such, the interest served through disclosure would primarily be to the benefit of the requester(s), rather than to a segment of interested individuals. Therefore this constitutes a denial of your fee waiver request. Your request will be processed under the “Other” fee category and if applicable, a fee estimate will be sent to you. Additionally, a clarification of the scope of your current request, as written, is required. The first item of your request is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to your FOIA litigation as constituting communications with the Attorney General under an agent relationship. Additionally, the fourth item of your request would be, in part, duplicative of the records sought in your prior litigated request. Please identify what, if any, records you are seeking that would pre-date the submission of your previously-litigated request, or whether you are only seeking records created following the submission of your litigated request (DOC-NOAA-2017-001101).

You have the right to appeal this denial of the FOIA Fee Waiver request. An appeal must be received within 90 calendar days of the date of this response letter by:

Assistant General Counsel for Employment, Litigation, and Information
U.S. Department of Commerce Room 5896
1401 Constitution Ave. NW
Washington, DC 20230

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machine, FOIAonline, or Office after normal business hours will be deemed received on the next normal 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.

You also may contact the NOAA FOIA Public Liaison, Robert Swisher, at (301)-628-5755.

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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

Sincerely,

Mr. Mark Graff
NOAA FOIA Officer

CAUSE *of* ACTION
— INSTITUTE —

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, May 8, 2018 7:38 AM
To: Torczon, Andrea
Subject: Fwd: Additional Fee Waiver Questions
Attachments: 2018.04.11 NOAA FRA Request Clarification, No. DOC-NOAA-2018-001058.pdf;
2018.04.11 CoA Inst. FOIA Request Clarification, No. DOC-NOAA-2018-001058.pdf;
ATT00003.bin

Hello Andrea,

Please see Mr. Mulvey's response to me email 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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----- Forwarded message -----

From: Ryan Mulvey <Ryan.Mulvey@causeofaction.org>
Date: Tue, May 8, 2018 at 2:23 AM
Subject: RE: Additional Fee Waiver Questions
To: "foia@noaa.gov" <foia@noaa.gov>
Cc: "mark.graff@noaa.gov" <mark.graff@noaa.gov>

Mark,

Thank you for your email. As you likely know, CoA Institute filed an appeal from NOAA's denial of the fee-related requests for FOIA request No. 2018-001058 on April 13, 2018. A few days before that, I sent you a clarification letter regarding the scope of Items 1 and 4 (dated April 11, 2018). I am attaching that letter here, as well as the cover email. I believe our response in the April 11th letter answers your questions concerning Items 1 and 4. Please let me know if you require any further clarification.

Ryan

From: foia@noaa.gov [mailto:foia@noaa.gov]
Sent: Monday, May 07, 2018 11:07 AM
To: Ryan Mulvey <Ryan.Mulvey@causeofaction.org>
Subject: Additional Fee Waiver Questions

05/07/2018 10:38 AM
FOIA Request: DOC-NOAA-2018-001058

Good Morning Mr. Mulvey,

In speaking with DOC, there are additional questions that will need to be answered that directly impact your eligibility for a fee waiver. Specifically, as to items #1 and #4, we needed to determine your continued interest in the records considering the dismissal of the underlying litigation by Cause of Action. A large portion of the records that would be responsive to your request are either part of the public record, or would be non-substantive in informing the public of any activities of the government.

Thank you in advance for your feedback on the scope of the request and the resulting impact on fee waiver eligibility. Best regards,

Mark Graff

NOAA FOIA Officer

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

From: Ryan Mulvey <Ryan.Mulvey@causeofaction.org>
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Cc: "foia@noaa.gov" <foia@noaa.gov>
Bcc:
Date: Wed, 11 Apr 2018 23:20:28 +0000
Subject: FOIA Request Clarification, No. DOC-NOAA-2018-001058

Mr. Graff,

I hope that this e-mail finds you well. I have received your recent denial of CoA Institute's fee-related requests for FOIA request No. 2018-001058. In the denial letter you also indicated that the agency required clarification as to the scope of Items One and Four. Please find attached a letter providing the requested clarification. I am happy to discuss this matter further if there is still any ambiguity or confusion.

Kind regards,

Ryan Mulvey

Ryan P. Mulvey | Counsel

Cause of Action Institute

1875 Eye Street NW, Suite 800

Washington, D.C. 20006

(o) 202.400.2729 / (c) (b)(6)

Ryan.Mulvey@causeofaction.org

Admitted to the practice of law in New York State and the District of Columbia



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CAUSE *of* ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

April 11, 2018

VIA E-MAIL

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
ATTN: Mark Graff, NOAA FOIA Officer
E-mail: foia@noaa.gov / mark.graff@noaa.gov

Re: Freedom of Information Act Request No. NOAA-2018-001058

Dear Mr. Graff:

On March 28, 2018, CoA Institute submitted a Freedom of Information Act (“FOIA”) request to the National Oceanic and Atmospheric Administration (“NOAA”).¹ This request seeks four categories of records concerning NOAA’s response to a Federal Records Act (“FRA”) inquiry by the National Archives and Records Administration (“NARA”), as well as NOAA’s policy of treating all electronic messages created or received through the “chat” function of the agency’s Google-based e-mail platform as categorically “off the record.”² CoA Institute also requested a public interest fee waiver, categorization as a requester of the news media, and expedited processing.³

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¹ Letter from CoA Inst. to Nat’l Oceanic & Atmospheric Admin. (Mar. 28, 2018) (on file with CoA Inst.).

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General under an agent relationship. Additionally, the fourth item . . . would be, in part, duplicative of the records sought in [CoA Institute's] prior litigated request. Please identify what, if any, records [CoA Institute] seek[s] that would pre-date the submission of [that] previously-litigated request, or whether [CoA Institute] only seek[s] records created following the submission of [the] litigated request (DOC-NOAA-2017-001101).⁹

This letter follows to clarify the scope of Items One and Four.

Item One

Item One seeks “[a]ll communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.”¹⁰ As suggested by the citation to 44 U.S.C. § 3106(a), the scope of Item One is limited to NOAA’s communications with the Department of Justice *in furtherance of NOAA’s efforts to comply with the FRA*. For example, if NOAA sought to initiate action through the Attorney General for the recovery of electronic messages created or received on Google Hangouts, then records of those efforts would be responsive to Item One. By contrast, communications between NOAA and the Assistant U.S. Attorney who represented the agency in litigation against CoA Institute would fall outside the intended scope of Item One.

Item Four

Item Four seeks “all records concerning NOAA’s efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue [in NARA’s inquiry], or to investigate [NOAA’s] formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages.”¹¹ Because the time frame for this request is “July 1, 2017 to the present,” any potentially responsive records that “pre-date” the submission of FOIA Request No. DOC-NOAA-2017-001101 (April 27, 2017), would not be responsive. Moreover, it is unclear how this item is in any way “duplicative.” CoA Institute’s previously-litigated requests sought (1) agency guidance and (2) electronic messages created or received on Google Chat/Hangouts. Here, Item Four seeks records that concern NOAA’s efforts to (1) locate said guidance, (2) retrieve the previously-requested chat messages (as they were the subject of the allegations addressed by NARA), or (3) otherwise react or respond to NARA’s July 17, 2017 inquiry letter.

Conclusion

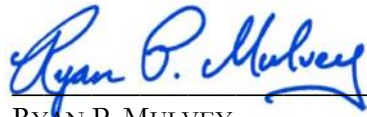
I hope that these clarifications are helpful. If you have any additional questions or require further clarification, please feel free to contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org. Thank you.

⁹ *Id.* at 2.

¹⁰ March 28, 2018 FOIA Request, *supra* note 1, at 2.

¹¹ *Id.*

Sincerely,

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RYAN P. MULVEY
COUNSEL

EXHIBIT

1



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

April 5, 2018

Attn: Ryan P. Mulvey
Cause of Action Institute
1875 Eye St. NW, Suite 800
Washington, DC 20006

Re: FOIA Request No. DOC-NOAA-2018-001058

Dear Mr./Ms. Mulvey:

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1. All communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.⁹
2. All records reflecting notification by NOAA to the Archivist of the United States or NARA under 44 U.S.C. § 3106 or submission of a report under 36 C.F.R. § 1230.14.
3. All communications between NOAA and NARA concerning Google Chat, Google Hangouts, Skype, or other similar electronic messaging system, including, but not limited to, all communications concerning CoA Institute's allegations, CoA Institute's ongoing FOIA litigation against NOAA,¹⁰ or the July 17, 2017 NARA letter.
4. To the extent not already covered by the above items of this request, all records concerning NOAA's efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue, or to investigate its formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages. Responsive records would include, for example, correspondence between NOAA's FOIA Office or Office of the Chief Administrative Officer and the National Marine Fisheries Service's Greater Atlantic Regional Office or the New England Fishery Management Council.

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5. Whether the requester has a commercial interest that would be furthered by the requester.
6. Whether any identified commercial interest of the requester is sufficiently great, in comparison with the public interest in disclosure, such that the disclosure is not primarily in the commercial interest of the requester.

Your fee waiver justification does not satisfy the six factors contemplated in 15 CFR 4.11. The requested records, contrary to your assertions, would not significantly increase the public’s understanding of Government Activities. Rather, the records would, only be the records generated pursuant to your own prior FOIA request and allegations you personally raised with the news media. As such, the interest served through disclosure would primarily be to the benefit of the requester(s), rather than to a segment of interested individuals. Therefore this constitutes a denial of your fee waiver request. Your request will be processed under the “Other” fee category and if applicable, a fee estimate will be sent to you. Additionally, a clarification of the scope of your current request, as written, is required. The first item of your request is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to your FOIA litigation as constituting communications with the Attorney General under an agent relationship. Additionally, the fourth item of your request would be, in part, duplicative of the records sought in your prior litigated request. Please identify what, if any, records you are seeking that would pre-date the submission of your previously-litigated request, or whether you are only seeking records created following the submission of your litigated request (DOC-NOAA-2017-001101).

You have the right to appeal this denial of the FOIA Fee Waiver request. An appeal must be received within 90 calendar days of the date of this response letter by:

Assistant General Counsel for Employment, Litigation, and Information
U.S. Department of Commerce Room 5896
1401 Constitution Ave. NW
Washington, DC 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, or by FOIAonline, if you have an account in FOIAonline, at <https://foiaonline.regulations.gov/foia/action/public/home#>. The appeal should include a copy of the original request and initial denial, if any. The appeal should include a statement of the reasons why the Fee Waiver request should not be denied and why the adverse determination was in error. The appeal letter, the envelope, the e-mail subject line, should be clearly marked "Freedom of Information Act Appeal." The e-mail, FOIAonline, and Office are monitored only on working days during normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday). FOIA appeals posted to the e-mail box, fax

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You also may contact the NOAA FOIA Public Liaison, Robert Swisher, at (301)-628-5755.

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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

Sincerely,

Mr. Mark Graff
NOAA FOIA Officer

CAUSE *of* ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

April 11, 2018

VIA E-MAIL

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
ATTN: Mark Graff, NOAA FOIA Officer
E-mail: foia@noaa.gov / mark.graff@noaa.gov

Re: Freedom of Information Act Request No. NOAA-2018-001058

Dear Mr. Graff:

On March 28, 2018, CoA Institute submitted a Freedom of Information Act (“FOIA”) request to the National Oceanic and Atmospheric Administration (“NOAA”).¹ This request seeks four categories of records concerning NOAA’s response to a Federal Records Act (“FRA”) inquiry by the National Archives and Records Administration (“NARA”), as well as NOAA’s policy of treating all electronic messages created or received through the “chat” function of the agency’s Google-based e-mail platform as categorically “off the record.”² CoA Institute also requested a public interest fee waiver, categorization as a requester of the news media, and expedited processing.³

On April 2, 2018, NOAA denied CoA Institute’s request for expedited processing, indicating that “the records you are seeking primarily involve records regarding the processing of your own prior FOIA request, litigation, and communications with NARA regarding your own . . . allegations.”⁴ NOAA concluded that the requested “records would primarily be for [CoA Institute’s] own benefit, rather than the criteria in 15 [C.F.R. §] 4.6(e) [*sic*].”⁵ Yet NOAA provided no justification for its adverse determination, except to state that CoA Institute did “not satisfy the regulatory threshold for other-than ordinary processing.”⁶ CoA Institute filed an administrative appeal on April 4, 2018.⁷

On April 5, 2018, NOAA denied both CoA Institute’s request for a public interest fee waiver and CoA Institute’s request for treatment as a representative of the news media for fee purposes.⁸ Furthermore—and relevant here—NOAA requested clarification of the scope of CoA Institute’s request. Specifically, NOAA wrote the following:

The first item . . . is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to [CoA Institute’s] FOIA litigation as constituting communications with the Attorney

¹ Letter from CoA Inst. to Nat’l Oceanic & Atmospheric Admin. (Mar. 28, 2018) (on file with CoA Inst.).

² *Id.* at 2.

³ *Id.* at 2–5.

⁴ Letter from Nat’l Oceanic & Atmospheric Admin. to CoA Inst. at 1 (Apr. 2, 2018) (on file with CoA Inst.).

⁵ *Id.* It appears NOAA meant to cite 15 C.F.R. § 4.6(f). Subsection (e) concerns multi-track processing.

⁶ *Id.* at 2.

⁷ Letter from CoA Inst. to Dep’t of Commerce (Apr. 4, 2018) (on file with CoA Inst.).

⁸ Letter from Nat’l Oceanic & Atmospheric Admin. to CoA Inst. (Apr. 5, 2018) (attached as Exhibit 1). CoA Institute intends to appeal these adverse determinations.

General under an agent relationship. Additionally, the fourth item . . . would be, in part, duplicative of the records sought in [CoA Institute's] prior litigated request. Please identify what, if any, records [CoA Institute] seek[s] that would pre-date the submission of [that] previously-litigated request, or whether [CoA Institute] only seek[s] records created following the submission of [the] litigated request (DOC-NOAA-2017-001101).⁹

This letter follows to clarify the scope of Items One and Four.

Item One

Item One seeks “[a]ll communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.”¹⁰ As suggested by the citation to 44 U.S.C. § 3106(a), the scope of Item One is limited to NOAA’s communications with the Department of Justice *in furtherance of NOAA’s efforts to comply with the FRA*. For example, if NOAA sought to initiate action through the Attorney General for the recovery of electronic messages created or received on Google Hangouts, then records of those efforts would be responsive to Item One. By contrast, communications between NOAA and the Assistant U.S. Attorney who represented the agency in litigation against CoA Institute would fall outside the intended scope of Item One.

Item Four

Item Four seeks “all records concerning NOAA’s efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue [in NARA’s inquiry], or to investigate [NOAA’s] formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages.”¹¹ Because the time frame for this request is “July 1, 2017 to the present,” any potentially responsive records that “pre-date” the submission of FOIA Request No. DOC-NOAA-2017-001101 (April 27, 2017), would not be responsive. Moreover, it is unclear how this item is in any way “duplicative.” CoA Institute’s previously-litigated requests sought (1) agency guidance and (2) electronic messages created or received on Google Chat/Hangouts. Here, Item Four seeks records that concern NOAA’s efforts to (1) locate said guidance, (2) retrieve the previously-requested chat messages (as they were the subject of the allegations addressed by NARA), or (3) otherwise react or respond to NARA’s July 17, 2017 inquiry letter.

Conclusion

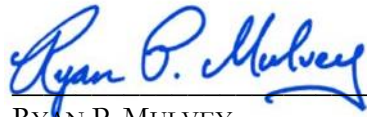
I hope that these clarifications are helpful. If you have any additional questions or require further clarification, please feel free to contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org. Thank you.

⁹ *Id.* at 2.

¹⁰ March 28, 2018 FOIA Request, *supra* note 1, at 2.

¹¹ *Id.*

Sincerely,



RYAN P. MULVEY
COUNSEL

EXHIBIT

1



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

April 5, 2018

Attn: Ryan P. Mulvey
Cause of Action Institute
1875 Eye St. NW, Suite 800
Washington, DC 20006

Re: FOIA Request No. DOC-NOAA-2018-001058

Dear Mr./Ms. Mulvey:

This letter responds to your Freedom of Information Act (FOIA) request entered into FOIAonline on March 28, 2018, in which you requested records as follows:

1. All communications between NOAA and the Attorney General of the United States concerning records created or received by NOAA employees through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system.⁹
2. All records reflecting notification by NOAA to the Archivist of the United States or NARA under 44 U.S.C. § 3106 or submission of a report under 36 C.F.R. § 1230.14.
3. All communications between NOAA and NARA concerning Google Chat, Google Hangouts, Skype, or other similar electronic messaging system, including, but not limited to, all communications concerning CoA Institute's allegations, CoA Institute's ongoing FOIA litigation against NOAA,¹⁰ or the July 17, 2017 NARA letter.
4. To the extent not already covered by the above items of this request, all records concerning NOAA's efforts to retrieve, recover, retain, or investigate the destruction of the electronic records at issue, or to investigate its formal policy concerning the retention of Google Chat, Google Hangout, or Skype messages. Responsive records would include, for example, correspondence between NOAA's FOIA Office or Office of the Chief Administrative Officer and the National Marine Fisheries Service's Greater Atlantic Regional Office or the New England Fishery Management Council.

Pursuant to procedures established in 15 CFR, Part 4.11(k), we rely on the following factors in determining whether the statutory standard for granting a fee waiver has been met:

1. The subject of the requested records must concern identifiable operations or activities of the Federal Government.

2. The disclosable portions of the requested records must be meaningfully informative about Government operations or activities in order to be “likely to contribute” to and increase public understanding of those operations or activities.
3. The disclosure of the requested information must 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. The disclosure of the requested information is likely to contribute “significantly” to the public’s understanding of Government operations or activities.
5. Whether the requester has a commercial interest that would be furthered by the requester.
6. Whether any identified commercial interest of the requester is sufficiently great, in comparison with the public interest in disclosure, such that the disclosure is not primarily in the commercial interest of the requester.

Your fee waiver justification does not satisfy the six factors contemplated in 15 CFR 4.11. The requested records, contrary to your assertions, would not significantly increase the public’s understanding of Government Activities. Rather, the records would, only be the records generated pursuant to your own prior FOIA request and allegations you personally raised with the news media. As such, the interest served through disclosure would primarily be to the benefit of the requester(s), rather than to a segment of interested individuals. Therefore this constitutes a denial of your fee waiver request. Your request will be processed under the “Other” fee category and if applicable, a fee estimate will be sent to you. Additionally, a clarification of the scope of your current request, as written, is required. The first item of your request is seeking all communications with the Attorney General. Please clarify to what extent this would include communications with the AUSA in response to your FOIA litigation as constituting communications with the Attorney General under an agent relationship. Additionally, the fourth item of your request would be, in part, duplicative of the records sought in your prior litigated request. Please identify what, if any, records you are seeking that would pre-date the submission of your previously-litigated request, or whether you are only seeking records created following the submission of your litigated request (DOC-NOAA-2017-001101).

You have the right to appeal this denial of the FOIA Fee Waiver request. An appeal must be received within 90 calendar days of the date of this response letter by:

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U.S. Department of Commerce Room 5896
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You also may contact the NOAA FOIA Public Liaison, Robert Swisher, at (301)-628-5755.

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Phone: 301-837-1996
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Toll-free: 1-877-684-6448

Sincerely,

Mr. Mark Graff
NOAA FOIA Officer

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CAUSE *of* ACTION
— INSTITUTE —

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, May 8, 2018 9:13 AM
To: Arlyn Penaranda - NOAA Federal
Cc: Charles Green - NOAA Federal; Lorna Martin-Gross - NOAA Federal; Milena Seelig - NOAA Federal; Robert Hogan
Subject: Re: FW: Records Request

Hi Arlyn,

(looping in Bob Hogan)

Fortunately, the handoff for processing on these is relatively straightforward--

(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)

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.

On Tue, May 8, 2018 at 9:00 AM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

Mark/Chaz,

Good morning. This inquiry came when I was on leave. Another unique situation for OLE.

(b)(5)

Please advise.

Thank you!

Arlyn

From: Kelly Andrade NOAA Federal <kelly.andrade@noaa.gov>
Sent: Friday, May 04, 2018 10:49 AM
To: 'Nelson, Rebekah' <Rebekah.Nelson@MyFWC.com>
Cc: 'Lorna Martin-Gross - NOAA Federal' <lorna.martin-gross@noaa.gov>; 'Arlyn Penaranda - NOAA Federal' <arlyn.penaranda@noaa.gov>; 'Manny Antonaras - NOAA Federal' <manny.antonaras@noaa.gov>; 'Tracy Dunn - NOAA Federal' <tracy.dunn@noaa.gov>; 'Carolyn Sramek - NOAA Federal' <carolyn.sramek@noaa.gov>
Subject: RE: Records Request

Good Morning Bekah,

I wanted to let you know that I received your email and will be forwarding it to our HQ's FOIA personnel, who are cc'd in this email (Arlyn Penaranda & Lorna Martin-Gross), for them to respond per our protocol.

Lorna & Arlyn,

A little background on this. I received a phone call from an FWC officer asking for guidance on a records request he received relating to an open-ongoing case. The case was still at the state level and had not yet been forwarded to NOAA OLE for review/processing. The officer, knowing that it was a federal violation,

reached out to me asking for information on our records request process for his PIO. I sent the email below explaining exemption open cases <(7)(a)> with the link to the NMFS site for additional information. I am now referring the questions that Rebekah Nelson, FWC PIO, sent per protocol and for consistency. Please let me know if you need additional information from me.

Thanks,
Kelly

Respectfully,

Kelly A. Andrade

Enforcement Technician & Property Custodian

NOAA Fisheries Office of Law Enforcement

Southeast Division

263 13th Avenue South, Suite 109

St. Petersburg, FL 33710

(727) 824-5329

Fax: (727) 824-5355

From: Nelson, Rebekah [<mailto:Rebekah.Nelson@MyFWC.com>]

Sent: Friday, May 04, 2018 10:29 AM

To: kelly.andrade@noaa.gov

Subject: RE: Records Request

Good morning Ms. Andrade,

I referred the reporter, Zack McDonald, with the Panama City News Herald to the link you provided to make his request. However, I did want to follow up with you to get some clarification on Florida's public records laws versus Freedom of Information Act. In Florida when we receive a public records request, there is certain information that is not considered criminal investigative information and must be immediately released.

This information includes:

1. The time, date, location and nature of a reported crime.
2. The name, sex, age and address of a person arrested (excluding certain juvenile crime records) or the name, sex, age and address of the victim of a crime, except as provided in s. 119.071(2)(h), F.S. (providing confidentiality for information revealing the identity of a victim of a sexual offense, child abuse or a child victim of human trafficking).
3. The time, date and location of the incident and of the arrest.
4. The crime charged.
5. Documents given or required to be given to the person arrested unless the court finds that release of the information prior to trial would be defamatory to the good name of a victim or witness and would impair the ability of the state attorney to locate or prosecute a codefendant.
6. Information and indictments except as provided in s. 905.26, F.S. (prohibiting disclosure of finding of indictment against a person not in custody, under recognizance or under arrest).

I wanted to check with you to see if the information above would be able to be released in Federal cases such as this one? Looking forward to your insight on this.

Very respectfully,

Bekah

Bekah Nelson

Regional Public Information Director

Florida Fish and Wildlife Conservation Commission
3911 Hwy. 2321 Panama City, FL, 32409-1658
Phone: (850) 767-3619 Cel (b)(6)

Rebekah.Nelson@MyFWC.com



From: Marlow, Jason

Sent: Wednesday, May 2, 2018 4:16 PM

To: Nelson, Rebekah <Rebekah.Nelson@MyFWC.com>

Cc: Kelly Andrade - NOAA Federal <kelly.andrade@noaa.gov>

Subject: RE: Records Request

Bekah,

See the below information from Kelly. If there is any concern over the Sunshine Law versus the Freedom of Information Act and what hat we are working under, then we may have to get Legal to speak with their General Council in order to come to a solution.

Jason

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

From: **Kelly Andrade NOAA Federal** <kelly.andrade@noaa.gov>

Date: Wednesday, May 2, 2018

Subject: Records Request

To: jason.marlow@noaa.gov

Cc: William Widener - NOAA Federal <william.widener@noaa.gov>, Carolyn Sramek - NOAA Federal <carolyn.sramek@noaa.gov>

Hello Jason,

In reference to the records request we spoke about earlier, since this is an open, on-going case we would withhold all documents associated with it until it is considered closed. Whomever is requesting this information is free to make the request for records but this is the reply they would receive. If your PIO would like to refer the requester to the following website, it provides an abundance of information on the Freedom of Information Act (FOIA) process including how to make the request:

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If you have any additional questions, please let me know.

Thanks,

Kelly

Respectfully,

Kelly A. Andrade

Enforcement Technician & Property Custodian

NOAA Fisheries Office of Law Enforcement

Southeast Division

263 13th Avenue South, Suite 109

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Kelly Andrade

Enforcement Technician

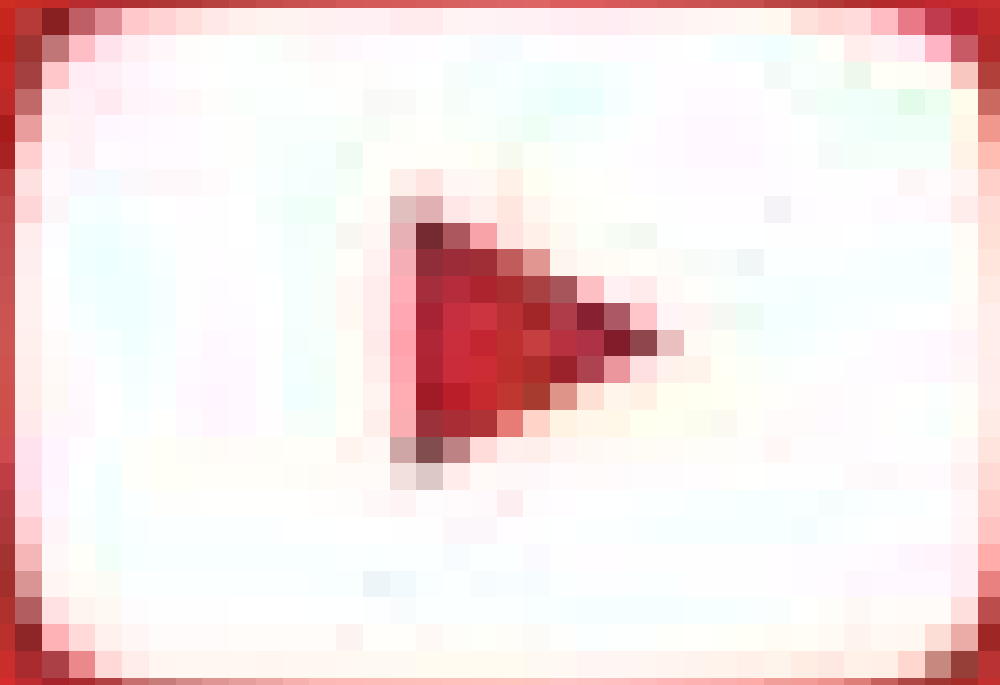
NOAA Office of Law Enforcement

(727) 824-5329













Arlyn Penaranda - NOAA Federal

From: Arlyn Penaranda - NOAA Federal
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(b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Please advise.

Thank you!

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Bekah Nelson

Regional Public Information Director
Florida Fish and Wildlife Conservation Commission
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Phone: (850) 767-3619 Cel (b)(6)
Rebekah.Nelson@MyFWC.com



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Subject: RE: Records Request

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Date: Wednesday, May 2, 2018
Subject: Records Request
To: jason.marlow@noaa.gov
Cc: William Widener - NOAA Federal <william.widener@noaa.gov>, Carolyn Sramek - NOAA Federal <carolyn.sramek@noaa.gov>

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Thanks,

Kelly

Respectfully,

Kelly A. Andrade

Enforcement Technician & Property Custodian
NOAA Fisheries Office of Law Enforcement
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Kelly Andrade

Enforcement Technician

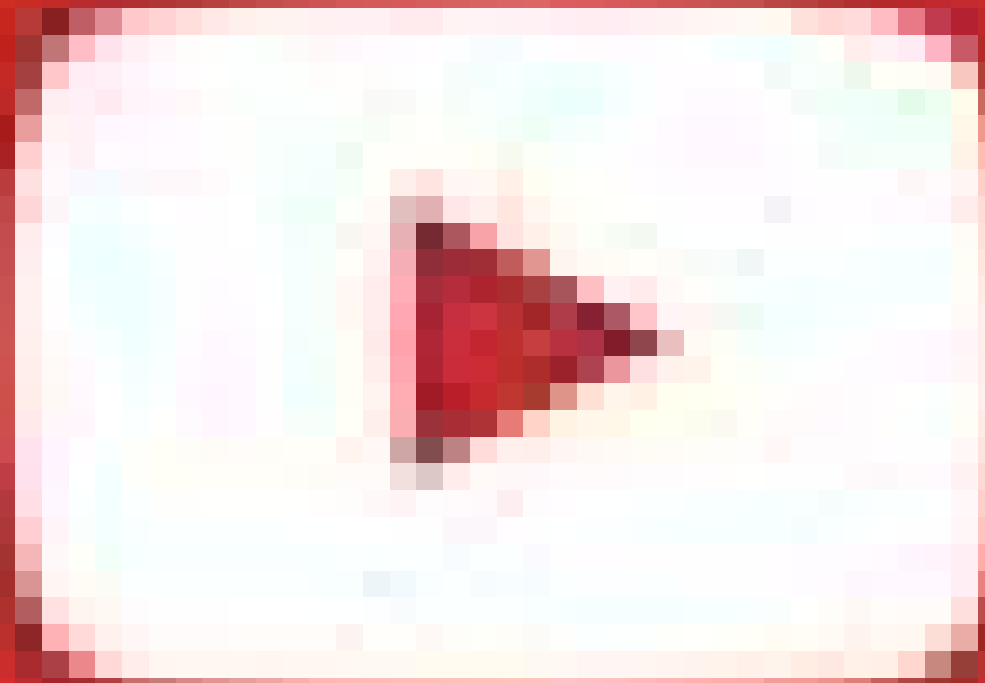
NOAA Office of Law Enforcement

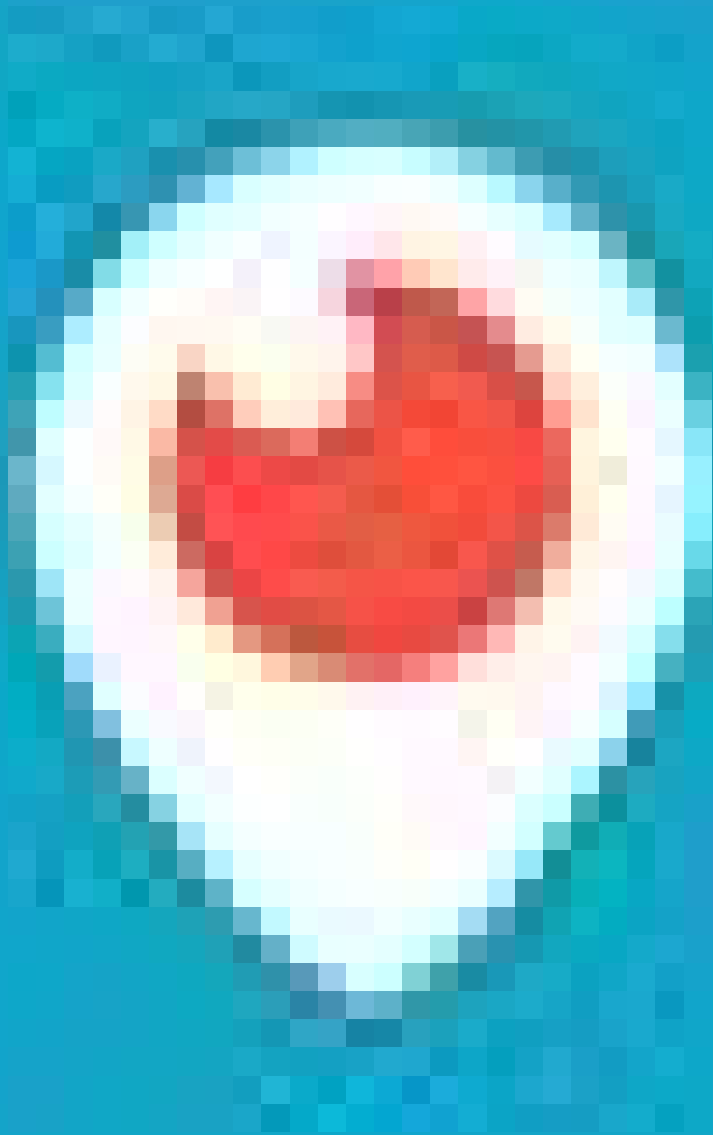
(727) 824-5329













Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, May 8, 2018 9:15 AM
To: Lola Stith - NOAA Affiliate
Subject: Fwd: FW: Records Request

Hey Lola,

Can you please reach out to Arlyn to make sure this FWC request gets logged in correctly? It has some nuance to it (as you can see 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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----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Tue, May 8, 2018 at 9:13 AM
Subject: Re: FW: Records Request
To: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>
Cc: Charles Green - NOAA Federal <charles.green@noaa.gov>, Lorna Martin-Gross - NOAA Federal <lorna.martin-gross@noaa.gov>, Milena Seelig - NOAA Federal <milena.seelig@noaa.gov>, Robert Hogan <robert.j.hogan@noaa.gov>

Hi Arlyn,

(looping in Bob Hogan)

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(b)(5)
[Redacted text block]

(b)(5) [Redacted]

[Redacted]

[Redacted]

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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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[Redacted] Please advise.

Thank you!

Arlyn

From: Kelly Andrade NOAA Federal <kelly.andrade@noaa.gov>

Sent: Friday, May 04, 2018 10:49 AM

To: 'Nelson, Rebekah' <Rebekah.Nelson@MyFWC.com>

Cc: 'Lorna Martin-Gross - NOAA Federal' <lorna.martin-gross@noaa.gov>; 'Arlyn Penaranda - NOAA Federal' <arlyn.penaranda@noaa.gov>; 'Manny Antonaras - NOAA Federal' <manny.antonaras@noaa.gov>; 'Tracy Dunn - NOAA Federal' <tracy.dunn@noaa.gov>; 'Carolyn Sramek - NOAA Federal' <carolyn.sramek@noaa.gov>

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Thanks,
Kelly

Respectfully,

Kelly A. Andrade

Enforcement Technician & Property Custodian

NOAA Fisheries Office of Law Enforcement

Southeast Division

263 13th Avenue South, Suite 109

St. Petersburg, FL 33710

(727) 824-5329

Fax: (727) 824-5355

From: Nelson, Rebekah [<mailto:Rebekah.Nelson@MyFWC.com>]

Sent: Friday, May 04, 2018 10:29 AM

To: kelly.andrade@noaa.gov

Subject: RE: Records Request

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Regional Public Information Director

Florida Fish and Wildlife Conservation Commission
3911 Hwy. 2321 Panama City, FL, 32409-1658
Phone: (850) 767-3619 Cel (b)(6)

Rebekah.Nelson@MyFWC.com



From: Marlow, Jason
Sent: Wednesday, May 2, 2018 4:16 PM
To: Nelson, Rebekah <Rebekah.Nelson@MyFWC.com>
Cc: Kelly Andrade - NOAA Federal <kelly.andrade@noaa.gov>
Subject: RE: Records Request

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Date: Wednesday, May 2, 2018
Subject: Records Request
To: jason.marlow@noaa.gov
Cc: William Widener - NOAA Federal <william.widener@noaa.gov>, Carolyn Sramek - NOAA Federal

<carolyn.sramek@noaa.gov>

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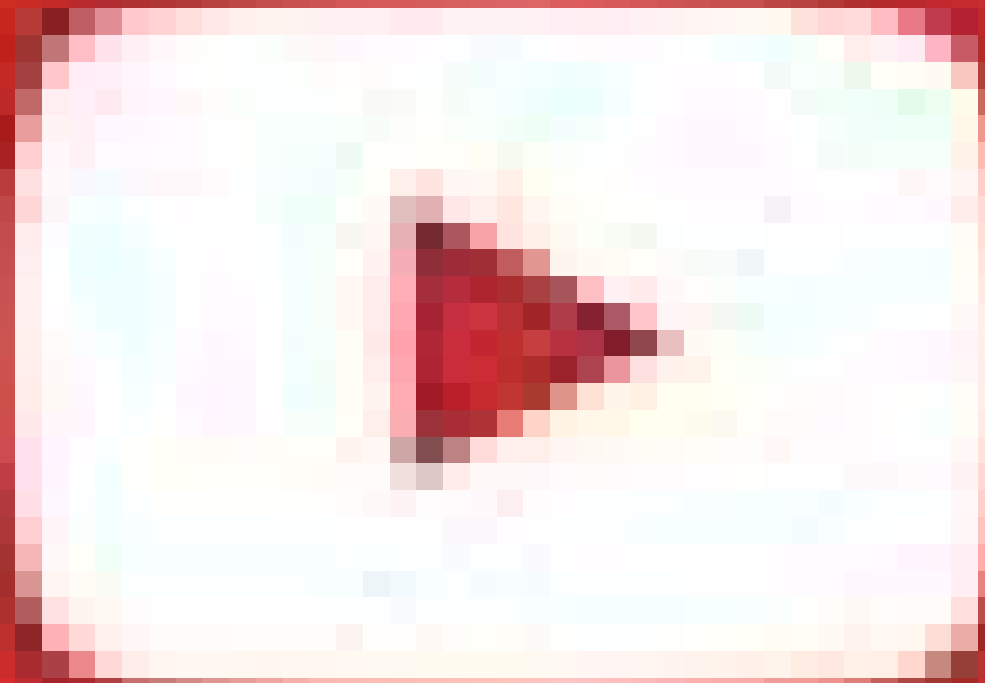
NOAA Office of Law Enforcement

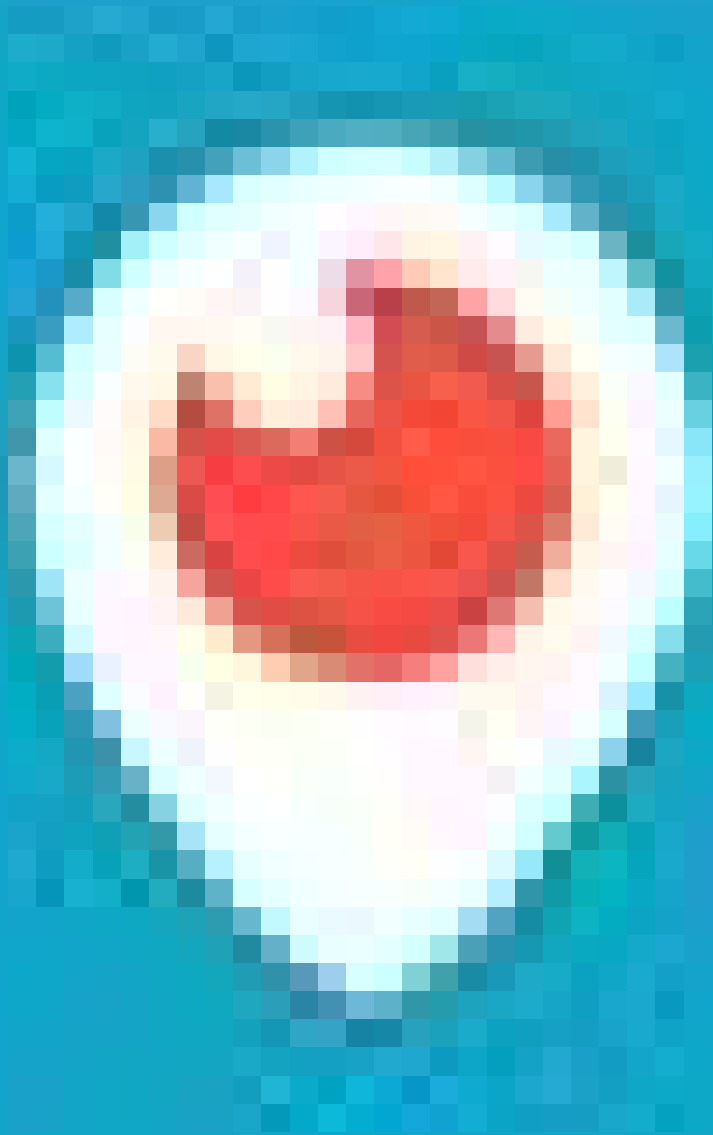
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Arlyn Penaranda - NOAA Federal

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NOAA Fisheries Office of Law Enforcement
Southeast Division

263 13th Avenue South, Suite 109
St. Petersburg, FL 33710
(727) 824-5329
Fax: (727) 824-5355

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Florida Fish and Wildlife Conservation Commission
3911 Hwy. 2321 Panama City, FL, 32409-1658
Phone: (850) 767-3619 Cel (b)(6)
Rebekah.Nelson@MyFWC.com



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Sent: Wednesday, May 2, 2018 4:16 PM
To: Nelson, Rebekah <Rebekah.Nelson@MyFWC.com>
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Date: Wednesday, May 2, 2018
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To: jason.marlow@noaa.gov
Cc: William Widener - NOAA Federal <william.widener@noaa.gov>, Carolyn Sramek - NOAA Federal <carolyn.sramek@noaa.gov>

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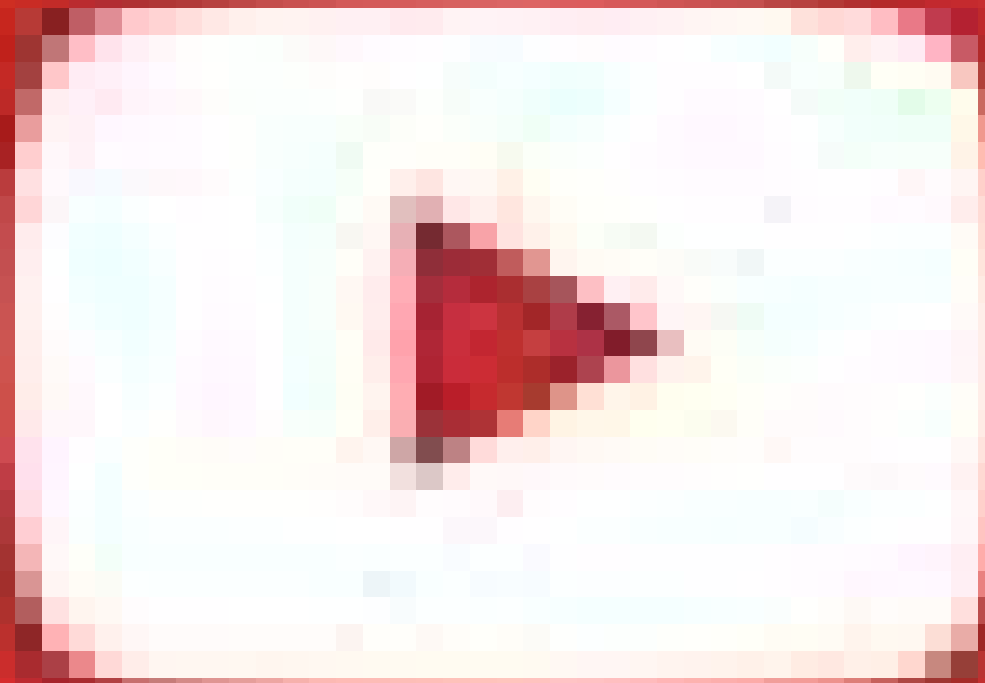
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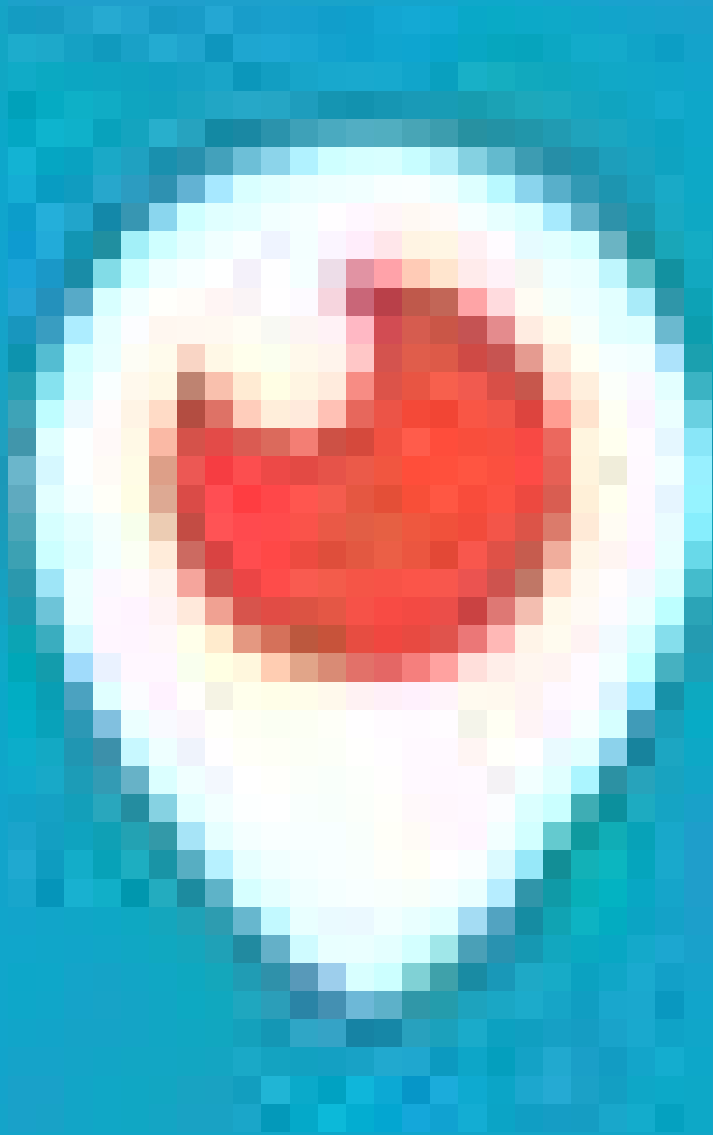
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Robert Hogan - NOAA Federal

From: Robert Hogan - NOAA Federal
Sent: Tuesday, May 8, 2018 9:46 AM
To: Arlyn Penaranda - NOAA Federal
Cc: Mark Graff - NOAA Federal; Charles Green - NOAA Federal; Lorna Martin-Gross - NOAA Federal; Milena Seelig - NOAA Federal
Subject: Re: FW: Records Request

Arlyn:

(b)(5) [Redacted]

Mark - please chime in if that's not correct.

Thanks,

Bob

NOAA General Counsel Enforcement Section
1315 East West Highway, Room 15861
Silver Spring, MD 20910
robert.j.hogan@noaa.gov
o 301-427-8283

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Florida Fish and Wildlife Conservation Commission
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Phone: (850) 767-3619 Cel (b)(6)

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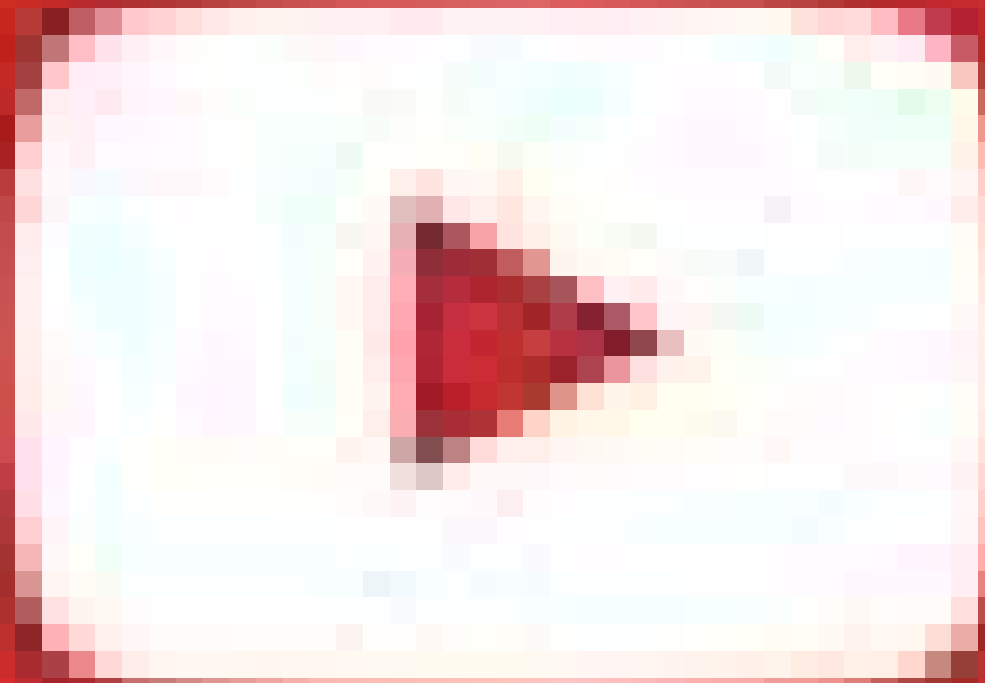
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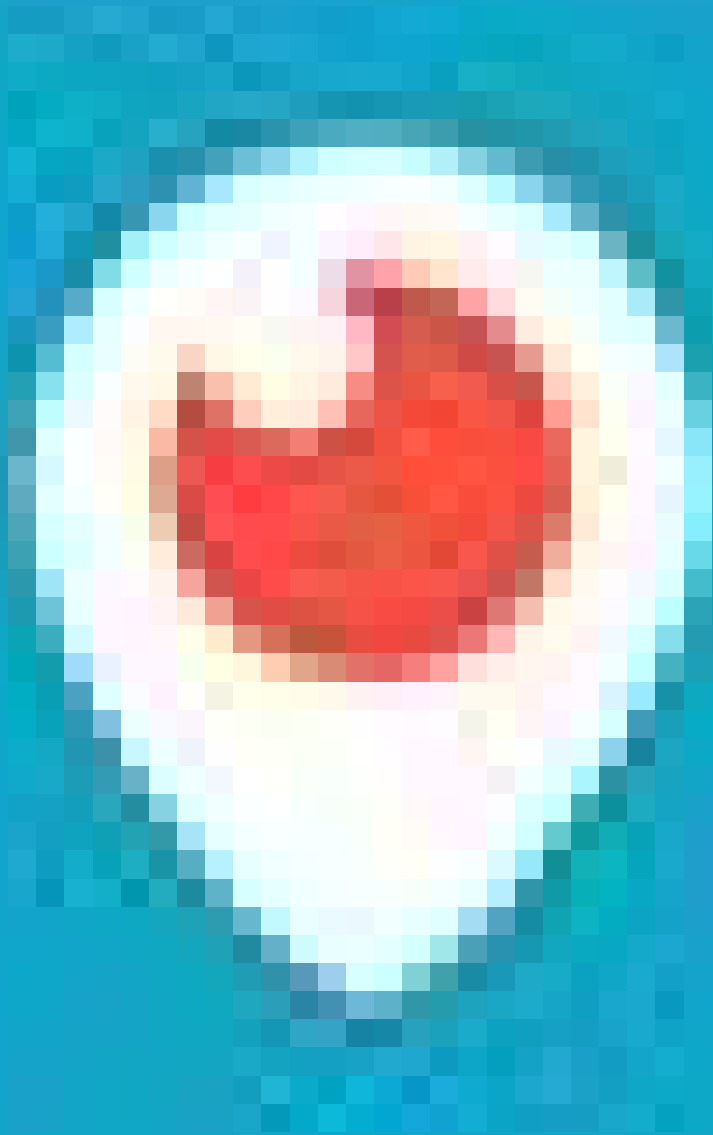
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A little background on this. I received a phone call from an FWC officer asking for guidance on a records request he received relating to an open-ongoing case. The case was still at the state level and had not yet been forwarded to NOAA OLE for review/processing. The officer, knowing that it was a federal violation, reached out to me asking for information on our records request process for his PIO. I sent the email below explaining exemption open cases <(7)(a)> with the link to the NMFS site for additional information. I am now referring the questions that Rebekah Nelson, FWC PIO, sent per protocol and for consistency. Please let me know if you need additional information from me.

Thanks,
Kelly

Respectfully,

Kelly A. Andrade

Enforcement Technician & Property Custodian

NOAA Fisheries Office of Law Enforcement

Southeast Division

263 13th Avenue South, Suite 109

St. Petersburg, FL 33710

(727) 824-5329

Fax: (727) 824-5355

From: Nelson, Rebekah [<mailto:Rebekah.Nelson@MyFWC.com>]

Sent: Friday, May 04, 2018 10:29 AM

To: kelly.andrade@noaa.gov

Subject: RE: Records Request

Good morning Ms. Andrade,

I referred the reporter, Zack McDonald, with the Panama City News Herald to the link you provided to make his request. However, I did want to follow up with you to get some clarification on Florida's public records laws versus Freedom of Information Act. In Florida when we receive a public records request, there is certain information that is not considered criminal investigative information and must be immediately released.

This information includes:

1. The time, date, location and nature of a reported crime.
2. The name, sex, age and address of a person arrested (excluding certain juvenile crime records) or the name, sex, age and address of the victim of a crime, except as provided in s. 119.071(2) (h), F.S. (providing confidentiality for information revealing the identity of a victim of a sexual offense, child abuse or a child victim of human trafficking).
3. The time, date and location of the incident and of the arrest.
4. The crime charged.
5. Documents given or required to be given to the person arrested unless the court finds that release of the information prior to trial would be defamatory to the good name of a victim or witness and would impair the ability of the state attorney to locate or prosecute a codefendant.
6. Information and indictments except as provided in s. 905.26, F.S. (prohibiting disclosure of finding of indictment against a person not in custody, under recognizance or under arrest).

I wanted to check with you to see if the information above would be able to be released in Federal cases such as this one? Looking forward to your insight on this.

Very respectfully,

Bekah

Bekah Nelson

Regional Public Information Director

Florida Fish and Wildlife Conservation Commission
3911 Hwy. 2321 Panama City, FL, 32409-1658
Phone: (850) 767-3619 Cel (b)(6)

Rebekah.Nelson@MyFWC.com



From: Marlow, Jason
Sent: Wednesday, May 2, 2018 4:16 PM
To: Nelson, Rebekah <Rebekah.Nelson@MyFWC.com>
Cc: Kelly Andrade - NOAA Federal <kelly.andrade@noaa.gov>
Subject: RE: Records Request

Bekah,

See the below information from Kelly. If there is any concern over the Sunshine Law versus the Freedom of Information Act and what hat we are working under, then we may have to get Legal to speak with their General Council in order to come to a solution.

Jason

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

From: Kelly Andrade NOAA Federal <kelly.andrade@noaa.gov>
Date: Wednesday, May 2, 2018
Subject: Records Request
To: jason.marlow@noaa.gov
Cc: William Widener - NOAA Federal <william.widener@noaa.gov>, Carolyn Sramek - NOAA Federal <carolyn.sramek@noaa.gov>

Hello Jason,

In reference to the records request we spoke about earlier, since this is an open, on-going case we would withhold all documents associated with it until it is considered closed. Whomever is requesting this information is free to make the request for records but this is the reply they would receive. If your PIO would like to refer the requester to the following website, it provides an abundance of information on the Freedom of Information Act (FOIA) process including how to make the request:

<http://www.noaa.gov/foia-freedom-of-information-act>

If you have any additional questions, please let me know.

Thanks,

Kelly

Respectfully,

Kelly A. Andrade

Enforcement Technician & Property Custodian

NOAA Fisheries Office of Law Enforcement

Southeast Division

263 13th Avenue South, Suite 109

St. Petersburg, FL 33710

(727) 824-5329

Fax: (727) 824-5355

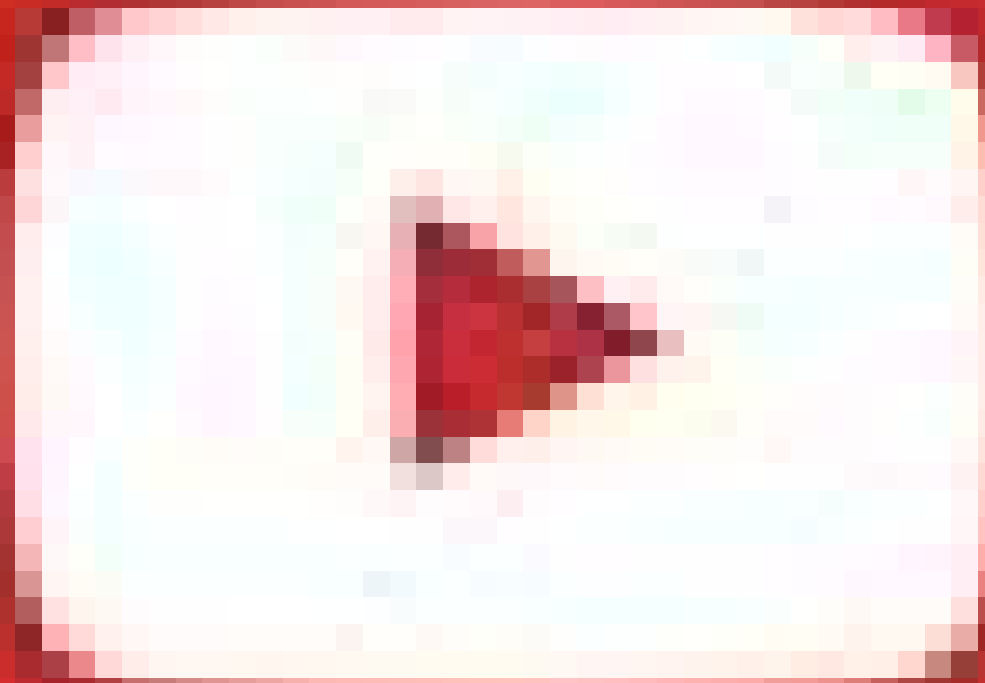
--

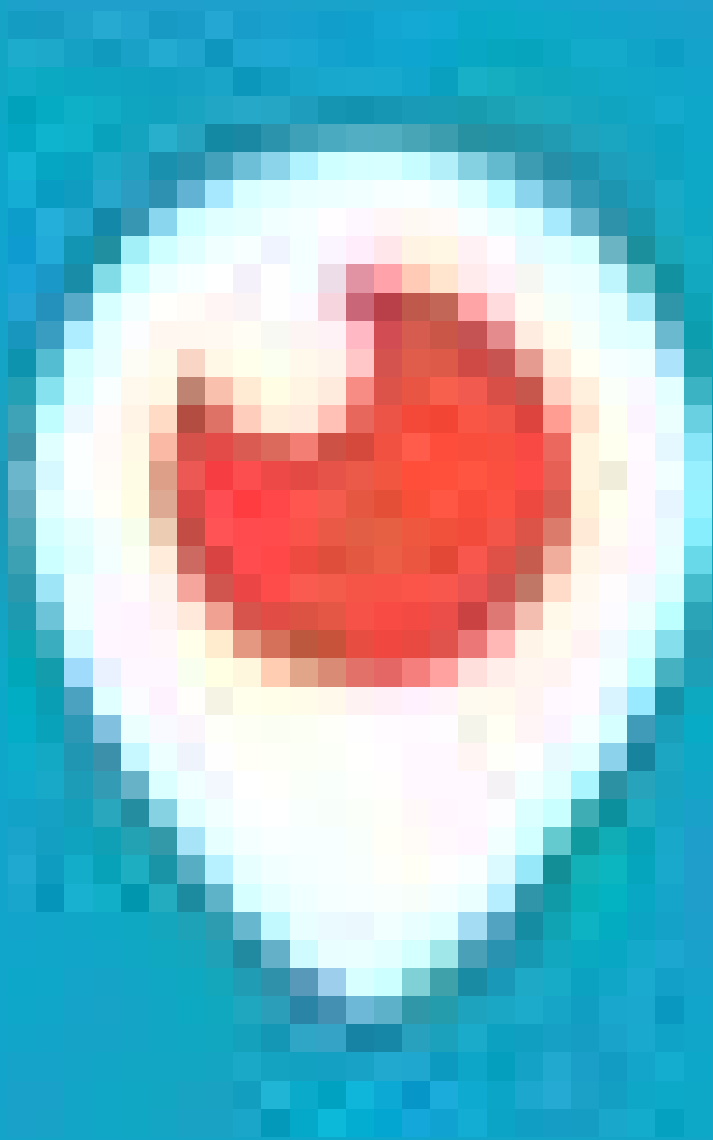
Kelly Andrade
Enforcment Technician
NOAA Office of Law Enforcement
(727) 824-5329













Lola Stith - NOAA Affiliate

From: Lola Stith - NOAA Affiliate
Sent: Tuesday, May 8, 2018 10:23 AM
To: Mark Graff - NOAA Federal
Subject: Re: DOC-NOAA-2018-000951
Attachments: Requesters Reply to Clarification_ Freedom of Information Act Request #DOC-NOAA-2018-000951.pdf

Hi Mark (b)(5) |
have it attached for convenience.

Lola

On Tue, May 8, 2018 at 10:07 AM, 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 (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)
lola.m.stith@noaa.gov



RE: Freedom of Information Act Request #DOC-NOAA-2018-000951

1 message

50541-48120867@requests.muckrock.com <50541-48120867@requests.muckrock.com> Tue, Apr 3, 2018 at 10:47 AM
To: foia@noaa.gov

National Oceanic and Atmospheric Administration
FOIA Office
Room 10641, SSMC-3
[1315 East West Highway](#)
[Silver Spring, MD 20910-3281](#)

April 3, 2018

This is a follow up to request number DOC-NOAA-2018-000951:

Hello Mr. Graff,

Thank you for your message. I will attempt to address your questions in as efficient a manner as possible.

These records are being requested as part of a journalistic interrogation of the contents of agency "talking point" communications, as well as of the FOIA process by which they're obtained. For many years, I have been a reporter for MuckRock News, an organization that reports on and participates in the public records process and the materials released therefrom; we have a global audience of journalists, academics, historians, federal employees, FOIA officers, and individuals.

I am interested in all emails and other memos and communications referencing the initially-mentioned terms circulated through your agency - in both the Office of Public Affairs and in the agency as a whole. A description would be welcome in order to consider further limitations on this request, though if you consider such a provision outside the scope of this request, other alternatives or an estimate of the associated costs, if applicable, would be appreciated.

If a universal search of agency records isn't possible, please let me know and we can consider how to further limit this request by subject; the rhetoric and direction associated with "talking points" would undoubtedly be enlightening to an American public hoping to understand the operations of this agency and the workings of the federal government as a whole at this point in the country's development, but I'll await your response on the technological capabilities of the search before expounding upon additional support for this point.

Thank you for your time and help.

Best wishes,
Beryl

Filed via MuckRock.com

E-mail (Preferred): 50541-48120867@requests.muckrock.com

Upload documents directly: https://www.muckrock.com/accounts/agency_login/national-oceanic-and-atmospheric-administration-121/foia-march-madness-2018-agency-talking-points-november-8-2016-march-13-2018-national-oceanic-and-atmospheric-administration-50541/?uuid-login=778d9640-7eac-4e08-9af1-91c4b051a4d8&email=foia%40noaa.gov#agency-reply

Is this email coming to the wrong contact? Something else wrong? Use the above link to let us know.

For mailed responses, please address (see note):

MuckRock News
DEPT MR 50541
[411A Highland Ave](#)
[Somerville, MA 02144-2516](#)

PLEASE NOTE: This request was filed by a MuckRock staff reporter. Also note that improperly addressed (i.e., with the requester's name rather than "MuckRock News" and the department number) requests might be returned as

undeliverable.

On March 15, 2018:
03/15/2018 03:13 PM FOIA Request: DOC-NOAA-2018-000951

In reviewing your request for a full waiver of fees, additional information is necessary to determine your eligibility for a fee waiver under 15 CFR 4.11. Specifically, please indicate the intended use of the records being sought, how they will be disseminated, your expertise in extracting, analyzing, and producing a unique work, and who the intended audience is that will receive a significant increased understanding of government activities by disclosure of the records. Additionally, please clarify the scope of the requested records you are seeking. You have asked for a description of the necessary offices that will be tasked with conducting a search. However, any record reflecting the taskings assigned for processing your FOIA request will necessarily post-date the responsive cut-off for records that could be responsive to your request itself. The same is true for any search logs, the search process, or the locations where a search is conducted. Any records created after the commencement of any search will not be responsive to the request for which a search has commenced.

Lastly, please specify the medium you wish to have searched for the phrases you have included, and the subject of the communications with those phrases. If the phrases are being sought as search terms without any nexus to a subject matter or topic, please explain how an unknown subject could be expected to increase the public's understanding of any particular topic of responsive records.

No work will be performed on your request pending your response and the responsive timeframe for responding to your request is tolled.

Mark Graff
NOAA FOIA Officer

On March 15, 2018:
This message is to confirm your request submission to the FOIAonline application: View Request. Request information is as follows: (<https://foiaonline.regulations.gov:443/foia/action/public/view/request?objectId=090004d28185e49f>)

* Tracking Number: DOC-NOAA-2018-000951

* Requester Name: Beryl C. Lipton

* Date Submitted: 03/13/2018

* Request Status: Submitted

* Description: This is a request under the Freedom of Information Act. I hereby request the following records: For the 16-month, 5-day period from Tuesday, November 8, 2016 through Tuesday, March 13, 2018: (SUMMARY) Any and all talking points and similar memorandums, emails, and transcripts providing advice or direction on how to handle the media, media interviews, and statements. ---- (SPECIFICALLY) Please include in your responsive materials any documents, emails, or communications with the following phrases in the title or subject line: TALKING POINTS STMT STATEMENT PRESS STRATEGY

On March 13, 2018:
To Whom It May Concern:

This is a request under the Freedom of Information Act. I hereby request the following records:

For the 16-month, 5-day period from Tuesday, November 8, 2016 through Tuesday, March 13, 2018:

(SUMMARY)

Any and all talking points and similar memorandums, emails, and transcripts providing advice or direction on how to handle the media, media interviews, and statements.

(SPECIFICALLY)

Please include in your responsive materials any documents, emails, or communications with the following phrases in the title or subject line:

TALKING POINTS
STMT
STATEMENT

PRESS STRATEGY

It would be greatly appreciated if materials could be provided on a rolling basis.

1. In the Office of Public Affairs or equivalent division

Please provide first all such materials produced in this agency's Office of Public Affairs or equivalent division, and any representative thereof.

Please also provide all such materials received by this agency's Office of Public Affairs or equivalent division, and any representative thereof.

2. Related to all agency employees

Please also include all employee email communications containing the following phrases:

TALKING POINTS
STMT
STATEMENT
PRESS STRATEGY

Alternative Response to 2:

If processing of this portion of this request would require its distribution to another or multiple other offices, it would be greatly appreciated if a response to this request would contain a description of the necessary offices to be tasked, the process by which the search will be conducted, and an estimate of the time and fees to be incurred. Such a description will allow us to better understand the parameters of this FOIA office's ability to respond to this request as worded and will better enable us to reorganize and limit it as appropriate.

Additional clarification:

This request is not intended for materials regarding one particular subject or event during this period.

If a different search procedure will be required dependent on segment of time covered, it would be greatly appreciated if a response could contain a description of the necessary difference in approach by time period (for example, if file keeping procedures have changed at some point in the last year and a half or if particular materials have been moved to another location).

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires.

Sincerely,

Beryl Lipton

Filed via MuckRock.com

E-mail (Preferred): 50541-48120867@requests.muckrock.com

Upload documents directly: https://www.muckrock.com/accounts/agency_login/national-oceanic-and-atmospheric-administration-121/foia-march-madness-2018-agency-talking-points-november-8-2016-march-13-2018-national-oceanic-and-atmospheric-administration-50541/?uuid-login=778d9640-7eac-4e08-9af1-91c4b051a4d8&email=foia%40noaa.gov#agency-reply

Is this email coming to the wrong contact? Something else wrong? Use the above link to let us know.

For mailed responses, please address (see note):

MuckRock News
DEPT MR 50541

5/8/2018

National Oceanic and Atmospheric Administration Mail - RE: Freedom of Information Act Request #DOC-NOAA-2018-000951

[411A Highland Ave](#)
[Somerville, MA 02144-2516](#)

PLEASE NOTE: This request was filed by a MuckRock staff reporter. Also note that improperly addressed (i.e., with the requester's name rather than "MuckRock News" and the department number) requests might be returned as undeliverable.

Arlyn Penaranda - NOAA Federal

From: Arlyn Penaranda - NOAA Federal
Sent: Tuesday, May 8, 2018 10:04 AM
To: Mark Graff - NOAA Federal; Robert Hogan - NOAA Federal
Cc: Charles Green - NOAA Federal; Lorna Martin-Gross - NOAA Federal; Milena Seelig - NOAA Federal
Subject: RE: FW: Records Request

Thank you for this legal guidance and for always being available for me to reach out to! OLE handles such unique FOIA requests all the time. I greatly appreciate it.

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Tuesday, May 08, 2018 9:49 AM
To: Robert Hogan - NOAA Federal <robert.j.hogan@noaa.gov>
Cc: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>; Charles Green - NOAA Federal <charles.green@noaa.gov>; Lorna Martin-Gross - NOAA Federal <lorna.martin-gross@noaa.gov>; Milena Seelig - NOAA Federal <milena.seelig@noaa.gov>
Subject: Re: FW: Records Request

(b)(5)
[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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On Tue, May 8, 2018 at 9:46 AM, Robert Hogan - NOAA Federal <robert.j.hogan@noaa.gov> wrote:

Arlyn:

(b)(5)
[Redacted]

Mark - please chime in if that's not correct.

Thanks,

Bob

NOAA General Counsel Enforcement Section
[1315 East West Highway, Room 15861](#)
[Silver Spring, MD 20910](#)
robert.j.hogan@noaa.gov
o 301-427-8283

On Tue, May 8, 2018 at 9:19 AM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

Thank you for the quick turnaround and guidance (b)(5) [REDACTED]
[REDACTED]
[REDACTED] I'll keep you on the loop.

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Tuesday, May 08, 2018 9:14 AM
To: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>
Cc: Charles Green - NOAA Federal <charles.green@noaa.gov>; Lorna Martin-Gross - NOAA Federal <lorna.martin-gross@noaa.gov>; Milena Seelig - NOAA Federal <milena.seelig@noaa.gov>; Robert Hogan <robert.j.hogan@noaa.gov>
Subject: Re: FW: Records Request

Hi Arlyn,

(looping in Bob Hogan)

Fortunately, the handoff for processing on these is relatively straightforward--

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

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED] Please let me know if you need any follow-up discussion on the path forward.

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, May 8, 2018 at 9:00 AM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

Mark/Chaz,

Good morning. This inquiry came when I was on leave. Another unique situation for OLE.

(b)(5)
[Redacted]

[Redacted] Please advise.

Thank you!

Arlyn

From: Kelly Andrade NOAA Federal <kelly.andrade@noaa.gov>

Sent: Friday, May 04, 2018 10:49 AM

To: 'Nelson, Rebekah' <Rebekah.Nelson@MyFWC.com>

Cc: 'Lorna Martin-Gross - NOAA Federal' <lorna.martin-gross@noaa.gov>; 'Arlyn Penaranda - NOAA Federal' <arlyn.penaranda@noaa.gov>; 'Manny Antonaras - NOAA Federal' <manny.antonaras@noaa.gov>; 'Tracy Dunn - NOAA Federal' <tracy.dunn@noaa.gov>; 'Carolyn Sramek - NOAA Federal' <carolyn.sramek@noaa.gov>

Subject: RE: Records Request

Good Morning Bekah,

I wanted to let you know that I received your email and will be forwarding it to our HQ's FOIA personnel, who are cc'd in this email (Arlyn Penaranda & Lorna Martin-Gross), for them to respond per our protocol.

Lorna & Arlyn,

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had not yet been forwarded to NOAA OLE for review/processing. The officer, knowing that it was a federal violation, reached out to me asking for information on our records request process for his PIO. I sent the email below explaining exemption open cases <(7)(a)> with the link to the NMFS site for additional information. I am now referring the questions that Rebekah Nelson, FWC PIO, sent per protocol and for consistency. Please let me know if you need additional information from me.

Thanks,
Kelly

Respectfully,

Kelly A. Andrade

Enforcement Technician & Property Custodian
NOAA Fisheries Office of Law Enforcement
Southeast Division

263 13th Avenue South, Suite 109
St. Petersburg, FL 33710
(727) 824-5329
Fax: (727) 824-5355

From: Nelson, Rebekah [<mailto:Rebekah.Nelson@MyFWC.com>]

Sent: Friday, May 04, 2018 10:29 AM

To: kelly.andrade@noaa.gov

Subject: RE: Records Request

Good morning Ms. Andrade,

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This information includes:

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3. The time, date and location of the incident and of the arrest.
4. The crime charged.
5. Documents given or required to be given to the person arrested unless the court finds that release of the information prior to trial would be defamatory to the good name of a victim or witness and would impair the ability of the state attorney to locate or prosecute a codefendant.
6. Information and indictments except as provided in s. 905.26, F.S. (prohibiting disclosure of finding of indictment against a person not in custody, under recognizance or under arrest).

I wanted to check with you to see if the information above would be able to be released in Federal cases such as this one? Looking forward to your insight on this.

Very respectfully,
Bekah

Bekah Nelson

Regional Public Information Director
Florida Fish and Wildlife Conservation Commission
3911 Hwy. 2321 Panama City, FL, 32409-1658
Phone: (850) 767-3619 Cel (b)(6)
Rebekah.Nelson@MyFWC.com



From: Marlow, Jason
Sent: Wednesday, May 2, 2018 4:16 PM
To: Nelson, Rebekah <Rebekah.Nelson@MyFWC.com>
Cc: Kelly Andrade - NOAA Federal <kelly.andrade@noaa.gov>
Subject: RE: Records Request

Bekah,

See the below information from Kelly. If there is any concern over the Sunshine Law versus the Freedom of Information Act and what hat we are working under, then we may have to get Legal to speak with their General Council in order to come to a solution.

Jason

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

From: Kelly Andrade NOAA Federal <kelly.andrade@noaa.gov>
Date: Wednesday, May 2, 2018
Subject: Records Request
To: jason.marlow@noaa.gov
Cc: William Widener - NOAA Federal <william.widener@noaa.gov>, Carolyn Sramek - NOAA Federal <carolyn.sramek@noaa.gov>

Hello Jason,

In reference to the records request we spoke about earlier, since this is an open, on-going case we would withhold all documents associated with it until it is considered closed. Whomever is requesting this information is free to make the request for records but this is the reply they would receive. If your PIO would like to refer the requester to the following website, it provides an abundance of information on the Freedom of Information Act (FOIA) process including how to make the request:

<http://www.noaa.gov/foia-freedom-of-information-act>

If you have any additional questions, please let me know.

Thanks,

Kelly

Respectfully,

Kelly A. Andrade

Enforcement Technician & Property Custodian

NOAA Fisheries Office of Law Enforcement

Southeast Division

263 13th Avenue South, Suite 109

St. Petersburg, FL 33710

(727) 824-5329

Fax: (727) 824-5355

--

Kelly Andrade

Enforcement Technician

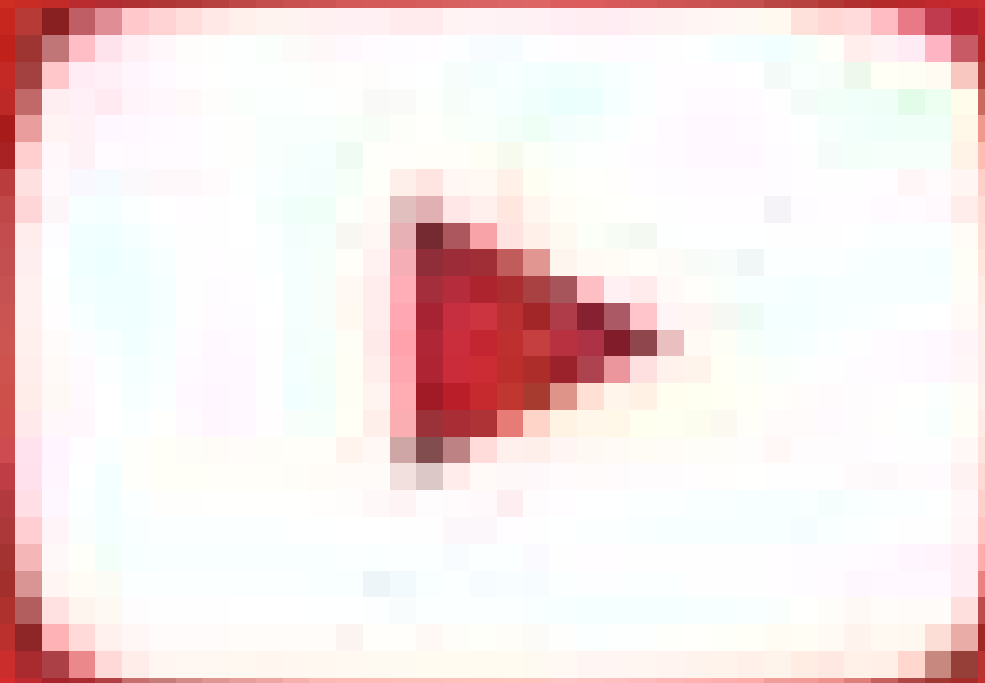
NOAA Office of Law Enforcement

(727) 824-5329













Samuel Dixon

From: Samuel Dixon
Sent: Tuesday, May 8, 2018 12:53 PM
To: Mark Graff - NOAA Federal
Subject: Fwd: [Non-DoD Source] NOAA Consultation # 2017-000170
Attachments: [Non-DoD Source] Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

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

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

From: Carter, Carmen (b)(6)
Date: Fri, Mar 9, 2018 at 9:20 AM
Subject: RE: [Non-DoD Source] NOAA Consultation # 2017-000170
To: Samuel Dixon <samuel.dixon@noaa.gov>, Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Dear Mr. Dixon – please see attached email to Mark Graff.

Carmen

Carmen Smith Carter

CG-JAG Information Law Attorney

Office: 202-372-3847

Wednesdays: 301-518-5911

From: Samuel Dixon [mailto:samuel.dixon@noaa.gov]
Sent: Friday, March 9, 2018 9:01 AM
To: Carter, Carmen (b)(6) Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Subject: [Non-DoD Source] NOAA Consultation # 2017-000170

Hi Carmen,

You sent some responsive records back to NOAA after consultation for this FOIA request but the accellion link has expired. Do you mind resending them?

Thanks,

Samuel Dixon

NMFS Assistant FOIA Liaison

*Contractor - IBSS Corp
(301) 427-8739
samuel.dixon@noaa.gov*

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

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

To: "Carter, Carmen" (b)(6)

Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>

Bcc:

Date: Tue, 30 Jan 2018 12:48:00 +0000

Subject: [Non-DoD Source] Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)

Good Morning,

Thank you for the consultation review (b)(5)

. Very 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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On Tue, Jan 30, 2018 at 6:52 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011

(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language. (b)(5)

[Redacted]

- [Redacted]

- [Redacted]

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

- [Redacted]

- [Redacted]

Detailed review comments:

(b) (7) [Redacted text block containing multiple paragraphs and bulleted lists]

(b) (7) [Redacted text block containing multiple paragraphs and bulleted lists]

Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

CG-0942 Office of Information and Intelligence Law

[202-372-3847](tel:202-372-3847)

Wednesdays/Telework: [301-518-5911](tel:301-518-5911)

A Coast Guard Attorney prepared this document for INTERNAL GOVERNMENT USE ONLY. This document is pre-decisional in nature and qualifies as an inter-agency/intra-agency document containing deliberative process material. This document contains confidential attorney-client communications relating to a legal matter for which the client has sought professional advice. Under exemption 5 of section (b) of 5 U.S.C. § 552 (Freedom of Information Act), this material is EXEMPT FROM RELEASE TO THE PUBLIC.

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

From: HQS-SMB-FOIA <EFOIA@uscg.mil>

To: "Carter, Carmen" (b)(6)

Cc: "Rice, Lisa M CDR" (b)(6)

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

Good afternoon,

The attached consultation has been assigned to your office for processing and direct response to Mr. Mark Graff (mark.graff@noaa.gov) of NOAA under consultation number 2018-CGCO-00011 . Please provide your final response by January 31, 2018 . Please provide CG-611 with a copy of your final response letter via EFOIA@uscg.mil <mailto:EFOIA@uscg.mil> so that the request may be closed in the system.

Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

Telephone:

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
To: "Carter, Carmen" (b)(6)
Cc: HQS-SMB-FOIA <EFOIA@uscg.mil>
Subject: [Non-DoD Source] Re: USCG Consultation Response to NOAA Consultation # 2017-000170 (Close-out)
Sent: Tue, 30 Jan 2018 12:48:00 +0000

Good Morning,
Thank you for the consultation review. (b)(5)
Very 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.

On Tue, Jan 30, 2018 at 6:52 AM, Carter, Carmen (b)(6) wrote:

Dear Mr. Graf – please read in HTML:

USCG Response to Consultation Request # 2018-CGCO-00011
(NOAA Consultation # 2017-000170)

TO: Mark.Graf@noaa.gov

NOAA FOIA Officer/Bureau Chief Privacy Officer (BCPO)

In consultation with the NOAA # 2017-000170 FOIA response review, you have asked the USCG to review and provide any additional withholding recommendations with appeals language. (b)(5)

[Redacted]

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Detailed review comments:

(b)(6) [Redacted]

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(b)(6) [REDACTED]

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[REDACTED]

[REDACTED]

Respectfully,

Carmen

Carmen Smith Carter

USCG Information Law Attorney

CG-0942 Office of Information and Intelligence Law

[202-372-3847](tel:202-372-3847)

Wednesdays/Telework: [301-518-5911](tel:301-518-5911)

A Coast Guard Attorney prepared this document for INTERNAL GOVERNMENT USE ONLY. This document is pre-decisional in nature and qualifies as an inter-agency/intra-agency document containing deliberative process material. This document contains confidential attorney-client communications relating to a legal matter for which the client has sought professional advice. Under exemption 5 of section (b) of 5 U.S.C. § 552 (Freedom of Information Act), this material is EXEMPT FROM RELEASE TO THE PUBLIC.

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

From: HQS-SMB-FOIA <EFOIA@uscg.mil>

To: "Carter, Carmen" (b)(6) [REDACTED]

Cc: "Rice, Lisa M CDR" (b)(6) [REDACTED]

Bcc:

Date: Mon, 8 Jan 2018 16:00:31 +0000

Subject: Consultation for Processing 2018-CGCO-00011 Part 2

Good afternoon,

The attached consultation has been assigned to your office for processing and direct response to Mr. Mark Graff (mark.graff@noaa.gov) of NOAA under consultation number 2018-CGCO-00011 . Please provide your final response by January 31, 2018 . Please provide CG-611 with a copy of your final response letter via EFOIA@uscg.mil <mailto:EFOIA@uscg.mil> so that the request may be closed in the system.

Notify CG-611 if you have any questions.

Regards,

Amanda Ackerson

U.S. Coast Guard (CG-611)
Office of Information Management

Email: EFOIA@uscg.mil <mailto:EFOIA@uscg.mil>

Telephone:

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, May 9, 2018 2:44 PM
To: Stephen Lipps - NOAA Federal; Holmes, Colin; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal; Robert Hogan; _DUS Staff; Tanya Dobrzynski - NOAA Federal; Stuart Levenbach - NOAA Federal; Kevin Wheeler - NOAA Federal; Brandon Elsner - NOAA Federal; Taylor Jordan - NOAA Federal; Erik Noble - NOAA Federal; Wendy Lewis - 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; Lawrence Charters - NOAA Federal; Allison Soussi-Tanani - NOAA Federal; Bogomolny, Michael (Federal); Roxie Allison-Holman - NOAA Federal; John Almeida - NOAA Federal; Michael Weiss - NOAA Federal; Maria Williams - NOAA Federal; Shawn Martin - NOAA Federal; Kathryn Kempton - NOAA Federal; Ed Kearns - NOAA Federal; Cheryl Scannell - NOAA Federal; Devin Brakob - NOAA Federal; _OCIO GPD; Darone Jones - NOAA Federal; Christina Storz - NOAA Federal
Subject: Weekly FOIA Incoming and High Visibility Requests
Attachments: SGM Complaint.pdf; SGM Original FOIA Request.pdf; Weekly FOIA Incoming and High Visibility Requests 05.2.18 - 05.8.18.xls

Good Afternoon,

Attached is the weekly report.

One request from American Bridge 21st Century is seeking all records of travel, expenses, and reimbursements for RDML Gallaudet from Oct. 5, 2017 to the present. DOC-NOAA-2018-001322.

In litigation, NWS issued its 5th interim response in the *SGM v. DOC* litigation. The underlying request sought records regarding weather modification within the Weather Service Organization Workforce Analysis. NWS will continue to review potentially responsive records and make interim responses to the Plaintiff. A copy of the underlying request and Complaint 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.

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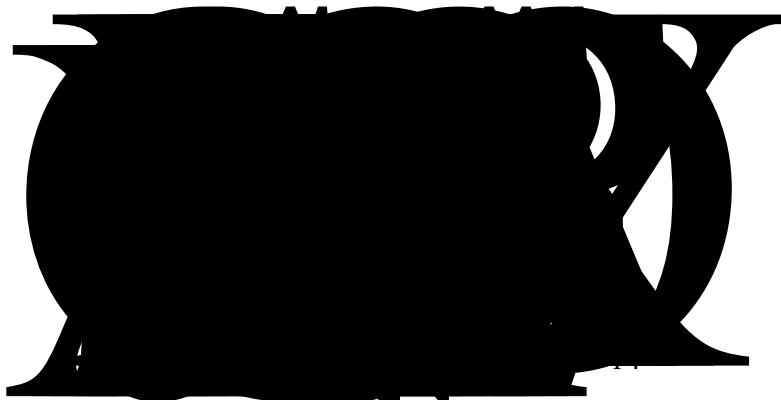
7. Gr

Respectfu



[b](#)

davebahr@mindspring.com



CIVIL COVER SHEET

JS-44 (Rev. 7/13 DC)

I. (a) PLAINTIFFS Stop Geoengineering Minnesota (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>88888</u> (EXCEPT IN U.S. PLAINTIFF CASES)	DEFENDANTS U.S. DEPARTMENT OF COMMERCE COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY) <small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small>																												
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) David A. Bahr, Bahr Law Offices, P.C. 1035 1/2 Monroe St. Eugene, OR 97402 (541) 556-6439	ATTORNEYS (IF KNOWN)																												
II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY) <table style="width:100%;"> <tr> <td><input type="radio"/> 1 U.S. Government Plaintiff</td> <td><input type="radio"/> 3 Federal Question (U.S. Government Not a Party)</td> </tr> <tr> <td><input checked="" type="radio"/> 2 U.S. Government Defendant</td> <td><input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)</td> </tr> </table>	<input type="radio"/> 1 U.S. Government Plaintiff	<input type="radio"/> 3 Federal Question (U.S. Government Not a Party)	<input checked="" type="radio"/> 2 U.S. Government Defendant	<input type="radio"/> 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) FOR DIVERSITY CASES ONLY! <table style="width:100%;"> <thead> <tr> <th></th> <th>PTF</th> <th>DFT</th> <th></th> <th>PTF</th> <th>DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td><input type="radio"/> 1</td> <td><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td><input type="radio"/> 4</td> <td><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="radio"/> 2</td> <td><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td><input type="radio"/> 5</td> <td><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="radio"/> 3</td> <td><input type="radio"/> 3</td> <td>Foreign Nation</td> <td><input type="radio"/> 6</td> <td><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
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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)

<input type="radio"/> A. Antitrust <input type="checkbox"/> 410 Antitrust	<input type="radio"/> B. Personal Injury/Malpractice <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 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input type="radio"/> C. Administrative Agency Review <input type="checkbox"/> 151 Medicare Act <u>Social Security</u> <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)) <u>Other Statutes</u> <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input type="radio"/> D. Temporary Restraining Order/Preliminary Injunction Any nature of suit from any category may be selected for this category of case assignment. *(If Antitrust, then A governs)*
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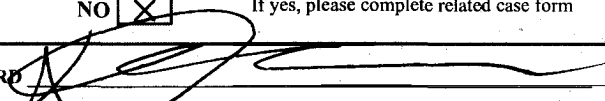
<input type="radio"/> E. General Civil (Other)		OR	<input type="radio"/> F. Pro Se General Civil	
<u>Real Property</u> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property <u>Personal Property</u> <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	<u>Bankruptcy</u> <input type="checkbox"/> 422 Appeal 27 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <u>Prisoner Petitions</u> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Conditions <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement <u>Property Rights</u> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <u>Federal Tax Suits</u> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	<u>Forfeiture/Penalty</u> <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <u>Other Statutes</u> <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization	<input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <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 <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)	

<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) <i>*(If pro se, select this deck)*</i>	<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) <i>*(If pro se, select this deck)*</i>	<input type="radio"/> J. Recovery of Defaulted Student Loan (excluding veterans) <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

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
Plaintiff challenges Defendant's failure to respond to record request and appeal in manner required by FOIA.

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: 9/21/17	SIGNATURE OF ATTORNEY OF RECORD: 
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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.

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

Stop Geoengineering Minnesota

Plaintiff

v.

U.S. Department of Commerce

Defendant

Civil Action No. 1:17-cv-1930

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 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:

David A. Bahr, Bahr Law Offices, P.C.
1035 1/2 Monroe St.
Eugene, OR 97402
(541) 556-6439

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: _____

Signature of Clerk or Deputy Clerk

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

Stop Geoengineering Minnesota

Plaintiff

v.

U.S. Department of Commerce

Defendant

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Civil Action No. 1:17-cv-1930

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*
U.S. Attorney General, Jefferson Sessions
950 Pennsylvania Avenue
NW, Washington, D.C. 20530-0001

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:

David A. Bahr, Bahr Law Offices, P.C.
1035 1/2 Monroe St.
Eugene, OR 97402
(541) 556-6439

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: _____

Signature of Clerk or Deputy Clerk

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

Stop Geoengineering Minnesota

Plaintiff

v.

U.S. Department of Commerce

Defendant

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Civil Action No. 1:17-cv-1930

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA
555 4th Street, 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:

David A. Bahr, Bahr Law Offices, P.C.
1035 1/2 Monroe St.
Eugene, OR 97402
(541) 556-6439

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: _____

Signature of Clerk or Deputy Clerk

LAW OFFICES OF BRIAN GAFFNEY, A Professional Corporation

446 Old County Road, Suite 100-310

Pacifica, California 94044

(650) 219 3187 Phone

brian@gaffneylegal.com

March 10, 2017

Via U.S. Mail and Email

Department of Commerce
Departmental FOIA Office
14th and Constitution Avenue NW.
Mail Stop A300
Washington, DC 20230
EFoia@doc.gov

**Re: Freedom of Information Act Request
Fee Waiver Requested**

Dear Sir/Madam,

Records Requested

Pursuant to the Freedom of Information Act, through this office Stop Geoengineering Minnesota (“SGM”), requests all records¹ from January 1, 2015 to the present discussing, documenting, memorializing, or otherwise concerning:

- (1) weather modification within the Weather Service Organization Workforce Analysis;
- (2) the reason for adoption of the confidentiality provision of the “Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams” a copy of which is attached hereto;

Fee Waiver Requested

Stop Geoengineering Minnesota (“SGM”) requests that the Department of Commerce waive any applicable fees because disclosure meets the statutory standard for waiver of fees in that it is “in the public interest because furnishing the information can be considered as primarily benefitting the general public,” 5 U.S.C. § 552(a)(4)(A). SGM is a project of the non-profit Minnesota Natural Health Coalition. SGM is itself a non-profit entity whose purpose is to

¹ “Records,” includes all documents, correspondence, including email; agency guidelines and policies; memoranda; agency Memoranda of Understanding; notices, comments, and responses to comments; biological, scientific, and other studies; reports; environmental analyses; surveys; timelines; charts; graphs; maps; analyses; data; meeting minutes and agendas; distribution lists; notes and transcripts of meetings and conversations; and any other relevant information, **whether in hard copy or electronic/computer format.**

educate the public about how geoengineering and weather modification can impact public health. SGM has no intention to use the information sought in furtherance of any commercial interest.

(1) The Subject of the Request. The requested records concern the activities of the Department of Commerce and other government agencies regarding weather modification. The subject matter of this request therefore involves information that will significantly contribute to the public's understanding of the government's operations and activities in regards to weather modification.

(2) The Informative Value of the Information to Be Disclosed. The requested records are likely to contribute to an understanding of government operations or activities. The Department of Commerce is involved in weather modification activities and research. The requested records will provide insight into the Department of Commerce's process for implementing and regulating weather modification. Many of the requested records may contain information that is not currently available to the general public; therefore, release of the requested records would represent a significant new contribution to the public domain. For these reasons, the requested records will be highly informative in relation to the subject matter of the request, and will further public understanding.

(3) Contribution to General Public Understanding. SGM's mission is to educate the public about how geoengineering and weather modification can impact public health. SGM makes this request for the purposes of providing information about governmental activities and standards, including those of Department of Commerce, to concerned members of the public. SGM is interested in the requested records because they will likely help SGM and the public better understand the methods and procedures which the Department of Commerce has for implementing and regulating weather modification.

(4) The Significance of the Contribution to Public Understanding. The requested records are likely to contribute significantly to public understanding of government operations or activities. SGM will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. SGM regularly informs, educates and counsels the public regarding weather modification and government involvement in implementing and regulating weather modification. The subject of this FOIA request will be used to contribute to one or more of the following: public presentations, news stories contributed to or written by SGM volunteers and/or members, and/or websites (<http://www.minnesotanaturalhealth.org/stopgeoengineeringmn.html> and <http://stopgeoengineeringmn.squarespace.com>). Exactly which of these uses of the information addressed in this FOIA request will be determined after complete review of the requested material. SGM's members, volunteers, and counsel bring a broad range of expertise, skills, and familiarity with weather modification that will enable SGM to review and understand the responsive records and to supply this information in a coherent and understandable way to the general public and the media. SGM can draw on scientists, attorneys, and others to review and summarize this information. SGM certainly has the necessary qualifications relevant to any use of the records that may come about upon reviewing them. SGM's contribution to the public understanding, as compared to the level of understanding prior to disclosure, as well as SGM's

intent to inform the public, are well established. Moreover, many of the records requested may not have been publicly released to date. A requester is likely to contribute significantly to the public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government. 132 Cong. Rec. H9464 (Reps. English and Kindness).

(5) The Existence and Magnitude of a Commercial Interest. SGM has no commercial interest that would be furthered by the requested disclosure. SGM is a non-profit entity and requests the information to further its scientific, legal, and educational efforts. The FOIA fee waiver amendments of 1986 were designed specifically to allow nonprofit, public interest groups, such as SGM, access to government records without the payment of fees. FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters.

Department of Commerce Response

Please submit responsive records, along with an index for any records withheld that clearly identifies the basis for withholding, to the letterhead address above. Please segregate any records you determine are exempt and provide the remainder and the reasons for not providing all of the responsive records.

The basic time limit for responding to FOIA requests is twenty work days. See 5 U.S.C. § 552(a)(6)(A). This time limit can be extended under certain limited circumstances for at most an additional ten working days. *See id.* at § 552(a)(6)(B).

Please provide all responsive documents that are in the files maintained by Department of Commerce personnel or offices on the date that Department of Commerce staff conducts their searches for the documents responsive to this request.¹ **SGM requests that to the extent that the Department of Commerce can do so, it furnish electronic copies of the above documents in lieu of paper copies (to minimize the expense and burden of copying).** 5 U.S.C. § 552(a)(3)(B) (note, as amended in 1996 FOIA mandates that “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.”)

Please contact this office if you have any questions regarding the scope of this request, the nature of the records sought, or any other aspect of this request. I look forward to hearing from you.

By signing below, I certify that the reasons provided for a fee waiver are true and correct.

Sincerely,



Brian Gaffney

¹ See *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983); *Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002); *Oregon Natural Desert Ass'n v. Gutierrez*, 419 F. Supp. 2d 1284, 1288 (D. Or. 2006) (federal agencies must release all documents in their possession through the date they conduct the review of their files for documents responsive to FOIA requests).

Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams

The National Weather Service (NWS) Operations and Workforce Analysis (OWA) project is supported by four “Core Teams” that are each focused on one of the following topics:

- Communications and stakeholder engagement
- Organizational structure
- Operating model (including Impact-based Decision Support Services or IDSS)
- Workforce analysis

The membership of the Core Teams include NWS employees from across the organization who were approved for participation by NWS leadership. They also include National Weather Service Employees Organization (NWSEO) bargaining unit members who were recommended by NWSEO for each workstream. McKinsey & Company, which is working as an independent third-party consultant for NWS, is also participating on the teams. The Core Teams will provide essential support to the overall OWA project. This charter will establish the scope of activities and responsibilities of the Core Teams.

The main activities of the Core Teams are to:

1. **Support the Operations and Workforce Committee (OWC)**¹ in reviewing project analyses, developing and assessing options for the OWA, and answering questions or replying to requests for additional information.
2. **Assist and collaborate** with NWS OWA project leadership and McKinsey as they conduct their assessment of the NWS to ensure a collaborative and customized approach while preserving objectivity and independence. This collaboration could include participation in data calls, working groups, and/or research, and through providing guidance on action steps to take leading up to OWC² meetings.
3. **Augment and support** the data, information, perspectives, and ideas collected through application of individual expertise, experience, and insights (e.g., adding the perspective of Weather Forecast Offices, recommending subject matter experts (SME) for specific topics).
4. **Review and engage** on McKinsey's methodologies, insights, results and recommendations for accuracy and suggest changes if needed. To ensure an unbiased assessment, McKinsey will have final determination on the content presented to the OWC but it will be developed in a joint and collaborative effort with the Core Teams and subject matter experts.

Expectations for each member of the Core Teams include the following (may be adapted as needed, and notice will be given to ensure awareness and agreement with any changes):

- **Confidentiality: Core Team members, consultants, and SMEs are expected to maintain at all times the highest level of privacy and confidentiality regarding all information and materials shared as part of the OWA project, including initial findings and of all Core Team discussions, unless otherwise indicated (e.g., to share an approved project update that is intended to reach all NWS staff). Any interim reports or materials are considered to be**

¹ The National Weather Service (NWS) Executive Council (EC) established the NWS Operations and Workforce Committee (OWC) for the purposes of providing guidance to and making decisions on the OWA project.

drafts and are not to be shared beyond the Core Team and any consultants or SMEs who are providing independent advice. Core Team members will indicate their understanding of this requirement by signing this Charter. Consultants and SMEs will be covered as appropriate by separate non-disclosure agreements.

- **Commitment:** Core Team members are expected to fully participate in regular team meetings (in person or as conference calls, depending on location); in addition they are responsible for completing document reviews, communication steps. and other actions between meetings.
- **Role:** Core Team members are critical to the OWA in contributing insights in their areas of expertise, conducting analyses of surveys and interviews and generating input / data / that can inform the options and reports that McKinsey provides to the OWC.
- **Scope:** The Core Team activities are pre-decisional, only. In this capacity Core Team members provide input / data / guidance, serving a critical role as action-oriented groups such that when decisions are made (e.g., the approval of language for a survey or information for the website), the teams will be responsible for next steps.
- **Support:** The Core Teams will call on and engage with a cohort of Subject Matter Experts (SMEs) within the organization when needed to address specific questions, analyses or provide other expert insight
- **Duration:** The Core Teams will be in place through Phase II of the OWA project and will be considered for extended participation Phase III based on availability, interest and relevance to their area of expertise. Phase II will extend through approximately mid-October of 2015.

If you, or another Core Team member, have any questions or concerns about the Core Team Charter or other aspects of your participation, please contact Joanne Swanson Kagan, NWS OWA Project leader, at joanne.swanson@noaa.gov; Direct: 301-427-9066 or Cell: 240-393-0415. Thank you for your service to this project.

I have reviewed the Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams, and I confirm that I will strictly maintain the confidentiality of all information in accordance with the Charter.

Name	Signature	Date
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Tracking Number	Type	Requester	Requester Organization	Submitted
DOC-NOAA-2018-001329	Request	Ben Dobson	NBC Connecticut	05/04/2018
DOC-NOAA-2018-001322	Request	Liz Charboneau	American Bridge 21st Century	05/03/2018

Custom Report - 05/08/2018 01:0

Received	Assigned To	Case File Assigned To	Perfected?	Due	Closed Date
05/04/2018	NWS	NWS	Yes	06/06/2018	TBD
05/03/2018	USEC	USEC	Yes	06/06/2018	TBD

2:24

Status	Dispositions
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Assignment Determination	
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Assignment Determination	
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Detail

Any records that would indicate when one of the National Weather Service Doppler Radars were out of service for
Travel Records: I am requesting copies of any and all travel records, including expenses and reimbursements, for

[REDACTED]
any amount of time between Jan 1, 2016 until today (May 4, 2018) at the following sites: Albany (ENX) 1
Timothy Gallaudet from October 5, 2017 through the present.

[REDACTED]
Faunton (BOX) Long Island (OKX) I agree to pay for the records, but would request any fees assessed b

[REDACTED]
be communicated ahead of fulfilling the request.

From: postmaster@DOCGOV.onmicrosoft.com
Sent: Wednesday, May 9, 2018 2:46 PM
To: Mark.Graff@noaa.gov
Subject: Undeliverable: Weekly FOIA Incoming and High Visibility Requests
Attachments: details.txt; Weekly FOIA Incoming and High Visibility Requests



Your message to cholmes@doc.gov couldn't be delivered.

cholmes wasn't found at doc.gov.

Mark.Graff	Office 365	cholmes
Action Required		Recipient
Unknown To address		

How to Fix It

The address may be misspelled or may not exist. Try one or more of the following:

- Send the message again following these steps: In Outlook, open this non-delivery report (NDR) and choose **Send Again** from the Report ribbon. In Outlook on the web, select this NDR, then select the link "**To send this message again, click here.**" Then delete and retype the entire recipient address. If prompted with an Auto-Complete List suggestion don't select it. After typing the complete address, click **Send**.
- Contact the recipient (by phone, for example) to check that the address exists and is correct.
- The recipient may have set up email forwarding to an incorrect address. Ask them to check that any forwarding they've set up is working correctly.
- Clear the recipient Auto-Complete List in Outlook or Outlook on the web by following the steps in this article: [Fix email delivery issues for error code 5.1.10 in Office 365](#), and then send the message again. Retype the entire recipient address before selecting **Send**.

If the problem continues, forward this message to your email admin. If you're an email admin, refer to the **More Info for Email Admins** section below.

Was this helpful? [Send feedback to Microsoft.](#)

More Info for Email Admins

Status code: 550 5.1.10

This error occurs because the sender sent a message to an email address hosted by Office 365 but the address is incorrect or doesn't exist at the destination domain. The error is reported by the recipient domain's email server, but most often it must be fixed by the person who sent the message. If the steps in the **How to Fix It** section above don't fix the problem, and you're the email admin for the recipient, try one or more of the following:

The email address exists and is correct - Confirm that the recipient address exists, is correct, and is accepting messages.

Synchronize your directories - If you have a hybrid environment and are using directory synchronization make sure the recipient's email address is synced correctly in both Office 365 and in your on-premises directory.

Errant forwarding rule - Check for forwarding rules that aren't behaving as expected. Forwarding can be set up by an admin via mail flow rules or mailbox forwarding address

settings, or by the recipient via the Inbox Rules feature.

Recipient has a valid license - Make sure the recipient has an Office 365 license assigned to them. The recipient's email admin can use the Office 365 admin center to assign a license (Users > Active Users > select the recipient > Assigned License > Edit).

Mail flow settings and MX records are not correct - Misconfigured mail flow or MX record settings can cause this error. Check your Office 365 mail flow settings to make sure your domain and any mail flow connectors are set up correctly. Also, work with your domain registrar to make sure the MX records for your domain are configured correctly.

For more information and additional tips to fix this issue, see [Fix email delivery issues for error code 5.1.10 in Office 365](#).

Original Message Details

Created Date: 5/9/2018 6:44:05 PM
Sender Address: Mark.Graff@noaa.gov
Recipient Address: cholmes@doc.gov
Subject: Weekly FOIA Incoming and High Visibility Requests

Error Details

Reported error: 550 5.1.10 RESOLVER.ADR.RecipientNotFound; Recipient cholmes@doc.gov not found by SMTP address lookup
DSN generated by: DM5PR09MB2140.namprd09.prod.outlook.com

Message Hops

HOP	TIME (UTC)	FROM	TO	WITH	RELAY TIME
1	5/9/2018 6:44:05 PM		10.200.44.82	HTTP	*
2	5/9/2018 6:45:02 PM		mail-qk0-x231.google.com	SMTP	57 sec
3	5/9/2018 6:45:02 PM	mail-qk0-x231.google.com	DM2GCC01FT005.mail.protection.outlook.com	Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA_P256)	*
4	5/9/2018 6:45:02 PM	DM2GCC01FT005.eop-gcc01.prod.protection.outlook.com	MWHPR09CA0036.outlook.office365.com	Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA384)	*
5	5/9/2018 6:45:03 PM	MWHPR09CA0036.namprd09.prod.outlook.com	DM5PR09MB2140.namprd09.prod.outlook.com	Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA384_P256)	1 sec

Original Message Headers

Received: from MWHPR09CA0036.namprd09.prod.outlook.com (2603:10b6:300:6d::22) by DM5PR09MB2140.namprd09.prod.outlook.com (2603:10b6:3:87::14) with Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA384_P256) id 15.20.755.16; Wed, 9 May 2018 18:45:03 +0000
Received: from DM2GCC01FT005.eop-gcc01.prod.protection.outlook.com (2a01:111:f400:7d01::207) by MWHPR09CA0036.outlook.office365.com (2603:10b6:300:6d::22) with Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA384) id 15.20.735.20 via Frontend Transport; Wed, 9 May 2018 18:45:02 +0000
Authentication-Results: spf=pass (sender IP is 2607:f8b0:400d:c09::231) smtp.mailfrom=noaa.gov; doc.gov; dkim=pass (signature was verified) header.d=noaa.gov;doc.gov; dmarc=pass action=none header.from=noaa.gov;
Received-SPF: Pass (protection.outlook.com: domain of noaa.gov designates 2607:f8b0:400d:c09::231 as permitted sender) receiver=protection.outlook.com; client-ip=2607:f8b0:400d:c09::231; helo=mail-qk0-x231.google.com;
Received: from mail-qk0-x231.google.com (2607:f8b0:400d:c09::231) by DM2GCC01FT005.mail.protection.outlook.com (2a01:111:e400:7d01::256) with Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA_P256) id 15.20.735.16 via Frontend Transport; Wed, 9 May 2018 18:45:02 +0000
Received: by mail-qk0-x231.google.com with SMTP id p186so28361300qkd.1 for <cholmes@doc.gov>; Wed, 09 May 2018 11:45:02 -0700 (PDT)
DKIM-Signature: v=1; a=rsa-sha256; c=relaxed/relaxed; d=noaa.gov; s=google; h=mime-version:from:date:message-id:subject:to:cc; bh=kmfNdjxsyu3KjZ4Gwv2//6COTg0059UhbqHin9lopd4=; b=mD3olWlg/gWhDI9RrYVSFYAccmAT2qZoEbyxGWpgMe6Ks0k7zAjeldSp61RQrs2s0DAG6WCClMT17Z8sef2sPlwuoX21I7zvmTB8mOukieYwnjOGYYdaLUFYryyir7wh6f/Vd+drfU+O/Pjg6cIRfOxQSjDtXeUL8aW0qleRX9BLQEJELt+ngaoYiETFB8HXf6JdRRuHwIaf9Ipu/+DKt9+Ggf1cgxMmjUdAicQh4e/wkxPAG9UeOORau1i3xEEWGdYMD3eLX0YarOqdzTinJZzulWka+0JJ0hMry/2ErwtuG6pF4uxEoo2k9w1zGWhideeLlFq8IvUzyPOFXXQ==

X-Google-DKIM-Signature: v=1; a=rsa-sha256; c=relaxed/relaxed; d=le100.net; s=20161025; h=x-gm-message-state:mime-version:from:date:message-id:subject:to:cc; bh=kmfNdjxysyu3KjZ4Gwv2//6COTg0059UhbqH9lopd4=; b=Wlfo94CBWRrkXGxGD5Bwof0XetfdTCi3HH4/LcJj6MlungsQHVnHFI6nQ+Y2YnIit1 NPVFiyylnRd1zjamUOBrce3CUFTq50iTMJJEYCLHP4ALzdCyihSp8AqDdpRsZ4UgAfj 3HEEOXA6t4OvbCKHCtCzw4eCFzDV0UiJEZot6VyBtSL10QpwQlsLk44+hJ25xViBVY79 hQlKvYulZGDBW0Dg7wiSgiS/wjdX5kZ7PFIS1JROU/QfAJeEliMyn6jvwDFVnctFxdUo h1DwC5h1WNFRFdo40fijKXekWigXqTUD+spmPAX+t40QM5UEotJtvn/5cGz4wgXWZaTq biBQ==

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X-Received: by 10.55.17.153 with SMTP id 25mr38901772qkr.409.1525891500000; Wed, 09 May 2018 11:45:00 -0700 (PDT)

MIME-Version: 1.0
Received: by 10.200.44.82 with HTTP; Wed, 9 May 2018 11:44:05 -0700 (PDT)
From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>Date: Wed, 9 May 2018 14:44:05 -0400

Message-ID: <CAFW6A9nvDvgz7KW5hXsTEh3R=ZA5A9pFD88ipWmVH0ZDpHf=g@mail.gmail.com>Subject: Weekly FOIA Incoming and High Visibility Requests

To: Stephen Lipps - NOAA Federal <stephen.lipps@noaa.gov>, "Holmes, Colin" <cholmes@doc.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>, Robert Hogan <robert.j.hogan@noaa.gov>, _DUS Staff <duso.staff@noaa.gov>, Tanya Dobrzynski - NOAA Federal <tanya.dobrzynski@noaa.gov>, Stuart Levenbach - NOAA Federal <Stuart.levenbach@noaa.gov>, Kevin Wheeler - NOAA Federal <Kevin.Wheeler@noaa.gov>, Brandon Elsner - NOAA Federal <Brandon.Elsner@noaa.gov>, Taylor Jordan - NOAA Federal <Taylor.Jordan@noaa.gov>, Erik Noble - NOAA Federal <erik.noble@noaa.gov>, Wendy Lewis - NOAA Federal <Wendy.Lewis@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>, Lawrence Charters - NOAA Federal <lawrence.charters@noaa.gov>, Allison Soussi-Tanani - NOAA Federal <Allison.Soussi-Tanani@noaa.gov>, "Bogomolny, Michael (Federal)" <MBogomolny@doc.gov>, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov>, John Almeida - NOAA Federal <john.almeida@noaa.gov>, Michael Weiss - NOAA Federal <michael.weiss@noaa.gov>, Maria Williams - NOAA Federal <Maria.Williams@noaa.gov>, Shawn Martin - NOAA Federal <shawn.martin@noaa.gov>, Kathryn Kempton - NOAA Federal <kathryn.kempton@noaa.gov>, Ed Kearns - NOAA Federal <ed.kearns@noaa.gov>, Cheryl Scannell - NOAA Federal <cheryl.scannell@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>, _OCIO GPD <ocio.gpd@noaa.gov>, Darone Jones - NOAA Federal <darone.jones@noaa.gov>, Christina Storz - NOAA Federal <christina.storz@noaa.gov>Content-Type: multipart/mixed; boundary="001a114580a0d3e33c056bca4cb6"
Return-Path: mark.graff@noaa.gov
X-EOPAttributedMessage: 0
X-EOPTenantAttributedMessage: 44cf3ec3-840c-4086-b7de-e3bc9a6c2db4:0
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X-MS-TrafficTypeDiagnostic: DM5PR09MB2140:

Reporting-MTA: dns;DM5PR09MB2140.namprd09.prod.outlook.com
Received-From-MTA: dns;mail-qk0-x231.google.com
Arrival-Date: Wed, 9 May 2018 18:45:03 +0000

Final-Recipient: rfc822;cholmes@doc.gov

Action: failed

Status: 5.1.10

Diagnostic-Code: smtp;550 5.1.10 RESOLVER.ADR.RecipientNotFound; Recipient cholmes@doc.gov
not found by SMTP address lookup

X-Display-Name: Holmes, Colin

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Wed, 9 May 2018 14:44:05 -0400
Subject: Weekly FOIA Incoming and High Visibility Requests
To: Stephen Lipps - NOAA Federal <stephen.lipps@noaa.gov>, "Holmes, Colin" <cholmes@doc.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>, Robert Hogan <robert.j.hogan@noaa.gov>, _DUS Staff <duso.staff@noaa.gov>, Tanya Dobrzynski - NOAA Federal <tanya.dobrzynski@noaa.gov>, Stuart Levenbach - NOAA Federal <Stuart.levenbach@noaa.gov>, Kevin Wheeler - NOAA Federal <Kevin.Wheeler@noaa.gov>, Brandon Elsner - NOAA Federal <Brandon.Elsner@noaa.gov>, Taylor Jordan - NOAA Federal <Taylor.Jordan@noaa.gov>, Erik Noble - NOAA Federal <erik.noble@noaa.gov>, Wendy Lewis - NOAA Federal <Wendy.Lewis@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>, Lawrence Charters - NOAA Federal <lawrence.charters@noaa.gov>, Allison Soussi-Tanani - NOAA Federal <Allison.Soussi-Tanani@noaa.gov>, "Bogomolny, Michael (Federal)" <MBogomolny@doc.gov>, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov>, John Almeida - NOAA Federal <john.almeida@noaa.gov>, Michael Weiss - NOAA Federal <michael.weiss@noaa.gov>, Maria Williams - NOAA Federal <Maria.Williams@noaa.gov>, Shawn Martin - NOAA Federal <shawn.martin@noaa.gov>, Kathryn Kempton - NOAA Federal <kathryn.kempton@noaa.gov>, Ed Kearns - NOAA Federal <ed.kearns@noaa.gov>, Cheryl Scannell - NOAA Federal <cheryl.scannell@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>, _OCIO GPD <ocio.gpd@noaa.gov>, Darone Jones - NOAA Federal <darone.jones@noaa.gov>, Christina Storz - NOAA Federal <christina.storz@noaa.gov>

[SGM Complaint.pdf](#)

[SGM Original FOIA Request.pdf](#)

[Weekly FOIA Incoming and High Visibility Requests 05.2.18 - 05.8.18.xls](#)

Good Afternoon,
Attached is the weekly report.

One request from American Bridge 21st Century is seeking all records of travel, expenses, and reimbursements for RDML Gallaudet from Oct. 5, 2017 to the present. DOC-NOAA-2018-001322.

In litigation, NWS issued its 5th interim response in the *SGM v. DOC* litigation. The underlying request sought records regarding weather modification within the Weather Service Organization Workforce Analysis. NWS will continue to review potentially responsive records and make interim responses to the Plaintiff. A copy of the underlying request and Complaint 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.

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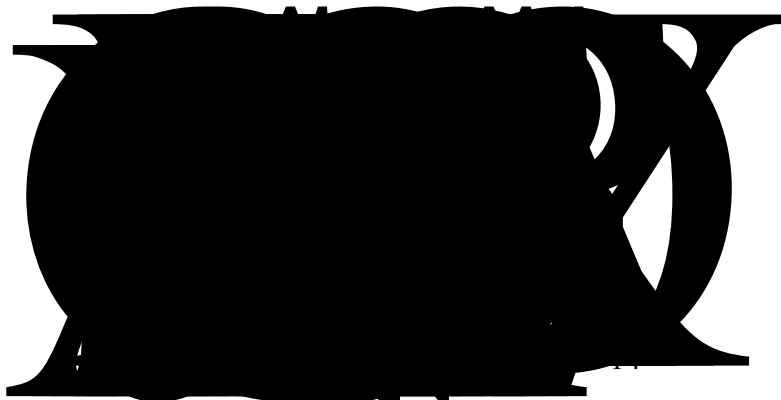
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davebahr@mindspring.com



<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) <i>*(If pro se, select this deck)*</i>	<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) <i>*(If pro se, select this deck)*</i>	<input type="radio"/> J. Recovery of Defaulted Student Loan (excluding veterans) <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

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 Plaintiff challenges Defendant's failure to respond to record request and appeal in manner required by FOIA.

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: 9/21/17	SIGNATURE OF ATTORNEY OF RECORD:
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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.

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

Stop Geoengineering Minnesota

Plaintiff

v.

U.S. Department of Commerce

Defendant

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Civil Action No. 1:17-cv-1930

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 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:

David A. Bahr, Bahr Law Offices, P.C.
1035 1/2 Monroe St.
Eugene, OR 97402
(541) 556-6439

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: _____

Signature of Clerk or Deputy Clerk

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

Stop Geoengineering Minnesota

Plaintiff

v.

U.S. Department of Commerce

Defendant

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Civil Action No. 1:17-cv-1930

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

U.S. Attorney General, Jefferson Sessions
950 Pennsylvania Avenue
NW, Washington, D.C. 20530-0001

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:

David A. Bahr, Bahr Law Offices, P.C.
1035 1/2 Monroe St.
Eugene, OR 97402
(541) 556-6439

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: _____

Signature of Clerk or Deputy Clerk

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

Stop Geoengineering Minnesota

Plaintiff

v.

U.S. Department of Commerce

Defendant

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Civil Action No. 1:17-cv-1930

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA
555 4th Street, 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:

David A. Bahr, Bahr Law Offices, P.C.
1035 1/2 Monroe St.
Eugene, OR 97402
(541) 556-6439

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: _____

Signature of Clerk or Deputy Clerk

LAW OFFICES OF BRIAN GAFFNEY, A Professional Corporation

446 Old County Road, Suite 100-310

Pacifica, California 94044

(650) 219 3187 Phone

brian@gaffneylegal.com

March 10, 2017

Via U.S. Mail and Email

Department of Commerce
Departmental FOIA Office
14th and Constitution Avenue NW.
Mail Stop A300
Washington, DC 20230
EFoia@doc.gov

**Re: Freedom of Information Act Request
Fee Waiver Requested**

Dear Sir/Madam,

Records Requested

Pursuant to the Freedom of Information Act, through this office Stop Geoengineering Minnesota (“SGM”), requests all records¹ from January 1, 2015 to the present discussing, documenting, memorializing, or otherwise concerning:

- (1) weather modification within the Weather Service Organization Workforce Analysis;
- (2) the reason for adoption of the confidentiality provision of the “Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams” a copy of which is attached hereto;

Fee Waiver Requested

Stop Geoengineering Minnesota (“SGM”) requests that the Department of Commerce waive any applicable fees because disclosure meets the statutory standard for waiver of fees in that it is “in the public interest because furnishing the information can be considered as primarily benefitting the general public,” 5 U.S.C. § 552(a)(4)(A). SGM is a project of the non-profit Minnesota Natural Health Coalition. SGM is itself a non-profit entity whose purpose is to

¹ “Records,” includes all documents, correspondence, including email; agency guidelines and policies; memoranda; agency Memoranda of Understanding; notices, comments, and responses to comments; biological, scientific, and other studies; reports; environmental analyses; surveys; timelines; charts; graphs; maps; analyses; data; meeting minutes and agendas; distribution lists; notes and transcripts of meetings and conversations; and any other relevant information, **whether in hard copy or electronic/computer format.**

educate the public about how geoengineering and weather modification can impact public health. SGM has no intention to use the information sought in furtherance of any commercial interest.

(1) The Subject of the Request. The requested records concern the activities of the Department of Commerce and other government agencies regarding weather modification. The subject matter of this request therefore involves information that will significantly contribute to the public's understanding of the government's operations and activities in regards to weather modification.

(2) The Informative Value of the Information to Be Disclosed. The requested records are likely to contribute to an understanding of government operations or activities. The Department of Commerce is involved in weather modification activities and research. The requested records will provide insight into the Department of Commerce's process for implementing and regulating weather modification. Many of the requested records may contain information that is not currently available to the general public; therefore, release of the requested records would represent a significant new contribution to the public domain. For these reasons, the requested records will be highly informative in relation to the subject matter of the request, and will further public understanding.

(3) Contribution to General Public Understanding. SGM's mission is to educate the public about how geoengineering and weather modification can impact public health. SGM makes this request for the purposes of providing information about governmental activities and standards, including those of Department of Commerce, to concerned members of the public. SGM is interested in the requested records because they will likely help SGM and the public better understand the methods and procedures which the Department of Commerce has for implementing and regulating weather modification.

(4) The Significance of the Contribution to Public Understanding. The requested records are likely to contribute significantly to public understanding of government operations or activities. SGM will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. SGM regularly informs, educates and counsels the public regarding weather modification and government involvement in implementing and regulating weather modification. The subject of this FOIA request will be used to contribute to one or more of the following: public presentations, news stories contributed to or written by SGM volunteers and/or members, and/or websites (<http://www.minnesotanaturalhealth.org/stopgeoengineeringmn.html> and <http://stopgeoengineeringmn.squarespace.com>). Exactly which of these uses of the information addressed in this FOIA request will be determined after complete review of the requested material. SGM's members, volunteers, and counsel bring a broad range of expertise, skills, and familiarity with weather modification that will enable SGM to review and understand the responsive records and to supply this information in a coherent and understandable way to the general public and the media. SGM can draw on scientists, attorneys, and others to review and summarize this information. SGM certainly has the necessary qualifications relevant to any use of the records that may come about upon reviewing them. SGM's contribution to the public understanding, as compared to the level of understanding prior to disclosure, as well as SGM's

intent to inform the public, are well established. Moreover, many of the records requested may not have been publicly released to date. A requester is likely to contribute significantly to the public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government. 132 Cong. Rec. H9464 (Reps. English and Kindness).

(5) The Existence and Magnitude of a Commercial Interest. SGM has no commercial interest that would be furthered by the requested disclosure. SGM is a non-profit entity and requests the information to further its scientific, legal, and educational efforts. The FOIA fee waiver amendments of 1986 were designed specifically to allow nonprofit, public interest groups, such as SGM, access to government records without the payment of fees. FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters.

Department of Commerce Response

Please submit responsive records, along with an index for any records withheld that clearly identifies the basis for withholding, to the letterhead address above. Please segregate any records you determine are exempt and provide the remainder and the reasons for not providing all of the responsive records.

The basic time limit for responding to FOIA requests is twenty work days. See 5 U.S.C. § 552(a)(6)(A). This time limit can be extended under certain limited circumstances for at most an additional ten working days. *See id.* at § 552(a)(6)(B).

Please provide all responsive documents that are in the files maintained by Department of Commerce personnel or offices on the date that Department of Commerce staff conducts their searches for the documents responsive to this request.¹ **SGM requests that to the extent that the Department of Commerce can do so, it furnish electronic copies of the above documents in lieu of paper copies (to minimize the expense and burden of copying).** 5 U.S.C. § 552(a)(3)(B) (note, as amended in 1996 FOIA mandates that “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.”)

Please contact this office if you have any questions regarding the scope of this request, the nature of the records sought, or any other aspect of this request. I look forward to hearing from you.

By signing below, I certify that the reasons provided for a fee waiver are true and correct.

Sincerely,



Brian Gaffney

¹ See *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983); *Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002); *Oregon Natural Desert Ass'n v. Gutierrez*, 419 F. Supp. 2d 1284, 1288 (D. Or. 2006) (federal agencies must release all documents in their possession through the date they conduct the review of their files for documents responsive to FOIA requests).

Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams

The National Weather Service (NWS) Operations and Workforce Analysis (OWA) project is supported by four “Core Teams” that are each focused on one of the following topics:

- Communications and stakeholder engagement
- Organizational structure
- Operating model (including Impact-based Decision Support Services or IDSS)
- Workforce analysis

The membership of the Core Teams include NWS employees from across the organization who were approved for participation by NWS leadership. They also include National Weather Service Employees Organization (NWSEO) bargaining unit members who were recommended by NWSEO for each workstream. McKinsey & Company, which is working as an independent third-party consultant for NWS, is also participating on the teams. The Core Teams will provide essential support to the overall OWA project. This charter will establish the scope of activities and responsibilities of the Core Teams.

The main activities of the Core Teams are to:

1. **Support the Operations and Workforce Committee (OWC)**¹ in reviewing project analyses, developing and assessing options for the OWA, and answering questions or replying to requests for additional information.
2. **Assist and collaborate** with NWS OWA project leadership and McKinsey as they conduct their assessment of the NWS to ensure a collaborative and customized approach while preserving objectivity and independence. This collaboration could include participation in data calls, working groups, and/or research, and through providing guidance on action steps to take leading up to OWC² meetings.
3. **Augment and support** the data, information, perspectives, and ideas collected through application of individual expertise, experience, and insights (e.g., adding the perspective of Weather Forecast Offices, recommending subject matter experts (SME) for specific topics).
4. **Review and engage** on McKinsey's methodologies, insights, results and recommendations for accuracy and suggest changes if needed. To ensure an unbiased assessment, McKinsey will have final determination on the content presented to the OWC but it will be developed in a joint and collaborative effort with the Core Teams and subject matter experts.

Expectations for each member of the Core Teams include the following (may be adapted as needed, and notice will be given to ensure awareness and agreement with any changes):

- **Confidentiality: Core Team members, consultants, and SMEs are expected to maintain at all times the highest level of privacy and confidentiality regarding all information and materials shared as part of the OWA project, including initial findings and of all Core Team discussions, unless otherwise indicated (e.g., to share an approved project update that is intended to reach all NWS staff). Any interim reports or materials are considered to be**

¹ The National Weather Service (NWS) Executive Council (EC) established the NWS Operations and Workforce Committee (OWC) for the purposes of providing guidance to and making decisions on the OWA project.

drafts and are not to be shared beyond the Core Team and any consultants or SMEs who are providing independent advice. Core Team members will indicate their understanding of this requirement by signing this Charter. Consultants and SMEs will be covered as appropriate by separate non-disclosure agreements.

- **Commitment:** Core Team members are expected to fully participate in regular team meetings (in person or as conference calls, depending on location); in addition they are responsible for completing document reviews, communication steps. and other actions between meetings.
- **Role:** Core Team members are critical to the OWA in contributing insights in their areas of expertise, conducting analyses of surveys and interviews and generating input / data / that can inform the options and reports that McKinsey provides to the OWC.
- **Scope:** The Core Team activities are pre-decisional, only. In this capacity Core Team members provide input / data / guidance, serving a critical role as action-oriented groups such that when decisions are made (e.g., the approval of language for a survey or information for the website), the teams will be responsible for next steps.
- **Support:** The Core Teams will call on and engage with a cohort of Subject Matter Experts (SMEs) within the organization when needed to address specific questions, analyses or provide other expert insight
- **Duration:** The Core Teams will be in place through Phase II of the OWA project and will be considered for extended participation Phase III based on availability, interest and relevance to their area of expertise. Phase II will extend through approximately mid-October of 2015.

If you, or another Core Team member, have any questions or concerns about the Core Team Charter or other aspects of your participation, please contact Joanne Swanson Kagan, NWS OWA Project leader, at joanne.swanson@noaa.gov; Direct: 301-427-9066 or Cell: 240-393-0415. Thank you for your service to this project.

I have reviewed the Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams, and I confirm that I will strictly maintain the confidentiality of all information in accordance with the Charter.

Name	Signature	Date
_____	_____	_____
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_____	_____	_____

Tracking Number	Type	Requester	Requester Organization	Submitted
DOC-NOAA-2018-001329	Request	Ben Dobson	NBC Connecticut	05/04/2018
DOC-NOAA-2018-001322	Request	Liz Charboneau	American Bridge 21st Century	05/03/2018

Custom Report - 05/08/2018 01:0

Received	Assigned To	Case File Assigned To	Perfected?	Due	Closed Date
05/04/2018	NWS	NWS	Yes	06/06/2018	TBD
05/03/2018	USEC	USEC	Yes	06/06/2018	TBD

2:24

Status	Dispositions
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Assignment Determination	
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Assignment Determination	
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Detail

Any records that would indicate when one of the National Weather Service Doppler Radars were out of service for
Travel Records: I am requesting copies of any and all travel records, including expenses and reimbursements, for

[REDACTED]
any amount of time between Jan 1, 2016 until today (May 4, 2018) at the following sites: Albany (ENX) 1
Timothy Gallaudet from October 5, 2017 through the present.

[REDACTED]
Faunton (BOX) Long Island (OKX) I agree to pay for the records, but would request any fees assessed b

[REDACTED]
be communicated ahead of fulfilling the request.

Lola Stith - NOAA Affiliate

From: Lola Stith - NOAA Affiliate
Sent: Monday, May 14, 2018 11:50 AM
To: Ana Liza Malabanan - NOAA Federal; Mark Graff - NOAA Affiliate
Cc: Samuel Dixon - NOAA Affiliate; Shawn Martin; Rosalie del Rosario
Subject: Re: Referral for Direct Response re: Audubon Society FOIA Request, ESI DCCO Management

(b)(5) .

Adding Mark (b)(5)

What should we do?

Lola

On Mon, May 14, 2018 at 11:07 AM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

Good morning,

Please advise on status. Today is day 20 on the clock.

Thanks!

Ana Liza

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

From: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Date: Fri, May 4, 2018 at 6:52 AM

Subject: Fwd: Referral for Direct Response re: Audubon Society FOIA Request, ESI DCCO Management

To: Heather.A.Hall@usace.army.mil, FOIA-NWP@usace.army.mil

Cc: Samuel Dixon <samuel.dixon@noaa.gov>, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>

Good morning Heathe (b)(5)
?
? Please advise.

Thank you.

Lola Stith
NOAA FOIA Office

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

From: **Lola Stith - NOAA Affiliate** <lola.m.stith@noaa.gov>

Date: Tue, Apr 17, 2018 at 11:55 AM

Subject: Fwd: Referral for Direct Response re: Audubon Society FOIA Request, ESI DCCO Management

To: Heather.A.Hall@usace.army.mil

Hi Heather - We received your referral for processing (b)(5)

. Please advise.

Thank you!

Lola
NOAA FOIA Office

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

From: **Samuel Dixon** <samuel.dixon@noaa.gov>

Date: Mon, Apr 2, 2018 at 12:46 PM

Subject: Fwd: Referral for Direct Response re: Audubon Society FOIA Request, ESI DCCO Management

To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, FOIA Office - NOAA Service Account <foia@noaa.gov>

Hi Lola,

Please see the attached referral from USACOE.

Thanks,

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

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

From: **FOIA-NWP** <foia-nwp@usace.army.mil>

Date: Mon, Apr 2, 2018 at 11:44 AM

Subject: Referral for Direct Response re: Audubon Society FOIA Request, ESI DCCO Management

To: "samuel.dixon@noaa.gov" <samuel.dixon@noaa.gov>, "joan.moumbleaux@noaa.gov" <joan.moumbleaux@noaa.gov>

Cc: "michelle_mcdowell@fws.gov" <michelle_mcdowell@fws.gov>

Good morning, Samuel and Joan,

I realized the documents I sent to Michelle McDowell last Thursday, March 29, 2018, should have been sent to you. Additionally, I need to revise the transmittal to a referral for direct response. Attached are the two documents referred in addition to Audubon Society's initial and revised FOIA request for reference.

Please let me know if you have any questions or require additional information from Portland District.

Thank you,
Heather

.....
Heather Hall
Paralegal Specialist | District FOIA Officer
U.S. Army Corps of Engineers
Portland District Counsel, CENWP-OC
333 SW First Avenue
Portland, OR 97204-3495
✉: Heather.A.Hall@usace.army.mil
FOIA ✉: FOIA-NWP@usace.army.mil
<http://www.nwp.usace.army.mil/About/FOIA.aspx>

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-----Original Message-----

From: HALL, Heather Angeline CIV USARMY CENWP (US)
Sent: Thursday, March 29, 2018 1:41 PM
To: 'michelle_mcdowell@fws.gov' <michelle_mcdowell@fws.gov>
Subject: Time Sensitive Consultation Request re: Audubon Society FOIA Request, ESI DCCO Management
Importance: High

**Please advise if contacting you directly is not the proper course of action for FOIA consultations.

Hi Michelle,

In response to Audubon Society's FOIA request, we identified two documents involving your guidance re: the Corps post-season Memorandum for the Record. Do you have any objections to release?

For reference, attached is a string of emails between the Corps and Audubon re: scope clarification.

Thank you, in advance, for responding at your earliest opportunity.

Cordially,

Heather

.....
Heather Hall
Paralegal Specialist | District FOIA Officer U.S. Army Corps of Engineers Portland District Counsel, CENWP-OC
333 SW First Avenue
Portland, OR 97204-3495

✉: Heather.A.Hall@usace.army.mil

FOIA ✉: FOIA-NWP@usace.army.mil

<http://www.nwp.usace.army.mil/About/FOIA.aspx>

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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

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

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

lola.m.stith@noaa.gov

--

Ana Liza S. Malabanan

Freedom of Information Act (FOIA) Coordinator

Information Services and Management Branch

Operations, Management & Information Division

NOAA Fisheries West Coast Region

U.S. Department of Commerce

Office: 562-980-4008



--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

((b)(6) 
lola.m.stith@noaa.gov

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Monday, May 14, 2018 11:56 AM
To: Lola Stith - NOAA Affiliate
Cc: Ana Liza Malabanan - NOAA Federal; Samuel Dixon - NOAA Affiliate; Shawn Martin; Rosalie del Rosario
Subject: Re: Referral for Direct Response re: Audubon Society FOIA Request, ESI DCCO Management

I would (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 Mon, May 14, 2018 at 11:49 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

(b)(5) [redacted]
[redacted]
[redacted]

What should we do?

Lola

On Mon, May 14, 2018 at 11:07 AM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

Good morning,

Please advise on status. Today is day 20 on the clock.

Thanks!

Ana Liza

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

From: **Lola Stith - NOAA Affiliate** <lola.m.stith@noaa.gov>

Date: Fri, May 4, 2018 at 6:52 AM

Subject: Fwd: Referral for Direct Response re: Audubon Society FOIA Request, ESI DCCO Management

To: Heather.A.Hall@usace.army.mil, FOIA-NWP@usace.army.mil

Cc: Samuel Dixon <samuel.dixon@noaa.gov>, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>

Good morning Heather - I am writing to follow-up on my previous email (b)(5)

Please advise.

Thank you.

Lola Stith
NOAA FOIA Office

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

From: **Lola Stith - NOAA Affiliate** <lola.m.stith@noaa.gov>

Date: Tue, Apr 17, 2018 at 11:55 AM

Subject: Fwd: Referral for Direct Response re: Audubon Society FOIA Request, ESI DCCO Management

To: Heather.A.Hall@usace.army.mil

Hi Heather - We received your referral for processing (b)(5)

Please advise.

Thank you!

Lola
NOAA FOIA Office

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

From: **Samuel Dixon** <samuel.dixon@noaa.gov>

Date: Mon, Apr 2, 2018 at 12:46 PM

Subject: Fwd: Referral for Direct Response re: Audubon Society FOIA Request, ESI DCCO Management

To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, FOIA Office - NOAA Service Account <foia@noaa.gov>

Hi Lola,

Please see the attached referral from USACOE.

Thanks,

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

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

From: **FOIA-NWP** <foia-nwp@usace.army.mil>
Date: Mon, Apr 2, 2018 at 11:44 AM
Subject: Referral for Direct Response re: Audubon Society FOIA Request, ESI DCCO Management
To: "samuel.dixon@noaa.gov" <samuel.dixon@noaa.gov>, "joan.moumbleaux@noaa.gov" <joan.moumbleaux@noaa.gov>
Cc: "michelle_mcdowell@fws.gov" <michelle_mcdowell@fws.gov>

Good morning, Samuel and Joan,

I realized the documents I sent to Michelle McDowell last Thursday, March 29, 2018, should have been sent to you. Additionally, I need to revise the transmittal to a referral for direct response. Attached are the two documents referred in addition to Audubon Society's initial and revised FOIA request for reference.

Please let me know if you have any questions or require additional information from Portland District.

Thank you,
Heather

.....
Heather Hall
Paralegal Specialist | District FOIA Officer
U.S. Army Corps of Engineers
Portland District Counsel, CENWP-OC
[333 SW First Avenue](#)
Portland, OR 97204-3495
✉: Heather.A.Hall@usace.army.mil
FOIA ✉: FOIA-NWP@usace.army.mil
<http://www.nwp.usace.army.mil/About/FOIA.aspx>

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-----Original Message-----

From: HALL, Heather Angeline CIV USARMY CENWP (US)
Sent: Thursday, March 29, 2018 1:41 PM
To: 'michelle_mcdowell@fws.gov' <michelle_mcdowell@fws.gov>
Subject: Time Sensitive Consultation Request re: Audubon Society FOIA Request, ESI DCCO Management
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**Please advise if contacting you directly is not the proper course of action for FOIA consultations.

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Thank you, in advance, for responding at your earliest opportunity.

Cordially,

Heather

.....

Heather Hall

Paralegal Specialist | District FOIA Officer U.S. Army Corps of Engineers Portland District Counsel,
CENWP-OC

[333 SW First Avenue](#)

Portland, OR 97204-3495

✉ : Heather.A.Hall@usace.army.mil

FOIA ✉ : FOIA-NWP@usace.army.mil

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--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(**(b)(6)**)

lola.m.stith@noaa.gov

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(**(b)(6)**)

lola.m.stith@noaa.gov

--

Ana Liza S. Malabanan
Freedom of Information Act (FOIA) Coordinator
Information Services and Management Branch
Operations, Management & Information Division
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office: 562-980-4008



--

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

Roxie Allison-Holman - NOAA Federal

From: Roxie Allison-Holman - NOAA Federal
Sent: Wednesday, May 16, 2018 10:12 AM
To: Mark Graff - NOAA Federal
Cc: Michael Bogomolny; Stacey Nathanson - NOAA Federal; Maria Williams - NOAA Federal
Subject: Re: Graff Decl. 5 15 2018_DRAFT.docx - Invitation to edit
Attachments: 580 Final_FAL-v2.pdf

IR5 FAL is attached.

On Wed, May 16, 2018 at 9:56 AM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

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

On Wed, May 16, 2018 at 8:26 AM, 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 (O)
(b)(6) [REDACTED] (C)

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On Tue, May 15, 2018 at 10:58 PM, Michael Bogomolny <mikebogo@gmail.com> wrote:

(b)(5) [REDACTED]

On Tue, May 15, 2018, 4:21 PM Mark Graff - NOAA Federal (via Google Docs) <drive-shares-noreply@google.com> wrote:

mark.graff@noaa.gov has invited you to **edit** the following document:

 [Graff Decl. 5 15 2018_DRAFT.docx](#)



(b)(5)

[Open in Docs](#)

Google Docs: Create and edit documents online.

Google LLC, [1600 Amphitheatre Parkway, Mountain View, CA 94043, USA](#)

You have received this email because someone shared a document with you from Google Docs.



--

Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
301-628-1625

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--

Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
301-628-1625

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December 29, 2017

Bill Marshall
425 Third St., SW
Suite 800
Washington, DC 20024

Re: FOIA Request No. DOC-NOAA-2017-000580

Dear Mr. Marshall:

This is in reference to the above-captioned FOIA request # **DOC-NOAA-2017-000580** sent to NOAA dated February 9, 2017, in which you requested:

Any and all communications between Thomas Karl and John Holdren between January 20, 2009 through January 20, 2017.

Enclosed is the final release to your FOIA request. These records are accessible via FOIAOnline.

We are releasing 614 pages responsive to this request as follows:

- 143 pages released in their entirety; and
- 334 pages that has been completely redacted under FOIA Exemptions (b)(5), 5 U.S.C. § 552(b)(5), which exempts from disclosure “inter-agency or intra-agency memorandums or letters that are both predecisional and deliberative”; and
- 137 pages that has been partially redacted under FOIA Exemptions (b)(5), 5 U.S.C. § 552(b)(5), which exempts from disclosure “inter-agency or intra-agency memorandums or letters that are both predecisional and deliberative”, and (b)(6), 5 U.S.C. 552(b)(6), which exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

Information on Appeals

Although we do not consider this to be a denial of your request, you are granted appeal rights for this determination. Your appeal must be received within 90 calendar days of the date of the denial letter.

Your appeal may be sent by the following methods:

- By email to FOIAAppeals@doc.gov.
- By FOIAOnline, if you have an account at <https://foiaonline.regulations.gov>.
- If sending by mail please address your appeal to:



Assistant General Counsel for Employment, Litigation, and Information
U.S. Department of Commerce Room 5896
1401 Constitution Ave. NW
Washington, DC 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, 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;
- Your statement explaining why the determination was in error; and
- The notation "Freedom of Information Act Appeal" 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
8601 Adelphi Road, Room 2510
College Park, MD 20740-6001
Email: ogis@nara.gov
Phone: 301-837-1996

Toll-free: 1-877- 684-6448

Department of Commerce receive correspondence only on business days from 8:30 a.m. to 5:00 p.m., Eastern Time. FOIA appeals received outside of our normal business hours will be deemed received on the next business day.

If you have any questions, please contact Maria Williams, NESDIS FOIA Coordinator, at maria.williams@noaa.gov, or the NOAA FOIA Public Liaison Robert Swisher at robert.swisher@noaa.gov.

Regards,



Mark S. Paese
Deputy Assistant Administrator
NOAA Satellite and Information Service

DOC-NOAA-2017-000580

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Monday, May 21, 2018 3:16 PM
To: Lola Stith - NOAA Affiliate
Subject: Re: ACTION REQUIRED: Task for Request Kleinman_DOC-OS-2018-000264 (REVIEW/SIGN)
Attachments: Kleinman_DOC-OS-2018-000264_Search Tasker__NOAA mhg.pdf

Perfect--signed and attached.

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, May 21, 2018 at 3:10 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:
Hi Mark,

(b)(5)

Please sign/return the attached tasker.

R/
Lola

On Mon, May 14, 2018 at 4:17 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Following u (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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this message in error, and delete the message.

On Thu, Jan 18, 2018 at 1:15 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

(b)(5)

. Am I mistaken on this one?

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: **Khalid, Sulma (Contractor)** <SKhalid@doc.gov>
Date: Thu, Jan 18, 2018 at 10:44 AM
Subject: Fee Estimate Tasker: Kleinman_DOC-OS-2018-000264
To: "Parsons, Bobbie (Federal)" <bParsons@doc.gov>, "Graff, Mark (Federal)" <Mark.Graff@noaa.gov>

Good Morning,

(b)(5)

Thanks!

Regards,

Sulma

Sulma Khalid

FOIA/PA Analyst (Contractor)

U.S. Department of Commerce

Office of Privacy and Open Government

Phone Number: [\(202\) 482-7432](tel:(202)482-7432)

Email: skhalid@doc.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



March 6, 2018

MEMORANDUM FOR: Bobbie Parsons, IOS
Catherine Fletcher, NIST
Mark Graff, NOAA
Jamie Boston, PTO

FROM: Michael J. Toland, Ph.D.
Deputy Chief Freedom of Information Act (FOIA) Officer

SUBJECT: FOIA Request Gretchen Kleinman
DOC-OS-2018-000264

The U.S. Department of Commerce's FOIA Office, Office of Privacy and Open Government, received a request seeking:

1. All communications between Safra Catz or someone with @oracle.com domain name and Wilbur Ross and/or his staff; and
2. All communications with Safra Catz or someone with @oracle.com domain name related to May 11, 2017 Presidential Executive Order on Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure.

I am sending this FOIA request to you for your attention, since your office has been identified as possibly having records that may be responsive to the request. Please take the following actions:

- Please notify our office if you know of any other bureau/office that may also have responsive documents.
- Conduct a search for responsive records.
 - You must search every place that could reasonably be expected to have responsive documents.
 - The date range for records that may be responsive to this request is 6 months before and 6 months after the May 11th, 2017 Order: December 11, 2016-December 11, 2017
- If you identify any records:
 - Please provide electronic copies of the records to me within ten (10) business days of the date of this letter—on or before March 20, 2018
 - Upload documents in FOIAonline following the instructions in the attachment entitled "Instructions for uploading documents into FOIAonline."
 - Identify whether you believe the records, or any portions thereof, should be withheld from disclosure.
 - Attached is a copy of FOIA Exemptions to assist you with making withholding determinations.

- Ayana Crawford is also available to answer any questions you may have about FOIA Exemptions or the FOIA request by phone at 202-482-7432, or by email at Skhalid@doc.gov
- Sign and date the attached Certification of Search.
- Return the completed Certification of Search along with the responsive records to my office.
- If you do not identify any responsive records:
 - Check the box “My Office has found no responsive document” on the attached Certification of Search.
 - Sign and date the Certification of Search.
 - Return the completed Certification of Search to my office.

Attachments

1. Instructions for uploading documents into FOIAonline
2. Certification of Search
3. FOIA Exemptions

Instructions for uploading documents into FOIAonline

A signed Certification of Search should be uploaded separately in Case File/Correspondence/Other. Only the Certification of Search signed by the FOIA Officer/Senior Official from the Bureau should be uploaded. Please do not upload Sub-Agency Taskers.

Responsive documents are to be uploaded in Case File/Records. Please identify whether you believe the document, or any portion of it, should be withheld from disclosure. You must include the FOIA exemption next to any information you identify as protected from disclosure.

- A clean copy and redacted copy shall be uploaded on FOIAonline.
- The clean copy will be uploaded with an UU (Unredacted – Unreleaseable) Publish Option.
- Redacted copy will be uploaded and grouped by exemptions applied, i.e., RR (Redacted-Releaseable) - (b)6, (b)5 (please include the privilege used).
- The format to be used for “Title” of uploaded documents: ITA - 24 documents, RR, (b)4, (b)6. (Bureau [not sub agency] - number of documents - Publish Options – exemptions).
- For documents that are completely withheld UU-Unredacted – Unreleaseable; and RU-Redacted-Unreleaseable (you must apply an Exemption in the Action Column).
- For referred documents use the following format for “Title:” 15 documents refer to NTIA.

Certification of Search for FOIA Request No. DOC-OS-2018-000264

THIS RESPONSE MUST BE SIGNED BY A SENIOR OFFICIAL IN YOUR OFFICE.

Please contact me if you have any questions about the scope of this request or the FOIA exemptions, at 202-482-3842.

Please sign this sheet of paper and check all of the appropriate boxes

- Uploaded in FOIAonline are all documents in the possession of my office which are responsive and can be released in entirety.
- Uploaded in FOIAonline are all documents within the possession of my office which are responsive and we have found reason to partially withhold. One clean copy and one redacted copy have been uploaded.
- Uploaded in FOIAonline are all documents within the possession of my office which are responsive and we have found reason to withhold entirely, each document to be withheld entirely has been noted.
- Uploaded in FOIAonline are all documents within the possession of my office which are responsive and must be referred to the originating office, bureau, or federal agency for disclosure determinations.
- My office has found no responsive documents.
- All disclosure determinations have been made by the Commerce Office that originated or has control of the documents
- A foreseeable harm review and analysis has been completed for all withheld documents and portions of documents and it has been determined that disclosure of the withheld material would result in harm to an interest protected by the asserted exemption or that disclosure is prohibited by law. Name of person most knowledgeable with the issue of foreseeable harm:
_____.

Interim response Final response

GRAFF.MARK.HYR
UM.1514447892

Signature (Senior Official)

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: 2018.05.21 15:16:07 -04'00'

Date

FOIA Exemptions

Exemption 1: classified national defense and foreign relations information;

Exemption 2: internal agency personnel rules and practices;

Exemption 3: information that is prohibited from disclosure by another federal law;

Exemption 4: trade secrets and other confidential or privileged commercial or financial information;

Exemption 5: inter-agency or intra-agency communications that are protected by legal privileges, including the deliberative process, attorney-client and attorney work-product privileges;

Exemption 6: information involving matters of personal privacy;

Exemption 7: records or information compiled for law enforcement purposes, to the extent that the production of those records:

Exemption (7)(A) could reasonably be expected to interfere with enforcement proceedings,

Exemption (7)(B) would deprive a person of a right to a fair trial or an impartial adjudication,

Exemption (7)(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

Exemption (7)(D) could reasonably be expected to disclose the identity of and/or information provided by a confidential source,

Exemption (7)(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, or

Exemption (7)(F) could reasonably be expected to endanger the life or physical safety of any individual;

Exemption 8: information relating to the supervision of financial institutions; and

Exemption 9: geological information on wells

Lola Stith - NOAA Affiliate

From: Lola Stith - NOAA Affiliate
Sent: Monday, May 21, 2018 3:11 PM
To: Mark Graff - NOAA Federal
Subject: ACTION REQUIRED: Task for Request Kleinman_DOC-OS-2018-000264 (REVIEW/SIGN)
Attachments: Kleinman_DOC-OS-2018-000264_Search Tasker__NOAA.docx

Hi Mark,

(b)(5)

.

R/
Lola

On Mon, May 14, 2018 at 4:17 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Following u (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 Thu, Jan 18, 2018 at 1:15 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

(b)(5)
. Am I mistaken on this one?

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: **Khalid, Sulma (Contractor)** <SKhalid@doc.gov>

Date: Thu, Jan 18, 2018 at 10:44 AM

Subject: Fee Estimate Tasker: Kleinman_DOC-OS-2018-000264

To: "Parsons, Bobbie (Federal)" <bParsons@doc.gov>, "Graff, Mark (Federal)" <Mark.Graff@noaa.gov>

Good Morning,

(b)(5)
[Redacted content]

Thanks!

Regards,

Sulma

Sulma Khalid

FOIA/PA Analyst (Contractor)

U.S. Department of Commerce

Office of Privacy and Open Government

Phone Number: [\(202\) 482-7432](tel:(202)482-7432)

Email: skhalid@doc.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



March 6, 2018

MEMORANDUM FOR: Bobbie Parsons, IOS
Catherine Fletcher, NIST
Mark Graff, NOAA
Jamie Boston, PTO

FROM: Michael J. Toland, Ph.D.
Deputy Chief Freedom of Information Act (FOIA) Officer

SUBJECT: FOIA Request Gretchen Kleinman
DOC-OS-2018-000264

The U.S. Department of Commerce's FOIA Office, Office of Privacy and Open Government, received a request seeking:

1. All communications between Safra Catz or someone with @oracle.com domain name and Wilbur Ross and/or his staff; and
2. All communications with Safra Catz or someone with @oracle.com domain name related to May 11, 2017 Presidential Executive Order on Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure.

I am sending this FOIA request to you for your attention, since your office has been identified as possibly having records that may be responsive to the request. Please take the following actions:

- Please notify our office if you know of any other bureau/office that may also have responsive documents.
- Conduct a search for responsive records.
 - You must search every place that could reasonably be expected to have responsive documents.
 - The date range for records that may be responsive to this request is 6 months before and 6 months after the May 11th, 2017 Order: December 11, 2016-December 11, 2017
- If you identify any records:
 - Please provide electronic copies of the records to me within ten (10) business days of the date of this letter—on or before March 20, 2018
 - Upload documents in FOIAonline following the instructions in the attachment entitled “Instructions for uploading documents into FOIAonline.”
 - Identify whether you believe the records, or any portions thereof, should be withheld from disclosure.
 - Attached is a copy of FOIA Exemptions to assist you with making withholding determinations.

- Ayana Crawford is also available to answer any questions you may have about FOIA Exemptions or the FOIA request by phone at 202-482-7432, or by email at Skhalid@doc.gov
- Sign and date the attached Certification of Search.
- Return the completed Certification of Search along with the responsive records to my office.
- If you do not identify any responsive records:
 - Check the box “My Office has found no responsive document” on the attached Certification of Search.
 - Sign and date the Certification of Search.
 - Return the completed Certification of Search to my office.

Attachments

1. Instructions for uploading documents into FOIAonline
2. Certification of Search
3. FOIA Exemptions

Instructions for uploading documents into FOIAonline

A signed Certification of Search should be uploaded separately in Case File/Correspondence/Other. Only the Certification of Search signed by the FOIA Officer/Senior Official from the Bureau should be uploaded. Please do not upload Sub-Agency Taskers.

Responsive documents are to be uploaded in Case File/Records. Please identify whether you believe the document, or any portion of it, should be withheld from disclosure. You must include the FOIA exemption next to any information you identify as protected from disclosure.

- A clean copy and redacted copy shall be uploaded on FOIAonline.
- The clean copy will be uploaded with an UU (Unredacted – Unreleaseable) Publish Option.
- Redacted copy will be uploaded and grouped by exemptions applied, i.e., RR (Redacted-Releaseable) - (b)6, (b)5 (please include the privilege used).
- The format to be used for “Title” of uploaded documents: ITA - 24 documents, RR, (b)4, (b)6. (Bureau [not sub agency] - number of documents - Publish Options – exemptions).
- For documents that are completely withheld UU-Unredacted – Unreleaseable; and RU-Redacted-Unreleaseable (you must apply an Exemption in the Action Column).
- For referred documents use the following format for “Title:” 15 documents refer to NTIA.

Certification of Search for FOIA Request No. DOC-OS-2018-000264

THIS RESPONSE MUST BE SIGNED BY A SENIOR OFFICIAL IN YOUR OFFICE.

Please contact me if you have any questions about the scope of this request or the FOIA exemptions, at 202-482-3842.

Please sign this sheet of paper and check all of the appropriate boxes

Uploaded in FOIAonline are all documents in the possession of my office which are responsive and can be released in entirety.

Uploaded in FOIAonline are all documents within the possession of my office which are responsive and we have found reason to partially withhold. One clean copy and one redacted copy have been uploaded.

Uploaded in FOIAonline are all documents within the possession of my office which are responsive and we have found reason to withhold entirely, each document to be withheld entirely has been noted.

Uploaded in FOIAonline are all documents within the possession of my office which are responsive and must be referred to the originating office, bureau, or federal agency for disclosure determinations.

My office has found no responsive documents.

All disclosure determinations have been made by the Commerce Office that originated or has control of the documents

A foreseeable harm review and analysis has been completed for all withheld documents and portions of documents and it has been determined that disclosure of the withheld material would result in harm to an interest protected by the asserted exemption or that disclosure is prohibited by law. Name of person most knowledgeable with the issue of foreseeable harm:

_____.

Interim response Final response

Signature (Senior Official)

Date

FOIA Exemptions

Exemption 1: classified national defense and foreign relations information;

Exemption 2: internal agency personnel rules and practices;

Exemption 3: information that is prohibited from disclosure by another federal law;

Exemption 4: trade secrets and other confidential or privileged commercial or financial information;

Exemption 5: inter-agency or intra-agency communications that are protected by legal privileges, including the deliberative process, attorney-client and attorney work-product privileges;

Exemption 6: information involving matters of personal privacy;

Exemption 7: records or information compiled for law enforcement purposes, to the extent that the production of those records:

Exemption (7)(A) could reasonably be expected to interfere with enforcement proceedings,

Exemption (7)(B) would deprive a person of a right to a fair trial or an impartial adjudication,

Exemption (7)(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

Exemption (7)(D) could reasonably be expected to disclose the identity of and/or information provided by a confidential source,

Exemption (7)(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, or

Exemption (7)(F) could reasonably be expected to endanger the life or physical safety of any individual;

Exemption 8: information relating to the supervision of financial institutions; and

Exemption 9: geological information on wells

Ellen Sebastian - NOAA Federal

From: Ellen Sebastian - NOAA Federal
Sent: Monday, May 21, 2018 3:28 PM
To: Graff, Mark; Lola Stith - NOAA Affiliate
Cc: Samuel Dixon - NOAA Affiliate; NMFS HQ PR FOIA Requests - NOAA Service Account
Subject: Action Requested: FEE WAIVER: FOIA Assignment for DOC-NOAA-2018-001372
Attachments: 2018.05.14 FOIA Request to NMFS RE EPA Request for Reinitiation of Pesticides Consultation.pdf

Hi Mark and Lola (b)(5)

Any help on this matter would be appreciated.

On stand by as needed.

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

From: foia@regulations.gov <foia@regulations.gov>
Date: Thu, May 17, 2018 at 9:07 AM
Subject: FOIA Assignment for DOC-NOAA-2018-001372
To: "ellen.sebastian@noaa.gov" <ellen.sebastian@noaa.gov>

You have been assigned to the FOIA request DOC-NOAA-2018-001372. Additional details for this request are as follows:

- Assigned By: Samuel B. Dixon
- Request Tracking Number: DOC-NOAA-2018-001372
- Due Date: 06/14/2018
- Requester: Margaret Townsend
- Request Track: Simple
- Short Description: N/A
- Long Description: The Center requests from the National Oceanic and Atmospheric Administration ("NOAA"), National Marine Fisheries Service ("NMFS"): the request, draft request, and records generated in connection to a request from the U.S. Environmental Protection Agency ("EPA") to reinitiate informal consultations, consultations, or otherwise review the NMFS Biological Opinion on Environmental Protection Agency's Registration of Pesticides containing Chlorpyrifos, Diazinon, and Malathion. See generally, NOAA Fisheries, Biological Opinion for Pesticides: Chlorpyrifos, Diazinon, and Malathion, <https://www.fisheries.NMFS.gov/resource/document/biological-opinion-pesticides-chlorpyrifosdiazinon-and-malathion> (last views May 14, 2018).

--
Ellen Sebastian

FOIA & Records Coordinator Alaska Region
Temporary Detail w/ Office of Protected Resources/PR4
(301) 427-8489

Nourish and sustain your sense of joy.



May 14, 2018

VIA FOIAONLINE.REGULATIONS.GOV

National Oceanic and Atmospheric Administration

Re: Freedom of Information Act Request: EPA Request for Reinitiation of Pesticides Consultation

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 from the National Oceanic and Atmospheric Administration (“NOAA”), National Marine Fisheries Service (“NMFS”): the request, draft request, and records generated in connection to a request from the U.S. Environmental Protection Agency (“EPA”) to reinitiate informal consultations, consultations, or otherwise review the NMFS Biological Opinion on Environmental Protection Agency’s Registration of Pesticides containing Chlorpyrifos, Diazinon, and Malathion. *See generally*, NOAA Fisheries, *Biological Opinion for Pesticides: Chlorpyrifos, Diazinon, and Malathion*, <https://www.fisheries.NMFS.gov/resource/document/biological-opinion-pesticides-chlorpyrifos-diazinon-and-malathion> (last views May 14, 2018).

For this request, the term “records” refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related 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.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to 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, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

The Center is willing to receive records on a rolling basis.

Finally, FOIA's "frequently requested record" provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give "reading room" treatment to any FOIA-processed records that, "because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records." *See* 5 U.S.C. § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA's Rule of 3 requires all federal agencies to proactively "make available for public inspection in an electronic format" "copies of records, regardless of form or format ... that have been released to any person ... and ... that have been requested 3 or more times." 5 U.S.C. § 552(a)(2)(D)(ii)(II). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide 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."). "Readily accessible" means text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B). Pursuant to this requirement, we hereby request that you produce all records in an electronic format and in their native file formats. Additionally, please provide the records in a load-ready

format with a CSV file index or Excel spreadsheet. If you produce files in .PDF format, then please omit any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily accessible. Please do not provide the records in a single, or “batched,” .PDF file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

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). 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
foia@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please email me 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 1986 fee waiver amendments 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).

I. The Center Qualifies for a Fee Waiver.

Under FOIA, a party 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 U.S. Department of Commerce FOIA regulations that govern NMFS at 15 C.F.R. § 4.11(l) establish the same standard.

Thus, NMFS 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 concerns the operations and activities of NMFS. This request asks for the request, draft request, and records generated in connection to a request from EPA to reinstate informal consultations, consultations, or otherwise review the NMFS Biological Opinion on Environmental Protection Agency’s Registration of Pesticides containing Chlorpyrifos, Diazinon, and Malathion. *See generally*, NOAA Fisheries, *Biological Opinion for Pesticides: Chlorpyrifos, Diazinon, and Malathion*, <https://www.fisheries.noaa.gov/resource/document/biological-opinion-pesticides-chlorpyrifos-diazinon-and-malathion> (last views May 14, 2018).

This FOIA will provide the Center and the public with crucial insight into EPA’s request to reinstate consultations for the pesticides chlorpyrifos, diazinon, and malathion. It is clear that a federal agency’s request to another federal agency to reinstate consultations under a federal environmental law is a specific and identifiable activity of the government, in this case the executive branch agency, NMFS. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, the Center meets this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow the Center to convey to the public information about EPA's intent to review NMFS's biological opinion concerning toxic pesticides. Once the information is made available, the Center will analyze it and present it to its 1.6 million members and online activists and the general public in a manner that will meaningfully enhance the public's understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of NMFS operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of EPA Request for Reinitiation of Pesticides Consultation.

The requested records will contribute to public understanding of whether NMFS and EPA's actions are consistent with their own missions. As explained above, the records will contribute to public understanding of this topic.

Activities of NMFS generally, and specifically its actions concerning EPA's request to review NMFS' biological opinion on pesticides are areas of interest to a reasonably broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about this subject matter. See *W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.").

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

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern EPA's request for reinitiation of pesticides consultation that are not currently in the public domain. See *Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "clarify important facts" about agency policy, "the CLS request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[FOIA] legislative history suggests that information [has more potential to

contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations... .”¹

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of the rationale behind EPA’s request to NMFS for reinitiation of pesticides consultation. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about this topic.

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 EPA’s decision to reinitiate consultations regarding chlorpyrifos, diazinon, and malathion, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about EPA and NMFS’s work concerning these pesticides.

The records are also certain to shed light on EPA and NMFS’s compliance with their own missions. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

II. The Center has a Demonstrated Ability to Disseminate the Requested Information Broadly.

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 activities of numerous government agencies for over 25 years, 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: (1) that the information requested by the Center contributes significantly to the public’s understanding of the government’s operations or activities; (2) that the information enhances the public’s understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center’s track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public’s

¹ In this connection, it is immaterial 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. *See Judicial Watch*, 326 F.3d at 1315.

understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in more than 2,500 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*, *The Guardian*, and *Los Angeles Times*. Many media outlets have reported on the adverse effects of pesticides to human and environmental health utilizing information obtained by the Center from federal agencies, including NMFS. In 2017, more than 2.7 million people visited the Center's extensive website, and viewed pages a total of 5.7 million times. The Center sends out more than 277 email newsletters and action alerts per year to more than 1.6 million members and supporters. Three times a year, the Center sends printed newsletters to more than 63,000 members. More than 304,800 people have "liked" the Center on Facebook, and there are regular postings regarding environmental protection. The Center also regularly tweets to more than 57,900 to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of NMFS's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably-broad audience of persons 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 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.*

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 1.6 million 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 NMFS 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.

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret E. Townsend". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
foia@biologicaldiversity.org

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, May 22, 2018 7:24 AM
To: Robert Swisher - NOAA Federal; Lola Stith - NOAA Affiliate
Cc: Ed Kearns - NOAA Federal; Dennis Morgan - NOAA Federal; Robert Hogan
Subject: Fwd: 580 Challenges FAL and Corrected Documents
Attachments: 580 Challenges Binder_Redacted_v2 (1).pdf; 580 Challenges_FAL mhg.pdf

Hey Guys--

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

I'll keep you posted after the MSJ and Declaration are filed.

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: Mon, May 21, 2018 at 8:30 PM
Subject: Re: 580 Challenges FAL and Corrected Documents
To: Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov>
Cc: Maria Williams - NOAA Federal <maria.williams@noaa.gov>, Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov>

Hi Guys--

(looping in Bogos)

(b)(5)
[Redacted]

(b)(5)

Signing off for the night.

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, May 21, 2018 at 8:12 PM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

Maria,

(b)(5)

On Mon, May 21, 2018 at 8:00 PM, Maria Williams - NOAA Federal <maria.williams@noaa.gov> wrote:

My extreme apologies (b)(5)

Respectfully,

Maria S. Williams

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

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

On Mon, May 21, 2018 at 7:35 PM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

Mar (b)(5)

On Mon, May 21, 2018 at 7:34 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Guys--

(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) (C)

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On Mon, May 21, 2018 at 7:31 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Roxie--

(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, May 21, 2018 at 7:26 PM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

(b)(5)
[Redacted]

On Mon, May 21, 2018 at 7:25 PM, Maria Williams - NOAA Federal <maria.williams@noaa.gov> wrote:

(b)(5)
[Redacted]

On Mon, May 21, 2018 at 7:22 PM Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

(b)(5)
[Redacted]

(b)(5)

[REDACTED]

On Mon, May 21, 2018 at 6:26 PM, Maria Williams - NOAA Federal <maria.williams@noaa.gov> wrote:

Hi Mark,

(b)(5)

[REDACTED]

Respectfully,

Maria S. Williams

Admin Officer | NESDIS FOIA Liaison | Property | FAC-COR II

National Oceanic and Atmospheric Administration

Satellite and Information Service

Office of the Assistant Chief Information Officer

Phone: 202-308-4959

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

--

Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
301-628-1625

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--

Respectfully, Maria S. Williams Property/NESDIS FOIA/Admin Officer/FAC-COR II Office of the Assistant Chief Information Officer National Oceanic & Atmospheric Administration Phone: 202-308-4959 Follow NOAA Satellites on Social Media: Facebook, Twitter, YouTube "Talent wins games, but teamwork and intelligence wins championship" ~ MJ

--

Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
301-628-1625

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--

Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
301-628-1625

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--

Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
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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.

From: Thomas Karl <thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6) .eop.gov>
Cc: Rosina Bierbaum <rbierbau@umich.edu>;
Jane Lubchenco <jane.lubchenco@noaa.gov>; Dr. Kathryn Sullivan
<kathryn.sullivan@noaa.gov>
Bcc:
Subject: Re: Query about 2011 global temps
Date: Mon Jan 09 2012 14:22:37 EST
Attachments: 2011 Temperatures.docx

John and Rosina,

Attached is the pertinent information about Global Temperatures you requested. Let me know if you have any questions.

Regards, Tom

On Mon, Jan 9, 2012 at 8:58 AM, Thomas Karl <thomas.r.karl@noaa.gov> wrote:

John and Rosina,

I should have a chart to you by this afternoon (2011 data still not completely in, but we will have a very good estimate). We are planning a press announcement Thursday Jan. 19.

(b)(5)

Tom

On Sun, Jan 8, 2012 at 3:08 PM, Bierbaum, Rosina <rbierbau@umich.edu> wrote:

Hi John and Tom,

(b)(5)

(b)(5)

Hope all's well with both of you. Rosina

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Thomas Karl <thomas.r.karl@noaa.gov>
Cc: Rosina Bierbaum <rbierbau@umich.edu>;
Jane Lubchenco <jane.lubchenco@noaa.gov>; Dr. Kathryn Sullivan
<kathryn.sullivan@noaa.gov>
Bcc:
Subject: RE: Query about 2011 global temps
Date: Mon Jan 09 2012 16:13:39 EST
Attachments:

Many thanks, Tom. You're a hero! My best, John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology
and Director, Office of Science and Technology Policy
Executive Office of the President of the United States

(b)(6)

(b)(6)

(b)(6)

From: Thomas Karl [mailto:thomas.r.karl@noaa.gov]
Sent: Monday, January 09, 2012 2:23 PM
To: Holdren, John P.
Cc: Rosina Bierbaum; Jane Lubchenco; Dr. Kathryn Sullivan
Subject: Re: Query about 2011 global temps

John and Rosina,

Attached is the pertinent information about Global Temperatures you requested. Let me know if you have any questions.

Regards, Tom

On Mon, Jan 9, 2012 at 8:58 AM, Thomas Karl <thomas.r.karl@noaa.gov> wrote:

John and Rosina,

I should have a chart to you by this afternoon (b)(5)

We are planning a press announcement Thursday Jan. 19. The continuing La Nina has influenced global temps and they will not be anywhere near record levels.

Tom

On Sun, Jan 8, 2012 at 3:08 PM, Bierbaum, Rosina <rbierbau@umich.edu> wrote:

Hi John and Tom,

(b)(5)

(b)(5)

Hope all's well with both of you. Rosina

From: Holdren, John P. [mailto:John_P._Holdren@ostp.eop.gov]
Sent: Sunday, January 08, 2012 2:39 PM
To: thomas.r.karl@noaa.gov
Cc: Bierbaum, Rosina
Subject: Query about 2011 global temps

Hi Tom –

I was browsing today on the NCDC, GISS, and UK Met Office sites looking for insights about how 2011 is likely to come out in the global-T rankings. The only thing I was able to find on any of the three was the attached from the Met Office. It has a useful comparison table with the top ten warm years according to each of the three data sets (plus the WMO rankings based on the average of the three). But 2011 is represented, in this compilation, only by January through October readings. Do you know yet what NCDC is going to say after November and December are factored in?

Many thanks,

John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology

From: Holdren, John P.
(b)(6) ostp.eop.gov>
To: Jacobs, Katharine L.
(b)(6) @ostp.eop.gov>; (b)(6)
sgcrp.gov>; Thomas.R.Karl@noaa.gov
<thomas.r.karl@noaa.gov>; Jane.Lubchenco@noaa.gov (b)(6)
<jane.lubchenco@noaa.gov>; Kelly, Henry
(b)(6) @ostp.eop.gov>
Cc: Siger, Rick
(b)(6) @ostp.eop.gov>; Wackler, Ted M.
(b)(6) ostp.eop.gov>; Weiss, Rick
(b)(6) @ostp.eop.gov>
Bcc:
Subject: RE: The Cato Institute Anti-Assessment PRIVILEGED / DELIBERATIVE
Date: Mon Oct 15 2012 13:57:43 EDT
Attachments: CATO MEMORANDUM FOR FILE_10-15-2012.doc

Kathy et al. --

(b)(5)

Cheers,
John

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: John P. Holdren
(b)(6)
Cc: Alexander MacDonald - NOAA Federal
<alexander.e.macdonald@noaa.gov>
Bcc:
Subject: Solar and Wind Energy Analysis
Date: Tue Jul 01 2014 15:24:59 EDT
Attachments: cost 29jun14 v0 (1).docx
holdren 30jun14 v0.pptx
tom karl letter v1.docx

Hello John,

I want to bring to your attention a body of work that Sandy MacDonald and his team out at our NOAA Environmental Sciences Research Lab has been working on for the past several years. It is the most comprehensive look at the impact of real weather on the transmission of renewable energy across large areas that I have seen. Sandy has provided a power point and a draft of a Nature paper he and his team are still working on. I also included a short letter he wrote to me. (b)(5)

Given your expertise and the importance of this issue, I thought you might want to consider an hour brief by him to you and your staff at a time convenient to you. I have known Sandy for many years.

(b)(5)

Best Regards,
Tom

--

Thomas R. Karl, L.H.D.

Director, National Climatic Data Center

Chair of the Subcommittee on Global Change Research

Veach-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476
Fax: (828) 271-4246

From: Thomas Karl <thomas.r.karl@noaa.gov>
To: (b)(6) @ostp.eop.gov>
Cc: Holdren, John P. (b)(6)
(b)(6) @ostp.eop.gov>; Jacobs, Katharine L.
(b)(6) @ostp.eop.gov>; (b)(6) @usgcrp.gov
sgcrp.gov>; Jane.Lubchenco@noaa.gov
<jane.lubchenco@noaa.gov>; Kelly, Henry
(b)(6) @ostp.eop.gov>; Siger, Rick
(b)(6) @ostp.eop.gov>; Wackler, Ted M.
(b)(6) @ostp.eop.gov>
Bcc: thomas.r.karl@noaa.gov
<thomas.r.karl@noaa.gov>
Subject: Re: The Cato Institute Anti-Assessment PRIVILEGED / DELIBERATIVE
Date: Sun Oct 21 2012 22:25:46 EDT
Attachments:

Rick,

(b)(5)

Tom

Sent from my iPhone

On Oct 21, 2012, at 8:50 PM, (b)(6) @ostp.eop.gov> wrote:

Tom (K) please don't get things spun up further. We are watching the horizon for this report and the OSTP/WH comms team has options we can consider if and when it comes out. This is not the time for USGCRP - a WH-coordinated entity - to get out ahead of WH and WH comms. Let's talk by phone tomorrow please and let this thread rest.

Rick Weiss

Director of Communications and Senior Science and Technology Policy Analyst
Office of Science and Technology Policy
Executive Office of the President

(b)(6)

From: Thomas Karl [mailto:thomas.r.karl@noaa.gov]
Sent: Sunday, October 21, 2012 08:11 PM
To: Holdren, John P.
Cc: Jacobs (b)(6) @usgcrp.gov (b)(6) usgcrp.gov>; Jane.Lubchenco@noaa.gov <Jane.Lubchenco@noaa.gov>; Kelly, Henry; Siger, Rick; Wackler, Ted M.; Weiss, Rick
Subject: Re: The Cato Institute Anti-Assessment PRIVILEGED / DELIBERATIVE

All

I thought you would want to know about the email discussion regarding the CATO document (see below). I have also been copied on numerous emails from various Lead Authors of the 2009 Assessment prior to this exchange, which began Friday night.

Tom

Rick Piltz

6:30 PM (1 hour ago) Sunday Oct. 21, 2012

to Anthony, me, Jerry, Tom, Michael, Eileen, John, Brad, Tom, John, Mike, Don, David, Stewart, Don, Virginia, Lynne, Nancy, Jerry, Jay, David, Evan, Katharine, Jack, Jim

Tony--

(b)(5)

(b)(5)

(b)(5)

(b)(5)

--Rick

On Fri, Oct 19, 2012 at 6:16 PM, Janetos, Anthony C <Anthony.Janetos@pnnl.gov> wrote:
Hi Rick,

(b)(5)

(b)(5)

(b)(5)

Cheers,
Tony

On Oct 19, 2012, at 5:35 PM, Rick Piltz wrote:

Dear authors of the 2009 national climate assessment report, Global Climate Change Impacts in the

From: V Ramaswamy <v.ramaswamy@noaa.gov>
To: Thomas Karl <thomas.r.karl@noaa.gov>
Cc:
Bcc:
Subject: Re: Pretty urgent query
Date: Thu Nov 01 2012 10:09:13 EDT
Attachments:

Tom,

Thanks. That would be my answer too. We cannot think of hires coupled models without Gaea and Zeus. Been picking up the news on the NJ-NY damages. Couple of GFDL-ers may have lost virtually all their possessions - still checking. Lots of townships just punched hard and yet to recover.

Ram

On Thu, Nov 1, 2012 at 9:57 AM, Thomas Karl <thomas.r.karl@noaa.gov> wrote:

Ram -- I answered yes indeed. I hope you weathered the storm ok! Lots of focus on post Sandy analysis. NYC is still trying to cope w/o many trains and subways and power in areas. Lots of storm surge damage in NJ and NY

Tom

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

From: Jackie Bray <jackie.bray@noaa.gov>
Date: Thu, Nov 1, 2012 at 9:46 AM
Subject: Re: Pretty urgent query
To: Thomas Karl <thomas.r.karl@noaa.gov>
Cc: David Titley <david.titley@noaa.gov>, Jane Lubchenco <jane.lubchenco@noaa.gov>

Tom,

Is this work happening because of the new research computing capacity at oakridge that we invested in with ARRA funds?

Thanks,

Jackie

On Wed, Oct 31, 2012 at 9:45 AM, Thomas Karl <thomas.r.karl@noaa.gov> wrote:

A little less negative in the second sentence on this one.

*Atlantic hurricane generation arising from tropical disturbances is also being addressed for seasonal

>>>> -----
>>>>
>>>> John,
>>>>
>>>> Last year, we facilitated a series of four workshops and accompanying
>>>> papers to review the state of knowledge on various weather and climate
>>>> extremes. One of the papers, which is now undergoing final review at
>>>> BAMS (latest draft is attached), includes a brief analysis of floods.
>>>> Figure 3 of the paper indicates a qualitative match between the
>> geographic
>>>> distributions of annual precipitation trends and flooding, though
>> overall
>>>> the increasing number of days with heavy precipitation is not strongly
>>>> related changes in river flooding. More work is needed on this, for
>>>> example, extremes of daily precipitation are better expressed in the
>> warm
>>>> season when rivers are generally lower.
>>>>
>>>> Also attached are a couple of maps from our work in progress that show
>> 1)
>>>> the climatologically most common month of highest streamflow and 2) the
>>>> climatologically most common month of heaviest 3-day precipitation. The
>>>> similarities and differences between the spatial and temporal patterns
>> are
>>>> still under investigation, but at first glance seem consistent with
>> current
>>>> understanding. This work is being done in collaboration with Bob
>> Hirsch,
>>>> who was quoted in the blog entry.
>>>>
>>>> We haven't spent much time analyzing or responding to any non-peer
>>>> reviewed work, including this blog entry, but I certainly wouldn't
>>>> characterize the draft Assessment as "well out of step with the
>> scientific
>>>> literature".
>>>>
>>>> Let me know if you'd like any further detail or briefing on any aspect
>> of
>>>> this subject.
>>>>
>>>> Thanks,
>>>> Tom
>>>>
>>>> ----- Forwarded message -----
>>>> From: Holdren, John (b)(6) [REDACTED]@ostp.eop.gov>
>>>> Date: Wed, Jan 16, 2013 at 9:48 AM
>>>> Subject: Fwd: Extreme Misrepresentation: USGCRP and the Case of Floods
>>>> (Pielke, Jr, 15 Jan 2013)
>>>> To: "Thomas.R.Karl@noaa.gov" <Thomas.R.Karl@noaa.gov>
>>>>
>>>>
>>>> Hi Tom –****
>>>>
>>>> ** **
>>>>
>>>> I queried Peter Huybers about Roger Pielke Jr's blog on the treatment of

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc: jane.lubchenco@noaa.gov
<jane.lubchenco@noaa.gov>
Bcc:
Subject: Re: FW: WSJ (Lomborg): Climate-Change Misdirection
Date: Thu Jan 24 2013 17:46:46 EST
Attachments: Wall Street Journal opinion piece perspective.docx

John,

The opinion piece contains some factual errors and some statements that, taken out of their proper scientific context, are in danger of misleading readers. Attached is some perspective on separating fact from fiction in the opinion piece. Hope this helps.

Thanks,
Tom

On Thu, Jan 24, 2013 at 2:30 PM, Holdren, (b)(6)@ostp.eop.gov> wrote:

Hi Tom –

I sometimes say it seems that, every day, somebody tosses an unexpected smoke bomb into my office that I need to deal with immediately, whatever else might have been going on.

(b)(5)

Many thanks,

John

http://online.wsj.com/article/SB10001424127887323485704578258172660564886.html?mod=WSJ_Opinion_LEADTop

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
Cc: jane.lubchenco@noaa.gov
<jane.lubchenco@noaa.gov>
Bcc:
Subject: RE: FW: WSJ (Lomborg): Climate-Change Misdirection
Date: Thu Jan 24 2013 18:01:41 EST
Attachments:

Thanks, Tom. This is immensely helpful. Best, John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology
and Director, Office of Science and Technology Policy
Executive Office of the President of the United States

(b)(6)

(b)(6)

(b)(6)

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Thursday, January 24, 2013 5:47 PM
To: Holdren, John P.
Cc: jane.lubchenco@noaa.gov
Subject: Re: FW: WSJ (Lomborg): Climate-Change Misdirection

John,

(b)(5)

Thanks,

Tom

On Thu, Jan 24, 2013 at 2:30 PM, Holdren, (b)(6) @ostp.eop.gov> wrote:

Hi Tom –

(b)(5)

Many thanks,

John

http://online.wsj.com/article/SB10001424127887323485704578258172660564886.html?mod=WSJ_Opinion_LEADTop

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Document ID: 0.7.1334.17761

From: [REDACTED] (b)(6)
To: Mike <maccrac@comcast.net>; Tom <thomas.r.karl@noaa.gov> (b)(6)
Cc: [REDACTED] (b)(6) >
Bcc:
Subject: Daily Mail piece on IPCC WG1 SPM
Date: Sun Sep 15 2013 18:26:11 EDT
Attachments:

Mike, Tom --

[REDACTED] (b)(5)

Many thanks,
John

<http://www.dailymail.co.uk/news/article-2420783/Global-warming-just-HALF-said-Worlds-climate-scientists-admit-computers-got-effects-greenhouse-gases-wrong.html>

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc: Michael C. MacCracken
<maccrac@comcast.net>; Michael Oppenheimer
<omichael@princeton.edu>
Bcc: thomas.r.karl@noaa.gov
<thomas.r.karl@noaa.gov>
Subject: Re: Heartland Institute
Date: Thu Sep 19 2013 12:56:01 EDT
Attachments:

John

(b)(5)

Tom

Sent from my iPhone

On Sep 19, 2013, at 12:44 PM, "Holdren, John P."

(b)(6)@ostp.eop.gov> wrote:

> Tom, Mike, Michael --

>

> Clearly an orchestrated assault on the IPCC and mainstream climate science is being mounted with increasing fervor. The new Heartland Institute anti-IPCC tome is the latest salvo. I'll share by separate e-mail some material I've provided to key folks here. I'd much appreciate your keeping me posted on other responses you see or develop.

>

> Thanks!

>

> John

>

>

>

> 0

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6) @ostp.eop.gov (b)(6)
Cc: Jerry Melillo <jmelillo@mbl.edu>;
Dickinson, Tammy (b)(6) @ostp.eop.gov; Simon, Bob
(b)(6) @ostp.eop.gov
Bcc:
Subject: Re: Significant issue with US average-T representation in "Highlights"
Date: Mon Jan 06 2014 19:11:05 EST
Attachments: Box-changes in annual temperature_V4 (DE KK TK RV)DW-tk-DE.docx

John et al.

This is just an update of the work in progress on describing the temperature increase in the contiguous US time series. The attached box was worked today, but it is not final, but I did want to let you know what we (the CLAs and LAs and a few of us here at NCDC helping) doing. Still in the process of discussing confidence intervals and non parametric trends

Tom

On Sat, Jan 4, 2014 at 3:09 PM, Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov> wrote:

John

To your point about the 2009 report and the difference between the changes reported 1900 vs 1959 (b)(5)

One option we have is to use the exact same methodology we did in 2009 for comparison and maybe add a small box explaining the issue.

Again more later when I have time in front of the computer.

Cheers,
Tom

Sent from my iPhone

> On Jan 4, 2014, at 11:31 AM, "Holdren, John P." (b)(6) @ostp.eop.gov wrote:

>

> Jerry, Tom --

>

> In looking through the draft "Highlights" for the 3rd Assessment, (b)(5)

(b)(5) A bar graph on the second cover page, however, where U.S. decadal average temperatures are compared to the 1901-1960 average, appears to show the 1901-1910 average as about -0.4 degrees F and 2001-2012 as +1.5 degrees F, so the difference would be 1.9 degrees F based on these decadal averages. (As an aside, the labeling of the horizontal axis in relation to the positioning of the bars is a prescription for confusion.)

>
> [REDACTED] (b)(5). My recollection was that the more or less standard figure for the U.S. increase up to the present was 2 degrees F, when the starting point is the end of the 19th century. Indeed, my recollection was, more specifically, that the 2-degree figure was found in the 2009 Second Assessment.

>
> So I did a bit of digging to refresh those recollections. Here is what I found.

>
> [REDACTED] (b)(5)

>
> For a more recent result, I consulted NOAA State of the Climate 2012 (released in August 2013). There, in Figure 7.5 on page 149, the filtered value as of 1895 is 51.5 degrees F; the filtered value as of 2012 is 54.0 degrees F, which of course is 2.5 degrees higher than the 1895 value, not 1.5 degrees F higher.

>
> All of these statements and graphics are clearly referring to the contiguous United States, so the explanation cannot be the inclusion of Alaska in one instance and not in another.

>
> [REDACTED] (b)(5)

>
> Cheers anyway,
> John
>
>
>
> John P. Holdren, PhD
> Assistant to the President for Science and Technology
> Director, Office of Science and Technology Policy
> Executive Office of the President of the United States
> [REDACTED]@ostp.eop.gov (b)(6)

--

Thomas R. Karl, L.H.D.
Director, National Climatic Data Center
Chair of the Subcommittee on Global Change Research

Veach-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
Cc:
Bcc:
Subject: RE: Quick question - IF 2013 comes in in top 10, will that mean 14 out of last 16 warmest on record?
Date: Tue Jan 14 2014 09:48:14 EST
Attachments:

Thanks. (b)(5)
I have fixed those and will send my conclusion to both Rosina and you for another look. On the NCA, I agree that it needs to refer to an increase in the range of 1.5 to 2 degrees F.

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Tuesday, January 14, 2014 9:15 AM
To: Holdren, John P.
Subject: Fwd: Quick question - IF 2013 comes in in top 10, will that mean 14 out of last 16 warmest on record?

John,

Here is what I sent to Rosina. Please see the draft version of our annual report, still in process. Please note the emphasis on probabilities and likelihoods. I worry about the emphasis on exact ranks, so based on a new peer reviewed article we published this autumn we are going to try and emphasize how the uncertainty in the data affects our ability to state what is and is not the warmest year.

Tom

PS still trying to work with the NCA team as I think we would be most accurate to use a range for temperature change since 1895 --- something like "about 1.5 to 2 F".

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

From: Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov>
Date: Tue, Jan 14, 2014 at 7:48 AM
Subject: Re: Quick question - IF 2013 comes in in top 10, will that mean 14 out of last 16 warmest on record?
To: Rosina Bierbaum <rbierbau@umich.edu>

Rosina,

(b)(5)

(b)(5)

(b)(5)

Sent from my iPhone

On Jan 13, 2014, at 4:49 PM, Rosina Bierbaum <rbierbau@umich.edu> wrote:

1-2: 2010, 2005 3-8: 2007, 1998, 2002, 2003, 2006, 2009 9-12: 2012, 2011, 2001, 2004 (13: 2008 14: 1997 15: 1995)

--

Thanks, Rosina

--

Thomas R. Karl, L.H.D.

Director, National Climatic Data Center

Chair of the Subcommittee on Global Change Research

Veach-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476
Fax: (828) 271-4246

Thomas.R.Karl@noaa.gov

Follow NCDC on Facebook and Twitter

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
Cc:
Bcc:
Subject: FW: 15 warmest years to 2012 (with comment on 2013)
Date: Tue Jan 14 2014 08:03:46 EST
Attachments: Global avg temp anomalies through 2012_NASA Feb 2013.doc
Global avg temp anomalies_NOAA.doc

Tom –

(b)(5)

Cheers,

John

From: Holdren, John P.
Sent: Tuesday, January 14, 2014 7:47 AM
To: 'Rosina Bierbaum'
Subject: 15 warmest years to 2012

Rosina –

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Cheers,

John

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Rosina Bierbaum <rbierbau@umich.edu>;
Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov>
Cc:
Bcc:
Subject: 15 warmest years to 2012 -- REVISITED AND EXTENDED TO 17 AND 2013
Date: Tue Jan 14 2014 10:07:13 EST
Attachments: Global avg temp anomalies through 2012_NASA Feb 2013_jph_rev1.doc
Global avg temp anomalies_NOAA_jph_rev1.doc

Rosina, Tom –

(b)(5)

The attachments here fix those mistakes and extend the rankings through 2012 to capture the top 16, which allows bringing in 1995 on both datasets. (It ranks 15th on NASA's and 16th on NOAA's). I have not checked the NASA and NOAA sites, though, to see if they updated their time series. With that caveat, here is what I think can be said, consistent with rankings based on both data sets:

“Globally, the sixteen hottest years in the 130+ years of decent thermometer records occurred in the eighteen years from 1995 through 2012”.

After 2013 lands in the top 10, as expected, it will be the case that

“Globally, the seventeen hottest years in the 130+ years of decent thermometer records occurred in the nineteen years from 1995 through 2013.”

In the NOAA dataset, the two years in the indicated period that do NOT make the cut are 1996 and 2000. In the NASA dataset, the two years that don't make the cut are 1996 and 1999. I suppose the discrepancy underlines Tom's point that the uncertainties are big enough that the ranking exercise is somewhat freighted.

Cheers,

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc:
Bcc: Derek Arndt <derek.arndt@noaa.gov>;
Katy Vincent <katy.vincent@noaa.gov>
Subject: Re: Possible error in global T press release
Date: Mon Jan 20 2014 11:28:44 EST
Attachments:

Thanks John,

U R correct of course, thanks for reading as it would have been embarrassing. (b)(5)

(b)(5) Next time we will have more eyes checking. Again, thanks for saving us!

(b)(5)

One of our Branch Chiefs is double checking, but I read it as you do.

Tom

On Mon, Jan 20, 2014 at 10:31 AM, Holdren, (b)(6)@ostp.eop.gov> wrote:

Tom –

(b)(5)

First, since the record includes the year 1880, with 2013 included there are 134 years in the record.

Second, as I read the NOAA temperature record at ftp://ftp.ncdc.noaa.gov/pub/data/anomalies/annual.land_ocean.90S.90N.df_1901-2000mean.dat,

(b)(5)

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc: Simon, Bob
(b)(6)@ostp.eop.gov>
Bcc:
Subject: Re: FW: California drought and climate change
Date: Wed Feb 05 2014 19:58:02 EST
Attachments:

John,

(b)(5)

Another topic altogether,

This is a plea. Would you and Bob be willing to get together for an hour or so with the major agency leads in USGCRP (NASA Freilich, NSF Roger Wakimoto, NOAA Bob Detrick, DOE, Gary Geernaert --- 3 of these four are USGCRP Vice Chairs from agencies Sheri Abbott designated as Vice Chairs 4 and half years ago) to discuss how we move from

(b)(5)

but if you look at what they claim is supporting global change research in the USGCRP budget it is an order of magnitude smaller. This is causing anguish among the science push agencies. I can tell you that some of the agency leads are getting pretty jaded, which we do need to address.

Happy to discuss, but please let me know if you and Bob would be willing to have such a conversation. We can also get input from the Operational Task Force recommendations as how to fix this. Kei Koizami is working that one.

Tom

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Simon, Bob
[REDACTED]@ostp.eop.gov> This section redacted using (b)(6)
Cc: Holdren, John P.
[REDACTED]@ostp.eop.gov>; [REDACTED]@usgcrp.gov>;
Fried, Becky [REDACTED]@ostp.eop.gov>; Armstrong, Tom
[REDACTED]@ostp.eop.gov>; Dickinson, Tammy
[REDACTED]@ostp.eop.gov>; Petes, Laura
[REDACTED]@ostp.eop.gov>
Bcc:
Subject: Re: URGENT: TPs on Sandy & Haiyan -- MORE, ADDING SIMON AND ARMSTRONG
Date: Sun Feb 09 2014 16:03:35 EST
Attachments:

Good points Bob,

This is getting quite long, but see the modified piece in pink below.

[REDACTED]

(b)(5)

On Sun, Feb 9, 2014 at 3:38 PM, Simon, Bob [REDACTED]@ostp.eop.gov> wrote:

[REDACTED]

(b)(5)

[REDACTED]

(b)(5)

(b)(5)

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Sunday, February 09, 2014 2:14 PM
To: Holdren, John P.
Cc: Phil Duffy; Fried, Becky; Simon, Bob; Armstrong, Tom
Subject: Re: URGENT: TPs on Sandy & Haiyan -- MORE, ADDING SIMON AND ARMSTRONG

Sorry John, Let me try to clarify,

(b)(5)

(b)(5)

(b)(5)

The article by Pun et al. states that "the deeper layer of warmer water is possibly caused by multiple factors including piling up of warm , surface water due to wind strengthening and possibly global warming" They did not do any analysis on causes, so I would not want to speculate about this at this time.

And in the Science interview he said:

"While many observers blame Haiyan's destructive power on climate change, tropical storm experts say there is little hard evidence of a link. "It is possibly natural variability," Lin says. Nor is it certain that the western Pacific has become a supertyphoon breeding ground. Although warmer subsurface waters might raise the risk, Lin says, atmospheric conditions may not always cooperate."

(b)(5)

So perhaps a statement like:

(b)(5)

Hope this helps.

Tom

On Sun, Feb 9, 2014 at 12:49 PM, Holdren, John P. (b)(6) @ostp.eop.gov> wrote:

The article to which I was referring is lam-Fei Pun, I.-I. Lin, and Min-Hui Lo, Recent increase in high tropical heat potential area in the Western North Pacific Ocean, GRL 40, 4680-4684, published online 3 Sept 2013 and in the subsequent print edition. See also the account, with interviews of other experts, in SCIENCE, Dennis Normille, Clues to supertyphoon's ferocity found in Western Pacific, 29 Nov 2013, p 1027.

John P. Holdren, PhD
Assistant to the President for Science and Technology
Director, Office of Science and Technology Policy
Executive Office of the President of the United States

(b)(6)

-----Original Message-----

From: Phil Duffy (b)(6)@usgcrp.gov]
Sent: Sunday, February 09, 2014 11:30 AM Eastern Standard Time
To: Holdren, John P.
Cc: Thomas Karl - NOAA Federal; Fried, Becky
Subject: Re: URGENT: TPs on Sandy & Haiyan

(b)(5)

(b)(5)

Regards,

Phil

Philip B. Duffy

Senior Advisor

U.S. Global Change Research Program

National Science and Technology Council

Executive Office of the President

Washington, D.C.

(b)(5)

On Sun, Feb 9, 2014 at 11:05 AM, Holdren, John P. (b)(5) @ostp.eop.gov> wrote:

Tom, Becky, Phil --

This section redacted under (b)(5)

[Redacted]

[Redacted]

[Redacted]

Best,
John

John P. Holdren, PhD

Assistant to the President for Science and Technology
Director, Office of Science and Technology Policy
Executive Office of the President of the United States
(b)(6)@ostp.eop.gov

-----Original Message-----

From: Thomas Karl - NOAA Federal [thomas.r.karl@noaa.gov]
Sent: Sunday, February 09, 2014 09:13 AM Eastern Standard Time
To: Fried, Becky

Cc: Holdren, John P.; Phil Duffy; Reidmiller, David R; Siger, Rick; Simon, Bob; Laurier, Fabien; Tom
Armstrong (b)(6)@usgcrp.gov
Subject: Re: URGENT: TPs on Sandy & Haiyan

Becky (Please revise --- we are on weak grounds with such a strong statement above "but it was more powerful because of climate change"

Revised

(b)(5)

On Sun, Feb 9, 2014 at 12:57 AM, Fried, Becky (b)(6)@ostp.eop.gov> wrote:

Dr. H – Per below, Sec. Kerry is giving a speech on climate issues Wednesday in Indonesia and State has asked for any talking points we can offer on links between climate change and Typhoon Haiyan and/or Hurricane Sandy.

In the interest of expediency (deadline is early tomorrow), I am copying below the first two bullets from the draft talking points document on drought that you drafted and was iterated upon just the other day. I am adding you here in case you want to weigh in further, or offer a cry of outrage about using this language, which so far as I know, has not yet been uttered in a public setting.

This section redated using (b)(5)

* (b)(5)

(b)(5)

From: Laurier, Fabien
Sent: Saturday, February 08, 2014 11:50 PM
To: 'Phil Duffy'; 'Reidmiller, David R'
Cc: 'Thomas Karl - NOAA Federal'; 'Tom Armstrong'; Fried, Becky
Subject: RE: URGENT: TPs on Sandy & Haiyan

Below a couple official quotes. I hope this helps...

This section redacted using (b)(5)

HOLDREN:

(b)(5)

POTUS:

(b)(5)

(b)(5)

Fabien J.G. Laurier, Ph.D.
Director, Third National Climate Assessment
Office of Science and Technology Policy
Executive Office of the President

-----Original Message-----

From: Phil Duffy (b)(6) @usgcrp.gov]
Sent: Saturday, February 08, 2014 11:30 PM Eastern Standard Time
To: Reidmiller, David R
Cc: Thomas Karl - NOAA Federal; Tom Armstrong; Laurier, Fabien; Fried, Becky
Subject: Re: URGENT: TPs on Sandy & Haiyan

Hi David,

I have nothing "pre-cleared." Maybe Becky has an archive she can look through and find something.

However: to remind you of what you already know, one thing we can robustly say about ALL landfalling hurricanes is that sea level rise makes storm surge worse (independent of any changes in the properties of storms).

I am sure you also know that there have been a series of studies projecting increases in the frequencies of Cat 4 and 5 hurricanes in the North Atlantic (which the IPCC rated as "more likely than not.") . Most people feel that observed changes in hurricane properties cannot be rigorously attributed to anthropogenic climate change, and the IPCC attached "low confidence" to such attribution.

Regards,

Phil

Philip B. Duffy

Senior Advisor

U.S. Global Change Research Program

National Science and Technology Council

Executive Office of the President

Washington, D.C.

(b)(6)

On Sat, Feb 8, 2014 at 10:14 PM, Reidmiller, David R (b)(6) @state.gov> wrote:

All-

(b)(5)

I need this some time tonight or tomorrow as I need to get this back to them OOB tomorrow. Sorry for the quick turn-around, but I just got tasked with this this afternoon...

David Reidmiller, PhD

Physical Science Officer

U.S. Department of State

Office of Global Change, OES/EGC

(b)(6)

(b)(6)

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc:
Subject: Re: Drought in the American West -- A COUPLE OF QUERIES IN FOLLOW-UP

(b)(5)

John

The two papers I mentioned are attached.

Best Regards,

Tom

On Thu, Mar 6, 2014 at 6:02 PM, Holdren, John P. (b)(6)@ostp.eop.gov> wrote:

Tom – (b)(5)
Yes? Also, do you have the full cite for Fischer and Knutti
GRL handy? Many thanks. My best, John

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Thursday, March 06, 2014 5:42 PM
To: Holdren, John P.
Cc: kathryn.sullivan@noaa.gov
Subject: Re: Drought in the American West

John,

Remaining redaction under (b)(5)

Thanks for sharing your note. (b)(5)
(b)(5) A very recent paper in GRL (Barnes et al 2014 pp 638-644 DOI 10.1002/2013GL058745) present evidence to support their previous claim that the link between sea ice and blocking is not supported by the observations. (b)(5)
(b)(5)

(b)(5)

(b)(5)

Finally, just as a heads up. (b)(5) in severe
Thunderstorms in the central US under RCP8.5. I hope this gets published soon.

Tom

On Thu, Mar 6, 2014 at 11:28 AM, Holdren, John P. (b)(6) @ostp.eop.gov> wrote:

Dear Kathy and Tom --

In the Q&A following my testimony on climate-change preparedness and resilience before the Oversight Subcommittee of Senate EPW last week, Sen Sessions complained that my public statements on drought in the American West have been inconsistent with previous "expert" testimony before the Committee by Roger Pielke Jr. When I responded to Sen Sessions that Dr Pielke's views on this topic are not in the scientific mainstream, he asked for scientific references on this point, and I promised to submit promptly a written response for the record with the appropriate documentation.

That submission is attached here. It went to key staff members of the Oversight Subcommittee over the weekend and to the members on Monday or Tuesday. It is also posted on the OSTP website, at http://www.whitehouse.gov/sites/default/files/microsites/ostp/critique_of_pielke_jr_statements_on_drought.pdf.

Comments welcome, but only if you are so moved.

My best,

John

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: John Holdren (b) (6)
Cc:
Bcc:
Subject: Re: US T increase revisited
Date: Mon Mar 10 2014 08:32:13 EDT
Attachments:

John

Here is the situation

(b) (5)

(b) (5)

(b) (5)

(b) (5)

Does this help?

Tom

Thomas R. Karl, L.H.D.
Director, National Climatic Data Center
Chair of the Subcommittee on Global Change Research

> On Mar 9, 2014, at 4:31 PM, John Holdren (b) (6) wrote:

>

> Hi Tom --

>

(b) (5)

>

> Cheers,

> John

>

>

From: Holdren, John P.
[REDACTED]@ostp.eop.gov>
To: Laurier, Fabien
[REDACTED]@ostp.eop.gov> This section redacted using (b)(6)
Cc: jmelillo@mbl.edu <jmelillo@mbl.edu>;
Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov>; Armstrong,
Tom <thomas_r_armstrong@ostp.eop.gov>; Duffy, Phil
[REDACTED]@usgcrp.gov>; Simon, Bob [REDACTED]@ostp.eop.gov>;
Dickinson, Tammy [REDACTED]@ostp.eop.gov>
Bcc:
Subject: Holdren comments and edits on Highlights
Date: Wed Mar 12 2014 15:15:07 EDT
Attachments: Holdren comments_03-12-14.doc

Fabien –

Please see the attached comments and edits on the NCA Highlights document. [REDACTED]

[REDACTED]
(b)(5)

Best,

John

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: John P. Holdren
(b)(6)@ostp.eop.gov>
Cc:
Bcc:
Subject: Priorities in intraseasonal to multidecadal predictions and projections
Date: Tue Jul 01 2014 16:57:41 EDT
Attachments:

John,

(b)(5)

This could simply be an informal discussion at this time and be a one-on-one or something more. If you have other priorities do not feel obliged in any way.

Tom

--

Thomas R. Karl, L.H.D.

Director, National Climatic Data Center

Chair of the Subcommittee on Global Change Research

Veatch-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476
Fax: (828) 271-4246

Thomas.R.Karl@noaa.gov

Follow NCDC on Facebook and Twitter

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc:
Bcc:
Subject: Re: NOAA report - California drought largely the result of natural variability
Date: Thu Dec 11 2014 10:03:44 EST
Attachments:

John,

This is what I sent on the the study sponsor and one of the NOAA authors. Tom

Marty and Wayne,

(b)(5)

Tom

On Wed, Dec 10, 2014 at 6:17 PM, Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov> wrote:

John

The report was funded by the NOAA Climate Program Office's Modeling Analysis and Prediction Program (MAPP). It had eight authors from NOAA, NASA, Columbia University, and the International Research Institute for Climate and Society.

(b)(5)

So this is best described as a NOAA funded report in my view.

Tom

Thomas R. Karl, L.H.D.
Director, National Climatic Data Center
Chair of the Subcommittee on Global Change Research

On Dec 10, 2014, at 5:26 PM, Holdren, John P. <John_P._Holdren@ostp.eop.gov> wrote:

Tom -- Can you clarify exactly what the relation of NOAA was to this report? Thanks, John

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Monday, December 08, 2014 08:08 PM
To: Phil Duffy (b)(6) @usgcrp.gov>
Cc: Holdren, John P.; Armstrong, Tom; Simon, Bob; Dickinson, Tammy; Fried, Becky
Subject: Re: NOAA report - California drought largely the result of natural variability

John,

Phil and I briefly discussed [REDACTED]
[REDACTED] (b)(5) [REDACTED]

Tom

On Mon, Dec 8, 2014 at 7:53 PM, Phil Duffy (b)(6) @usgcrp.gov> wrote:

Hi John,

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

[REDACTED]

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

Regards,

Phil

Philip B. Duffy
Senior Advisor
U.S. Global Change Research Program
National Science and Technology Council
Executive Office of the President

Washington, D.C.

(b)(6)

On Mon, Dec 8, 2014 at 6:02 PM, Holdren, John P. (b)(6) @ostp.eop.gov> wrote:

(b)(5)

From: Simon, Bob

Sent: Monday, December 08, 2014 5:20 PM

To: Holdren, John P. (b)(6) @usgcrp.gov

Cc: thomas.r.karl@noaa.gov; Dickinson, Tammy; Fried, Becky

Subject: NOAA report - California drought largely the result of natural variability

Here are links to a NOAA report released today. The first link is to the public webpage for the report; the second is to a more complete summary page; and the final one is to the report itself (it's a big download).

>http://www.noaanews.noaa.gov/stories2014/20141208_californiadrought.html<

><http://cpo.noaa.gov/ClimatePrograms/ModelingAnalysisPredictionsandProjections/MAPPTaskForces/DroughtTaskForce/CaliforniaDrought.aspx><

>http://cpo.noaa.gov/sites/cpo/MAPP/Task%20Forces/DTF/californiadrought/california_drought_report.pdf<

Here is a link to Jason Samenow's blog describing the report, and some reaction from scientists:

><http://www.washingtonpost.com/blogs/capital-weather-gang/wp/2014/12/08/noaa-report-says-california-drought-mostly-due-to-natural-causes/?hpid=z3><

(b)(5)

(b)(5)

(b)(5)

Here is a key quote from the report's summary webpage (second link, above):

(b)(5)

<image001.jpg>

--

Thomas R. Karl, L.H.D.

Director, National Climatic Data Center

Chair of the Subcommittee on Global Change Research

Veach-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476
Fax: (828) 271-4246

Thomas.R.Karl@noaa.gov

Follow NCDC on Facebook and Twitter

Kathy

Sent from my iPhone

On Jan 23, 2015, at 16:04, Holdren, John P. (b)(6) @ostp.eop.gov> wrote:

Kathy, Tom –

(b)(5)

My best,

John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology

Director, Office of Science and Technology Policy

Executive Office of the President of the United States

--

Thomas R. Karl, L.H.D.

Director, National Climatic Data Center

Chair of the Subcommittee on Global Change Research

Veach-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
Cc:
Bcc:
Subject: RE: Kathy's response
Date: Wed May 13 2015 17:31:23 EDT
Attachments:

(b)(5)

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Wednesday, May 13, 2015 5:19 PM
To: Holdren, John P.
Subject: Re: Kathy's response

John

We r putting something together for u. Is next week still timely?

Tom

Sent from my iPhone

On May 12, 2015, at 5:48 PM, Holdren, John P. (b)(6)@ostp.eop.gov> wrote:

Tom – If you or Jim have other recent material you think I ought to see, please send it along! Best,
John

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Tuesday, May 12, 2015 5:41 PM
To: Holdren, John P.
Subject: Re: Kathy's response

Thanks John

We are trying to ensure we are co silted next year.

Tom

Sent from my iPhone

On May 12, 2015, at 5:39 PM, Holdren, John P. (b)(6)@ostp.eop.gov> wrote:

Tom – Many thanks.

(b)(5)

My best, John

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Tuesday, May 12, 2015 5:02 PM
To: Holdren, John P.
Subject: Re: Kathy's response

John

FYI. We were not consulted on this fact sheet. In fact our top NOAA expert on hurricane forcing , Jim Kossin,

(b)(5)

Tom

Sent from my iPhone

On May 12, 2015, at 12:25 PM, Holdren, John P. (b)(6)@ostp.eop.gov> wrote:

FYI

From: Dr. Kathryn Sullivan - NOAA Federal [mailto:kathryn.sullivan@noaa.gov]
Sent: Tuesday, May 12, 2015 11:44 AM
To: Holdren, John P.
Cc: Dickinson, Tammy; Petes, Laura
Subject: Re: FW: Hurricane season fact sheet

Your observations are correct and comprehensive, as always, John.

I appreciate your acknowledgement at the close that requested length of the reply requested affects the comprehensiveness one can provide. In this case,

[REDACTED] (b)(5)

Kathy

On Tue, May 12, 2015 at 10:56 AM, Holdren, John P. (b)(6) @ostp.eop.gov> wrote:

Hi Kathy –

All the following redacted under (b)(5)

[REDACTED] (b)(5)

[REDACTED] (b)(5)

[REDACTED] (b)(5)

[REDACTED] (b)(5)

“Since the early 1970s, however, the numbers of Atlantic hurricanes and major hurricanes have increased.”

[REDACTED]

“Confidence remains low for long-term (centennial) changes in tropical cyclone activity, after accounting for past changes in observing capabilities. However, for the years since the 1970s, it is virtually certain that the frequency and intensity of storms in the North Atlantic have increased although the reasons for this increase are debated.” [Emphasis in original]

[REDACTED] (b)(5)

“Human-caused increases in greenhouse-gas concentrations have very likely contributed to the warming of the tropical North Atlantic sea-surface temperatures observed over the past century.”

“The vulnerability of coastal regions to storm-surge flooding is expected to increase with future sea-level rise and coastal development, although this vulnerability will also depend upon further storm characteristics.”

[REDACTED] (b)(5)

“The migration away from the tropics is apparently linked to marked changes in the mean meridional structure of environmental vertical wind shear and potential intensity, and can plausibly be linked to tropical expansion, which is thought to have anthropogenic contributions.”

[REDACTED] (b)(5)

[REDACTED] (b)(5)

(b)(5)

(b)(5)

I hope you find this critique more helpful than aggravating!

My best as always,

John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology

Director, Office of Science and Technology Policy

Co-Chair, President's Council of Advisors on Science and Technology

Executive Office of the President of the United States

(b)(6)

(b)(6)

(b)(6)

(b)(6)

(b)(6)

(b)(6)

(b)(6)

(b)(6)

From: Dr. Kathryn Sullivan - NOAA Federal [mailto:kathryn.sullivan@noaa.gov]

Sent: Monday, May 11, 2015 9:38 PM

To: Holdren, John P.

Subject: Fwd: Hurricane season fact sheet

John,

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: John P. Holdren
(b)(6) ostp.eop.gov>
Cc:
Bcc:
Subject: Fwd: Acceptance of your Science Manuscript aaa5632
Date: Tue May 26 2015 16:35:22 EDT
Attachments:

John,

Hope you had a great Holiday weekend. Just want to pass along to you the release date for the "hiatus" paper is June 4th (see email forwarded below).

All items redacted under (b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Looking forward to hearing your thoughts.

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: John P. Holdren
(b)(6)@ostp.eop.gov>
Cc:
Bcc:
Subject: Fwd: Acceptance of your Science Manuscript aaa5632
Date: Thu Jun 04 2015 10:16:35 EDT
Attachments:

John,

We have had a flood of interest in our new global temperature analysis. I am sure you will read lots of stories about this tomorrow.

(b)(5)

Please let me know what you think.

Thanks,
Tom

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

From: Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov>
Date: Tue, May 26, 2015 at 4:35 PM
Subject: Fwd: Acceptance of your Science Manuscript aaa5632
To: "John P. Holdren" (b)(6)@ostp.eop.gov>

John,

Hope you had a great Holiday weekend. Just want to pass along to you the release date for the "hiatus" paper is June 4th (see email forwarded below).

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Looking forward to hearing your thoughts.

Tom

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

From: Jesse H Smith <hjsmith@aaas.org>

Date: Mon, May 25, 2015 at 3:10 PM

Subject: RE: Acceptance of your Science Manuscript aaa5632

To: Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov>

Tom,

Publication of your paper via Science Express has been scheduled for 4 June 2015.

Best,

Jesse

Document ID: 0.7.1334.17510

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc:
Bcc:
Subject: Re: Urgent query
Date: Mon Jan 11 2016 14:28:46 EST
Attachments: NOAA_Global_2015_Climate Summary_DRAFT.doc

John,

Got your call -- here is a very prelim document. All data in except Boliva. This year the temperatures globally exceed 2014 breaking the record by the largest margin in our records.

Tom

On Mon, Jan 11, 2016 at 12:36 PM, (b)(6)@ostp.eop.gov> wrote:

Hi Tom –

Just left a voice message on your cellphone. This note is just an attempt to be sure you see my question. I need confirmation that the official NOAA/NASA analysis scheduled to come out on Jan 20 (as I understand it) will in fact confirm that 2015 surpassed 2014 as the warmest year on record globally. My reading of where we were as of mid-December is that this must surely be so, but I have been asked to double check because of interest in referring to this point in an important upcoming speech by a senior leader. Please get back to me as soon as you can. Many thanks!

John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology

Director, Office of Science and Technology Policy

--

Thomas R. Karl, L.H.D.

Tom

Sent from my iPhone

Begin forwarded message:

From: Katy Matthews - NOAA Federal <katy.matthews@noaa.gov>
Date: January 20, 2016 at 7:35:00 AM EST
To: Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov>, Michael Tanner - NOAA Federal <michael.tanner@noaa.gov>, Derek Arndt - NOAA Federal <Derek.Arndt@noaa.gov>, Jessica Blunden - NOAA Affiliate <jessica.blunden@noaa.gov>, John Ewald - NOAA Federal <john.ewald@noaa.gov>
Cc: Ahira Sanchez-Lugo - NOAA Federal <ahira.sanchez-lugo@noaa.gov>, Jake Crouch - NOAA Federal <jake.crouch@noaa.gov>
Subject: Re: FINAL Global Annual Press Highlights

[Redacted block containing (b)(5)]

[Redacted block containing (b)(5)]

Thanks -
Katy

On Wed, Jan 20, 2016 at 7:21 AM, Katy Matthews - NOAA Federal <katy.matthews@noaa.gov> wrote:

Tom, et al -

[Redacted block containing (b)(5)]

[Redacted block containing (b)(5)]

Thanks -
Katy

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Thomas Karl - NOAA Federal
(thomas.r.karl@noaa.gov) <thomas.r.karl@noaa.gov>
Cc: Wuebbles, Donald
(b)(6)@ostp.eop.gov>
Bcc:
Subject: Query about US spring-summer T since 1983
Date: Tue Feb 02 2016 10:25:31 EST
Attachments: image001.png
NIFC fire area 1983-2015.xlsx

Hi Tom –

Items on this page redacted under (b)(5)

(b)(5)

(b)(5)

Many thanks in advance for any help you can provide on this.

My best,

John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology

Director, Office of Science and Technology Policy

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc: Wuebbles, Donald
(b)(6)@ostp.eop.gov>
Bcc:
Subject: Re: Query about US spring-summer T since 1983
Date: Tue Feb 02 2016 11:04:31 EST
Attachments: image001.png

Sure John,

(b)(5)

Tom

PS Is there a rush on this --- otherwise in may be a few days.

On Tue, Feb 2, 2016 at 10:25 AM, Holdren, John P. (b)(6)@ostp.eop.gov> wrote:

Hi Tom –

(b)(5)

(b)(5)

Many thanks in advance for any help you can provide on this.

My best,

John

Document ID: 0.7.1334.17498

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Dr. Kathryn Sullivan - NOAA Federal
<kathryn.sullivan@noaa.gov>
Cc: Dickinson, Tammy
(b)(6)@ostp.eop.gov>; Thomas.r.Karl@noaa.gov
<thomas.r.karl@noaa.gov>; wayne.higgins@noaa.gov
<wayne.higgins@noaa.gov>; laura.letson@noaa.gov
<laura.letson@noaa.gov>; (b)(6)@usgcrp.gov
(b)(6)@usgcrp.gov>; Dorgelo, Cristin
(b)(6)@ostp.eop.gov>
Bcc:
Subject: THE NCA FAC
Date: Wed Feb 03 2016 07:21:04 EST
Attachments: FAC National Assessment Adv Committee-OSTP recommendations-2.docx
image001.jpg

Dear Kathy --

I would like to thank NOAA for agreeing to establish a 15-member Federal Advisory Committee (FAC) to provide advice on USGCRP's Sustained National Climate Assessment Process. I would also like to recognize the effort that NOAA put into developing and vetting sets of 15 Tier One (Primary) candidates and 15 Tier Two (Alternate) candidates who represent a well-balanced consideration of expertise, geographic location, and other factors.

As you know, the FAC charter states that you, as the Under Secretary of Commerce for Oceans and Atmosphere, in consultation with the OSTP Director, shall select and appoint members. The Subcommittee on Global Change Research (SGCR) was invited to review the candidates, focusing primarily on the Tier One and Tier Two candidates, and provide recommendations to OSTP for my consideration. SGCR discussed the nominations and reached consensus on partially revised lists for the Tier One and Tier Two recommended candidates to serve on the FAC. The attached document contains their recommendations, with which I concur, and share here with you as part of our consultation process.

Please let me know if you would like to discuss.

My best,

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology

Director, Office of Science and Technology Policy

Executive Office of the President of the United States

E-mail: (b)(6)@ostp.eop.gov

[REDACTED]
(b)(5)

[REDACTED]
(b)(5)

[REDACTED]
(b)(5)

[REDACTED]
(b)(5)

Rick Piltz
Director, Climate Science Watch
Government Accountability Project
1612 K St., N.W. Suite 1100
Washington, DC 20006

www.climatesciencewatch.org<<http://www.climatesciencewatch.org>>

Direct: (b)(6)

<Backgrounder-Cato-Addendum-
v2-15oct2012.docx>

Dr. Anthony C. Janetos, Director
Joint Global Change Research Institute
Pacific Northwest National Laboratory/University of Maryland
5825 University Research Court, Suite 3500
College Park, MD 20740
USA

Phone: (b)(6)

Fax: 301-314-6719

Email: anthony.janetos@pnnl.gov<<mailto:anthony.janetos@pnnl.gov>>

Web: www.globalchange.umd.edu<<http://www.globalchange.umd.edu>>

Please note slight change in email address to pnnl.gov<<http://pnnl.gov>>

On Mon, Oct 15, 2012 at 1:57 PM, Holdren, John P. (b)(6) <john.p.holdren@epa.gov> wrote:

Kathy et al. --

(b)(5)

Cheers,
John

--

Thomas R. Karl, L.H.D.

Director, National Climatic Data Center

Chair of the Subcommittee on Global Change Research

Veatch-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476
Fax: (828) 271-4246

Thomas.R.Karl@noaa.gov



May 21, 2018

Bill Marshall
425 Third St., SW
Suite 800
Washington, DC 20024

Re: FOIA Request No. DOC-NOAA-2017-000580

Dear Mr. Marshall:

This is in reference to the above-captioned FOIA request # **DOC-NOAA-2017-000580** sent to NOAA dated February 9, 2017, in which you requested:

Any and all communications between Thomas Karl and John Holdren between January 20, 2009 through January 20, 2017.

Enclosed are some corrected documents from release 3, 4 and 5 that are in response to your challenged documents. These records are accessible via FOIAOnline.

We are releasing 56 pages responsive to this request as follows:

- All 56 pages were partially redacted under FOIA Exemptions (b)(5), 5 U.S.C. § 552(b)(5), which exempts from disclosure “inter-agency or intra-agency memorandums or letters that are both predecisional and deliberative”; and (b)(6), 5 U.S.C. 552(b)(6), which exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

Information on Appeals

Although we do not consider this to be a denial of your request, you are granted appeal rights for this determination. Your appeal must be received within 90 calendar days of the date of the denial letter.

Your appeal may be sent by the following methods:

- By email to FOIAAppeals@doc.gov.
- By FOIAOnline, if you have an account at <https://foiaonline.regulations.gov>.
- If sending by mail please address your appeal to:



Assistant General Counsel for Employment, Litigation, and Information
U.S. Department of Commerce Room 5896
1401 Constitution Ave. NW
Washington, DC 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, 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;
- Your statement explaining why the determination was in error; and
- The notation "Freedom of Information Act Appeal" 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
8601 Adelphi Road, Room 2510
College Park, MD 20740-6001
Email: ogis@nara.gov
Phone: 301-837-1996

Toll-free: 1-877- 684-6448

Department of Commerce receive correspondence only on business days from 8:30 a.m. to 5:00 p.m., Eastern Time. FOIA appeals received outside of our normal business hours will be deemed received on the next business day.

If you have any questions, please contact Maria Williams, NESDIS FOIA Coordinator, at maria.williams@noaa.gov, or the NOAA FOIA Public Liaison Robert Swisher at robert.swisher@noaa.gov .

Regards,

GRAFF.MARK.HYRU
M.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: 2018.05.21 20:22:53 -04'00'

Mark H. Graff
FOIA Officer/
Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric
Administration

DOC-NOAA-2017-000580

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Monday, May 21, 2018 8:30 PM
To: Roxie Allison-Holman - NOAA Federal
Cc: Maria Williams - NOAA Federal; Stacey Nathanson - NOAA Federal
Subject: Re: 580 Challenges FAL and Corrected Documents
Attachments: 580 Challenges Binder_Redacted_v2 (1).pdf; 580 Challenges_FAL mhg.pdf

Hi Guys--

(looping in Bogο)

Fantasti (b)(5)

Signing off for the night.

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, May 21, 2018 at 8:12 PM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

Maria,

(b)(5)

I'll take another look.

On Mon, May 21, 2018 at 8:00 PM, Maria Williams - NOAA Federal <maria.williams@noaa.gov> wrote:

My extreme apologies (b)(5)

Respectfully,

Maria S. Williams

Admin Officer | NESDIS FOIA Liaison | Property | FAC-COR II

National Oceanic and Atmospheric Administration

Satellite and Information Service

Office of the Assistant Chief Information Officer

Phone: 202-308-4959

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

On Mon, May 21, 2018 at 7:35 PM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

Mark (b)(5)

On Mon, May 21, 2018 at 7:34 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
Guys--

(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, May 21, 2018 at 7:31 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
Roxie--

(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, May 21, 2018 at 7:26 PM, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

(b)(5)

On Mon, May 21, 2018 at 7:25 PM, Maria Williams - NOAA Federal <maria.williams@noaa.gov> wrote:

(b)(5)

On Mon, May 21, 2018 at 7:22 PM Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov> wrote:

(b)(5)

(b)(5)

On Mon, May 21, 2018 at 6:26 PM, Maria Williams - NOAA Federal <maria.williams@noaa.gov> wrote:

Hi Mark,

(b)(5)

Respectfully,

Maria S. Williams

Admin Officer | NESDIS FOIA Liaison | Property | FAC-COR II

National Oceanic and Atmospheric Administration

Satellite and Information Service

Office of the Assistant Chief Information Officer

Phone: 202-308-4959

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

--

Roxie Allison-Holman

Attorney

NOAA GC for Weather, Satellites and Research

301-628-1625

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--

Respectfully, Maria S. Williams Property/NESDIS FOIA/Admin Officer/FAC-COR II Office of the Assistant Chief Information Officer National Oceanic & Atmospheric Administration Phone: 202-308-4959 Follow NOAA Satellites on Social Media: Facebook, Twitter, YouTube "Talent wins games, but teamwork and intelligence wins championship" ~ MJ

--

Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
301-628-1625

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--

Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
301-628-1625

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| error, and delete the message.

--

Roxie Allison-Holman
Attorney
NOAA GC for Weather, Satellites and Research
301-628-1625

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.

From: Thomas Karl <thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6) .eop.gov>
Cc: Rosina Bierbaum <rbierbau@umich.edu>;
Jane Lubchenco <jane.lubchenco@noaa.gov>; Dr. Kathryn Sullivan
<kathryn.sullivan@noaa.gov>
Bcc:
Subject: Re: Query about 2011 global temps
Date: Mon Jan 09 2012 14:22:37 EST
Attachments: 2011 Temperatures.docx

John and Rosina,

Attached is the pertinent information about Global Temperatures you requested. Let me know if you have any questions.

Regards, Tom

On Mon, Jan 9, 2012 at 8:58 AM, Thomas Karl <thomas.r.karl@noaa.gov> wrote:

John and Rosina,

I should have a chart to you by this afternoon (2011 data still not completely in, but we will have a very good estimate). We are planning a press announcement Thursday Jan. 19.

(b)(5)

Tom

On Sun, Jan 8, 2012 at 3:08 PM, Bierbaum, Rosina <rbierbau@umich.edu> wrote:

Hi John and Tom,

(b)(5)

(b)(5)

Hope all's well with both of you. Rosina

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Thomas Karl <thomas.r.karl@noaa.gov>
Cc: Rosina Bierbaum <rbierbau@umich.edu>;
Jane Lubchenco <jane.lubchenco@noaa.gov>; Dr. Kathryn Sullivan
<kathryn.sullivan@noaa.gov>
Bcc:
Subject: RE: Query about 2011 global temps
Date: Mon Jan 09 2012 16:13:39 EST
Attachments:

Many thanks, Tom. You're a hero! My best, John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology
and Director, Office of Science and Technology Policy
Executive Office of the President of the United States

(b)(6)

(b)(6)

(b)(6)

From: Thomas Karl [mailto:thomas.r.karl@noaa.gov]
Sent: Monday, January 09, 2012 2:23 PM
To: Holdren, John P.
Cc: Rosina Bierbaum; Jane Lubchenco; Dr. Kathryn Sullivan
Subject: Re: Query about 2011 global temps

John and Rosina,

Attached is the pertinent information about Global Temperatures you requested. Let me know if you have any questions.

Regards, Tom

On Mon, Jan 9, 2012 at 8:58 AM, Thomas Karl <thomas.r.karl@noaa.gov> wrote:

John and Rosina,

I should have a chart to you by this afternoon (b)(5)

We are planning a press announcement Thursday Jan. 19. The continuing La Nina has influenced global temps and they will not be anywhere near record levels.

Tom

On Sun, Jan 8, 2012 at 3:08 PM, Bierbaum, Rosina <rbierbau@umich.edu> wrote:

Hi John and Tom,

(b)(5)

(b)(5)

Hope all's well with both of you. Rosina

From: Holdren, John P. [mailto:John_P._Holdren@ostp.eop.gov]
Sent: Sunday, January 08, 2012 2:39 PM
To: thomas.r.karl@noaa.gov
Cc: Bierbaum, Rosina
Subject: Query about 2011 global temps

Hi Tom –

I was browsing today on the NCDC, GISS, and UK Met Office sites looking for insights about how 2011 is likely to come out in the global-T rankings. The only thing I was able to find on any of the three was the attached from the Met Office. It has a useful comparison table with the top ten warm years according to each of the three data sets (plus the WMO rankings based on the average of the three). But 2011 is represented, in this compilation, only by January through October readings. Do you know yet what NCDC is going to say after November and December are factored in?

Many thanks,

John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology

From: Holdren, John P.
(b)(6) ostp.eop.gov>
To: Jacobs, Katharine L.
(b)(6) @ostp.eop.gov>; (b)(6)
sgcrp.gov>; Thomas.R.Karl@noaa.gov
<thomas.r.karl@noaa.gov>; Jane.Lubchenco@noaa.gov (b)(6)
<jane.lubchenco@noaa.gov>; Kelly, Henry
(b)(6) @ostp.eop.gov>
Cc: Siger, Rick
(b)(6) @ostp.eop.gov>; Wackler, Ted M.
(b)(6) ostp.eop.gov>; Weiss, Rick
(b)(6) @ostp.eop.gov>
Bcc:
Subject: RE: The Cato Institute Anti-Assessment PRIVILEGED / DELIBERATIVE
Date: Mon Oct 15 2012 13:57:43 EDT
Attachments: CATO MEMORANDUM FOR FILE_10-15-2012.doc

Kathy et al. --

(b)(5)

Cheers,
John

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: John P. Holdren
(b)(6)
Cc: Alexander MacDonald - NOAA Federal
<alexander.e.macdonald@noaa.gov>
Bcc:
Subject: Solar and Wind Energy Analysis
Date: Tue Jul 01 2014 15:24:59 EDT
Attachments: cost 29jun14 v0 (1).docx
holdren 30jun14 v0.pptx
tom karl letter v1.docx

Hello John,

I want to bring to your attention a body of work that Sandy MacDonald and his team out at our NOAA Environmental Sciences Research Lab has been working on for the past several years. It is the most comprehensive look at the impact of real weather on the transmission of renewable energy across large areas that I have seen. Sandy has provided a power point and a draft of a Nature paper he and his team are still working on. I also included a short letter he wrote to me. (b)(5)

Given your expertise and the importance of this issue, I thought you might want to consider an hour brief by him to you and your staff at a time convenient to you. I have known Sandy for many years.

(b)(5)

Best Regards,
Tom

--

Thomas R. Karl, L.H.D.

Director, National Climatic Data Center

Chair of the Subcommittee on Global Change Research

Veach-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476
Fax: (828) 271-4246

From: Thomas Karl <thomas.r.karl@noaa.gov>
To: (b)(6) @ostp.eop.gov>
Cc: Holdren, John P. (b)(6)
(b)(6) @ostp.eop.gov>; Jacobs, Katharine L.
(b)(6) @ostp.eop.gov>; (b)(6) @usgcrp.gov
sgcrp.gov>; Jane.Lubchenco@noaa.gov
<jane.lubchenco@noaa.gov>; Kelly, Henry
(b)(6) @ostp.eop.gov>; Siger, Rick
(b)(6) @ostp.eop.gov>; Wackler, Ted M.
(b)(6) @ostp.eop.gov>
Bcc: thomas.r.karl@noaa.gov
<thomas.r.karl@noaa.gov>
Subject: Re: The Cato Institute Anti-Assessment PRIVILEGED / DELIBERATIVE
Date: Sun Oct 21 2012 22:25:46 EDT
Attachments:

Rick,

(b)(5)

Tom

Sent from my iPhone

On Oct 21, 2012, at 8:50 PM, (b)(6) @ostp.eop.gov> wrote:

Tom (K) please don't get things spun up further. We are watching the horizon for this report and the OSTP/WH comms team has options we can consider if and when it comes out. This is not the time for USGCRP - a WH-coordinated entity - to get out ahead of WH and WH comms. Let's talk by phone tomorrow please and let this thread rest.

Rick Weiss

Director of Communications and Senior Science and Technology Policy Analyst
Office of Science and Technology Policy
Executive Office of the President

(b)(6)

From: Thomas Karl [mailto:thomas.r.karl@noaa.gov]
Sent: Sunday, October 21, 2012 08:11 PM
To: Holdren, John P.
Cc: Jacobs (b)(6) @usgcrp.gov (b)(6) usgcrp.gov>; Jane.Lubchenco@noaa.gov <Jane.Lubchenco@noaa.gov>; Kelly, Henry; Siger, Rick; Wackler, Ted M.; Weiss, Rick
Subject: Re: The Cato Institute Anti-Assessment PRIVILEGED / DELIBERATIVE

All

I thought you would want to know about the email discussion regarding the CATO document (see below). I have also been copied on numerous emails from various Lead Authors of the 2009 Assessment prior to this exchange, which began Friday night.

Tom

Rick Piltz

6:30 PM (1 hour ago) Sunday Oct. 21, 2012

to Anthony, me, Jerry, Tom, Michael, Eileen, John, Brad, Tom, John, Mike, Don, David, Stewart, Don, Virginia, Lynne, Nancy, Jerry, Jay, David, Evan, Katharine, Jack, Jim

Tony--

(b)(5)

(b)(5)

(b)(5)

(b)(5)

--Rick

On Fri, Oct 19, 2012 at 6:16 PM, Janetos, Anthony C <Anthony.Janetos@pnnl.gov> wrote:
Hi Rick,

(b)(5)

(b)(5)

(b)(5)

Cheers,
Tony

On Oct 19, 2012, at 5:35 PM, Rick Piltz wrote:

Dear authors of the 2009 national climate assessment report, Global Climate Change Impacts in the

From: V Ramaswamy <v.ramaswamy@noaa.gov>
To: Thomas Karl <thomas.r.karl@noaa.gov>
Cc:
Bcc:
Subject: Re: Pretty urgent query
Date: Thu Nov 01 2012 10:09:13 EDT
Attachments:

Tom,

Thanks. That would be my answer too. We cannot think of hires coupled models without Gaea and Zeus. Been picking up the news on the NJ-NY damages. Couple of GFDL-ers may have lost virtually all their possessions - still checking. Lots of townships just punched hard and yet to recover.

Ram

On Thu, Nov 1, 2012 at 9:57 AM, Thomas Karl <thomas.r.karl@noaa.gov> wrote:

Ram -- I answered yes indeed. I hope you weathered the storm ok! Lots of focus on post Sandy analysis. NYC is still trying to cope w/o many trains and subways and power in areas. Lots of storm surge damage in NJ and NY

Tom

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

From: Jackie Bray <jackie.bray@noaa.gov>
Date: Thu, Nov 1, 2012 at 9:46 AM
Subject: Re: Pretty urgent query
To: Thomas Karl <thomas.r.karl@noaa.gov>
Cc: David Titley <david.titley@noaa.gov>, Jane Lubchenco <jane.lubchenco@noaa.gov>

Tom,

Is this work happening because of the new research computing capacity at oakridge that we invested in with ARRA funds?

Thanks,

Jackie

On Wed, Oct 31, 2012 at 9:45 AM, Thomas Karl <thomas.r.karl@noaa.gov> wrote:

A little less negative in the second sentence on this one.

*Atlantic hurricane generation arising from tropical disturbances is also being addressed for seasonal

>>>> -----
>>>>
>>>> John,
>>>>
>>>> Last year, we facilitated a series of four workshops and accompanying
>>>> papers to review the state of knowledge on various weather and climate
>>>> extremes. One of the papers, which is now undergoing final review at
>>>> BAMS (latest draft is attached), includes a brief analysis of floods.
>>>> Figure 3 of the paper indicates a qualitative match between the
>> geographic
>>>> distributions of annual precipitation trends and flooding, though
>> overall
>>>> the increasing number of days with heavy precipitation is not strongly
>>>> related changes in river flooding. More work is needed on this, for
>>>> example, extremes of daily precipitation are better expressed in the
>> warm
>>>> season when rivers are generally lower.
>>>>
>>>> Also attached are a couple of maps from our work in progress that show
>> 1)
>>>> the climatologically most common month of highest streamflow and 2) the
>>>> climatologically most common month of heaviest 3-day precipitation. The
>>>> similarities and differences between the spatial and temporal patterns
>> are
>>>> still under investigation, but at first glance seem consistent with
>> current
>>>> understanding. This work is being done in collaboration with Bob
>> Hirsch,
>>>> who was quoted in the blog entry.
>>>>
>>>> We haven't spent much time analyzing or responding to any non-peer
>>>> reviewed work, including this blog entry, but I certainly wouldn't
>>>> characterize the draft Assessment as "well out of step with the
>> scientific
>>>> literature".
>>>>
>>>> Let me know if you'd like any further detail or briefing on any aspect
>> of
>>>> this subject.
>>>>
>>>> Thanks,
>>>> Tom
>>>>
>>>> ----- Forwarded message -----
>>>> From: Holdren, John [REDACTED] (b)(6) @ostp.eop.gov>
>>>> Date: Wed, Jan 16, 2013 at 9:48 AM
>>>> Subject: Fwd: Extreme Misrepresentation: USGCRP and the Case of Floods
>>>> (Pielke, Jr, 15 Jan 2013)
>>>> To: "Thomas.R.Karl@noaa.gov" <Thomas.R.Karl@noaa.gov>
>>>>
>>>>
>>>> Hi Tom –****
>>>>
>>>> ** **
>>>>
>>>> I queried Peter Huybers about Roger Pielke Jr's blog on the treatment of

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc: jane.lubchenco@noaa.gov
<jane.lubchenco@noaa.gov>
Bcc:
Subject: Re: FW: WSJ (Lomborg): Climate-Change Misdirection
Date: Thu Jan 24 2013 17:46:46 EST
Attachments: Wall Street Journal opinion piece perspective.docx

John,

The opinion piece contains some factual errors and some statements that, taken out of their proper scientific context, are in danger of misleading readers. Attached is some perspective on separating fact from fiction in the opinion piece. Hope this helps.

Thanks,
Tom

On Thu, Jan 24, 2013 at 2:30 PM, Holdren, (b)(6)@ostp.eop.gov> wrote:

Hi Tom –

I sometimes say it seems that, every day, somebody tosses an unexpected smoke bomb into my office that I need to deal with immediately, whatever else might have been going on.

(b)(5)

Many thanks,

John

http://online.wsj.com/article/SB10001424127887323485704578258172660564886.html?mod=WSJ_Opinion_LEADTop

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
Cc: jane.lubchenco@noaa.gov
<jane.lubchenco@noaa.gov>
Bcc:
Subject: RE: FW: WSJ (Lomborg): Climate-Change Misdirection
Date: Thu Jan 24 2013 18:01:41 EST
Attachments:

Thanks, Tom. This is immensely helpful. Best, John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology
and Director, Office of Science and Technology Policy
Executive Office of the President of the United States

(b)(6)

(b)(6)

(b)(6)

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Thursday, January 24, 2013 5:47 PM
To: Holdren, John P.
Cc: jane.lubchenco@noaa.gov
Subject: Re: FW: WSJ (Lomborg): Climate-Change Misdirection

John,

(b)(5)

Thanks,

Tom

On Thu, Jan 24, 2013 at 2:30 PM, Holdren, (b)(6) @ostp.eop.gov> wrote:

Hi Tom –

(b)(5)

Many thanks,

John

http://online.wsj.com/article/SB10001424127887323485704578258172660564886.html?mod=WSJ_Opinion_LEADTop

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(b)(5)

Document ID: 0.7.1334.17761

From: (b)(6)
To: Mike <maccrac@comcast.net>; Tom <thomas.r.karl@noaa.gov> (b)(6)
Cc: (b)(6) >
Bcc:
Subject: Daily Mail piece on IPCC WG1 SPM
Date: Sun Sep 15 2013 18:26:11 EDT
Attachments:

Mike, Tom --

(b)(5)

Many thanks,
John

<http://www.dailymail.co.uk/news/article-2420783/Global-warming-just-HALF-said-Worlds-climate-scientists-admit-computers-got-effects-greenhouse-gases-wrong.html>

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc: Michael C. MacCracken
<maccrac@comcast.net>; Michael Oppenheimer
<omichael@princeton.edu>
Bcc: thomas.r.karl@noaa.gov
<thomas.r.karl@noaa.gov>
Subject: Re: Heartland Institute
Date: Thu Sep 19 2013 12:56:01 EDT
Attachments:

John

(b)(5)

Tom

Sent from my iPhone

On Sep 19, 2013, at 12:44 PM, "Holdren, John P."

(b)(6)@ostp.eop.gov> wrote:

> Tom, Mike, Michael --

>

> Clearly an orchestrated assault on the IPCC and mainstream climate science is being mounted with increasing fervor. The new Heartland Institute anti-IPCC tome is the latest salvo. I'll share by separate e-mail some material I've provided to key folks here. I'd much appreciate your keeping me posted on other responses you see or develop.

>

> Thanks!

>

> John

>

>

>

> 0

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6) @ostp.eop.gov (b)(6)
Cc: Jerry Melillo <jmelillo@mbl.edu>;
Dickinson, Tammy (b)(6) @ostp.eop.gov; Simon, Bob
(b)(6) @ostp.eop.gov
Bcc:
Subject: Re: Significant issue with US average-T representation in "Highlights"
Date: Mon Jan 06 2014 19:11:05 EST
Attachments: Box-changes in annual temperature_V4 (DE KK TK RV)DW-tk-DE.docx

John et al.

This is just an update of the work in progress on describing the temperature increase in the contiguous US time series. The attached box was worked today, but it is not final, but I did want to let you know what we (the CLAs and LAs and a few of us here at NCDC helping) doing. Still in the process of discussing confidence intervals and non parametric trends

Tom

On Sat, Jan 4, 2014 at 3:09 PM, Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov> wrote:

John

To your point about the 2009 report and the difference between the changes reported 1900 vs 1959 (b)(5)

One option we have is to use the exact same methodology we did in 2009 for comparison and maybe add a small box explaining the issue.

Again more later when I have time in front of the computer.

Cheers,
Tom

Sent from my iPhone

> On Jan 4, 2014, at 11:31 AM, "Holdren, John P." (b)(6) @ostp.eop.gov wrote:

>

> Jerry, Tom --

>

> In looking through the draft "Highlights" for the 3rd Assessment, (b)(5)

(b)(5) A bar graph on the second cover page, however, where U.S. decadal average temperatures are compared to the 1901-1960 average, appears to show the 1901-1910 average as about -0.4 degrees F and 2001-2012 as +1.5 degrees F, so the difference would be 1.9 degrees F based on these decadal averages. (As an aside, the labeling of the horizontal axis in relation to the positioning of the bars is a prescription for confusion.)

>
> [REDACTED] (b)(5). My recollection was that the more or less standard figure for the U.S. increase up to the present was 2 degrees F, when the starting point is the end of the 19th century. Indeed, my recollection was, more specifically, that the 2-degree figure was found in the 2009 Second Assessment.

>
> So I did a bit of digging to refresh those recollections. Here is what I found.

>
> [REDACTED] (b)(5)

>
> For a more recent result, I consulted NOAA State of the Climate 2012 (released in August 2013). There, in Figure 7.5 on page 149, the filtered value as of 1895 is 51.5 degrees F; the filtered value as of 2012 is 54.0 degrees F, which of course is 2.5 degrees higher than the 1895 value, not 1.5 degrees F higher.

>
> All of these statements and graphics are clearly referring to the contiguous United States, so the explanation cannot be the inclusion of Alaska in one instance and not in another.

>
> [REDACTED] (b)(5)

>
> Cheers anyway,
> John
>
>
>
> John P. Holdren, PhD
> Assistant to the President for Science and Technology
> Director, Office of Science and Technology Policy
> Executive Office of the President of the United States
> [REDACTED]@ostp.eop.gov (b)(6)

--

Thomas R. Karl, L.H.D.
Director, National Climatic Data Center
Chair of the Subcommittee on Global Change Research

Veach-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
Cc:
Bcc:
Subject: RE: Quick question - IF 2013 comes in in top 10, will that mean 14 out of last 16 warmest on record?
Date: Tue Jan 14 2014 09:48:14 EST
Attachments:

Thanks. (b)(5)
I have fixed those and will send my conclusion to both Rosina and you for another look. On the NCA, I agree that it needs to refer to an increase in the range of 1.5 to 2 degrees F.

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Tuesday, January 14, 2014 9:15 AM
To: Holdren, John P.
Subject: Fwd: Quick question - IF 2013 comes in in top 10, will that mean 14 out of last 16 warmest on record?

John,

Here is what I sent to Rosina. Please see the draft version of our annual report, still in process. Please note the emphasis on probabilities and likelihoods. I worry about the emphasis on exact ranks, so based on a new peer reviewed article we published this autumn we are going to try and emphasize how the uncertainty in the data affects our ability to state what is and is not the warmest year.

Tom

PS still trying to work with the NCA team as I think we would be most accurate to use a range for temperature change since 1895 --- something like "about 1.5 to 2 F".

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

From: Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov>
Date: Tue, Jan 14, 2014 at 7:48 AM
Subject: Re: Quick question - IF 2013 comes in in top 10, will that mean 14 out of last 16 warmest on record?
To: Rosina Bierbaum <rbierbau@umich.edu>

Rosina,

(b)(5)

(b)(5)

(b)(5)

Sent from my iPhone

On Jan 13, 2014, at 4:49 PM, Rosina Bierbaum <rbierbau@umich.edu> wrote:

1-2: 2010, 2005 3-8: 2007, 1998, 2002, 2003, 2006, 2009 9-12: 2012, 2011, 2001, 2004 (13: 2008 14: 1997 15: 1995)

--

Thanks, Rosina

--

Thomas R. Karl, L.H.D.

Director, National Climatic Data Center

Chair of the Subcommittee on Global Change Research

Veach-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476
Fax: (828) 271-4246

Thomas.R.Karl@noaa.gov

Follow NCDC on Facebook and Twitter

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
Cc:
Bcc:
Subject: FW: 15 warmest years to 2012 (with comment on 2013)
Date: Tue Jan 14 2014 08:03:46 EST
Attachments: Global avg temp anomalies through 2012_NASA Feb 2013.doc
Global avg temp anomalies_NOAA.doc

Tom –

(b)(5)

Cheers,

John

From: Holdren, John P.
Sent: Tuesday, January 14, 2014 7:47 AM
To: 'Rosina Bierbaum'
Subject: 15 warmest years to 2012

Rosina –

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Cheers,

John

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Rosina Bierbaum <rbierbau@umich.edu>;
Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov>
Cc:
Bcc:
Subject: 15 warmest years to 2012 -- REVISITED AND EXTENDED TO 17 AND 2013
Date: Tue Jan 14 2014 10:07:13 EST
Attachments: Global avg temp anomalies through 2012_NASA Feb 2013_jph_rev1.doc
Global avg temp anomalies_NOAA_jph_rev1.doc

Rosina, Tom –

(b)(5)

The attachments here fix those mistakes and extend the rankings through 2012 to capture the top 16, which allows bringing in 1995 on both datasets. (It ranks 15th on NASA's and 16th on NOAA's). I have not checked the NASA and NOAA sites, though, to see if they updated their time series. With that caveat, here is what I think can be said, consistent with rankings based on both data sets:

“Globally, the sixteen hottest years in the 130+ years of decent thermometer records occurred in the eighteen years from 1995 through 2012”.

After 2013 lands in the top 10, as expected, it will be the case that

“Globally, the seventeen hottest years in the 130+ years of decent thermometer records occurred in the nineteen years from 1995 through 2013.”

In the NOAA dataset, the two years in the indicated period that do NOT make the cut are 1996 and 2000. In the NASA dataset, the two years that don't make the cut are 1996 and 1999. I suppose the discrepancy underlines Tom's point that the uncertainties are big enough that the ranking exercise is somewhat freighted.

Cheers,

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc:
Bcc: Derek Arndt <derek.arndt@noaa.gov>;
Katy Vincent <katy.vincent@noaa.gov>
Subject: Re: Possible error in global T press release
Date: Mon Jan 20 2014 11:28:44 EST
Attachments:

Thanks John,

U R correct of course, thanks for reading as it would have been embarrassing. (b)(5)

(b)(5)
Next time we will have more eyes checking. Again, thanks for saving us!

(b)(5)

One of our Branch Chiefs is double checking, but I read it as you do.

Tom

On Mon, Jan 20, 2014 at 10:31 AM, Holdren, (b)(6)@ostp.eop.gov> wrote:

Tom –

(b)(5)

First, since the record includes the year 1880, with 2013 included there are 134 years in the record.

Second, as I read the NOAA temperature record at ftp://ftp.ncdc.noaa.gov/pub/data/anomalies/annual.land_ocean.90S.90N.df_1901-2000mean.dat,

(b)(5)

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc: Simon, Bob
(b)(6)@ostp.eop.gov>
Bcc:
Subject: Re: FW: California drought and climate change
Date: Wed Feb 05 2014 19:58:02 EST
Attachments:

John,

(b)(5)

Another topic altogether,

This is a plea. Would you and Bob be willing to get together for an hour or so with the major agency leads in USGCRP (NASA Freilich, NSF Roger Wakimoto, NOAA Bob Detrick, DOE, Gary Geernaert --- 3 of these four are USGCRP Vice Chairs from agencies Sheri Abbott designated as Vice Chairs 4 and half years ago) to discuss how we move from

(b)(5)

but if you look at what they claim is supporting global change research in the USGCRP budget it is an order of magnitude smaller. This is causing anguish among the science push agencies. I can tell you that some of the agency leads are getting pretty jaded, which we do need to address.

Happy to discuss, but please let me know if you and Bob would be willing to have such a conversation. We can also get input from the Operational Task Force recommendations as how to fix this. Kei Koizami is working that one.

Tom

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Simon, Bob
[REDACTED]@ostp.eop.gov> This section redacted using (b)(6)
Cc: Holdren, John P.
[REDACTED]@ostp.eop.gov>; [REDACTED]@usgcrp.gov>;
Fried, Becky [REDACTED]@ostp.eop.gov>; Armstrong, Tom
[REDACTED]@ostp.eop.gov>; Dickinson, Tammy
[REDACTED]@ostp.eop.gov>; Petes, Laura
[REDACTED]@ostp.eop.gov>
Bcc:
Subject: Re: URGENT: TPs on Sandy & Haiyan -- MORE, ADDING SIMON AND ARMSTRONG
Date: Sun Feb 09 2014 16:03:35 EST
Attachments:

Good points Bob,

This is getting quite long, but see the modified piece in pink below.

[REDACTED]

(b)(5)

On Sun, Feb 9, 2014 at 3:38 PM, Simon, Bob [REDACTED]@ostp.eop.gov> wrote:

[REDACTED]

(b)(5)

[REDACTED]

(b)(5)

(b)(5)

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Sunday, February 09, 2014 2:14 PM
To: Holdren, John P.
Cc: Phil Duffy; Fried, Becky; Simon, Bob; Armstrong, Tom
Subject: Re: URGENT: TPs on Sandy & Haiyan -- MORE, ADDING SIMON AND ARMSTRONG

Sorry John, Let me try to clarify,

(b)(5)

(b)(5)

(b)(5)

The article by Pun et al. states that "the deeper layer of warmer water is possibly caused by multiple factors including piling up of warm , surface water due to wind strengthening and possibly global warming" They did not do any analysis on causes, so I would not want to speculate about this at this time.

And in the Science interview he said:

"While many observers blame Haiyan's destructive power on climate change, tropical storm experts say there is little hard evidence of a link. "It is possibly natural variability," Lin says. Nor is it certain that the western Pacific has become a supertyphoon breeding ground. Although warmer subsurface waters might raise the risk, Lin says, atmospheric conditions may not always cooperate."

(b)(5)

So perhaps a statement like:

(b)(5)

Hope this helps.

Tom

On Sun, Feb 9, 2014 at 12:49 PM, Holdren, John P. (b)(6) @ostp.eop.gov> wrote:

The article to which I was referring is lam-Fei Pun, I.-I. Lin, and Min-Hui Lo, Recent increase in high tropical heat potential area in the Western North Pacific Ocean, GRL 40, 4680-4684, published online 3 Sept 2013 and in the subsequent print edition. See also the account, with interviews of other experts, in SCIENCE, Dennis Normille, Clues to supertyphoon's ferocity found in Western Pacific, 29 Nov 2013, p 1027.

John P. Holdren, PhD
Assistant to the President for Science and Technology
Director, Office of Science and Technology Policy
Executive Office of the President of the United States

(b)(6)

-----Original Message-----

From: Phil Duffy (b)(6)@usgcrp.gov]
Sent: Sunday, February 09, 2014 11:30 AM Eastern Standard Time
To: Holdren, John P.
Cc: Thomas Karl - NOAA Federal; Fried, Becky
Subject: Re: URGENT: TPs on Sandy & Haiyan

(b)(5)

(b)(5)

Regards,

Phil

Philip B. Duffy

Senior Advisor

U.S. Global Change Research Program

National Science and Technology Council

Executive Office of the President

Washington, D.C.

(b)(5)

On Sun, Feb 9, 2014 at 11:05 AM, Holdren, John P. (b)(5) @ostp.eop.gov> wrote:

Tom, Becky, Phil --

This section redacted under (b)(5)

[Redacted]

[Redacted]

[Redacted]

Best,
John

John P. Holdren, PhD

Assistant to the President for Science and Technology
Director, Office of Science and Technology Policy
Executive Office of the President of the United States
(b)(6)@ostp.eop.gov

-----Original Message-----

From: Thomas Karl - NOAA Federal [thomas.r.karl@noaa.gov]
Sent: Sunday, February 09, 2014 09:13 AM Eastern Standard Time
To: Fried, Becky

Cc: Holdren, John P.; Phil Duffy; Reidmiller, David R; Siger, Rick; Simon, Bob; Laurier, Fabien; Tom
Armstrong (b)(6)@usgcrp.gov
Subject: Re: URGENT: TPs on Sandy & Haiyan

Becky (Please revise --- we are on weak grounds with such a strong statement above "but it was more powerful because of climate change"

Revised

(b)(5)

On Sun, Feb 9, 2014 at 12:57 AM, Fried, Becky (b)(6)@ostp.eop.gov> wrote:

Dr. H – Per below, Sec. Kerry is giving a speech on climate issues Wednesday in Indonesia and State has asked for any talking points we can offer on links between climate change and Typhoon Haiyan and/or Hurricane Sandy.

In the interest of expediency (deadline is early tomorrow), I am copying below the first two bullets from the draft talking points document on drought that you drafted and was iterated upon just the other day. I am adding you here in case you want to weigh in further, or offer a cry of outrage about using this language, which so far as I know, has not yet been uttered in a public setting.

This section redated using (b)(5)

* (b)(5)

(b)(5)

From: Laurier, Fabien
Sent: Saturday, February 08, 2014 11:50 PM
To: 'Phil Duffy'; 'Reidmiller, David R'
Cc: 'Thomas Karl - NOAA Federal'; 'Tom Armstrong'; Fried, Becky
Subject: RE: URGENT: TPs on Sandy & Haiyan

Below a couple official quotes. I hope this helps...

This section redacted using (b)(5)

HOLDREN:

(b)(5)

POTUS:

(b)(5)

(b)(5)

Fabien J.G. Laurier, Ph.D.
Director, Third National Climate Assessment
Office of Science and Technology Policy
Executive Office of the President

-----Original Message-----

From: Phil Duffy (b)(6) @usgcrp.gov]
Sent: Saturday, February 08, 2014 11:30 PM Eastern Standard Time
To: Reidmiller, David R
Cc: Thomas Karl - NOAA Federal; Tom Armstrong; Laurier, Fabien; Fried, Becky
Subject: Re: URGENT: TPs on Sandy & Haiyan

Hi David,

I have nothing "pre-cleared." Maybe Becky has an archive she can look through and find something.

However: to remind you of what you already know, one thing we can robustly say about ALL landfalling hurricanes is that sea level rise makes storm surge worse (independent of any changes in the properties of storms).

I am sure you also know that there have been a series of studies projecting increases in the frequencies of Cat 4 and 5 hurricanes in the North Atlantic (which the IPCC rated as "more likely than not.") . Most people feel that observed changes in hurricane properties cannot be rigorously attributed to anthropogenic climate change, and the IPCC attached "low confidence" to such attribution.

Regards,

Phil

Philip B. Duffy

Senior Advisor

U.S. Global Change Research Program

National Science and Technology Council

Executive Office of the President

Washington, D.C.

(b)(6)

On Sat, Feb 8, 2014 at 10:14 PM, Reidmiller, David R (b)(6) @state.gov> wrote:

All-

(b)(5)

I need this some time tonight or tomorrow as I need to get this back to them OOB tomorrow. Sorry for the quick turn-around, but I just got tasked with this this afternoon...

David Reidmiller, PhD

Physical Science Officer

U.S. Department of State

Office of Global Change, OES/EGC

(b)(6)

(b)(6)

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc:
Subject: Re: Drought in the American West -- A COUPLE OF QUERIES IN FOLLOW-UP

(b)(5)

John

The two papers I mentioned are attached.

Best Regards,

Tom

On Thu, Mar 6, 2014 at 6:02 PM, Holdren, John P. (b)(6)@ostp.eop.gov> wrote:

Tom – (b)(5)
Yes? Also, do you have the full cite for Fischer and Knutti
GRL handy? Many thanks. My best, John

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Thursday, March 06, 2014 5:42 PM
To: Holdren, John P.
Cc: kathryn.sullivan@noaa.gov
Subject: Re: Drought in the American West

John,

Remaining redaction under (b)(5)

Thanks for sharing your note. (b)(5)
(b)(5) A very recent paper in GRL (Barnes et al 2014 pp 638-644 DOI 10.1002/2013GL058745) present evidence to support their previous claim that the link between sea ice and blocking is not supported by the observations. (b)(5)
(b)(5)

(b)(5)

(b)(5)

Finally, just as a heads up. (b)(5) in severe
Thunderstorms in the central US under RCP8.5. I hope this gets published soon.

Tom

On Thu, Mar 6, 2014 at 11:28 AM, Holdren, John P. (b)(6) @ostp.eop.gov> wrote:

Dear Kathy and Tom --

In the Q&A following my testimony on climate-change preparedness and resilience before the Oversight Subcommittee of Senate EPW last week, Sen Sessions complained that my public statements on drought in the American West have been inconsistent with previous "expert" testimony before the Committee by Roger Pielke Jr. When I responded to Sen Sessions that Dr Pielke's views on this topic are not in the scientific mainstream, he asked for scientific references on this point, and I promised to submit promptly a written response for the record with the appropriate documentation.

That submission is attached here. It went to key staff members of the Oversight Subcommittee over the weekend and to the members on Monday or Tuesday. It is also posted on the OSTP website, at http://www.whitehouse.gov/sites/default/files/microsites/ostp/critique_of_pielke_jr_statements_on_drought.pdf.

Comments welcome, but only if you are so moved.

My best,

John

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: John Holdren (b) (6)
Cc:
Bcc:
Subject: Re: US T increase revisited
Date: Mon Mar 10 2014 08:32:13 EDT
Attachments:

John

Here is the situation

(b) (5)

(b) (5)

(b) (5)

(b) (5)

Does this help?

Tom

Thomas R. Karl, L.H.D.
Director, National Climatic Data Center
Chair of the Subcommittee on Global Change Research

> On Mar 9, 2014, at 4:31 PM, John Holdren (b) (6) wrote:

>

> Hi Tom --

>

(b) (5)

(b) (5)

>

> Cheers,

> John

>

>

From: Holdren, John P.
[REDACTED]@ostp.eop.gov>
To: Laurier, Fabien
[REDACTED]@ostp.eop.gov> This section redacted using (b)(6)
Cc: jmelillo@mbi.edu <jmelillo@mbi.edu>;
Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov>; Armstrong,
Tom <thomas_r_armstrong@ostp.eop.gov>; Duffy, Phil
[REDACTED]@usgcrp.gov>; Simon, Bob [REDACTED]@ostp.eop.gov>;
Dickinson, Tammy [REDACTED]@ostp.eop.gov>
Bcc:
Subject: Holdren comments and edits on Highlights
Date: Wed Mar 12 2014 15:15:07 EDT
Attachments: Holdren comments_03-12-14.doc

Fabien –

Please see the attached comments and edits on the NCA Highlights document. [REDACTED]

[REDACTED]
(b)(5)

Best,

John

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: John P. Holdren
(b)(6)@ostp.eop.gov>
Cc:
Bcc:
Subject: Priorities in intraseasonal to multidecadal predictions and projections
Date: Tue Jul 01 2014 16:57:41 EDT
Attachments:

John,

(b)(5)

This could simply be an informal discussion at this time and be a one-on-one or something more. If you have other priorities do not feel obliged in any way.

Tom

--

Thomas R. Karl, L.H.D.

Director, National Climatic Data Center

Chair of the Subcommittee on Global Change Research

Veach-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476
Fax: (828) 271-4246

Thomas.R.Karl@noaa.gov

Follow NCDC on Facebook and Twitter

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc:
Bcc:
Subject: Re: NOAA report - California drought largely the result of natural variability
Date: Thu Dec 11 2014 10:03:44 EST
Attachments:

John,

This is what I sent on the the study sponsor and one of the NOAA authors. Tom

Marty and Wayne,

(b)(5)

Tom

On Wed, Dec 10, 2014 at 6:17 PM, Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov> wrote:

John

The report was funded by the NOAA Climate Program Office's Modeling Analysis and Prediction Program (MAPP). It had eight authors from NOAA, NASA, Columbia University, and the International Research Institute for Climate and Society.

(b)(5)

So this is best described as a NOAA funded report in my view.

Tom

Thomas R. Karl, L.H.D.
Director, National Climatic Data Center
Chair of the Subcommittee on Global Change Research

On Dec 10, 2014, at 5:26 PM, Holdren, John P. <John_P._Holdren@ostp.eop.gov> wrote:

Tom -- Can you clarify exactly what the relation of NOAA was to this report? Thanks, John

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Monday, December 08, 2014 08:08 PM
To: Phil Duffy (b)(6) @usgcrp.gov>
Cc: Holdren, John P.; Armstrong, Tom; Simon, Bob; Dickinson, Tammy; Fried, Becky
Subject: Re: NOAA report - California drought largely the result of natural variability

John,

Phil and I briefly discussed [REDACTED]
[REDACTED] (b)(5) [REDACTED]

Tom

On Mon, Dec 8, 2014 at 7:53 PM, Phil Duffy (b)(6) @usgcrp.gov> wrote:

Hi John,

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

[REDACTED]

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

Regards,

Phil

Philip B. Duffy
Senior Advisor
U.S. Global Change Research Program
National Science and Technology Council
Executive Office of the President

Washington, D.C.

(b)(6)

On Mon, Dec 8, 2014 at 6:02 PM, Holdren, John P. (b)(6) @ostp.eop.gov> wrote:

(b)(5)

From: Simon, Bob

Sent: Monday, December 08, 2014 5:20 PM

To: Holdren, John P. (b)(6) @usgcrp.gov

Cc: thomas.r.karl@noaa.gov; Dickinson, Tammy; Fried, Becky

Subject: NOAA report - California drought largely the result of natural variability

Here are links to a NOAA report released today. The first link is to the public webpage for the report; the second is to a more complete summary page; and the final one is to the report itself (it's a big download).

>http://www.noaanews.noaa.gov/stories2014/20141208_californiadrought.html<

><http://cpo.noaa.gov/ClimatePrograms/ModelingAnalysisPredictionsandProjections/MAPPTaskForces/DroughtTaskForce/CaliforniaDrought.aspx><

>http://cpo.noaa.gov/sites/cpo/MAPP/Task%20Forces/DTF/californiadrought/california_drought_report.pdf<

Here is a link to Jason Samenow's blog describing the report, and some reaction from scientists:

><http://www.washingtonpost.com/blogs/capital-weather-gang/wp/2014/12/08/noaa-report-says-california-drought-mostly-due-to-natural-causes/?hpid=z3><

(b)(5)

(b)(5)

(b)(5)

Here is a key quote from the report's summary webpage (second link, above):

(b)(5)

<image001.jpg>

--

Thomas R. Karl, L.H.D.

Director, National Climatic Data Center

Chair of the Subcommittee on Global Change Research

Veach-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476
Fax: (828) 271-4246

Thomas.R.Karl@noaa.gov

Follow NCDC on Facebook and Twitter

Kathy

Sent from my iPhone

On Jan 23, 2015, at 16:04, Holdren, John P. (b)(6) @ostp.eop.gov> wrote:

Kathy, Tom –

(b)(5)

My best,

John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology

Director, Office of Science and Technology Policy

Executive Office of the President of the United States

--

Thomas R. Karl, L.H.D.

Director, National Climatic Data Center

Chair of the Subcommittee on Global Change Research

Veach-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
Cc:
Bcc:
Subject: RE: Kathy's response
Date: Wed May 13 2015 17:31:23 EDT
Attachments:

(b)(5)

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Wednesday, May 13, 2015 5:19 PM
To: Holdren, John P.
Subject: Re: Kathy's response

John

We r putting something together for u. Is next week still timely?

Tom

Sent from my iPhone

On May 12, 2015, at 5:48 PM, Holdren, John P. (b)(6)@ostp.eop.gov> wrote:

Tom – If you or Jim have other recent material you think I ought to see, please send it along! Best,
John

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Tuesday, May 12, 2015 5:41 PM
To: Holdren, John P.
Subject: Re: Kathy's response

Thanks John

We are trying to ensure we are co silted next year.

Tom

Sent from my iPhone

On May 12, 2015, at 5:39 PM, Holdren, John P. (b)(6)@ostp.eop.gov> wrote:

Tom – Many thanks.

(b)(5)

My best, John

From: Thomas Karl - NOAA Federal [mailto:thomas.r.karl@noaa.gov]
Sent: Tuesday, May 12, 2015 5:02 PM
To: Holdren, John P.
Subject: Re: Kathy's response

John

FYI. We were not consulted on this fact sheet. In fact our top NOAA expert on hurricane forcing , Jim Kossin,

(b)(5)

Tom

Sent from my iPhone

On May 12, 2015, at 12:25 PM, Holdren, John P. (b)(6)@ostp.eop.gov> wrote:

FYI

From: Dr. Kathryn Sullivan - NOAA Federal [mailto:kathryn.sullivan@noaa.gov]
Sent: Tuesday, May 12, 2015 11:44 AM
To: Holdren, John P.
Cc: Dickinson, Tammy; Petes, Laura
Subject: Re: FW: Hurricane season fact sheet

Your observations are correct and comprehensive, as always, John.

I appreciate your acknowledgement at the close that requested length of the reply requested affects the comprehensiveness one can provide. In this case,

[REDACTED] (b)(5)

Kathy

On Tue, May 12, 2015 at 10:56 AM, Holdren, John P. (b)(6) @ostp.eop.gov> wrote:

Hi Kathy –

All the following redacted under (b)(5)

[REDACTED] (b)(5)

[REDACTED] (b)(5)

[REDACTED] (b)(5)

[REDACTED] (b)(5)

“Since the early 1970s, however, the numbers of Atlantic hurricanes and major hurricanes have increased.”

[REDACTED]

“Confidence remains low for long-term (centennial) changes in tropical cyclone activity, after accounting for past changes in observing capabilities. However, for the years since the 1970s, it is virtually certain that the frequency and intensity of storms in the North Atlantic have increased although the reasons for this increase are debated.” [Emphasis in original]

[REDACTED] (b)(5)

“Human-caused increases in greenhouse-gas concentrations have very likely contributed to the warming of the tropical North Atlantic sea-surface temperatures observed over the past century.”

“The vulnerability of coastal regions to storm-surge flooding is expected to increase with future sea-level rise and coastal development, although this vulnerability will also depend upon further storm characteristics.”

[REDACTED] (b)(5)

“The migration away from the tropics is apparently linked to marked changes in the mean meridional structure of environmental vertical wind shear and potential intensity, and can plausibly be linked to tropical expansion, which is thought to have anthropogenic contributions.”

[REDACTED] (b)(5)

[REDACTED] (b)(5)

(b)(5)

(b)(5)

I hope you find this critique more helpful than aggravating!

My best as always,

John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology

Director, Office of Science and Technology Policy

Co-Chair, President's Council of Advisors on Science and Technology

Executive Office of the President of the United States

(b)(6)

(b)(6)

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(b)(6)

(b)(6)

From: Dr. Kathryn Sullivan - NOAA Federal [mailto:kathryn.sullivan@noaa.gov]

Sent: Monday, May 11, 2015 9:38 PM

To: Holdren, John P.

Subject: Fwd: Hurricane season fact sheet

John,

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: John P. Holdren
(b)(6) ostp.eop.gov>
Cc:
Bcc:
Subject: Fwd: Acceptance of your Science Manuscript aaa5632
Date: Tue May 26 2015 16:35:22 EDT
Attachments:

John,

Hope you had a great Holiday weekend. Just want to pass along to you the release date for the "hiatus" paper is June 4th (see email forwarded below).

All items redacted under (b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Looking forward to hearing your thoughts.

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: John P. Holdren
(b)(6)@ostp.eop.gov>
Cc:
Bcc:
Subject: Fwd: Acceptance of your Science Manuscript aaa5632
Date: Thu Jun 04 2015 10:16:35 EDT
Attachments:

John,

We have had a flood of interest in our new global temperature analysis. I am sure you will read lots of stories about this tomorrow.

(b)(5)

Please let me know what you think.

Thanks,
Tom

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

From: Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov>
Date: Tue, May 26, 2015 at 4:35 PM
Subject: Fwd: Acceptance of your Science Manuscript aaa5632
To: "John P. Holdren" (b)(6)@ostp.eop.gov>

John,

Hope you had a great Holiday weekend. Just want to pass along to you the release date for the "hiatus" paper is June 4th (see email forwarded below).

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Looking forward to hearing your thoughts.

Tom

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

From: Jesse H Smith <hjsmith@aaas.org>

Date: Mon, May 25, 2015 at 3:10 PM

Subject: RE: Acceptance of your Science Manuscript aaa5632

To: Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov>

Tom,

Publication of your paper via Science Express has been scheduled for 4 June 2015.

Best,

Jesse

Document ID: 0.7.1334.17510

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc:
Bcc:
Subject: Re: Urgent query
Date: Mon Jan 11 2016 14:28:46 EST
Attachments: NOAA_Global_2015_Climate Summary_DRAFT.doc

John,

Got your call -- here is a very prelim document. All data in except Boliva. This year the temperatures globally exceed 2014 breaking the record by the largest margin in our records.

Tom

On Mon, Jan 11, 2016 at 12:36 PM, (b)(6)@ostp.eop.gov> wrote:

Hi Tom –

Just left a voice message on your cellphone. This note is just an attempt to be sure you see my question. I need confirmation that the official NOAA/NASA analysis scheduled to come out on Jan 20 (as I understand it) will in fact confirm that 2015 surpassed 2014 as the warmest year on record globally. My reading of where we were as of mid-December is that this must surely be so, but I have been asked to double check because of interest in referring to this point in an important upcoming speech by a senior leader. Please get back to me as soon as you can. Many thanks!

John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology

Director, Office of Science and Technology Policy

--

Thomas R. Karl, L.H.D.

Tom

Sent from my iPhone

Begin forwarded message:

From: Katy Matthews - NOAA Federal <katy.matthews@noaa.gov>
Date: January 20, 2016 at 7:35:00 AM EST
To: Thomas Karl - NOAA Federal <thomas.r.karl@noaa.gov>, Michael Tanner - NOAA Federal <michael.tanner@noaa.gov>, Derek Arndt - NOAA Federal <Derek.Arndt@noaa.gov>, Jessica Blunden - NOAA Affiliate <jessica.blunden@noaa.gov>, John Ewald - NOAA Federal <john.ewald@noaa.gov>
Cc: Ahira Sanchez-Lugo - NOAA Federal <ahira.sanchez-lugo@noaa.gov>, Jake Crouch - NOAA Federal <jake.crouch@noaa.gov>
Subject: Re: FINAL Global Annual Press Highlights

[Redacted block containing (b)(5)]

[Redacted block containing (b)(5)]

Thanks -
Katy

On Wed, Jan 20, 2016 at 7:21 AM, Katy Matthews - NOAA Federal <katy.matthews@noaa.gov> wrote:

Tom, et al -

[Redacted block containing (b)(5)]

[Redacted block containing (b)(5)]

Thanks -
Katy

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Thomas Karl - NOAA Federal
(thomas.r.karl@noaa.gov) <thomas.r.karl@noaa.gov>
Cc: Wuebbles, Donald
(b)(6)@ostp.eop.gov>
Bcc:
Subject: Query about US spring-summer T since 1983
Date: Tue Feb 02 2016 10:25:31 EST
Attachments: image001.png
NIFC fire area 1983-2015.xlsx

Hi Tom –

Items on this page redacted under (b)(5)

(b)(5)

(b)(5)

Many thanks in advance for any help you can provide on this.

My best,

John

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology

Director, Office of Science and Technology Policy

From: Thomas Karl - NOAA Federal
<thomas.r.karl@noaa.gov>
To: Holdren, John P.
(b)(6)@ostp.eop.gov>
Cc: Wuebbles, Donald
(b)(6)@ostp.eop.gov>
Bcc:
Subject: Re: Query about US spring-summer T since 1983
Date: Tue Feb 02 2016 11:04:31 EST
Attachments: image001.png

Sure John,

(b)(5)

Tom

PS Is there a rush on this --- otherwise in may be a few days.

On Tue, Feb 2, 2016 at 10:25 AM, Holdren, John P. (b)(6)@ostp.eop.gov> wrote:

Hi Tom –

(b)(5)

(b)(5)

Many thanks in advance for any help you can provide on this.

My best,

John

Document ID: 0.7.1334.17498

From: Holdren, John P.
(b)(6)@ostp.eop.gov>
To: Dr. Kathryn Sullivan - NOAA Federal
<kathryn.sullivan@noaa.gov>
Cc: Dickinson, Tammy
(b)(6)@ostp.eop.gov>; Thomas.r.Karl@noaa.gov
<thomas.r.karl@noaa.gov>; wayne.higgins@noaa.gov
<wayne.higgins@noaa.gov>; laura.letson@noaa.gov
<laura.letson@noaa.gov>; (b)(6)@usgcrp.gov
(b)(6)@usgcrp.gov>; Dorgelo, Cristin
(b)(6)@ostp.eop.gov>
Bcc:
Subject: THE NCA FAC
Date: Wed Feb 03 2016 07:21:04 EST
Attachments: FAC National Assessment Adv Committee-OSTP recommendations-2.docx
image001.jpg

Dear Kathy --

I would like to thank NOAA for agreeing to establish a 15-member Federal Advisory Committee (FAC) to provide advice on USGCRP's Sustained National Climate Assessment Process. I would also like to recognize the effort that NOAA put into developing and vetting sets of 15 Tier One (Primary) candidates and 15 Tier Two (Alternate) candidates who represent a well-balanced consideration of expertise, geographic location, and other factors.

As you know, the FAC charter states that you, as the Under Secretary of Commerce for Oceans and Atmosphere, in consultation with the OSTP Director, shall select and appoint members. The Subcommittee on Global Change Research (SGCR) was invited to review the candidates, focusing primarily on the Tier One and Tier Two candidates, and provide recommendations to OSTP for my consideration. SGCR discussed the nominations and reached consensus on partially revised lists for the Tier One and Tier Two recommended candidates to serve on the FAC. The attached document contains their recommendations, with which I concur, and share here with you as part of our consultation process.

Please let me know if you would like to discuss.

My best,

JOHN P. HOLDREN, PhD

Assistant to the President for Science and Technology

Director, Office of Science and Technology Policy

Executive Office of the President of the United States

E-mail: (b)(6)@ostp.eop.gov

[REDACTED]
(b)(5)

[REDACTED]
(b)(5)

[REDACTED]
(b)(5)

[REDACTED]
(b)(5)

Rick Piltz
Director, Climate Science Watch
Government Accountability Project
1612 K St., N.W. Suite 1100
Washington, DC 20006

www.climatesciencewatch.org<<http://www.climatesciencewatch.org>>

Direct: (b)(6)

<Backgrounder-Cato-Addendum-
v2-15oct2012.docx>

Dr. Anthony C. Janetos, Director
Joint Global Change Research Institute
Pacific Northwest National Laboratory/University of Maryland
5825 University Research Court, Suite 3500
College Park, MD 20740
USA

Phone: (b)(6)

Fax: 301-314-6719

Email: anthony.janetos@pnnl.gov<<mailto:anthony.janetos@pnnl.gov>>

Web: www.globalchange.umd.edu<<http://www.globalchange.umd.edu>>

Please note slight change in email address to pnnl.gov<<http://pnnl.gov>>

On Mon, Oct 15, 2012 at 1:57 PM, Holdren, John P. (b)(6) <john.p.holdren@epa.gov> wrote:

Kathy et al. --

(b)(5)

Cheers,
John

--

Thomas R. Karl, L.H.D.

Director, National Climatic Data Center

Chair of the Subcommittee on Global Change Research

Veatch-Baley Federal Building
151 Patton Avenue
Asheville, NC 28801-5001
Tel: (828) 271-4476
Fax: (828) 271-4246

Thomas.R.Karl@noaa.gov



May 21, 2018

Bill Marshall
425 Third St., SW
Suite 800
Washington, DC 20024

Re: FOIA Request No. DOC-NOAA-2017-000580

Dear Mr. Marshall:

This is in reference to the above-captioned FOIA request # **DOC-NOAA-2017-000580** sent to NOAA dated February 9, 2017, in which you requested:

Any and all communications between Thomas Karl and John Holdren between January 20, 2009 through January 20, 2017.

Enclosed are some corrected documents from release 3, 4 and 5 that are in response to your challenged documents. These records are accessible via FOIAOnline.

We are releasing 56 pages responsive to this request as follows:

- All 56 pages were partially redacted under FOIA Exemptions (b)(5), 5 U.S.C. § 552(b)(5), which exempts from disclosure “inter-agency or intra-agency memorandums or letters that are both predecisional and deliberative”; and (b)(6), 5 U.S.C. 552(b)(6), which exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

Information on Appeals

Although we do not consider this to be a denial of your request, you are granted appeal rights for this determination. Your appeal must be received within 90 calendar days of the date of the denial letter.

Your appeal may be sent by the following methods:

- By email to FOIAAppeals@doc.gov.
- By FOIAOnline, if you have an account at <https://foiaonline.regulations.gov>.
- If sending by mail please address your appeal to:



Assistant General Counsel for Employment, Litigation, and Information
U.S. Department of Commerce Room 5896
1401 Constitution Ave. NW
Washington, DC 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, 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;
- Your statement explaining why the determination was in error; and
- The notation "Freedom of Information Act Appeal" 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
8601 Adelphi Road, Room 2510
College Park, MD 20740-6001
Email: ogis@nara.gov
Phone: 301-837-1996

Toll-free: 1-877- 684-6448

Department of Commerce receive correspondence only on business days from 8:30 a.m. to 5:00 p.m., Eastern Time. FOIA appeals received outside of our normal business hours will be deemed received on the next business day.

If you have any questions, please contact Maria Williams, NESDIS FOIA Coordinator, at maria.williams@noaa.gov, or the NOAA FOIA Public Liaison Robert Swisher at robert.swisher@noaa.gov .

Regards,

GRAFF.MARK.HYRU
M.1514447892

Digitally signed by
GRAFF.MARK.HYRU.M.1514447892
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI,
ou=OTHER, cn=GRAFF.MARK.HYRU.M.1514447892
Date: 2018.05.21 20:22:53 -04'00'

Mark H. Graff
FOIA Officer/
Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric
Administration

DOC-NOAA-2017-000580

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, May 22, 2018 2:52 PM
To: Lola Stith - NOAA Affiliate
Subject: Fwd: Freedom of Information Act request (FOIA) Louisiana Offshore Oil Port
Attachments: SC_FOIA NOAA_LA Offshore Oil Port_04_18_2018_FINAL.pdf

Hi Lola,

(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: David Abell <david.abell@sierraclub.org>
Date: Tue, May 22, 2018 at 2:39 PM
Subject: Fwd: Freedom of Information Act request (FOIA) Louisiana Offshore Oil Port
To: mark.graff@noaa.gov

see attached: original email and FOIA request



David Abell
Paralegal Specialist
Environmental Law Program
2101 Webster St., Suite 1300
Oakland, CA 94612
Phone: (415) 977-5764
Fax: (510) 208-3140

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From: David Abell <david.abell@sierraclub.org>
Date: Wed, Apr 18, 2018 at 5:19 PM

Subject: Freedom of Information Act request (FOIA) Louisiana Offshore Oil Port

To: FOIA@noaa.gov

Dear NOAA FOIA Officer:

Attached, please find Sierra Club's FOIA request.

Sincerely,



David Abell

Paralegal Specialist
Environmental Law Program
2101 Webster St., Suite 1300
Oakland, CA 94612
Phone: (415) 977-5764
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April 18, 2018

Via email

NOAA FOIA Officer
National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910
(301) 628-5658
Email: FOIA@noaa.gov

Re: Freedom of Information Act request – Louisiana Offshore Oil Port

Dear NOAA FOIA Officer:

On behalf of the Sierra Club, I am writing to request that the National Oceanic and Atmospheric Administration (“NOAA”) provide copies of the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the NOAA regulations set forth at 15 C.F.R. § 4.1, *et seq.* This request is sent to you because you were identified as the proper person to receive such requests. If this request should be directed at another person, please forward this request to that person.

Sierra Club is the nation’s oldest grassroots organization. It has 822,000 members and 3 million supporters nationwide. Sierra Club is dedicated to the protection and preservation of the natural and human environment. Sierra Club’s purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of industrial discharges of air and water pollutants, development of natural resources, and the use of fossil fuels. It has been conducting multiple public campaigns around these issues, including educating the public about deep-water drilling and the transportation of fossil fuels. This request is made on behalf of those education campaigns, as well as the organization’s long-standing interest in government accountability and transparency.

Sierra Club Requests the Following Records:¹

Requesting the following documentation relating to the Louisiana Offshore Oil Port² between 2008 to present:

1. All Clean Water Act and Clean Air Act permitting files, including permit applications and permits;
2. All air emission or water discharge compliance or monitoring reports; all documents related to the discharge of any oil or hazardous substance, or any other pollutant;
3. All records reflecting communications within the National Oceanic and Atmospheric Administration (“NOAA”), including the National Marine Fisheries Service, regarding the Louisiana Offshore Oil Port’s compliance with the Clean Water Act, the Clean Air Act, NEPA, or the Endangered Species Act;
4. All records reflecting communications between the National Oceanic and Atmospheric Administration (“NOAA”), including the National Marine Fisheries Service, and any of the following entities regarding the Louisiana Offshore Oil Port’s compliance with the Clean Water Act, the Clean Air Act, NEPA, or the Endangered Species Act:
 - a. U.S. EPA;
 - b. Bureau of Safety and Environmental Enforcement;
 - c. U.S. Department of Transportation—Maritime Administration;
 - d. Bureau of Ocean Energy Management;
 - e. U.S. Coast Guard;
 - f. Marathon Oil & Gas Company;
 - g. Valero;
 - h. Shell Oil Company;
 - i. LOOP LLC; or
 - j. Any other owner or operator of the Louisiana Offshore Oil Port;
5. All documentation and communications relating to whether the Louisiana Offshore Oil Port is categorically excluded from compliance with the Clean Water Act, Clean Air Act, NEPA, or Endangered Species Act.
6. All documents relating to any impact of the Louisiana Offshore Oil Port on marine animal or plant species.

Exempt Records

Should you decide to invoke a FOIA exemption with regard to any of the requested

¹ “Records” means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, e-mails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of the National Oceanic and Atmospheric Administration, and all of its Offices, Regions and other subdivisions.

² The Louisiana Offshore Oil Port is a deepwater crude oil transfer and storage terminal about 18 miles off the coast near Port Fourchon, Louisiana.

records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club at the address listed below.

Fee Waiver Request

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 15 C.F.R. § 4.11(l). The Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA. The Sierra Club is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Instead, the Sierra Club intends to maintain public websites containing the requested information, so the public can access this important information regarding pollution in their communities.

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). The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as Sierra Club access to government records without payment of fees. *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (fee waiver provision 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.")).

As explained below, this FOIA request satisfies the factors listed in NOAA's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 15 C.F.R. § 4.11(l)(1).

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

The requested records relate to NOAA programs, projects, and observations. These activities are unquestionably “identifiable operations or activities of the government.” The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by a federal agency will meet this threshold” of identifiable operations or activities of the government.

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

The Department of Justice Freedom of Information Act Guide makes it clear that, in the Department of Justice’s view, the “likely to contribute” determination hinges in part on whether the requested documents provide information that is not already in the public domain. This information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of your agencies’ oversight of the Louisiana Offshore Oil Port.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

The Sierra Club and its members have long-standing experience and expertise in the subject area of FOIA requests, specifically, issues related to the Clean Air Act, the Clean Water Act, and the development and use of energy resources and protection of endangered species. Sierra Club also has a long standing interest in government accountability and transparency.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on the Club’s website, emailing and list serve distribution to our members across the U.S., and via public meetings and events. Every year the Sierra Club website receives 26,298,200 unique visits and 30,358,239 page views; on average, the site gets 72,049 visits per day. Sierra Magazine is a bi-monthly magazine with a printed circulation of approximately 650,000 copies. Sierra Club Insider, an electronic newsletter, is sent to nearly 3,000,000 people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system. In the past, the Sierra Club has published, posted, and disseminated numerous stories on coal and coal power plants regarding their impacts on health, the environment and alternative energy. This includes information on our various webpages, such as our [Beyond Coal](#)

[Campaign](#) portal, our [Clean Energies Solutions](#) portal and our press releases. Sierra Club intends to share the information received from this FOIA request with the public.³

Sierra Club intends to share the information received from this FOIA request with our impacted members across the country, the media, and other groups who share a common interest in protecting our coastal and offshore environments.

Sierra Club unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the “public-at-large.”

4. The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent.

The records requested will contribute to the public understanding of NOAA’s “operations and activities,” as the requested records include information regarding NOAA’s oversight of the Louisiana Offshore Oil Port. The disclosure of the requested records is essential to the public’s understanding of NOAA’s operations and activities. After disclosure of these records, the public understanding of NOAA’s activities will be significantly enhanced. The requirement that disclosure must contribute “significantly” to the public understanding is therefore met.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

The Sierra Club has no commercial interest in the requested records. Nor does it have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. The Sierra Club is a tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of the Sierra Club’s mission to inform the public on matters of vital importance to the environment and public health.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”

³ For example, Sierra Club sought information about coal export and permitting activities in Oregon via a state public records act request at the Port of Coos Bay. All correspondence is published online and has received extensive media attention from press releases on the subject. See Sierra Club Challenges Dirty and Dangerous Fossil Fuel Exports in Oregon, <http://content.sierraclub.org/environmentallaw/lawsuit/2013/sierra-club-challenges-dirty-and-dangerous-fossil-fuel-exports-oregon>. Sierra Club also recently publicized the results of its FOIA requests regarding agency job freezes, a story that was picked up by the Washington Post. Alexander Rony, *Trump Admin Policy Leaves 700 CDC Jobs Vacant*, The Planet, <http://www.sierraclub.org/planet/2017/05/trump-admin-policies-leave-700-cdc-jobs-vacant>; Lena H. Sun, *Nearly 700 vacancies at CDC because of Trump administration’s hiring freeze*, The Washington Post, https://www.washingtonpost.com/news/to-your-health/wp/2017/05/19/nearly-700-vacancies-at-cdc-because-of-trump-administration-hiring-freeze/?utm_term=.6c2e70d8581e.

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the “public interest” in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, the Sierra Club has no commercial interest in the requested records. Disclosure of this information is not “primarily” in the Sierra Club’s commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of NOAA’s activities and oversight of the Louisiana Offshore Oil Port.

The Sierra Club respectfully requests, because the public will be the primary beneficiary of this requested information, that NOAA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A). In the event that your agency denies a fee waiver, please send a written explanation for the denial. Also, please continue to produce the records as expeditiously as possible, but in any event no later than the applicable FOIA deadlines.

Format of Requested Records

Under FOIA, you are obligated to provide 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.”) Please provide all records in an electronic .pdf format that is text-searchable and OCR-formatted. Portfolios and embedded files within files are not readily-accessible. Please do not provide the records in a single or “batched” .pdf file.

Record Delivery

In responding to this request, please comply with all relevant deadlines and other obligations set forth in FOIA and the agency’s regulations. 5 U.S.C. § 552(a)(6)(A)(i); 15 C.F.R. § 4.6. Please produce the records on a rolling basis; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce.

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at (415) 977-5764 or by e-mail at david.abell@sierraclub.org.

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David Abell
Sierra Club
Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612

David Abell

From: David Abell
Sent: Tuesday, May 22, 2018 2:40 PM
To: mark.graff@noaa.gov
Subject: Fwd: Freedom of Information Act request (FOIA) Louisiana Offshore Oil Port
Attachments: SC_FOIA NOAA_LA Offshore Oil Port_04_18_2018_FINAL.pdf

see attached: original email and FOIA request



David Abell
Paralegal Specialist
Environmental Law Program
2101 Webster St., Suite 1300
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April 18, 2018

Via email

NOAA FOIA Officer
National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910
(301) 628-5658
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Re: Freedom of Information Act request – Louisiana Offshore Oil Port

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The Sierra Club respectfully requests, because the public will be the primary beneficiary of this requested information, that NOAA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A). In the event that your agency denies a fee waiver, please send a written explanation for the denial. Also, please continue to produce the records as expeditiously as possible, but in any event no later than the applicable FOIA deadlines.

Format of Requested Records

Under FOIA, you are obligated to provide 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.”) Please provide all records in an electronic .pdf format that is text-searchable and OCR-formatted. Portfolios and embedded files within files are not readily-accessible. Please do not provide the records in a single or “batched” .pdf file.

Record Delivery

In responding to this request, please comply with all relevant deadlines and other obligations set forth in FOIA and the agency’s regulations. 5 U.S.C. § 552(a)(6)(A)(i); 15 C.F.R. § 4.6. Please produce the records on a rolling basis; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce.

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at (415) 977-5764 or by e-mail at david.abell@sierraclub.org.

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David Abell
Sierra Club
Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, May 22, 2018 12:30 PM
To: Stacey Nathanson - NOAA Federal; Robert Hogan; John Almeida - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Robert Swisher - NOAA Federal
Subject: DOC-NOAA-2018-000428
Attachments: All Combined RR Emails REDACTED_Redacted.pdf; All Combined RR Emails CLEAN.pdf; 6th IR FAL mhg signed.pdf

Hey Guys,

(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 (O)
(b)(6) [REDACTED] (C)

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U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

May 22, 2018

Via FOIAonline

Mr. Ryan Mulvey
Cause of Action Institute
1875 Eye St. NW Suite 800
Washington, DC 20006

Re: Request No. DOC-NOAA-2018-000428

Dear Mr. Mulvey:

This letter is in response to your Freedom of Information Act (FOIA) request which was perfected in FOIAonline on December 11, 2017. You requested:

1. All weekly reports, charts, and transmittal e-mails that identify “high visibility” or otherwise “sensitive” FOIA requests. The time period for this item of the request is December 2015 to the present.
2. All memoranda, guidelines, procedures, processing metrics, or communications concerning any type of “sensitive review,” or handling of “high visibility” FOIA requests, including politically-sensitive requests or those submitted by news-media requesters. The scope of this item includes records defining or describing “high visibility” requests or pertaining to the justification and/or genesis of the weekly reports sought in Item One. The time period for this item of the request is January 2010 to the present.
3. All communications (including case summaries, memoranda, guidelines, or procedures) concerning the tracking of “transition cases,” i.e., FOIA requests pertaining to the incoming Trump Administration. The scope of this item includes records of correspondence between and amongst NOAA and (1) the Department of Commerce, (2) the Executive Office of the President (including the Office of the White House Counsel), (3) the Republican National Committee, or (4) Donald Trump’s presidential transition team. The time period for this item of the request is November 9, 2016 to the present.
4. All communications between NOAA and the Department of Commerce Office of the Inspector General concerning audits, investigations, inspections, evaluations, or inquiries into the involvement of non-career officials in the FOIA process (e.g., reviewing or approving proposed FOIA productions, etc.). The time periods for this item of the request are (1) August 23, 2010 to September 21, 2010 and (2) June 23, 2015 to August 14, 2015. * * * Please see the attached PDF for a complete description of CoA Institute's FOIA request.

We have located 12 additional files responsive to your FOIA request, which have been combined into a single .pdf document for release. These files are the Email transmissions discussing various FOIA reports. These records have been partially withheld pursuant to FOIA Exemption

5, including the Deliberative Process Privilege and Attorney Client Privilege, as well as Exemption 6, which has been used to withhold information that, if disclosed, would cause an unwarranted invasion of personal privacy. A copy of the responsive records is enclosed. We continue to process your request, and will provide additional interim releases as responsive records are located and processed for production to you.

There will be no charge for processing this FOIA request.

You have the right to file an administrative appeal if you are not satisfied with our response to your 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 Employment, Litigation, and Information
U.S. Department of Commerce
Room 5896
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, 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 FOIA request,
- our response to your FOIA request,
- “Freedom of Information Act Appeal” must appear on your appeal letter. It should also be written on your envelope or e-mail subject line.

FOIA appeals posted to the e-mail box, 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 any 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.HYRUM
.1514447892

Mark H. Graff
NOAA FOIA Officer
National Oceanic and Atmospheric Administration

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: 2018.05.22 12:21:08 -04'00'

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Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Fwd: October 26 Legal Experts Call Summary

1 message

Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Thu, Oct 27, 2016 at 8:07 AM

To: Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov>

Hey Rob/Dennis,

(b)(5) DPP

DOC has not yet agreed to a Certificate of Appreciation or other recognition at the BOU level. Could CIO management sign a Certificate of Appreciation/Time Off Award or something similar for some outstanding SO/LO FOIA players? I think it has the potential to transform the working relationship with the SO/LOs to have CIO management recognize and appreciate the efforts from Coordinators and Liaisons, most of whom are only doing FOIA as an ancillary duty, and yet put forth immense effort to reign in NOAA's growing FOIA backlog before end-of-fy.

(b)(5) DPP

Thoughts?

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

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

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Thu, Oct 27, 2016 at 7:58 AM
Subject: Re: October 26 Legal Experts Call Summary
To: John Almeida - NOAA Federal <bhn.almeida@noaa.gov>

Good call--I agree. I've reached out to DOC on the awards, and they said they'd consider how to go forward with them. Let me also reach out to CIO management and see their posture as well.

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

On Thu, Oct 27, 2016 at 7:55 AM, John Almeida - NOAA Federal <bhn.almeida@noaa.gov> wrote:
Mark, this looks fine.

(b)(5) DPP

On Thu, Oct 27, 2016 at 7:25 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
Hi John,

As we discussed, attached is a summary of the legal experts call we had yesterday covering the three issues we discussed. Let me know if you want any changes or revisions to this before distributing to the group. I'm also including another copy of the September Monthly FOIA Report which gives the basis for the end of year metrics I discussed at the end of the call.

Also, I'll add Alaska's topic that Lauren had to the material to go over for the next call. Talk to you soon--

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



Mark Graff - NOAA Federal <mark.graff@noaa.gov>

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1 message

Mark Graff - NOAA Federal <mark.graff@noaa.gov>
To: Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>
Cc: Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov>

Thu, Oct 27, 2016 at 10:07 AM

(b)(5) DPP

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

On Thu, Oct 27, 2016 at 10:03 AM, Robert Swisher - NOAA Federal <robert.swisher@noaa.gov> wrote:
I'm all for it. I like the idea transforming working relationships idea...I will broach the idea of a certificate from the NOAA OCIO for these two individuals.

On Thu, Oct 27, 2016 at 8:07 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
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National Oceanic and Atmospheric Administration

(301) 628-5658 (O)

(b)(6) (C)

--

Rob Swisher
Director, Governance and Portfolio Division
NOAA OCIO
301-628-5755

(b)(6)



Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Re: Quick Note

1 message

Mark Graff - NOAA Federal <mark.graff@noaa.gov>
To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Wed, Oct 21, 2015 at 10:01 AM

Roger that--this is great. Anything we left off can be added for a later meeting.

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

On Wed, Oct 21, 2015 at 9:16 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Mark - I'm recapping these off the top of my head as in my haste to leave yesterday, I misplaced the paper that I wrote them all out. Hope you find this helpful and please let me know if you need anything else.

Best,

Lola

Process Improvements:

- Fee waiver determinations (new use of discretionary/partial grants) and processing
 - Complex requests vs. Simple requests
 - OGIS mediation
 - Tolling – When to use it
- (b)(5) DPP
- Narrowing the scope of requests – FO's assistance
 - FOnline changes – Use of the "OTHER" category for final disposition
 - Copyright material

On Wed, Oct 21, 2015 at 9:32 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Completely agree. Also, as you'll see in a minute, I've included in the slideshow for the FOIA Professionals meeting the breakdown of where we finished at for FY15 on those metrics and what we have to get to in order to meet the goals for FY16.

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

On Wed, Oct 21, 2015 at 9:06 AM, Robert Swisher - NOAA Federal <robert.swisher@noaa.gov> wrote:

Mark,

Per our quick discussion this morning, Perhaps we can add the "time/days to complete" metric and the 10% backlog metric in the Monthly FOIA report for FY16.....

--

Rob Swisher
Director, Governance and Portfolio Division

NOAA OCIO
301-628-5755

(b)(6)

--

Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c) 703.298.8005
lola.m.stith@noaa.gov



Mark Graff - NOAA Federal <mark.graff@noaa.gov>

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To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Wed, Oct 21, 2015 at 10:07 AM

(b)(5) DPP

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Rob Swisher
Director, Governance and Portfolio Division
NOAA OCIO
[301-628-5755](tel:301-628-5755)

(b)(6)

--

Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c) 703.298.8005
lola.m.stith@noaa.gov



Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Re: June 2017 Monthly FOIA Report

1 message

Mark Graff - NOAA Federal <mark.graff@noaa.gov>
To: "Bogomolny, Michael (Federal)" <MBogomolny@doc.gov>

Wed, Jul 12, 2017 at 7:05 AM

(b)(5) DPP/ACP
(b)(5) DPP/ACP

(301) 628-5658 (O)

(b)(6) (C)

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On Tue, Jul 11, 2017 at 6:07 PM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

In case it is helpful for the
(b)(5) DPP/ACP

(b)(5) DPP/ACP

-bogo

Additionally, Cause of Action filed a new FOIA lawsuit premised on constructive denial (attached). The underlying two requests at issue in the suit respectively sought (1) records about GC's guidance on determining Google Chat and Google Hangout records are not agency records and will not be retained, and (2) records of communications by NOAA employees serving on the NEFMC during the week of April 17-April 24, 2017, including media such as text messages, Google Chat, and Hangout discussions.

3 attachments

NOAA_UnifiedMessagingService_Operational_Procedures.pdf
481K

Q and A on the Guidance.pdf
602K



Guidance from GC to UMS.pdf

502K



Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Re: New FOIA

1 message

Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Wed, Feb 15, 2017 at 11:56 AM

To: "Davidson, Hillary (Federal)" <HDavidson@doc.gov>

Cc: "Gustafson, Kristen (Federal)" <Kristen.L.Gustafson@noaa.gov>, "Wilds, Troy (Federal)" <Troy.Wilds@noaa.gov>, "Moller, Robert (Federal)" <Robert.Moller@noaa.gov>, "Smullen, Scott (Federal)" <Scott.Smullen@noaa.gov>, "Lowery, Ruth Ann (Federal)" <RuthAnn.Lowery@noaa.gov>, "Stanley, Rose (Federal)" <Rose.Stanley@noaa.gov>, "Vieira, Rodney (Federal)" <Rod.Vieira@noaa.gov>, "Swisher, Robert (Federal)" <Robert.Swisher@noaa.gov>, "Stith, Lola (Contractor)" <Lola.M.Stith@noaa.gov>

You bet. I'll plan on the call.

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, Feb 15, 2017 at 11:22 AM, Davidson, Hillary (Federal) <HDavidson@doc.gov> wrote:

Yes – I should be able to join.

From: Kristen Gustafson - NOAA Federal [mailto:kristen.l.gustafson@noaa.gov]**Sent:** Wednesday, February 15, 2017 11:14 AM**To:** Graff, Mark (Federal) <Mark.Graff@noaa.gov>**Cc:** Wilds, Troy (Federal) <Troy.Wilds@noaa.gov>; Moller, Robert (Federal) <Robert.Moller@noaa.gov>;

Smullen, Scott (Federal) <Scott.Smullen@noaa.gov>; Lowery, Ruth Ann (Federal)

<RuthAnn.Lowery@noaa.gov>; Stanley, Rose (Federal) <Rose.Stanley@noaa.gov>; Vieira, Rodney (Federal)

<Rod.Vieira@noaa.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Swisher, Robert (Federal)

<Robert.Swisher@noaa.gov>; Stith, Lola (Contractor) <Lola.M.Stith@noaa.gov>

Subject: Re: New FOIA

Good morning all,

Would folks be available at 4:00pm today for a quick check-in call to discuss the status of the FOIA request? We can use 877-929-1180, Pin:

b6

Thanks,

Kristen

On Thu, Feb 9, 2017 at 10:54 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Good Morning,

As a follow up to our discussion yesterday evening,

(b)(5) DPP/ACP

(b)(5) DPP/ACP

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

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On Wed, Feb 8, 2017 at 4:18 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

For everyone's reference during the call, attached is a copy of the new incoming request. Also attached is the earlier original related request from Judicial Watch along with the associated Complaint in DDC currently in litigation. Talk to you all soon,

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, Feb 8, 2017 at 4:06 PM, Troy Wilds - NOAA Federal <troy.wilds@noaa.gov> wrote:

I'm on calls until 5:30. Just fill me in, please.

On Wed, Feb 8, 2017 at 4:05 PM, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov> wrote:

Let's talk about the new FOIA request at 4:30pm. We can use the NOAA GCHQ conference line: **877-929-1180**, Pin: **b6**

Thanks,

Kristen

On Wed, Feb 8, 2017 at 3:05 PM, Robert Moller - NOAA Federal <robert.moller@noaa.gov> wrote:

Hi all:

Mark Graff mentioned in his monthly FOIA report that we got a FOIA request today from Judicial Watch requesting all communications between John Holdren and Tom Karl for the past seven years. It may be good to pull together a quick call with Mark, Comms, UnSec, GC, and others as you see fit to discuss our response.

Thanks,

Rob

--

Robert Moller

Deputy Director

Office of Legislative and Intergovernmental Affairs

National Oceanic and Atmospheric Administration

U.S. Department of Commerce

1401 Constitution Ave., NW

Washington, DC 20230

Phone: [202-482-3596](tel:202-482-3596)

Fax: [202-482-4960](tel:202-482-4960)

--

Kristen L. Gustafson

Deputy General Counsel

General Counsel's Office

National Oceanic and Atmospheric Administration

U.S. Department of Commerce

Kristen.L.Gustafson@noaa.gov

Office: 202-482-1588

Cell (b)(6)

--

Troy S. Wilds

Chief of Staff (Acting) - NOAA

Office: (202) 482-3193

Ce (b)(6)

National Oceanic and Atmospheric Administration

1401 Constitution Ave., NW

Washington, D.C. 20230

--

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Office: 202-482-1588

Cell (b)(6)



Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Re: New FOIA

1 message

Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Thu, Feb 9, 2017 at 10:54 AM

To: Troy Wilds - NOAA Federal <troy.wilds@noaa.gov>, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>, Robert Moller - NOAA Federal <robert.moller@noaa.gov>, Jeff Dillen - NOAA Federal <jeff.dillen@noaa.gov>, Scott Smullen <scott.smullen@noaa.gov>, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>, Rose Stanley - NOAA Federal <rose.stanley@noaa.gov>, Rod Vieira <rod.vieira@noaa.gov>, Hillary Davidson <HDavidson@doc.gov>, jmeyers@doc.gov
Cc: Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Good Morning,

As a follow up to our discussion yesterday evening,

(b)(5) DPP/ACP

(b)(5) DPP/ACP

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, Feb 8, 2017 at 4:18 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

For everyone's reference during the call, attached is a copy of the new incoming request. Also attached is the earlier original related request from Judicial Watch along with the associated Complaint in DDC currently in litigation. Talk to you all soon,

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
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I'm on calls until 5:30. Just fill me in, please.

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Let's talk about the new FOIA request at 4:30pm. We can use the NOAA GCHQ conference line: 877-929-1180, Pin: b6

Thanks,
Kristen

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Robert Moller
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National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230
Phone: [202-482-3596](tel:202-482-3596)
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--

Kristen L. Gustafson
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General Counsel's Office
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
Kristen.L.Gustafson@noaa.gov
Office: [202-482-1588](tel:202-482-1588)
Cell **(b)(6)**

--

Troy S. Wilds
Chief of Staff (Acting) - NOAA
Office: [202-482-3193](tel:202-482-3193)
Cel **(b)(6)**

National Oceanic and Atmospheric Administration
1401 Constitution Ave., NW
Washington, D.C. 20230



Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Re: New FOIA

1 message

Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Wed, Feb 8, 2017 at 4:18 PM

To: Troy Wilds - NOAA Federal <troy.wilds@noaa.gov>, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>, Robert Moller - NOAA Federal <robert.moller@noaa.gov>, Jeff Dillen - NOAA Federal <jeff.dillen@noaa.gov>, Scott Smullen <scott.smullen@noaa.gov>, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>, Rose Stanley - NOAA Federal <rose.stanley@noaa.gov>, Rod Vieira <rod.vieira@noaa.gov>, Hillary Davidson <HDavidson@doc.gov>, jmeyers@doc.gov
Cc: Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

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Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
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Thanks,
Kristen

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Thanks,

Rob

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National Oceanic and Atmospheric Administration
1401 Constitution Ave., NW
Washington, D.C. 20230

3 attachments



New Judicial Watch Request.pdf

107K



Original Judicial Watch FOIA request_cert mail recpt copy.pdf

522K



Judicial Watch DDC complaint.pdf

108K



Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Re: New FOIA

1 message

Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Wed, Feb 15, 2017 at 4:50 PM

To: Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>

Cc: Troy Wilds - NOAA Federal <troy.wilds@noaa.gov>, Robert Moller - NOAA Federal <robert.moller@noaa.gov>, Scott Smullen <scott.smullen@noaa.gov>, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>, Rose Stanley - NOAA Federal <rose.stanley@noaa.gov>, Rod Vieira <rod.vieira@noaa.gov>, Hillary Davidson <HDavidson@doc.gov>, Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Hello Everyone,

As discussed, this is the text of the request for additional information sent to Judicial Watch outlining what they need to provide to satisfy the requirements of a fee waiver. The correspondence was sent through the FOIAOnline system, so it is not available in an attachment. However, the text is copied below:

02/09/2017 07:12 AM

FOIA Request: DOC-NOAA-2017-000580

Good Morning,

Additional information is necessary to adjudicate your request for a full waiver of fees. Specifically, you have requested all communications between Dr. Thomas Karl and OSTP Director John Holdren over a period of 8 years.

Pursuant to 15 CFR 4.11(l)(2)(iii), in order to adjudicate your fee waiver request, it is necessary to gauge the contribution to an understanding of the subject by the public likely to result from disclosure. In that request, you have not sought a subject matter, a topic of email discussion, keywords for search filters, or any other scope definition that would enable a determination of the significance of the public interest in the records you are seeking.

Similarly, the fee waiver requirements of 15 CFR 4.11(l)(2)(iv) require an analysis of the significance of the contribution to the public understanding. Without defining the subject of the records being sought, you have also failed to identify a segment of individuals interested in the dissemination of these records, and have failed to explain how this particular set of records could significantly increase that segment of interested individual's understanding.

Please provide additional information necessary to identify the subject of the records being sought so that any significant public interest in the records can be determined, and so that the segment of interested individuals that would benefit through your disclosure of the records can be identified, as well as the increased understanding that would result through disclosure. This information is necessary in order to adjudicate your fee waiver request. The processing of your request will be tolled pending your response.

Mark Graff

NOAA FOIA Officer

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, Feb 15, 2017 at 11:13 AM, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov> wrote:

Good morning all,

Would folks be available at 4:00pm today for a quick check-in call to discuss the status of the FOIA request? We can use 877-929-1180, Pin: **b6**

Thanks,
Kristen

On Thu, Feb 9, 2017 at 10:54 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Good Morning,

As a follow up to our discussion yesterday evening,

(b)(5) DPP/ACP

(b)(5) DPP/ACP

Mark H. Graff
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Rob

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--

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Office: [202-482-1588](tel:202-482-1588)
Cel **(b)(6)**

--

Troy S. Wilds
Chief of Staff (Acting) - NOAA
Office: [202-482-3193](tel:202-482-3193)
Cel **(b)(6)**

National Oceanic and Atmospheric Administration
1401 Constitution Ave., NW
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--

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General Counsel's Office
National Oceanic and Atmospheric Administration
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Kristen.L.Gustafson@noaa.gov
Office: [202-482-1588](tel:202-482-1588)
Cell **(b)(6)**



Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Re: Quick Note

1 message

Mark Graff - NOAA Federal <mark.graff@noaa.gov>
To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Wed, Oct 21, 2015 at 10:08 AM

But of course.

b6

b6

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

(b)(6) (C)

On Wed, Oct 21, 2015 at 10:06 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> 1 rote:

Also...

b6

b6

Very much appreciated!

Lola

On Wed, Oct 21, 2015 at 10:04 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> 1 rote:

Roger that--this is great. Anything 1 e left off can be added for a later meeting.

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

(b)(6) (C)

On Wed, Oct 21, 2015 at 9:46 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> 1 rote:

Hi Mark - I'm recapping these off the top of my head as in my haste to leave yesterday, I misplaced the paper that I wrote them all out. Hope you find this helpful and please let me know if you need anything else.

Best,

Lola

Process Improvements:

- Fee waiver determinations (new use of discretionary/partial grants) and processing
- Complex requests vs. Simple requests
- OGIS mediation
- Tolling – When to use it

(b)(5) DPP

- Narrowing the scope of requests – FO's assistance
- FOnline changes – Use of the "OTHER" category for final disposition
- Copyright material

On Wed, Oct 21, 2015 at 9:32 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> 1 rote:

Completely agree. Also, as you'll see in a minute, I've included in the slidesho1 for the FOIA Professionals meeting the breakdo1 n of 1 here 1 e finished at for FY15 on those metrics and 1 hat 1 e have to get to in order to meet the goals for FY16.

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

On Wed, Oct 21, 2015 at 9:06 AM, Robert S1 isher - NOAA Federal <robert.s1 isher@noaa.gov> 1 rote:

Mark,

Per our quick discussion this morning, Perhaps 1 e can add the "time/days to complete" metric and the 10% backlog metric in the Monthly FOIA report for FY16.....

--

Rob S1 isher
Director, Governance and Portfolio Division
NOAA OCIO
301-628-5755

(b)(6)

--

Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c) 703.298.8005
lola.m.stith@noaa.gov

--

Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c) 703.298.8005
lola.m.stith@noaa.gov



Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Fwd: FW: FOIA REQUEST #DOC-NOAA-2015-000295 - Fwd: Queen Conch Litigation

1 message

Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Mon, Apr 24, 2017 at 3:45 PM

(b)(5) DPP/ACP

(301) 628-5658 (O)

(b)(6) (C)

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

From: **Bogomolny, Michael (Federal)** <MBogomolny@doc.gov>

Date: Mon, Apr 24, 2017 at 3:00 PM

Subject: FW: FOIA REQUEST #DOC-NOAA-2015-000295 - Fwd: Queen Conch Litigation

To: "Graff, Mark (Federal)" <Mark.Graff@noaa.gov>

(b)(5) DPP/ACP

-bogo

From: Bogomolny, Michael (Federal)

Sent: Monday, April 24, 2017 2:48 PM

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

Cc: Crable, Trent (ENRD) <Trent.Crable@usdoj.gov>; Grimes, Shepherd (Federal)

<Shepherd.Grimes@noaa.gov>; Lowery, Iris (Federal) <Iris.Lowery@noaa.gov>; Smit-Brunello, Monica (Federal)

<Monica.Smit-Brunello@noaa.gov>; Issenberg, Adam (Federal) <Adam.Issenberg@noaa.gov>; Vieira, Rodney

(Federal) <Rod.Vieira@noaa.gov>

Subject: RE: FOIA REQUEST #DOC-NOAA-2015-000295 - Fwd: Queen Conch Litigation

(b)(5) DPP/ACP

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

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From: Michael Mclemore - NOAA Federal [<mailto:michael.mclmore@noaa.gov>]

Sent: Monday, April 24, 2017 1:53 PM

To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>

Cc: Crable, Trent (ENRD) <Trent.Crable@usdoj.gov>; Grimes, Shepherd (Federal) <Shepherd.Grimes@noaa.gov>; Lowery, Iris (Federal) <Iris.Lowery@noaa.gov>; Smit-Brunello, Monica (Federal) <Monica.Smit-Brunello@noaa.gov>; Issenberg, Adam (Federal) <Adam.Issenberg@noaa.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>

Subject: Re: FOIA REQUEST #DOC-NOAA-2015-000295 - Fwd: Queen Conch Litigation

Thanks, Bogo.

(b)(5) DPP/ACP

(b)(5) DPP/ACP

Mike

On Mon, Apr 24, 2017 at 1:48 PM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

(b)(5) DPP/ACP

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

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-----Original Message-----

From: Bogomolny, Michael (Federal)
Sent: Thursday, April 20, 2017 6:32 PM
To: 'Crabbe, Trent (ENRD)' <Trent.Crabbe@usdoj.gov>; Mclemore, Michael (Federal) <Michael.Mclemore@noaa.gov>
Cc: Grimes, Shepherd (Federal) <Shepherd.Grimes@noaa.gov>; Lowery, Iris (Federal) <Iris.Lowery@noaa.gov>; Smit-Brunello, Monica (Federal) <Monica.Smit-Brunello@noaa.gov>
Subject: RE: FOIA REQUEST #DOC-NOAA-2015-000295 - Fwd: Queen Conch Litigation

(b)(5) DPP/ACP

Michael Bogomolny
Acting Chief, Information Law Division
mbogomolny@doc.gov (202) 482-0703
United States Department of Commerce
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-----Original Message-----

From: Crabbe, Trent (ENRD) [mailto:Trent.Crabbe@usdoj.gov]
Sent: Thursday, April 20, 2017 3:14 PM
To: Mclemore, Michael (Federal) <Michael.Mclemore@noaa.gov>
Cc: Grimes, Shepherd (Federal) <Shepherd.Grimes@noaa.gov>; Lowery, Iris (Federal) <Iris.Lowery@noaa.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Smit-Brunello, Monica (Federal) <Monica.Smit-Brunello@noaa.gov>
Subject: Re: FOIA REQUEST #DOC-NOAA-2015-000295 - Fwd: Queen Conch Litigation

(b)(5) DPP/ACP

Thanks.

Trent

Sent from a tiny handheld computer lacking a proper keyboard

On Apr 20, 2017, at 2:15 PM, Crabbe, Trent (ENRD) <TCrabbe@ENRD.USDOJ.GOV><mailto:

:TCrable@ENRD.USDOJ.GOV>> wrote:

(b)(5) DPP/ACP

From: Michael Mclemore - NOAA Federal [mailto:michael.mclmore@noaa.gov]
Sent: Thursday, April 20, 2017 12:41 PM
To: Crable, Trent (ENRD) <TCrable@ENRD.USDOJ.GOV<mailto:TCrable@ENRD.USDOJ.GOV>>
Cc: Shepherd Grimes <shepherd.grimes@noaa.gov<mailto:shepherd.grimes@noaa.gov>>; Iris Lowery - NOAA Federal <iris.lowery@noaa.gov<mailto:iris.lowery@noaa.gov>>; Michael Bogomolny <MBogomolny@doc.gov<mailto:MBogomolny@doc.gov>>; Monica Smit-Brunello <monica.smit-brunello@noaa.gov<mailto:monica.smit-brunello@noaa.gov>>
Subject: Re: FOIA REQUEST #DOC-NOAA-2015-000295 - Fwd: Queen Conch Litigation

(b)(5) DPP/ACP

I just left a message for Bogo.

(b)(5) DPP/ACP

Sent from a tiny handheld computer lacking a proper keyboard

On Apr 19, 2017, at 1:44 PM, Michael Mclemore - NOAA Federal <michael.mclmore@noaa.gov<mailto:michael.mclmore@noaa.gov>>> wrote:

(b)(5) DPP/ACP

On Wed, Apr 19, 2017 at 11:23 AM, Michael Mclemore - NOAA Federal <michael.mclmore@noaa.gov<mailto:michael.mclmore@noaa.gov>>>

(b)(5) DPP/ACP

(b)(5) DPP/ACP

Bogo, what are your thoughts?

Thanks,

Mike

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

From: Shepherd Grimes - NOAA Federal <shepherd.grimes@noaa.gov<<mailto:shepherd.grimes@noaa.gov>><<mailto:shepherd.grimes@noaa.gov>>>>
Date: Tue, Apr 18, 2017 at 4:45 PM
Subject: Fwd: FOIA REQUEST #DOC-NOAA-2015-000295<<tel:2015-000295>> - Fwd: Queen Conch Litigation
To: Michael Mclemore <Michael.Mclemore@noaa.gov<<mailto:Michael.Mclemore@noaa.gov>>>>, "Crabbe, Trent (ENRD)" <Trent.Crabbe@usdoj.gov<<mailto:Trent.Crabbe@usdoj.gov>><<mailto:Trent.Crabbe@usdoj.gov>>>>, Iris Lowery - NOAA Federal <iris.lowery@noaa.gov<<mailto:iris.lowery@noaa.gov>><<mailto:iris.lowery@noaa.gov>>>>

FYI.

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:28727%29%20551-5799>><[tel:\(727\)%20551-5799](tel:(727)%20551-5799)>

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From: Bogomolny, Michael (Federal) <MBogomolny@doc.gov<<mailto:MBogomolny@doc.gov>><<mailto:MBogomolny@doc.gov>>>>
Date: Tue, Apr 18, 2017 at 4:40 PM
Subject: RE: FOIA REQUEST #DOC-NOAA-2015-000295<<tel:2015-000295>> - Fwd: Queen Conch Litigation
To: "Graff, Mark (Federal)" <Mark.Graff@noaa.gov<<mailto:Mark.Graff@noaa.gov>><<mailto:Mark.Graff@noaa.gov>>>>, "Smith, Beverly (Federal)" <Beverly.Smith@noaa.gov<<mailto:Beverly.Smith@noaa.gov>><<mailto:Beverly.Smith@noaa.gov>>>>
Cc: "Swisher, Robert (Federal)" <Robert.Swisher@noaa.gov<<mailto:Robert.Swisher@noaa.gov>><<mailto:Robert.Swisher@noaa.gov>>>>, "Almeida, John (Federal)" <John.Almeida@noaa.gov<<mailto:John.Almeida@noaa.gov>><<mailto:John.Almeida@noaa.gov>>>>, "Grimes, Shepherd (Federal)" <Shepherd.Grimes@noaa.gov<<mailto:Shepherd.Grimes@noaa.gov>><<mailto:Shepherd.Grimes@noaa.gov>>>>

The AUSA assigned to the matter is Brian Field, [202-252-2551](tel:202-252-2551)<<tel:202-252-2551>><[tel:\(202\)%20252-2551](tel:(202)%20252-2551)>. I haven't yet connected with him.

Sincerely,
bogo

From: Mark Graff - NOAA Federal [<mailto:mark.graff@noaa.gov><<mailto:mark.graff@noaa.gov>><<mailto:mark.graff@noaa.gov>>>>
Sent: Tuesday, April 18, 2017 4:23 PM
To: Smith, Beverly (Federal) <Beverly.Smith@noaa.gov<<mailto:Beverly.Smith@noaa.gov>><<mailto:Beverly.Smith@noaa.gov>>>>

(b)(5) DPP/ACP

(b)(5) DPP/ACP

Thanks,
Shep

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--

Beverly J. Smith
FOIA Coordinator
Southeast Region
NOAA's National Marine Fisheries Service [727-55&5762](tel:727-55&5762)<tel:(727)%2055&5762>

--

B. Michael McLemore, Section Chief
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Torczon, Andrea (Federal)

From: Torczon, Andrea (Federal)
Sent: Tuesday, May 22, 2018 4:09 PM
To: Graff, Mark (Federal)
Subject: FOIA appeal for DOC-NOAA-2017-001431
Attachments: Appeal for DOC-NOAA-2017-001431 (no attachments).pdf

Mark,

I am reviewing this FOIA appeal from NOAA's response to a request from Margaret Townsend of the Center for Biological Diversity. Please let me know the contact for this request.

Thank you.

Andrea

Andrea Torczon
Senior Attorney
Information Law Division
Office of the General Counsel
U.S. Department of Commerce
202-482-8028

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May 4, 2018

VIA FOIAONLINE.REGULATIONS.GOV

National Oceanic and Atmospheric Administration

Re: FREEDOM OF INFORMATION ACT APPEAL: DOC-NOAA-2017-001431 (Final Pesticides BEs and BOs)

Dear FOIA Appeals Officer:

On behalf of the Center for Biological Diversity (“Center”), I appeal the National Oceanic and Atmospheric Administration’s (“NOAA”) final determination and all interim responses on the Center’s referenced request for records pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), assigned FOIA Request No. DOC-NOAA-2017-001431 (“FOIA request”). NOAA failed to conduct an adequate search and improperly applied redactions pursuant to FOIA Exemption 5. For the reasons set forth below, NOAA’s withholding of responsive records violates FOIA.

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 search for and disclose all responsive records immediately, in accordance with FOIA’s disclosure mandate and federal policies.

FACTUAL BACKGROUND ABOUT THE CENTER’S FOIA REQUEST

On June 27, 2017 the Center sent the National Marine Fisheries Service (“NMFS”) in care of the National Oceanic and Atmospheric Administration (“NOAA”) a request pursuant to FOIA through the U.S. Department of Commerce (“DOC”) via electronic mail and FOIAOnline. Attachment A (The Center’s June 27, 2017 FOIA Request). In that request the Center sought:

- (1) All records mentioning, including, and/or referencing the draft and/or final biological evaluation of chlorpyrifos under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”);
- (2) All records mentioning, including, and/or referencing the draft and/or final biological evaluation of malathion under the ESA;
- (3) All records mentioning, including, and/or referencing the draft and/or final biological evaluation of diazinon under ESA;
- (4) All records mentioning, including, and/or referencing the draft and/or final biological opinion of chlorpyrifos under the ESA;
- (5) All records mentioning, including, and/or referencing the draft and/or final biological opinion of malathion under the ESA;
- and (6) All records mentioning, including, and/or referencing the draft and/or final biological opinion of diazinon under ESA. Please note that this request does not apply to documents found online or under the docket EPA-HQ-OPP-2016-

0167. The Center is willing to receive records on a rolling basis, and requests that NMFS prioritize responsive records from April 1, 2017 to the date of the search.

Id. That same day, DOC sent the Center automated electronic mail through FOIAOnline acknowledging the Center's FOIA request and assigning it tracking number DOC-OS-2017-001431. Attachment B (DOC's June 27, 2017 Acknowledgment Email).

That same day, the Center submitted a separate FOIA request to DOC through FOIAOnline. Attachment C (The Center's June 27, 2017 DOC FOIA Request).

On June 28, 2017 DOC sent the Center automated electronic mail through FOIAOnline stating that "FOIA request DOC-OS-2017-001431 has had its Tracking Number changed to DOC-NOAA-2017-001431." Attachment D (DOC's June 28, 2017 Tracking Number Change Email).

On July 6, 2017 NOAA sent the Center a letter acknowledging its FOIA request. Attachment E (NOAA's July 6, 2017 Acknowledgment Letter).

On July 7, 2017 NOAA's Office of Protected Resources sent the Center electronic mail seeking to clarify the scope of its FOIA request. Attachment F (NOAA's July 7, 2017 Clarification Email).

On July 12, 2017 the Center and NOAA participated in a telephone call to clarify the scope of the Center's FOIA request. That same day, NOAA sent the Center electronic email memorializing the substance of their telephone call. Attachment G (NOAA's July 12, 2017 Memorialization Email Chain). In that email chain, NOAA stated:

We will only include in your request documents regarding the FWS biological opinion when we have relied on information found in those documents.

We will exclude from your request the following:

- 1 - routine internal reporting of pending matters
- 2 - personnel matters
- 3 - printed materials unless those printed materials have handwritten notes

You have also tentatively agreed that when the last email in an unbroken email chain contains all of the earlier emails, we may exclude all but that last email. In the case that the first email in such a chain had an attachment, we would treat that attachment as included in your request.

Id. That same day, the Center sent NOAA electronic mail stating that NOAA's email "summary accurately represents our agreement and understanding." *Id.*

On July 18, 2017 NOAA sent the Center electronic mail stating:

Since sending this list, I have learned that at least one of our biologists works almost exclusively on EPA and consultation, with only a small portion of her work involving pesticides. I suggest amending the list above to suggest removing “EPA” from the search terms, either altogether or specifically for this biologist and any others who may have a similar work profile.

Attachment H (NOAA’s July 18, 2017 Email Chain). That same day, the Center sent NOAA electronic mail agreeing to the change NOAA outlined. *Id.*

On July 25, 2017 NOAA sent the Center electronic mail granting its fee waiver request pursuant to its FOIA request. Attachment I (NOAA’s July 25, 2017 Fee Waiver Email).

On August 10, 2017 the Center sent NOAA a Notice of Deadline Violation and Offer to Assist Letter. Attachment J (The Center’s August 10, 2017 Notice of Deadline Violation and Offer to Assist Letter).

On August 11, 2017 NOAA sent the Center electronic mail acknowledging receipt of its Notice of Deadline Violation and Offer to Assist Letter. Attachment K (NOAA’s August 11, 2017 Acknowledgment Email).

On August 16, 2017 NOAA sent the Center electronic mail stating:

We have asked that responsive records be provided by this Friday, August 18, although because of vacation schedules it is possible we may not have all of them by that date

Until we know how many records are involved, it is difficult to predict exactly when we can provide an interim response or a final response. Once the documents are received, some time is needed to load them into our document review software. This can be a week or more, depending on the number of records identified. The amount of time needed for review will also depend on the number of documents found.

In addition, because other agencies also received similar requests from you, we are scheduling an interagency call by the end of the month to determine how to manage records in which other agencies have equities.

Based on the above, we should be able by September 15 to provide estimates for interim releases, if any, and estimate for a final response.

Attachment L (NOAA’S August 16, 2017 Status Update Email).

On November 20, 2017 the Center sent its Second Notice of Deadline Violation and Offer to Assist. Attachment M (The Center’s November 20, 2017 Second Notice of Deadline Violation and Offer to Assist).

On November 22, 2017 NOAA sent the Center electronic mail with a status update stating “We should be able to send our first interim response within the next two weeks. At that time we should be able to estimate the time for our final response.” Attachment N (NOAA’s November 22, 2017 Status Update Email Chain). That same day, the Center sent NOAA electronic mail thanking the agency for the quick response and status update. *Id.*

On November 30, 2017 NOAA sent the Center its First Response Letter. Attachment O (NOAA’s November 30, 2017 First Response Letter).

On December 8, 2017 NOAA sent electronic mail stating:

This is to let you know that you either have received or will have received a small - 15 documents - first interim response.

Our 2nd and larger interim response is in process and should get to you in the next two weeks.

We anticipate providing a third interim response in January, and believe that we can provide NOAA’s final response by the end of February.

Attachment P (NOAA’s December 8, 2017 Status Update).

On January 11, 2018 NOAA sent the Center its Second Response Letter. Attachment Q (NOAA’s January 11, 2018 Second Response Letter).

On February 1, 2018 NOAA sent the Center its Third Response Letter. Attachment R (NOAA’s February 1, 2018 Third Response Letter).

On February 2, 2018 the Center sent NOAA electronic mail stating:

Thank you for providing the most recent interim release. I would like to note that I was not notified of this release in my inbox, but happened to come upon it while checking FOIAonline. I believe the file size was too large and did not transmit properly. To ensure we receive proper notification I suggest that large records be sent separately from the notification email.

I noticed the cover letter states this to be the 3rd interim response. Please note that we also never received notification of a 2nd interim response. The letter states the 2nd release was provided on January 11, 2018 but we did not receive any emails nor is there any recorded notification on FOIAonline. I do see the released records themselves, however, they are not dated January 11 and share the same release date as the 3rd response. If available, please provide the cover letter for the 2nd response.

Additionally, per our December 8, 2017 correspondence with Ms. Lawrence, please confirm whether we may all expect a final response by the end of February and if not please provide an updated estimated completion date.

Attachment S (The Center's February 2, 2018 Email). That same day, NOAA sent the Center electronic mail stating:

I must apologize for the recent third interim response as I attached the records to the correspondence. I sincerely apologize for not realizing it would be too large for your email. ...

I've attached the second interim response to your request dated January 11, 2018. We can not [sic] confirm at this time why FOIAonline did not provide you with the second interim response. We're looking into the permission issue as I provided the second interim response in FOIAonline instead of Ms. Hodge-Tonic.

... In light of this situation, we understand the agency should contact you via the email above to alert you of an agency response to ensure you have awareness and receipt, and we will not attach records to the response.

We are on track to complete this request by the end of February.

Attachment T (NOAA's February 2, 2018 Email).

On February 5, 2018 the Center sent NOAA electronic mail stating:

We had originally sent this request to the Department of Commerce and was assigned tracking number DOC-OS-2017-001431 but the request was later reassigned to NOAA. The requester is also interested in records generated at the DOC level and wanted to know if a search was also being conducted there or if it has solely taken place on the NOAA level.

Attachment U (The Center's February 5, 2018 Email).

On February 6, 2018 NOAA sent the Center electronic mail stating that the agency confirmed that the "DOC records responsive to this request will be provided under NOAA FOIA referenced as DOC-NOAA-2017-0001431 [sic]." Attachment V (NOAA's February 6, 2018 Email). In that email, NOAA stated that the Center is "correct in assuming DOC is processing under its own timeline. While we are networking and cooperating with DOC FOIA to provide you responsive records, NOAA will not close out DOC-NOAA-2017-0001431 [sic] until DOC documents are provided. NOAA is on track to provide our response to you by end of February." *Id.*

On February 8, 2018 NOAA sent the Center its Fourth Response Letter. Attachment W (NOAA's February 8, 2018 Fourth Response Letter). In that letter, NOAA stated that 731 records were "exempted from disclosure through Attorney Client-Privilege, Attorney Work

Product and/or Deliberate Process Privilege.” *Id.* The letter further stated that 13 records were released in part with portions exempt from disclosure by Exemption 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.” *Id.* That same day, NOAA sent the Center electronic mail stating, that NMFS was “on track to provide you a final response by end of February which should include Department of Commerce (DOC) records responsive to your request.” Attachment X (NOAA’s February 8, 2018 ECD Email).

On February 27, 2018 NOAA sent the Center its Fifth Response Letter. Attachment Y (NOAA’s February 27, 2018 Fifth Response Letter). In that letter, NOAA stated that it released 72 records in part and withheld 139 in full pursuant to Exemption 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 Attorney Client-Privilege, Attorney Work Product and/or Deliberate Process Privilege.” *Id.* Furthermore, NOAA stated that it released one record in part with portions exempt pursuant Exemption 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,” and Exemption 6, “which protects personnel and medical files and similar files about individuals when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.” *Id.*

On March 8, 2018 NOAA sent the Center automated electronic mail from FOIAOnline notifying the Center that it approved its fifth interim response for release. Attachment Z (NOAA’s March 8, 2018 Email).

On March 16, 2018 NOAA sent the Center electronic mail with a status update. Attachment AA (NOAA’s March 16, 2018 Status Update Email). In that email, NOAA stated that it had provided its fifth interim release and had informed the Center that “approximately 100 records were in need of consultation before their release to you. Those records are trickling back to our agency and you can expect another response shortly. In that response, we will also update you to the Department of Commerce’s search and collection of responsive records.” *Id.*

On March 19, 2018 NOAA sent the Center electronic mail asking the Center:

We have one responsive email that we would like you to consider excluding from your request. This is a May 3, 2017, email to NOAA attorneys Dan Pollak and me, from the Department of Justice attorney representing NMFS in the Northwest Coalition for Alternatives to Pesticides v. NMFS litigation. The email from the Department of Justice attorney attaches the April 13, 2017 letter from David Weinberg of Wiley Rein to Secretary Ross and the April 27, 2017 letter to Administrator Pruitt. I then forwarded the email from the Department of Justice attorney to Cathy Tortorici, my program client.

Please advise if you are willing to allow us to exclude this email chain. If you are not, we will refer this email to the Department of Justice for their review.

Attachment BB (NOAA's March 19, 2018 Email Chain to Exclude Email Chain). That same day, the Center sent NOAA electronic mail agreeing to exclude the email chain. *Id.*

On March 27, 2018 NOAA sent the Center its sixth and Final Response Letter. Attachment CC (NOAA's March 27, 2018 Final Response Letter). In that letter, NOAA stated, *inter alia*:

34 records are released in part and 8 are withheld in full 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 through Attorney Client-Privilege, Attorney Work Product and/or Deliberate Process Privilege.

2 records are released in part with portions exempt 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 and 5 U.S.C. § 552 (b)(6) which protects personnel and medical files and similar files about individuals when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.

Id. On March 29, 2018 NOAA sent the Center electronic mail notifying the Center of its final release. Attachment DD (NOAA's March 29, 2018 Final Release Notification). NOAA states that “[t]he National Marine Fisheries Service has completed search and review of responsive records in its possession.” *Id.* at 2. NOAA summarized that it had released 1,825 records, of which 186 records were redacted in full and 1,050 redacted in part based on the deliberative process privilege. *Id.* Based on these representations, the Center believes that this appeal is to NOAA's final determination on the Center's original FOIA request to NOAA.

In this appeal, the Center challenges the adequacy of NOAA's search, and its withholding of responsive records under Exemption 5 for all of NOAA's interim responses. The Center also challenges NOAA's withholding of the original electronic names of the records, which should not be subject to any exemption. The Center also appeals DOC's constructive denial of the Center's FOIA request, and its failure to show that there are no non-exempt, segregable portions of the withheld records for all of the interim responses. The Center does not challenge NOAA's withholding of information from responsive records pursuant to Exemption 6.

THE FREEDOM OF INFORMATION ACT

The purpose of FOIA is to “open agency action to the light of public scrutiny.” *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). 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 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. *Id.* 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.* These authorities remain in effect.

FOIA “mandates a policy of broad disclosure of government documents” and carries a strict disclosure mandate that requires federal agencies to expeditiously disclose requested records to requesters. *See* 5 U.S.C. § 552; *Church of Scientology v. Dep’t of the Army*, 611 F.2d 738, 741 (9th Cir. 1980). Consequently, 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).

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 in light of FOIA’s dominant objective of disclosure, not secrecy.” *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1996). Accordingly, because FOIA carries a presumption in favor of disclosure, and indeed, because “FOIA requesters face an information asymmetry given that the agency possesses the requested information and decides whether it should be withheld or disclosed,” *COMPTTEL v. U.S. Federal Comm’n Comm.*, 910 F. Supp. 2d 100, 111 (D.D.C. 2012) (internal citations omitted), agencies bear the burden of justifying the withholding of any records that are responsive to a FOIA request. 5 U.S.C. § 552(a)(4).

An agency must provide “a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *See King v. Dept. of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987) (agency must provide); *see also Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (holding an agency’s disclosure of “who wrote the [document], to whom it was addressed, its date, and a brief description” was “patently inadequate” to establish exemption under FOIA).

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

DISCUSSION

I. NOAA DID NOT CONDUCT AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS.

NOAA failed to demonstrate that it conducted an adequate search for records responsive to the Center’s FOIA request.

To achieve FOIA's core purpose of disclosure, an agency must perform an adequate search for responsive records. *Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979). Upon receiving a FOIA request, federal agencies are "required to perform more than a perfunctory search" to identify records that are responsive to the request. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). An agency must demonstrate "a 'good faith effort to conduct a search using methods which can be reasonably expected to produce the information requested.'" *DiBacco v. U.S. Army*, 795 F.3d 178, 188 (D.C. Cir. 2014) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)) (internal alterations omitted); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. U.S. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)) (to meet this burden, the agency must "demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents'").

In addition, "agency affidavits must explain in reasonable detail the scope and method of the search conducted by the agency" for the agency to "satisfy its burden of establishing the adequacy of its search." *Nat'l Sec. Counselors II*, 960 F. Supp. 2d 101, 152 (internal quotations omitted); *Ancient Coin Collectors Guild*, 641 F.3d at 514 (internal quotation omitted) (agency may meet its burden by submitting "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched"). 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 evidence suggests that NOAA failed to conduct an adequate search for records responsive to the Center's FOIA request. *Founding Church of Scientology*, 610 F.2d at 837. NOAA's Final Response Letter lacks any information about the scope and method of the search it conducted. Attachment CC; *Nat'l Sec. Counselors II*, 960 F. Supp. 2d at 152; *Ancient Coin Collectors Guild*, 641 F.3d at 514. Nowhere in NOAA's Final Response Letter did the agency provide search terms or a description of its search. Attachment CC. Instead, the agency merely stated, "Our search within the National Marine Fisheries Service, Office of Protected Resources Headquarters, has identified 129 responsive records." *Id.* As such, NOAA did not demonstrate that it made a "good faith effort to conduct a search" for the requested records, nor did the agency prove that it used methods that "can be reasonably expected to produce the information requested." *Oglesby* at 920 F.2d at 68. Therefore, the agency did not satisfy its burden to prove the adequacy of its search.

Accordingly, it appears that NOAA merely performed a perfunctory search for responsive records. *Ancient Coin Collectors Guild v.*, 641 F.3d at 514. Without a description of the search methods NOAA used, or the original electronic names of the documents, the agency has failed to make it apparent to the Center that it conducted an adequate search for records. *Oglesby* at 920 F.2d at 68; *Nat'l Sec. Counselors II*, 960 F. Supp. 2d at 152; *Ancient Coin Collectors Guild v.*, 641 F.3d at 514. To remedy this, NOAA must conduct an adequate search for responsive records, release responsive records immediately, and provide adequate detail about the search methods that it utilized. Additionally, because the Center believes there may be further evidence

of NOAA's inadequate search, the Center reserves its right to further challenge any subsequent searches once it receives additional records from NOAA and has an opportunity to review them.

The Center is simply unable to conclude that NOAA's search was reasonably calculated to locate all records that are responsive to the Center's FOIA request. Thus, based on available information, NOAA failed to conduct an adequate search for requested responsive records.

II. NOAA HAS NOT CARRIED ITS BURDEN TO PROVE THAT IT MAY LAWFULLY WITHHOLD RESPONSIVE RECORDS UNDER EXEMPTION 5.

In addition to conducting an inadequate search, NOAA failed to prove that it may lawfully withhold responsive records under FOIA Exemption 5's deliberative process privilege. 5 U.S.C. § 552(b)(5). An agency may only withhold information pursuant to one of FOIA's exemptions if "the agency reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption...; or ... disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). To satisfy its burden, an agency seeking to utilize a FOIA exemption to withhold information "must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (citations omitted). "Without a sufficiently specific affidavit or *Vaughn* Index, a court cannot decide, one way or the other, a deliberative process, attorney-client, or attorney work product privilege claim." *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 259-60 (D.D.C. 2004) (citation omitted). Indeed, an agency seeking to withhold information "must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA" and, thus, "[a]n agency cannot meet its statutory burden of justification by conclusory allegations." *Mead Data Cent.*, 566 F.2d at 258.

Here, NOAA withheld 186 records in full (completely blacked out) and withheld 1,050 records in part by broadly invoking Exemption 5's privileges. Attachment CC (summary). But, NOAA failed to provide "a relatively detailed justification specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of the withheld document to which they apply." *Mead Data Cent.*, 566 F.2d at 251. NOAA did not address how it applied Exemption 5 to the withheld records, or how it justified its use of Exemption 5. *Id.* Considering the scarcity of information in NOAA's Final Response Letter, there is no way to determine if the records would "routinely be disclosed" in civil litigation. Attachment CC; *See U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984). It is nearly impossible for the Center to ascertain what is missing from the records since most of the records are completely or nearly completely blacked out. Attachment CC. Due to NOAA's complete lack of justification, the Center is left to speculate as to how the redacted records qualify for the deliberate process privilege.

Nowhere in NOAA's communications did the agency state that it reasonably foresaw that disclosure would harm an interest protected by Exemption 5. Aside from failing to demonstrate or allege that NOAA reasonably foresaw that disclosure of the requested records would harm a protected interest, NOAA also failed to satisfy the elements necessary to show that withholding information is warranted pursuant to Exemption 5. Exemption 5 allows government agencies to

withhold “interagency 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.” 5 U.S.C. § 552(b)(5). To qualify for Exemption 5, (1) a record’s “source must be a Government agency,” and (2) “it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.” *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8, (2001). In other words, Exemption 5 covers “those documents, and only those documents, normally privileged in the civil discovery context[.]” *Loving v. Dep’t of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008) (quotation omitted).

First, NOAA provided no evidence that the records are inter-agency or intra-agency memoranda or letters that would not be available to a party other than one in litigation with the agency. Second, NOAA failed to show that the records are predecisional and deliberative such that they would qualify for the deliberative process privilege. Third, NOAA failed to show that the records qualify for the attorney-client privilege. Fourth, NOAA did not demonstrate that it withheld records properly under the attorney work-product privilege. Thus, NOAA did not meet its burden to prove that it may lawfully withhold records pursuant to Exemption 5.

A. NOAA Did Not Meet FOIA Exemption 5’s Threshold Requirement.

NOAA failed to show that it could meet the threshold requirement of FOIA Exemption 5 that the records must be inter- or intra-agency records. 5 U.S.C. § 552(b)(5).

The Supreme Court has held that the standard to determine whether records fall under the inter-agency or intra-agency threshold requirement is whether the records would “routinely be disclosed” in civil litigation. *See U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984). Furthermore, to satisfy Exemption 5’s threshold requirement that a record must be inter- or intra-agency, the agency must show that it has not shared the withheld records with third parties, including state agencies or tribes. *See People for Am. Way Found. v. U.S. Dep’t of Educ.*, 516 F. Supp. 2d 28, 36 (D.D.C. 2007) (citing 5 U.S.C. § 551(1)) (for the purpose of FOIA, “it is clear” that “an ‘agency’ must be a federal entity”).

Here, it is not apparent that the responsive records withheld by NOAA are, in fact, inter- or intra-agency records. In its Final Response Letter, NOAA did not address whether it shared the withheld records with non-federal entities. Attachment CC. However, given the nature of the Center’s FOIA request, it is reasonable to assume that the records were shared with third-parties, such as chemical companies or pesticide trade or advocacy organizations (e.g. Croplife America) and even state agencies. If NOAA withheld records under Exemption 5 but shared the records with third parties, then the agency directly offended the threshold requirement that Exemption 5 can only apply only to federal inter- and intra-agency communications. *See People for Am. Way Found.*, 516 F. Supp. 2d at 36. Moreover, considering the utter lack of information in NOAA’s Final Response Letter, the agency failed to show that the redacted or withheld records were inter- or intra-agency. Attachment CC.

Thus, NOAA has not met its burden to prove that it may lawfully withhold records pursuant to Exemptions 5.

B. NOAA Failed To Show That The Records Are Both Predecisional And Deliberative.

Even if NOAA had proved that it met Exemption 5's threshold requirement (which it did not), NOAA failed to show that the withheld records were predecisional and deliberative, thus warranting the deliberative process privilege.

The deliberative process privilege allows a federal agency to withhold responsive records only where the records contain material that is both "predecisional" and "deliberative." 5 U.S.C. § 552(b)(5). For a record to be "predecisional," it must reflect the give-and-take of a consultative process before the agency took final action. *Vaughn v. Rosen (II)*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). An agency must be able to point to a specific agency decision to which a withheld record pertains. *Senate of P.R. v. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987). Even draft documents are not universally exempt from disclosure. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982); *Nevada v. DOE*, 517 F.Supp.2d 1245, 1264-65 (D. Nev. 2007).

In addition to being "predecisional," records must be "deliberative" to qualify for the privilege. Portions of a record are "deliberative" only 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), <http://www.justice.gov/oip/doj-guide-freedom-information-act-0> (hereinafter *DOJ Guide*) (website last visited June 7, 2017). 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).

In evaluating withholdings based on Exemption 5's deliberative process privilege, the privilege "must be construed as narrowly as is consistent with efficient government operation." *Army Times Pub. Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1069 (D.C. Cir. 1993). To explain how information qualifies for the privilege, an agency necessarily must explain, at a minimum, what the records consist of (i.e., who generated them, who received them, and what they contain). Simply providing conclusory statements of privilege or policy justifications for withholding information is wholly inadequate for an agency to overcome FOIA's strong disclosure presumption and to withhold information from records under the narrowly construed deliberative process privilege. *Founding Church of Scientology*, 610 F.2d at 837; see also *COMPTEL*, 910 F.

Supp. at 111 (“conclusory assertions of privilege will not suffice to carry the Government’s burden of proof in defending FOIA cases”); *see also 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 justification whatsoever as to why it may withhold portions of the final pesticide biological evaluations and opinions under the deliberative process privilege. Attachment CC. As stated above, in its Final Response Letter NOAA failed to provide any explanation for the legal standard it invoked, let alone how the records qualified for the privilege. *Id.* NOAA only included the exemption’s language from the statute, which amounts to conclusory, boilerplate language. *Id.* The agency broadly redacted records of the final pesticide biological evaluations and opinions under Exemption 5, but as stated above, NOAA did not offer a “relatively detailed justification” for withholding and redacting records. *King*, 830 F.2d at 219; *Mead Data Cent.*, 566 F.2d at 251. Moreover, NOAA failed to explain what the records consist of (i.e., who generated them, who received them, and what they contain). As a result, NOAA failed to establish that it may withhold any portion of the records.

NOAA did not identify any particular decision to which the records are purportedly “predecisional.” *Senate of P.R.*, 823 F.2d at 585. It is unclear how the *final* pesticide biological evaluations and opinions could be categorized as predecisional. As such, NOAA cannot overcome FOIA’s strong disclosure mandate and lawfully withhold these records under the narrowly construed deliberative process privilege. *Founding Church of Scientology of Wash.*, 610 F.2d at 830; and *see also COMPTEL*, 910 F. Supp. 2d at 119; *see also Senate of P.R.*, 823 F.2d at 585.

Furthermore, NOAA did not demonstrate how the redacted portions of final pesticide biological evaluations and opinions qualify as “deliberative.” The Center requested all records of the final pesticide biological evaluations and opinions; however, as these are records of final evaluations and opinions, it is highly unlikely that they reflect advisory opinions, recommendations, or 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); *see also Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (internal citations omitted). NOAA failed to show that the withheld records were “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn*, 523 F.2d at 1143-44. Exemption 5 only protects “preliminary positions or ruminations about how to exercise *discretion* on some *policy matter*.” *Petroleum Info. Corp.*, 976 F.2d at 1435 (emphasis added). Here, NOAA is not exercising discretion in a policy matter. NOAA is not making a decision by which it is exercising its policy judgment in commenting on the statements of other agencies. Therefore, the deliberative process privilege does not apply.

Indeed, the substance of the withheld records is, presumably, primarily factual in nature and would include a significant amount of information that is not, by nature, deliberative. Under Exemption 5, NOAA may not withhold factual information as deliberative. *Julian*, 806 F.2d at 1419. The burden is on NOAA to demonstrate that the withheld records reveal an agency exercise of discretionary policy-making judgment which it has failed to do. *Coastal States Gas*

Corp., 617 F.2d at 861. Therefore, NOAA failed to show that the withheld records are “deliberative,” and as such it does not qualify for the deliberative process privilege.

Thus, NOAA failed to show that it can meet Exemption 5’s requirements. As a result, NOAA must promptly release any and all records improperly withheld under the deliberative process privilege, including portions of records.

C. NOAA Failed To Carry Its Burden To Show That It May Withhold Records Pursuant To Exemption 5’s Attorney-Client Privilege.

In addition to failing to prove that the records qualify for Exemption 5’s deliberative process privilege, NOAA also failed to prove that the attorney-client privilege applies. The attorney-client privilege protects confidential communications with counsel which must concern a legal matter for which the client sought professional, legal advice. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *see also Schlefer v. U.S.*, 702 F.2d 233, 25 (D.C. Cir 1983). The privilege protects an agency’s communication with its attorneys, as long as the communications occurred pursuant to obtaining legal advice and is limited to agents authorized to speak or act on behalf of the agency. *See Coastal States* at 617 F.2d at 862-64. This privilege “does not exempt a document simply because the communication involves the government’s counsel.” *See Judicial Watch v. Dep’t of Army*, 435 F.Supp. 2d 81 (D.D.C. 2006).

Here again, NOAA failed to provide a “relatively detailed justification, specifically identifying the reasons” for withholding the records. *King*, 830 F.2d at 219. In its Final Response Letter, NOAA provided a paltry explanation for its application of Exemption 5, and as such, the Center is left to speculate as to how the attorney-client privilege may apply to the records. Attachment CC. NOAA merely stated that “the records are exempted from disclosure through Attorney Client-Privilege, Attorney Work Product and/or Deliberate Process Privilege.” *Id.* Nowhere in its Final Response Letter did NOAA provide any meaningful explanation as to how the withheld records would reveal the agency’s communications seeking legal advice from agency counsel. *NLRB*, 421 U.S. at 154; *Schlefer*, 702 F.2d at 25. Furthermore, as the Center’s request sought final pesticide biological evaluations and opinions, it is unclear how the records would qualify as communications occurring pursuant to obtaining legal advice. *Coastal States* at 617 F.2d at 862-64. NOAA’s utter lack of justification in its Final Response Letter is entirely insufficient to warrant attorney-client privilege protection to records responsive to the Center’s FOIA request.

Thus, NOAA failed to prove that it properly applied the attorney-client privilege to the withheld records. As a result, NOAA must promptly release any and all improperly withheld information, including portions of records.

D. NOAA Has Failed To Show That It May Withhold Records Under The Attorney Work-Product Privilege.

Suffering the same flaws as the deliberative-process and attorney-client privileges, NOAA has failed to establish that it may withhold records under the attorney work-product privilege.













The attorney work-product privilege is intended to protect records that have been prepared by an attorney or others in anticipation of litigation, preserving the adversarial process by shielding materials which would disclose the attorney's theory of the case or litigation strategy. *See, e.g., Coastal States*, 617 F.2d at 864. Thus, "at the very least some articulable claim, likely to lead to litigation," must have arisen. *Id.* at 865.

Here, NOAA has not provided any information to substantiate its claims that this privilege applies whatsoever. Indeed, NOAA failed to show that "at the very least some articulable claim, likely to lead to litigation." *Coastal States*, 617 F.2d at 864 at 865.




Thus, NOAA failed to demonstrate that it properly withheld records under Exemption 5's attorney work-product privilege.

III. NOAA UNLAWFULLY WITHHELD THE ORIGINAL, ELECTRONIC NAMES OF THE RECORDS.

In addition to improperly invoking Exemption 5 to the released records, NOAA improperly changed the file names that were part of the records. The name of an electronic record is part of the record, and NOAA cannot withhold it without claiming an exemption. In its first interim release, NOAA included the name of the records as follows:

-  4-13-17 Wiley Rein LLP memo to The Honorable Ryan Zinke-DOI.pdf
-  4-13-17 Wiley Rein LLP memo to The Honorable Scott Pruitt-EPA.pdf
-  4-13-17 Wiley Rein LLP memo to The Honorable Wilbur Ross-DOC.pdf
-  4-19-17 CropLife America memo to EPA_ DOI_ DOC.pdf
-  6-20-17 Proposed Mtg Agenda_EPA-USFWS-USDA FESTF Mtg (wNotes).pdf
-  103-601Malathion_Data_Report_2016.pdf
-  Appendix C - Critical Habitat PBFs (6-30-17).pdf
-  Best Mgmt Practices to Prvent Aquatic Contamination.pdf
-  expertise slide.pdf
-  Proportion US range summary 6-8-15.pdf
-  Thistle et al 2017 Evalutation of Spray Drift from Backpack Sprayer and UTV.pdf
-  WSDA 2015 MONITORING REPORT- issued 5-30-17.pdf

Yet, in its second release, and all subsequent releases, NOAA changed the names of the records. For example, NOAA's second interim response released three records in full, but changed the names:

-  0.7.1596.5205.pdf
-  0.7.1596.6433.pdf
-  0.7.1596.12481.pdf

The Center is entitled to the original record, including the name of the record, not a modified record. Thus, NOAA's withholding of the original, electronic names of the records is unlawful.

IV. THE DEPARTMENT OF COMMERCE CONSTRUCTIVELY DENIED THE CENTER'S FOIA REQUEST.

In addition to NOAA's unlawfully withholding the original electronic names of the records, DOC has constructively denied the Center's FOIA request. A FOIA requester "shall be deemed to have exhausted his administrative remedies" whenever an agency fails to comply with a time limit of the Act. 5 U.S.C. § 552(a)(6)(C); *see also 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."). In other words, when an agency fails to respond to a FOIA request within the statutory timeframe, the request is treated as being constructively denied by the agency. At this time, DOC has violated statutory 20-workday deadline that FOIA mandates for agencies to make a determination on FOIA requests, effectively constructively denying the Center's request such that the Center is now deemed to have constructively exhausted its administrative remedies.

Here, the Center submitted two FOIA requests on June 27, 2017: one to DOC and one to NOAA. In the Center's original FOIA request to DOC, the agency assigned it tracking number DOC-OS-2017-00143. Then, without the Center's consent or approval, DOC consolidated that request with the Center's separate request to NOAA, and changed the tracking number to DOC-NOAA-2017-001431. In NOAA's Final Response Letter, the agency stated that "[t]he Department of Commerce continues to search, collect, and review responsive records. You can expect further or final response regarding those records under the FOIA reference number DOC-NOAA-2017-001431." Attachment CC. Now, while NOAA's response is "complete" the request is not final because DOC has still not provided any responsive records, effectively holding up the agency's response. The Center routinely submits requests to agencies and their sub-agencies without the departmental agency subsuming the separate requests into one matter.

Here, because DOC has treated the Center's two separate requests as one matter and because the agency has not provided any response to the Center's request, let alone one that complies with FOIA's 20-workday deadline, DOC has constructively denied the Center's request.

V. 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 the records under Exemption 5 was proper (which it did not), the agency did not carry its burden to prove that there are no reasonably segregable, non-exempt portions of the withheld records, such as purely factual and scientific information. This issue was not even mentioned in NOAA's Final Response Letter. Attachment CC.

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. Interior*, 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.

VI. CONCLUSION

As described above, NOAA violated FOIA by failing to conduct an adequate search for final pesticide biological evaluations and opinions, and by improperly redacting records pursuant to Exemptions 5. Accordingly, NOAA must conduct an adequate search for responsive records and produce all responsive records immediately. In so doing, NOAA must also provide an estimated date of completion of its release of the records. 5 U.S.C. § 552(a)(7)(B).

We expect your timely resolution of this matter. Do not hesitate to contact me with any questions regarding this appeal. Please contact me at 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 June 27, 2017 FOIA Request)
- Attachment B (DOC's June 27, 2017 Acknowledgment Email)
- Attachment C (The Center's June 27, 2017 DOC FOIA Request)
- Attachment D (DOC's June 28, 2017 Tracking Number Change Email)
- Attachment E (NOAA's July 6, 2017 Acknowledgment Letter)
- Attachment F (NOAA's July 7, 2017 Clarification Email)
- Attachment G (NOAA's July 12, 2017 Memorialization Email)
- Attachment H (NOAA's July 18, 2017 Email Chain)
- Attachment I (NOAA's July 25, 2017 Fee Waiver Email)
- Attachment J (The Center's August 10, 2017 Notice of Deadline Violation and Offer to Assist Letter)
- Attachment K (NOAA's August 11, 2017 Acknowledgment Email)
- Attachment L (NOAA'S August 16, 2017 Status Update Email)
- Attachment M (The Center's November 20, 2017 Second Notice of Deadline Violation and Offer to Assist)

Attachment N (NOAA's November 22, 2017 Status Update Email Chain)
Attachment O (NOAA's November 30, 2017 First Response Letter)
Attachment P (NOAA's December 8, 2017 Status Update)
Attachment Q (NOAA's January 11, 2018 Second Response Letter)
Attachment R (NOAA's February 1, 2018 Third Response Letter)
Attachment S (The Center's February 2, 2018 Email)
Attachment T (NOAA's February 2, 2018 Email)
Attachment U (The Center's February 5, 2018 Email)
Attachment V (NOAA's February 6, 2018 Email)
Attachment W (NOAA's February 8, 2018 Fourth Response Letter)
Attachment X (NOAA's February 8, 2018 ECD Email)
Attachment Y (NOAA's February 27, 2018 Fifth Response Letter)
Attachment Z (NOAA's March 8, 2018 Email)
Attachment AA (NOAA's March 16, 2018 Status Update Email)
Attachment BB (NOAA's March 19, 2018 Email Chain to Exclude Email Chain)
Attachment CC (NOAA's March 27, 2018 Final Response Letter)
Attachment DD (NOAA's March 29, 2018 Final Release Notification)

Arlyn Penaranda - NOAA Federal

From: Arlyn Penaranda - NOAA Federal
Sent: Tuesday, May 22, 2018 3:50 PM
To: Mark Graff - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Samuel Dixon - NOAA Affiliate; Logan Gregory - NOAA Federal; Lorna Martin-Gross - NOAA Federal; Milena Seelig - NOAA Federal; Will Ellis - NOAA Federal; Nathan Lagerwey - NOAA Federal; Shawn Puyear - NOAA Federal; Steven Goodman - NOAA Federal; Robert Hogan - NOAA Federal
Subject: RE: DOC-NOAA-2017-001376 question
Attachments: DOC-NOAA-2017-001376_Appeal.pdf; FAL_AdminClosureDOC-NOAA-2017-001376.pdf; Still Interested Letter_DOC-NOAA-2017-001376 (1).pdf

Mark,

(b)(5) [Redacted]

[Redacted]

[Redacted]

[Redacted]

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

[Redacted]

[Redacted]

[Redacted]

(b)(5)

Please let me know how we will proceed.

Arlyn

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Sent: Monday, March 12, 2018 5:12 PM
To: Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>
Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>; Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>
Subject: Re: DOC-NOAA-2017-001376 question

No issues with the letter, Arlyn--good to go. 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 Mon, Mar 12, 2018 at 3:28 PM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

Please see attached draft. I'll send once I get the greenlight from you.

From: Arlyn Penaranda - NOAA Federal [mailto:arlyn.penaranda@noaa.gov]
Sent: Monday, March 12, 2018 3:11 PM
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>
Subject: Re: DOC-NOAA-2017-001376 question

Thank you. Will do and send via FOIA Online.

On Mon, Mar 12, 2018 at 3:00 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Hi Arlyn--

(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, Mar 12, 2018 at 2:41 PM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

Thank you. I'll wait for Mark's response. I'll continue to process the last sets of records starting tomorrow unless I hear from Mark otherwise.

On Mon, Mar 12, 2018 at 2:25 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Arlyn - I believe we can and add an explanation similar to what you stated in your email. I defer to Mark for final guidance.

Lola

On Thu, Mar 8, 2018 at 3:48 PM, Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov> wrote:

Mark/Ms. Lola,

I'm doing the last leg of review...

(b)(5)

[Redacted content]

(b)(5) [Redacted]

Please let me know how I should proceed. Will your office send the letter or will I?

Thanks.

Arlyn

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

From: **Arlyn Penaranda - NOAA Federal** <arlyn.penaranda@noaa.gov>
Date: Mon, Jan 29, 2018 at 4:44 PM
Subject: DOC-NOAA-2017-001376 question
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Mark,

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

[Redacted]

Thanks!

Arlyn

--
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>

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6)

lola.m.stith@noaa.gov

--

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>

--

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>

Spencer Nathan Thal
ATTORNEY

VANGUARD LAW



May 15, 2018

Mr. Logan Gregory

Deputy Director

Office of Law Enforcement

United States Department of Commerce

NOAA, NMFS, OLEHQ

1315 East West Highway

Silver Spring MD 20910

Re: FOIA Request DOC-NOAA-2017-001376 (Appeal) and
New FOIA Request

Dear Mr. Gregory:

I represent the Deep Sea Fishermen's Union of the Pacific who is the originator of the above-referenced FOIA Request, submitted by Gabe Flick. Please direct all further correspondence regarding this issue to me.

As you know, the requested documents cover the two-year time frame from May 8, 2015 through May 8, 2017, sent or received by two individuals (Will Ellis and Nathan Lagerwey) and some seventy-five sources/recipients. To date, this request resulted in the production of fifty-three (53) documents. It strains credibility to suggest that this document production complies with the mandates of the law.

Separately, Ms. Penaranda requested that we provide greater specificity with respect to the second part of the request which sought records of communications between Nathan Lagerwey and/or Will Ellis and a list of sixteen organizations or agencies. As these organizations and agencies all have e-mail addresses with unique extensions, it was certainly possible for Department personnel to locate them with a reasonable amount of effort, as contemplated by 15 C.F.R. § 4.4(c).

We do intend to file an administrative appeal of your agency's response to our FOIA request. In addition, and without waiving our rights to pursue the administrative appeal and any subsequent litigation to compel disclosure of records that should have been provided long ago, we now request that the agency produce the following documents, without delay:

1. All documents that relate to the observer program including, without limitation, any documents that relate to the assessment of the effectiveness of the observer program in reducing bycatch;

2. All documents that relate to dockside monitoring;

3. All documents that relate to the observation in the 2017 annual report that: "The results of dockside monitoring from 2016 represent the third year in which the observer program failed to obtain a random sample of partial-coverage trawl deliveries due to tendering activity;"

4. All communications that relate to the permissibility of trawlers delivering to a tender either to avoid, or with the effect of avoiding, participation in the observer program.

5. All documents that relate to the frequency of trawler delivery to tenders;

6. All documents that relate to the frequency of trawler delivery to docksides;

7. All documents that relate to any salmon bycatch rate;

8. All email communication of Will Ellis or Nathan Lagerwey with any of the following subject matters: "bycatch," "tender," "dockside," "observe," "observer," or "monitor."

9. All written warnings issued to any trawler or shoreside processor;

10. All documents that relate to "biasing observer sampling procedures," or "impeding an observer from collecting samples, from making observation or otherwise performing their duties," as reference in the 2017 annual report;

Thank you in advance for your attention to these matters.

Sincerely,



Spencer Nathan Thal



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Office of Law Enforcement
Headquarters
1315 East West Highway
Silver Spring, MD 20910

April 16, 2018

Gabe Flick
10672 Kenai Spur
Highway, 112 PMB 916
Kenai, AK 99611

Re: FOIA Request DOC-NOAA-2017-001376

Dear Mr. Flick,

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on June 21, 2017, in which you requested:

For the time period of May 8, 2015 through May 8, 2017 all text messages, facsimiles and emails (including attachments) sent or received by:

1. Will Ellis, NOAA OLE, Alaska Division Assistant Director,
2. Nathan Lagerwey, OLE, Alaska Division, Deputy Special Agent in Charge to or from (75 listed sources in the request).

This letter completes our response to your request.

On October 18, 2017, December 20, 2017 and January 23, 2018, Arlyn Penaranda, FOIA Coordinator, Office of Law Enforcement, reached out to you to provide you with the interim releases and/or status updated on FOIA your request. She also reached out to you in numerous occasions requesting a clarification of the scope of your FOIA request. In addition, on March 12, 2018, Ms. Penaranda sent you a “still interested” letter to determine whether you were still interested in the request.

Because you did not respond to the request for clarification and the still interested letter sent to you within 30 days, our office administratively closed this request without further action.

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@doc.gov, 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, or e-mail subject line.

FOIA appeals posted to the e-mail box, 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 your request, please contact Arlyn Penaranda at (301) 427-8256 or Arlyn.Penaranda@noaa.gov or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

Logan Gregory

 Digitally signed by Logan Gregory
Date: 2018.04.16 14:22:30 -04'00'

Logan Gregory
Deputy Director
Office of Law Enforcement



UNITED STATES DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Marine Fisheries Service

Office of Law Enforcement

Headquarters

1315 East West Highway

Silver Spring, MD 20910

March 12, 2018

Gabe Flick
10672 Kenai Spur
Highway, 112 PMB 916
Kenai, AK 99611

Re: FOIA Request DOC-NOAA-2017-001376

Dear Mr. Flick:

Thank you for your Freedom of Information Act (FOIA) request dated May 8, 2017, received by the National Oceanic and Atmospheric Administration (NOAA) Office of Law Enforcement on June 21, 2017.

You requested the following records:

For the time period of May 8, 2015 through May 8, 2017 all text messages, facsimiles and emails (including attachments) sent or received by:

- 1. Will Ellis, NOAA OLE, Alaska Division Assistant Director*
- 2. Nathan Lagerwey, OLE, Alaska Division, Deputy Special Agent in Charge to or from (75 listed sources in the request).*

As a recap, on September 14, 2017, our office provided you with an interim release of nineteen (19) documents responsive to your request. Subsequently, on November 22, 2017, our office provided you with an interim release of six (6) documents responsive to your request. You were granted full access to these records. On January 23, 2018, our office provided you with twenty-eight (28) documents responsive to your request. You were given full access to these records.

As stated in the previous correspondences, out of the thousands of e-mails pulled via UMS search from both Assistant Director Will Ellis and Deputy Special Agent in Charge Nathan Lagerwey's e-mail boxes between May 8, 2015 through May 8, 2017, we were unable to locate any emails sent or received by Assistant Director Will Ellis and Deputy Special Agent in Charge Nathan Lagerwey and the following sources you listed on your request:

- Bill Tweit
- Sarah Marrinan
- Dr. Ann Hollowed
- Glenn Reed
- Dave Benson
- Craig Cross
- Julie Bonney
- Doug Vincent-Lang
- Maura Sullivan
- John Lapore
- Katy McGauley



- John Henderschedt
- Craig Cross
- Chris Anderson
- Dave Witherall
- Jim (James) Armstrong
- Sam Cunningham
- Dan Evans
- Diana Stram
- Michel Fey
- Helena Park
- Dennis Moran
- Mike Guy - Fishermen's Finest
- Mike Szymanski
- Arne Fugelvog
- Corine Rosado
- Elizabeth Tief
- Phil Dang
- Patrick Tracy
- Todd Loomis
- Susan Robinson
- Michael Faris
- Sara Watterson
- Frank O'Hara III
- Matt Doherty
- Jonathan Spool
- Udo G. Brossmann
- David S. Wood
- Michelle Broome
- Phil Gunsolus
- Darrin Manor
- Heather McCarty
- Dr. Gordon Kruse
- Dr. Terry Quinn
- John Gavin
- Michael Hyde
- Joe Plesha
- Stefani Moreland
- Stephanie Madsen
- John Bundy
- Jim Gilmore
- Bill Tweit
- Sarah Marrinan
- Dr. Anne Hollowed
- Glenn Reed
- Dave Benson
- Craig Cross
- Julie Bonney

On October 18, 2017, December 20, 2017 and January 23, 2018, I reached out to you to provide you with the interim releases and/or status updated on FOIA your request and informed you that we are unable to process the second part of your request in in which you requested for:

Email messages sent or received by Nathan Lagerwey and/or Will Ellis "...to or from any and all employees and/or representatives of 1. NOAA Fisheries, Office of Law Enforcement, Alaska Division 2. At Sea Processors 3. Pacific Seafood Processors Association 4. Groundfish Forum 5. United Catcher Boats 6. IQUIQUE 7. Fishermen's Finest 8. Ocean Peace 9. O'Hara Corporation 10. United States Seafoods 11. The Fishing Company of Alaska 12. Trident Seafoods 13. Glacier Fish 14. Alaska Seafood Cooperative 15. Aleutian Spray Fisheries 16. Ground Fish Data Bank"

Pursuant to 15 CFR 4.4(c) "the records requested must be described in enough detail to enable Department personnel to locate them with a reasonable amount of effort. If possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the records. In general, the more specific the request describes the records sought, the greater likelihood that the Department will be able to locate those records. Please keep in mind that the FOIA does not require agencies to create new records or to conduct research, analyze data, or answer questions when responding to requests.

We have not heard back from you.

We would like to determine (1) whether you were still interested in the request and (2) whether the temporal responsive time cutoff needed to be changed with a subsequent submission considering the timeframe since the original request was submitted.

Please notify this office within 30 days of the date of this letter. If we do not hear from you we will administratively close this request without further action.

If you have questions regarding your request, please contact me at Arlyn Penaranda at (301) 427-8256 or Arlyn.Penaranda@noaa.gov or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

PENARANDA.AR^{AR} Digitally signed by
PENARANDA.ARLYN.EVAN
LYN.EVANGELIS GELISTA.1177159472
TA.1177159472 Date: 2018.03.12 17:18:56
-04'00'

Arlyn Penaranda
FOIA Coordinator
Office of Law Enforcement

Bogomolny, Michael (Federal)

From: Bogomolny, Michael (Federal)
Sent: Tuesday, May 22, 2018 5:04 PM
To: Graff, Mark (Federal)
Cc: Allison-Holman, Roxie (Federal); Nathanson, Stacey (Federal)
Subject: FW: JW v. DOC - Vaughn index and declarations
Attachments: Perkins Decl + Exhibits (FINAL COMBINED).pdf; JW v DOC - Graff Decl. - MWY markup 5-22-2018.pdf
Importance: High

Mark,

(b)(5)

Sincerely,
bogo

-----Original Message-----

From: Yee, Marsha (USADC) [mailto:Marsha.Yee@usdoj.gov]
Sent: Tuesday, May 22, 2018 4:47 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Subject: RE: JW v. DOC - Vaughn index and declarations
Importance: High

(b)(5)

-----Original Message-----

From: Yee, Marsha (USADC)
Sent: Monday, May 21, 2018 12:57 PM
To: 'Bogomolny, Michael (Federal)' <MBogomolny@doc.gov>
Subject: RE: JW v. DOC - Vaughn index and declarations

Importance: High

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Attachment K

File Name	Page No.	Document's Date	Document's Description	FOIA Exemption(s)	Description/ Justification for Withholding
15-201_Discretionary Release_Redacted	218	11/21/2014	Email from Mark Brook (FSIS FOIA) to Aaron Lavallee (FSIS Deputy Assistant Administrator)	(b)(5) DPP WIP	(b)(5) -- DPP: The redacted information reflects the internal comments and discussions between various members of FSIS FOIA staff and OGC regarding withholding the names of facilities that expressed interest in NPIS, prior to final decision by the agency and would harm the decision making process. Release of the information would reveal ongoing policy discussions prior to final decision by the agency and would harm the decision making process in this and every FOIA case.
15-201_Discretionary Release_Redacted	218-219	11/15/2014	Email from Phil Derfler (FSIS Deputy Administrator) to Susan Golabek (USDA OGC) and Mark Brook (FSIS FOIA)	(b)(5) DPP WIP	(b)(5) -- DPP: The redacted information reflects the internal comments and discussions between various members of FSIS FOIA staff and OGC regarding withholding the names of facilities that expressed interest in NPIS. Release of the information would reveal ongoing policy discussions prior to final decision by the agency and would harm the decision making process in this and every FOIA case.
15-201_Discretionary Release_Redacted	221	11/14/2014	Email from Mark Brook (FSIS FOIA) to Aaron Lavallee (FSIS Deputy Assistant Administrator)	(b)(5) DPP WIP	(b)(5) -- DPP: The redacted information reflects the internal comments and discussions between various members of FSIS FOIA staff and OGC regarding withholding the names of facilities that expressed interest in NPIS. Release of the information would reveal ongoing policy discussions prior to final decision by the agency and would harm the decision making process in this and every FOIA case.
15-201_Discretionary Release_Redacted	221	11/14/2014	Email from Aaron Lavallee (FSIS Deputy Assistant Administrator) to Mark Brook (FSIS FOIA)	(b)(5) DPP WIP	(b)(5) -- DPP: The redacted information reflects the internal comments and discussions between various members of FSIS FOIA staff and OGC regarding withholding the names of facilities that expressed interest in NPIS. Release of the information would reveal ongoing policy discussions prior to final decision by the agency and would harm the decision making process in this and every FOIA case.

Attachment K

File Name	Page No.	Document's Date	Document's Description	FOIA Exemption(s)	Description/ Justification for Withholding
15-201_Discretionary Release_Redacted	225	11/13/2014	Email from Carmen Rottenberg (FSIS Chief of Staff) to Aaron Lavallee (FSIS Deputy Assistant Administrator)	(b)(5) DPP WIP	(b)(5) -- DPP: The redacted information reflects the internal comments and discussions between FSIS Management regarding withholding the names of facilities that expressed interest in NPIS. Release of the information would reveal ongoing policy discussions prior to final decision by the agency and would harm the decision making process in this and every FOIA case.
15-201_Discretionary Release_Redacted	228	10/28/2014	Email from Phil Derfler (FSIS Deputy Administrator) to Bill Smith (FSIS Assistant Administrator), Carmen Rottenberg (FSIS Chief of Staff), and Carol Blake (FSIS Assistant Administrator)	(b)(5) DPP WIP	(b)(5) --DPP: The redacted information reflects the internal comments and discussions between FSIS Management regarding withholding the names of facilities that expressed interest in NPIS. Release of the information would reveal ongoing policy discussions prior to final decision by the agency and would harm the decision making process in this and every FOIA case.

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, May 23, 2018 1:15 PM
To: Stacey Nathanson - NOAA Federal
Cc: Bogomolny, Michael (Federal)
Subject: Re: Docs for re-release in FOIA online
Attachments: JW v. DOC IR6 FAL mhg.docx

(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 Wed, May 23, 2018 at 12:59 PM, Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov> wrote:

Good afternoon,

(b)(5)

Let me know if you have any questions. Thanks!

Stacey
Stacey Nathanson
Attorney-Advisor

NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: 301-628-1614
Email: Stacey.Nathanson@noaa.gov

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Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, May 23, 2018 2:38 PM
To: Stacey Nathanson - NOAA Federal
Cc: Bogomolny, Michael (Federal)
Subject: Re: Document ID stamped docs from Binder
Attachments: JW v. DOC IR6 FAL mhg.docx

(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 Wed, May 23, 2018 at 2:30 PM, Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov> wrote:

(b)(5)

(b)(5). Let me know if you need anything else on this. Thanks!

Stacey
Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: 301-628-1614
Email: Stacey.Nathanson@noaa.gov

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(b) (5)

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Bogomolny, Michael (Federal)

From: Bogomolny, Michael (Federal)
Sent: Wednesday, May 23, 2018 3:58 PM
To: Nathanson, Stacey (Federal); Graff, Mark (Federal)
Subject: FW: FW: Judicial Watch v. DOC - Vaughn index
Attachments: Cleaned-JW v DOC - Def's MSJ - 5-23-2018.docx; Cleaned-JW v DOC - Def's SMF - 5-23-2018.docx
Importance: High

From: Yee, Marsha (USADC) [mailto:Marsha.Yee@usdoj.gov]
Sent: Wednesday, May 23, 2018 3:26 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Subject: RE: FW: Judicial Watch v. DOC - Vaughn index
Importance: High

(b) (5)

Marsha W. Yee
Assistant United States Attorney
U.S. Attorney's Office for the
District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20530
Telephone: (202) 252-2539
Fax: (202) 252-2599
Email: Marsha.Yee@usdoj.gov

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Torczon, Andrea (Federal)

From: Torczon, Andrea (Federal)
Sent: Thursday, May 24, 2018 10:55 AM
To: Graff, Mark (Federal)
Cc: Stith, Lola (Contractor)
Subject: FW: FOIA appeal for DOC-NOAA-2017-001431
Attachments: Appeal for DOC-NOAA-2017-001431 (no attachments).pdf

Mark,

(b)(5)

Thank you.

Andrea

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From: Torczon, Andrea (Federal)
Sent: Tuesday, May 22, 2018 4:08 PM
To: Graff, Mark (Federal) <Mark.Graff@noaa.gov>
Subject: FOIA appeal for DOC-NOAA-2017-001431

Mark,

I am reviewing this FOIA appeal from NOAA's response to a request from Margaret Townsend of the Center for Biological Diversity. Please let me know the contact for this request.

Thank you.

Andrea

Andrea Torczon
Senior Attorney
Information Law Division
Office of the General Counsel
U.S. Department of Commerce
202-482-8028

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May 4, 2018

VIA FOIAONLINE.REGULATIONS.GOV

National Oceanic and Atmospheric Administration

Re: FREEDOM OF INFORMATION ACT APPEAL: DOC-NOAA-2017-001431 (Final Pesticides BEs and BOs)

Dear FOIA Appeals Officer:

On behalf of the Center for Biological Diversity (“Center”), I appeal the National Oceanic and Atmospheric Administration’s (“NOAA”) final determination and all interim responses on the Center’s referenced request for records pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), assigned FOIA Request No. DOC-NOAA-2017-001431 (“FOIA request”). NOAA failed to conduct an adequate search and improperly applied redactions pursuant to FOIA Exemption 5. For the reasons set forth below, NOAA’s withholding of responsive records violates FOIA.

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 search for and disclose all responsive records immediately, in accordance with FOIA’s disclosure mandate and federal policies.

FACTUAL BACKGROUND ABOUT THE CENTER’S FOIA REQUEST

On June 27, 2017 the Center sent the National Marine Fisheries Service (“NMFS”) in care of the National Oceanic and Atmospheric Administration (“NOAA”) a request pursuant to FOIA through the U.S. Department of Commerce (“DOC”) via electronic mail and FOIAOnline. Attachment A (The Center’s June 27, 2017 FOIA Request). In that request the Center sought:

- (1) All records mentioning, including, and/or referencing the draft and/or final biological evaluation of chlorpyrifos under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”);
- (2) All records mentioning, including, and/or referencing the draft and/or final biological evaluation of malathion under the ESA;
- (3) All records mentioning, including, and/or referencing the draft and/or final biological evaluation of diazinon under ESA;
- (4) All records mentioning, including, and/or referencing the draft and/or final biological opinion of chlorpyrifos under the ESA;
- (5) All records mentioning, including, and/or referencing the draft and/or final biological opinion of malathion under the ESA;
- and (6) All records mentioning, including, and/or referencing the draft and/or final biological opinion of diazinon under ESA. Please note that this request does not apply to documents found online or under the docket EPA-HQ-OPP-2016-

0167. The Center is willing to receive records on a rolling basis, and requests that NMFS prioritize responsive records from April 1, 2017 to the date of the search.

Id. That same day, DOC sent the Center automated electronic mail through FOIAOnline acknowledging the Center's FOIA request and assigning it tracking number DOC-OS-2017-001431. Attachment B (DOC's June 27, 2017 Acknowledgment Email).

That same day, the Center submitted a separate FOIA request to DOC through FOIAOnline. Attachment C (The Center's June 27, 2017 DOC FOIA Request).

On June 28, 2017 DOC sent the Center automated electronic mail through FOIAOnline stating that "FOIA request DOC-OS-2017-001431 has had its Tracking Number changed to DOC-NOAA-2017-001431." Attachment D (DOC's June 28, 2017 Tracking Number Change Email).

On July 6, 2017 NOAA sent the Center a letter acknowledging its FOIA request. Attachment E (NOAA's July 6, 2017 Acknowledgment Letter).

On July 7, 2017 NOAA's Office of Protected Resources sent the Center electronic mail seeking to clarify the scope of its FOIA request. Attachment F (NOAA's July 7, 2017 Clarification Email).

On July 12, 2017 the Center and NOAA participated in a telephone call to clarify the scope of the Center's FOIA request. That same day, NOAA sent the Center electronic email memorializing the substance of their telephone call. Attachment G (NOAA's July 12, 2017 Memorialization Email Chain). In that email chain, NOAA stated:

We will only include in your request documents regarding the FWS biological opinion when we have relied on information found in those documents.

We will exclude from your request the following:

- 1 - routine internal reporting of pending matters
- 2 - personnel matters
- 3 - printed materials unless those printed materials have handwritten notes

You have also tentatively agreed that when the last email in an unbroken email chain contains all of the earlier emails, we may exclude all but that last email. In the case that the first email in such a chain had an attachment, we would treat that attachment as included in your request.

Id. That same day, the Center sent NOAA electronic mail stating that NOAA's email "summary accurately represents our agreement and understanding." *Id.*

On July 18, 2017 NOAA sent the Center electronic mail stating:

Since sending this list, I have learned that at least one of our biologists works almost exclusively on EPA and consultation, with only a small portion of her work involving pesticides. I suggest amending the list above to suggest removing “EPA” from the search terms, either altogether or specifically for this biologist and any others who may have a similar work profile.

Attachment H (NOAA’s July 18, 2017 Email Chain). That same day, the Center sent NOAA electronic mail agreeing to the change NOAA outlined. *Id.*

On July 25, 2017 NOAA sent the Center electronic mail granting its fee waiver request pursuant to its FOIA request. Attachment I (NOAA’s July 25, 2017 Fee Waiver Email).

On August 10, 2017 the Center sent NOAA a Notice of Deadline Violation and Offer to Assist Letter. Attachment J (The Center’s August 10, 2017 Notice of Deadline Violation and Offer to Assist Letter).

On August 11, 2017 NOAA sent the Center electronic mail acknowledging receipt of its Notice of Deadline Violation and Offer to Assist Letter. Attachment K (NOAA’s August 11, 2017 Acknowledgment Email).

On August 16, 2017 NOAA sent the Center electronic mail stating:

We have asked that responsive records be provided by this Friday, August 18, although because of vacation schedules it is possible we may not have all of them by that date

Until we know how many records are involved, it is difficult to predict exactly when we can provide an interim response or a final response. Once the documents are received, some time is needed to load them into our document review software. This can be a week or more, depending on the number of records identified. The amount of time needed for review will also depend on the number of documents found.

In addition, because other agencies also received similar requests from you, we are scheduling an interagency call by the end of the month to determine how to manage records in which other agencies have equities.

Based on the above, we should be able by September 15 to provide estimates for interim releases, if any, and estimate for a final response.

Attachment L (NOAA’S August 16, 2017 Status Update Email).

On November 20, 2017 the Center sent its Second Notice of Deadline Violation and Offer to Assist. Attachment M (The Center’s November 20, 2017 Second Notice of Deadline Violation and Offer to Assist).

On November 22, 2017 NOAA sent the Center electronic mail with a status update stating “We should be able to send our first interim response within the next two weeks. At that time we should be able to estimate the time for our final response.” Attachment N (NOAA’s November 22, 2017 Status Update Email Chain). That same day, the Center sent NOAA electronic mail thanking the agency for the quick response and status update. *Id.*

On November 30, 2017 NOAA sent the Center its First Response Letter. Attachment O (NOAA’s November 30, 2017 First Response Letter).

On December 8, 2017 NOAA sent electronic mail stating:

This is to let you know that you either have received or will have received a small - 15 documents - first interim response.

Our 2nd and larger interim response is in process and should get to you in the next two weeks.

We anticipate providing a third interim response in January, and believe that we can provide NOAA’s final response by the end of February.

Attachment P (NOAA’s December 8, 2017 Status Update).

On January 11, 2018 NOAA sent the Center its Second Response Letter. Attachment Q (NOAA’s January 11, 2018 Second Response Letter).

On February 1, 2018 NOAA sent the Center its Third Response Letter. Attachment R (NOAA’s February 1, 2018 Third Response Letter).

On February 2, 2018 the Center sent NOAA electronic mail stating:

Thank you for providing the most recent interim release. I would like to note that I was not notified of this release in my inbox, but happened to come upon it while checking FOIAonline. I believe the file size was too large and did not transmit properly. To ensure we receive proper notification I suggest that large records be sent separately from the notification email.

I noticed the cover letter states this to be the 3rd interim response. Please note that we also never received notification of a 2nd interim response. The letter states the 2nd release was provided on January 11, 2018 but we did not receive any emails nor is there any recorded notification on FOIAonline. I do see the released records themselves, however, they are not dated January 11 and share the same release date as the 3rd response. If available, please provide the cover letter for the 2nd response.

Additionally, per our December 8, 2017 correspondence with Ms. Lawrence, please confirm whether we may all expect a final response by the end of February and if not please provide an updated estimated completion date.

Attachment S (The Center's February 2, 2018 Email). That same day, NOAA sent the Center electronic mail stating:

I must apologize for the recent third interim response as I attached the records to the correspondence. I sincerely apologize for not realizing it would be too large for your email. ...

I've attached the second interim response to your request dated January 11, 2018. We can not [sic] confirm at this time why FOIAonline did not provide you with the second interim response. We're looking into the permission issue as I provided the second interim response in FOIAonline instead of Ms. Hodge-Tonic.

... In light of this situation, we understand the agency should contact you via the email above to alert you of an agency response to ensure you have awareness and receipt, and we will not attach records to the response.

We are on track to complete this request by the end of February.

Attachment T (NOAA's February 2, 2018 Email).

On February 5, 2018 the Center sent NOAA electronic mail stating:

We had originally sent this request to the Department of Commerce and was assigned tracking number DOC-OS-2017-001431 but the request was later reassigned to NOAA. The requester is also interested in records generated at the DOC level and wanted to know if a search was also being conducted there or if it has solely taken place on the NOAA level.

Attachment U (The Center's February 5, 2018 Email).

On February 6, 2018 NOAA sent the Center electronic mail stating that the agency confirmed that the "DOC records responsive to this request will be provided under NOAA FOIA referenced as DOC-NOAA-2017-0001431 [sic]." Attachment V (NOAA's February 6, 2018 Email). In that email, NOAA stated that the Center is "correct in assuming DOC is processing under its own timeline. While we are networking and cooperating with DOC FOIA to provide you responsive records, NOAA will not close out DOC-NOAA-2017-0001431 [sic] until DOC documents are provided. NOAA is on track to provide our response to you by end of February." *Id.*

On February 8, 2018 NOAA sent the Center its Fourth Response Letter. Attachment W (NOAA's February 8, 2018 Fourth Response Letter). In that letter, NOAA stated that 731 records were "exempted from disclosure through Attorney Client-Privilege, Attorney Work

Product and/or Deliberate Process Privilege.” *Id.* The letter further stated that 13 records were released in part with portions exempt from disclosure by Exemption 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.” *Id.* That same day, NOAA sent the Center electronic mail stating, that NMFS was “on track to provide you a final response by end of February which should include Department of Commerce (DOC) records responsive to your request.” Attachment X (NOAA’s February 8, 2018 ECD Email).

On February 27, 2018 NOAA sent the Center its Fifth Response Letter. Attachment Y (NOAA’s February 27, 2018 Fifth Response Letter). In that letter, NOAA stated that it released 72 records in part and withheld 139 in full pursuant to Exemption 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 Attorney Client-Privilege, Attorney Work Product and/or Deliberate Process Privilege.” *Id.* Furthermore, NOAA stated that it released one record in part with portions exempt pursuant Exemption 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,” and Exemption 6, “which protects personnel and medical files and similar files about individuals when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.” *Id.*

On March 8, 2018 NOAA sent the Center automated electronic mail from FOIAOnline notifying the Center that it approved its fifth interim response for release. Attachment Z (NOAA’s March 8, 2018 Email).

On March 16, 2018 NOAA sent the Center electronic mail with a status update. Attachment AA (NOAA’s March 16, 2018 Status Update Email). In that email, NOAA stated that it had provided its fifth interim release and had informed the Center that “approximately 100 records were in need of consultation before their release to you. Those records are trickling back to our agency and you can expect another response shortly. In that response, we will also update you to the Department of Commerce’s search and collection of responsive records.” *Id.*

On March 19, 2018 NOAA sent the Center electronic mail asking the Center:

We have one responsive email that we would like you to consider excluding from your request. This is a May 3, 2017, email to NOAA attorneys Dan Pollak and me, from the Department of Justice attorney representing NMFS in the Northwest Coalition for Alternatives to Pesticides v. NMFS litigation. The email from the Department of Justice attorney attaches the April 13, 2017 letter from David Weinberg of Wiley Rein to Secretary Ross and the April 27, 2017 letter to Administrator Pruitt. I then forwarded the email from the Department of Justice attorney to Cathy Tortorici, my program client.

Please advise if you are willing to allow us to exclude this email chain. If you are not, we will refer this email to the Department of Justice for their review.

Attachment BB (NOAA's March 19, 2018 Email Chain to Exclude Email Chain). That same day, the Center sent NOAA electronic mail agreeing to exclude the email chain. *Id.*

On March 27, 2018 NOAA sent the Center its sixth and Final Response Letter. Attachment CC (NOAA's March 27, 2018 Final Response Letter). In that letter, NOAA stated, *inter alia*:

34 records are released in part and 8 are withheld in full 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 through Attorney Client-Privilege, Attorney Work Product and/or Deliberate Process Privilege.

2 records are released in part with portions exempt 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 and 5 U.S.C. § 552 (b)(6) which protects personnel and medical files and similar files about individuals when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.

Id. On March 29, 2018 NOAA sent the Center electronic mail notifying the Center of its final release. Attachment DD (NOAA's March 29, 2018 Final Release Notification). NOAA states that “[t]he National Marine Fisheries Service has completed search and review of responsive records in its possession.” *Id.* at 2. NOAA summarized that it had released 1,825 records, of which 186 records were redacted in full and 1,050 redacted in part based on the deliberative process privilege. *Id.* Based on these representations, the Center believes that this appeal is to NOAA's final determination on the Center's original FOIA request to NOAA.

In this appeal, the Center challenges the adequacy of NOAA's search, and its withholding of responsive records under Exemption 5 for all of NOAA's interim responses. The Center also challenges NOAA's withholding of the original electronic names of the records, which should not be subject to any exemption. The Center also appeals DOC's constructive denial of the Center's FOIA request, and its failure to show that there are no non-exempt, segregable portions of the withheld records for all of the interim responses. The Center does not challenge NOAA's withholding of information from responsive records pursuant to Exemption 6.

THE FREEDOM OF INFORMATION ACT

The purpose of FOIA is to “open agency action to the light of public scrutiny.” *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). 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 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. *Id.* 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.* These authorities remain in effect.

FOIA “mandates a policy of broad disclosure of government documents” and carries a strict disclosure mandate that requires federal agencies to expeditiously disclose requested records to requesters. *See* 5 U.S.C. § 552; *Church of Scientology v. Dep’t of the Army*, 611 F.2d 738, 741 (9th Cir. 1980). Consequently, 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).

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 in light of FOIA’s dominant objective of disclosure, not secrecy.” *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1996). Accordingly, because FOIA carries a presumption in favor of disclosure, and indeed, because “FOIA requesters face an information asymmetry given that the agency possesses the requested information and decides whether it should be withheld or disclosed,” *COMPTTEL v. U.S. Federal Comm’n Comm.*, 910 F. Supp. 2d 100, 111 (D.D.C. 2012) (internal citations omitted), agencies bear the burden of justifying the withholding of any records that are responsive to a FOIA request. 5 U.S.C. § 552(a)(4).

An agency must provide “a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *See King v. Dept. of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987) (agency must provide); *see also Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (holding an agency’s disclosure of “who wrote the [document], to whom it was addressed, its date, and a brief description” was “patently inadequate” to establish exemption under FOIA).

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

DISCUSSION

I. NOAA DID NOT CONDUCT AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS.

NOAA failed to demonstrate that it conducted an adequate search for records responsive to the Center’s FOIA request.

To achieve FOIA's core purpose of disclosure, an agency must perform an adequate search for responsive records. *Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979). Upon receiving a FOIA request, federal agencies are "required to perform more than a perfunctory search" to identify records that are responsive to the request. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). An agency must demonstrate "a 'good faith effort to conduct a search using methods which can be reasonably expected to produce the information requested.'" *DiBacco v. U.S. Army*, 795 F.3d 178, 188 (D.C. Cir. 2014) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)) (internal alterations omitted); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. U.S. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)) (to meet this burden, the agency must "demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents'").

In addition, "agency affidavits must explain in reasonable detail the scope and method of the search conducted by the agency" for the agency to "satisfy its burden of establishing the adequacy of its search." *Nat'l Sec. Counselors II*, 960 F. Supp. 2d 101, 152 (internal quotations omitted); *Ancient Coin Collectors Guild*, 641 F.3d at 514 (internal quotation omitted) (agency may meet its burden by submitting "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched"). 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 evidence suggests that NOAA failed to conduct an adequate search for records responsive to the Center's FOIA request. *Founding Church of Scientology*, 610 F.2d at 837. NOAA's Final Response Letter lacks any information about the scope and method of the search it conducted. Attachment CC; *Nat'l Sec. Counselors II*, 960 F. Supp. 2d at 152; *Ancient Coin Collectors Guild*, 641 F.3d at 514. Nowhere in NOAA's Final Response Letter did the agency provide search terms or a description of its search. Attachment CC. Instead, the agency merely stated, "Our search within the National Marine Fisheries Service, Office of Protected Resources Headquarters, has identified 129 responsive records." *Id.* As such, NOAA did not demonstrate that it made a "good faith effort to conduct a search" for the requested records, nor did the agency prove that it used methods that "can be reasonably expected to produce the information requested." *Oglesby* at 920 F.2d at 68. Therefore, the agency did not satisfy its burden to prove the adequacy of its search.

Accordingly, it appears that NOAA merely performed a perfunctory search for responsive records. *Ancient Coin Collectors Guild v.*, 641 F.3d at 514. Without a description of the search methods NOAA used, or the original electronic names of the documents, the agency has failed to make it apparent to the Center that it conducted an adequate search for records. *Oglesby* at 920 F.2d at 68; *Nat'l Sec. Counselors II*, 960 F. Supp. 2d at 152; *Ancient Coin Collectors Guild v.*, 641 F.3d at 514. To remedy this, NOAA must conduct an adequate search for responsive records, release responsive records immediately, and provide adequate detail about the search methods that it utilized. Additionally, because the Center believes there may be further evidence

of NOAA's inadequate search, the Center reserves its right to further challenge any subsequent searches once it receives additional records from NOAA and has an opportunity to review them.

The Center is simply unable to conclude that NOAA's search was reasonably calculated to locate all records that are responsive to the Center's FOIA request. Thus, based on available information, NOAA failed to conduct an adequate search for requested responsive records.

II. NOAA HAS NOT CARRIED ITS BURDEN TO PROVE THAT IT MAY LAWFULLY WITHHOLD RESPONSIVE RECORDS UNDER EXEMPTION 5.

In addition to conducting an inadequate search, NOAA failed to prove that it may lawfully withhold responsive records under FOIA Exemption 5's deliberative process privilege. 5 U.S.C. § 552(b)(5). An agency may only withhold information pursuant to one of FOIA's exemptions if "the agency reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption...; or ... disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). To satisfy its burden, an agency seeking to utilize a FOIA exemption to withhold information "must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (citations omitted). "Without a sufficiently specific affidavit or *Vaughn* Index, a court cannot decide, one way or the other, a deliberative process, attorney-client, or attorney work product privilege claim." *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 259-60 (D.D.C. 2004) (citation omitted). Indeed, an agency seeking to withhold information "must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA" and, thus, "[a]n agency cannot meet its statutory burden of justification by conclusory allegations." *Mead Data Cent.*, 566 F.2d at 258.

Here, NOAA withheld 186 records in full (completely blacked out) and withheld 1,050 records in part by broadly invoking Exemption 5's privileges. Attachment CC (summary). But, NOAA failed to provide "a relatively detailed justification specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of the withheld document to which they apply." *Mead Data Cent.*, 566 F.2d at 251. NOAA did not address how it applied Exemption 5 to the withheld records, or how it justified its use of Exemption 5. *Id.* Considering the scarcity of information in NOAA's Final Response Letter, there is no way to determine if the records would "routinely be disclosed" in civil litigation. Attachment CC; *See U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984). It is nearly impossible for the Center to ascertain what is missing from the records since most of the records are completely or nearly completely blacked out. Attachment CC. Due to NOAA's complete lack of justification, the Center is left to speculate as to how the redacted records qualify for the deliberate process privilege.

Nowhere in NOAA's communications did the agency state that it reasonably foresaw that disclosure would harm an interest protected by Exemption 5. Aside from failing to demonstrate or allege that NOAA reasonably foresaw that disclosure of the requested records would harm a protected interest, NOAA also failed to satisfy the elements necessary to show that withholding information is warranted pursuant to Exemption 5. Exemption 5 allows government agencies to

withhold “interagency 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.” 5 U.S.C. § 552(b)(5). To qualify for Exemption 5, (1) a record’s “source must be a Government agency,” and (2) “it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.” *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8, (2001). In other words, Exemption 5 covers “those documents, and only those documents, normally privileged in the civil discovery context[.]” *Loving v. Dep’t of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008) (quotation omitted).

First, NOAA provided no evidence that the records are inter-agency or intra-agency memoranda or letters that would not be available to a party other than one in litigation with the agency. Second, NOAA failed to show that the records are predecisional and deliberative such that they would qualify for the deliberative process privilege. Third, NOAA failed to show that the records qualify for the attorney-client privilege. Fourth, NOAA did not demonstrate that it withheld records properly under the attorney work-product privilege. Thus, NOAA did not meet its burden to prove that it may lawfully withhold records pursuant to Exemption 5.

A. NOAA Did Not Meet FOIA Exemption 5’s Threshold Requirement.

NOAA failed to show that it could meet the threshold requirement of FOIA Exemption 5 that the records must be inter- or intra-agency records. 5 U.S.C. § 552(b)(5).

The Supreme Court has held that the standard to determine whether records fall under the inter-agency or intra-agency threshold requirement is whether the records would “routinely be disclosed” in civil litigation. *See U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984). Furthermore, to satisfy Exemption 5’s threshold requirement that a record must be inter- or intra-agency, the agency must show that it has not shared the withheld records with third parties, including state agencies or tribes. *See People for Am. Way Found. v. U.S. Dep’t of Educ.*, 516 F. Supp. 2d 28, 36 (D.D.C. 2007) (citing 5 U.S.C. § 551(1)) (for the purpose of FOIA, “it is clear” that “an ‘agency’ must be a federal entity”).

Here, it is not apparent that the responsive records withheld by NOAA are, in fact, inter- or intra-agency records. In its Final Response Letter, NOAA did not address whether it shared the withheld records with non-federal entities. Attachment CC. However, given the nature of the Center’s FOIA request, it is reasonable to assume that the records were shared with third-parties, such as chemical companies or pesticide trade or advocacy organizations (e.g. Croplife America) and even state agencies. If NOAA withheld records under Exemption 5 but shared the records with third parties, then the agency directly offended the threshold requirement that Exemption 5 can only apply only to federal inter- and intra-agency communications. *See People for Am. Way Found.*, 516 F. Supp. 2d at 36. Moreover, considering the utter lack of information in NOAA’s Final Response Letter, the agency failed to show that the redacted or withheld records were inter- or intra-agency. Attachment CC.

Thus, NOAA has not met its burden to prove that it may lawfully withhold records pursuant to Exemptions 5.

B. NOAA Failed To Show That The Records Are Both Predecisional And Deliberative.

Even if NOAA had proved that it met Exemption 5's threshold requirement (which it did not), NOAA failed to show that the withheld records were predecisional and deliberative, thus warranting the deliberative process privilege.

The deliberative process privilege allows a federal agency to withhold responsive records only where the records contain material that is both "predecisional" and "deliberative." 5 U.S.C. § 552(b)(5). For a record to be "predecisional," it must reflect the give-and-take of a consultative process before the agency took final action. *Vaughn v. Rosen (II)*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). An agency must be able to point to a specific agency decision to which a withheld record pertains. *Senate of P.R. v. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987). Even draft documents are not universally exempt from disclosure. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982); *Nevada v. DOE*, 517 F.Supp.2d 1245, 1264-65 (D. Nev. 2007).

In addition to being "predecisional," records must be "deliberative" to qualify for the privilege. Portions of a record are "deliberative" only 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), <http://www.justice.gov/oip/doj-guide-freedom-information-act-0> (hereinafter *DOJ Guide*) (website last visited June 7, 2017). 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).

In evaluating withholdings based on Exemption 5's deliberative process privilege, the privilege "must be construed as narrowly as is consistent with efficient government operation." *Army Times Pub. Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1069 (D.C. Cir. 1993). To explain how information qualifies for the privilege, an agency necessarily must explain, at a minimum, what the records consist of (i.e., who generated them, who received them, and what they contain). Simply providing conclusory statements of privilege or policy justifications for withholding information is wholly inadequate for an agency to overcome FOIA's strong disclosure presumption and to withhold information from records under the narrowly construed deliberative process privilege. *Founding Church of Scientology*, 610 F.2d at 837; see also *COMPTEL*, 910 F.

Supp. at 111 (“conclusory assertions of privilege will not suffice to carry the Government’s burden of proof in defending FOIA cases”); *see also 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 justification whatsoever as to why it may withhold portions of the final pesticide biological evaluations and opinions under the deliberative process privilege. Attachment CC. As stated above, in its Final Response Letter NOAA failed to provide any explanation for the legal standard it invoked, let alone how the records qualified for the privilege. *Id.* NOAA only included the exemption’s language from the statute, which amounts to conclusory, boilerplate language. *Id.* The agency broadly redacted records of the final pesticide biological evaluations and opinions under Exemption 5, but as stated above, NOAA did not offer a “relatively detailed justification” for withholding and redacting records. *King*, 830 F.2d at 219; *Mead Data Cent.*, 566 F.2d at 251. Moreover, NOAA failed to explain what the records consist of (i.e., who generated them, who received them, and what they contain). As a result, NOAA failed to establish that it may withhold any portion of the records.

NOAA did not identify any particular decision to which the records are purportedly “predecisional.” *Senate of P.R.*, 823 F.2d at 585. It is unclear how the *final* pesticide biological evaluations and opinions could be categorized as predecisional. As such, NOAA cannot overcome FOIA’s strong disclosure mandate and lawfully withhold these records under the narrowly construed deliberative process privilege. *Founding Church of Scientology of Wash.*, 610 F.2d at 830; and *see also COMPTEL*, 910 F. Supp. 2d at 119; *see also Senate of P.R.*, 823 F.2d at 585.

Furthermore, NOAA did not demonstrate how the redacted portions of final pesticide biological evaluations and opinions qualify as “deliberative.” The Center requested all records of the final pesticide biological evaluations and opinions; however, as these are records of final evaluations and opinions, it is highly unlikely that they reflect advisory opinions, recommendations, or 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); *see also Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (internal citations omitted). NOAA failed to show that the withheld records were “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn*, 523 F.2d at 1143-44. Exemption 5 only protects “preliminary positions or ruminations about how to exercise *discretion* on some *policy matter*.” *Petroleum Info. Corp.*, 976 F.2d at 1435 (emphasis added). Here, NOAA is not exercising discretion in a policy matter. NOAA is not making a decision by which it is exercising its policy judgment in commenting on the statements of other agencies. Therefore, the deliberative process privilege does not apply.

Indeed, the substance of the withheld records is, presumably, primarily factual in nature and would include a significant amount of information that is not, by nature, deliberative. Under Exemption 5, NOAA may not withhold factual information as deliberative. *Julian*, 806 F.2d at 1419. The burden is on NOAA to demonstrate that the withheld records reveal an agency exercise of discretionary policy-making judgment which it has failed to do. *Coastal States Gas*

Corp., 617 F.2d at 861. Therefore, NOAA failed to show that the withheld records are “deliberative,” and as such it does not qualify for the deliberative process privilege.

Thus, NOAA failed to show that it can meet Exemption 5’s requirements. As a result, NOAA must promptly release any and all records improperly withheld under the deliberative process privilege, including portions of records.

C. NOAA Failed To Carry Its Burden To Show That It May Withhold Records Pursuant To Exemption 5’s Attorney-Client Privilege.

In addition to failing to prove that the records qualify for Exemption 5’s deliberative process privilege, NOAA also failed to prove that the attorney-client privilege applies. The attorney-client privilege protects confidential communications with counsel which must concern a legal matter for which the client sought professional, legal advice. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *see also Schlefer v. U.S.*, 702 F.2d 233, 25 (D.C. Cir 1983). The privilege protects an agency’s communication with its attorneys, as long as the communications occurred pursuant to obtaining legal advice and is limited to agents authorized to speak or act on behalf of the agency. *See Coastal States* at 617 F.2d at 862-64. This privilege “does not exempt a document simply because the communication involves the government’s counsel.” *See Judicial Watch v. Dep’t of Army*, 435 F.Supp. 2d 81 (D.D.C. 2006).

Here again, NOAA failed to provide a “relatively detailed justification, specifically identifying the reasons” for withholding the records. *King*, 830 F.2d at 219. In its Final Response Letter, NOAA provided a paltry explanation for its application of Exemption 5, and as such, the Center is left to speculate as to how the attorney-client privilege may apply to the records. Attachment CC. NOAA merely stated that “the records are exempted from disclosure through Attorney Client-Privilege, Attorney Work Product and/or Deliberate Process Privilege.” *Id.* Nowhere in its Final Response Letter did NOAA provide any meaningful explanation as to how the withheld records would reveal the agency’s communications seeking legal advice from agency counsel. *NLRB*, 421 U.S. at 154; *Schlefer*, 702 F.2d at 25. Furthermore, as the Center’s request sought final pesticide biological evaluations and opinions, it is unclear how the records would qualify as communications occurring pursuant to obtaining legal advice. *Coastal States* at 617 F.2d at 862-64. NOAA’s utter lack of justification in its Final Response Letter is entirely insufficient to warrant attorney-client privilege protection to records responsive to the Center’s FOIA request.

Thus, NOAA failed to prove that it properly applied the attorney-client privilege to the withheld records. As a result, NOAA must promptly release any and all improperly withheld information, including portions of records.

D. NOAA Has Failed To Show That It May Withhold Records Under The Attorney Work-Product Privilege.

Suffering the same flaws as the deliberative-process and attorney-client privileges, NOAA has failed to establish that it may withhold records under the attorney work-product privilege.













The attorney work-product privilege is intended to protect records that have been prepared by an attorney or others in anticipation of litigation, preserving the adversarial process by shielding materials which would disclose the attorney's theory of the case or litigation strategy. *See, e.g., Coastal States*, 617 F.2d at 864. Thus, "at the very least some articulable claim, likely to lead to litigation," must have arisen. *Id.* at 865.

Here, NOAA has not provided any information to substantiate its claims that this privilege applies whatsoever. Indeed, NOAA failed to show that "at the very least some articulable claim, likely to lead to litigation." *Coastal States*, 617 F.2d at 864 at 865.




Thus, NOAA failed to demonstrate that it properly withheld records under Exemption 5's attorney work-product privilege.

III. NOAA UNLAWFULLY WITHHELD THE ORIGINAL, ELECTRONIC NAMES OF THE RECORDS.

In addition to improperly invoking Exemption 5 to the released records, NOAA improperly changed the file names that were part of the records. The name of an electronic record is part of the record, and NOAA cannot withhold it without claiming an exemption. In its first interim release, NOAA included the name of the records as follows:

-  4-13-17 Wiley Rein LLP memo to The Honorable Ryan Zinke-DOI.pdf
-  4-13-17 Wiley Rein LLP memo to The Honorable Scott Pruitt-EPA.pdf
-  4-13-17 Wiley Rein LLP memo to The Honorable Wilbur Ross-DOC.pdf
-  4-19-17 CropLife America memo to EPA_ DOI_ DOC.pdf
-  6-20-17 Proposed Mtg Agenda_EPA-USFWS-USDA FESTF Mtg (wNotes).pdf
-  103-601Malathion_Data_Report_2016.pdf
-  Appendix C - Critical Habitat PBFs (6-30-17).pdf
-  Best Mgmt Practices to Prvent Aquatic Contamination.pdf
-  expertise slide.pdf
-  Proportion US range summary 6-8-15.pdf
-  Thistle et al 2017 Evalutation of Spray Drift from Backpack Sprayer and UTV.pdf
-  WSDA 2015 MONITORING REPORT- issued 5-30-17.pdf

Yet, in its second release, and all subsequent releases, NOAA changed the names of the records. For example, NOAA's second interim response released three records in full, but changed the names:

-  0.7.1596.5205.pdf
-  0.7.1596.6433.pdf
-  0.7.1596.12481.pdf

The Center is entitled to the original record, including the name of the record, not a modified record. Thus, NOAA's withholding of the original, electronic names of the records is unlawful.

IV. THE DEPARTMENT OF COMMERCE CONSTRUCTIVELY DENIED THE CENTER'S FOIA REQUEST.

In addition to NOAA's unlawfully withholding the original electronic names of the records, DOC has constructively denied the Center's FOIA request. A FOIA requester "shall be deemed to have exhausted his administrative remedies" whenever an agency fails to comply with a time limit of the Act. 5 U.S.C. § 552(a)(6)(C); *see also 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."). In other words, when an agency fails to respond to a FOIA request within the statutory timeframe, the request is treated as being constructively denied by the agency. At this time, DOC has violated statutory 20-workday deadline that FOIA mandates for agencies to make a determination on FOIA requests, effectively constructively denying the Center's request such that the Center is now deemed to have constructively exhausted its administrative remedies.

Here, the Center submitted two FOIA requests on June 27, 2017: one to DOC and one to NOAA. In the Center's original FOIA request to DOC, the agency assigned it tracking number DOC-OS-2017-00143. Then, without the Center's consent or approval, DOC consolidated that request with the Center's separate request to NOAA, and changed the tracking number to DOC-NOAA-2017-001431. In NOAA's Final Response Letter, the agency stated that "[t]he Department of Commerce continues to search, collect, and review responsive records. You can expect further or final response regarding those records under the FOIA reference number DOC-NOAA-2017-001431." Attachment CC. Now, while NOAA's response is "complete" the request is not final because DOC has still not provided any responsive records, effectively holding up the agency's response. The Center routinely submits requests to agencies and their sub-agencies without the departmental agency subsuming the separate requests into one matter.

Here, because DOC has treated the Center's two separate requests as one matter and because the agency has not provided any response to the Center's request, let alone one that complies with FOIA's 20-workday deadline, DOC has constructively denied the Center's request.

V. 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 the records under Exemption 5 was proper (which it did not), the agency did not carry its burden to prove that there are no reasonably segregable, non-exempt portions of the withheld records, such as purely factual and scientific information. This issue was not even mentioned in NOAA's Final Response Letter. Attachment CC.

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. Interior*, 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.

VI. CONCLUSION

As described above, NOAA violated FOIA by failing to conduct an adequate search for final pesticide biological evaluations and opinions, and by improperly redacting records pursuant to Exemptions 5. Accordingly, NOAA must conduct an adequate search for responsive records and produce all responsive records immediately. In so doing, NOAA must also provide an estimated date of completion of its release of the records. 5 U.S.C. § 552(a)(7)(B).

We expect your timely resolution of this matter. Do not hesitate to contact me with any questions regarding this appeal. Please contact me at foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,



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Attachments:

- Attachment A (The Center's June 27, 2017 FOIA Request)
- Attachment B (DOC's June 27, 2017 Acknowledgment Email)
- Attachment C (The Center's June 27, 2017 DOC FOIA Request)
- Attachment D (DOC's June 28, 2017 Tracking Number Change Email)
- Attachment E (NOAA's July 6, 2017 Acknowledgment Letter)
- Attachment F (NOAA's July 7, 2017 Clarification Email)
- Attachment G (NOAA's July 12, 2017 Memorialization Email)
- Attachment H (NOAA's July 18, 2017 Email Chain)
- Attachment I (NOAA's July 25, 2017 Fee Waiver Email)
- Attachment J (The Center's August 10, 2017 Notice of Deadline Violation and Offer to Assist Letter)
- Attachment K (NOAA's August 11, 2017 Acknowledgment Email)
- Attachment L (NOAA'S August 16, 2017 Status Update Email)
- Attachment M (The Center's November 20, 2017 Second Notice of Deadline Violation and Offer to Assist)

Attachment N (NOAA's November 22, 2017 Status Update Email Chain)
Attachment O (NOAA's November 30, 2017 First Response Letter)
Attachment P (NOAA's December 8, 2017 Status Update)
Attachment Q (NOAA's January 11, 2018 Second Response Letter)
Attachment R (NOAA's February 1, 2018 Third Response Letter)
Attachment S (The Center's February 2, 2018 Email)
Attachment T (NOAA's February 2, 2018 Email)
Attachment U (The Center's February 5, 2018 Email)
Attachment V (NOAA's February 6, 2018 Email)
Attachment W (NOAA's February 8, 2018 Fourth Response Letter)
Attachment X (NOAA's February 8, 2018 ECD Email)
Attachment Y (NOAA's February 27, 2018 Fifth Response Letter)
Attachment Z (NOAA's March 8, 2018 Email)
Attachment AA (NOAA's March 16, 2018 Status Update Email)
Attachment BB (NOAA's March 19, 2018 Email Chain to Exclude Email Chain)
Attachment CC (NOAA's March 27, 2018 Final Response Letter)
Attachment DD (NOAA's March 29, 2018 Final Release Notification)

Bogomolny, Michael (Federal)

From: Bogomolny, Michael (Federal)
Sent: Thursday, May 24, 2018 12:26 PM
To: Graff, Mark (Federal)
Subject: FW: documents at issue in the challenge
Attachments: challenges.zip; 12 MSJ.pdf

(b)(5)

I am also attaching ERF's MSJ for your reference.

-bogo

From: Bogomolny, Michael (Federal)
Sent: Thursday, May 24, 2018 11:49 AM
To: 'Wang, Jennifer (USACAN)' <Jennifer.S.Wang@usdoj.gov>
Subject: documents at issue in the challenge

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NORTHERN DISTRICT OF CALIFORNIA
16

17 ECOLOGICAL RIGHTS FOUNDATION, a
non-profit corporation,

18
19 Plaintiff,

20 v.

21 NATIONAL MARINE FISHERIES SERVICE,

22
23 Defendant.
24
25
26
27
28

Case No. 3:18-cv-00888-JSC

**PLAINTIFF'S NOTICE OF MOTION,
MOTION FOR SUMMARY
JUDGMENT, AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Hearing date: May 31, 2018

Time: 9:00am

Location: Courtroom F, 15th Floor

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NOTICE OF MOTION AND MOTION

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2 Plaintiff ECOLOGICAL RIGHTS FOUNDATION ("EcoRights") hereby provides notice of a
3 hearing before the Honorable Jacqueline Scott Corley, at 9:00am on May 31, 2018 in Courtroom F, 15th
4 Floor.

5 PLEASE TAKE NOTICE that EcoRights moves this Court for an order granting summary
6 judgment pursuant to Local Rule 56 and Federal Rule of Civil Procedure 56 establishing that the
7 National Marine Fisheries Service ("NMFS") has violated and remains in violation of the Freedom of
8 Information Act ("FOIA"), and issuing declaratory and injunctive relief remedying these violations.

1 **I. INTRODUCTION/STATEMENT OF ISSUES**

2 Congress enacted the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to "pierce the veil
3 of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v.*
4 *Rose*, 425 U.S. 352, 361 (1976) (internal citation omitted). Such access "ensure[s] an informed citizenry,
5 vital to the functioning of a democratic society, needed to check against corruption and to hold the
6 governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242
7 (1978). Concerned that the U.S. Army Corps of Engineers ("Corps") and NMFS have shirked their
8 Endangered Species Act ("ESA") duties concerning two Corps dams and other Corps activities on the
9 Yuba River that adversely affect threatened fish species, EcoRights sent a FOIA request to NMFS
10 seeking records related to unlawful take¹ of protected Yuba River fish species² that the Corps and /or its
11 licensees may be perpetuating and concerning NMFS ESA section 7 consultations with the Corps.

12 In response to EcoRights' request NMFS released 239 documents in their entirety and 54
13 documents that were heavily redacted. EcoRights timely appealed NMFS's release determination,
14 claiming that the search was inadequate and that non-exempt information was improperly withheld from
15 ten documents. NMFS has never provided its appeal determination, which is now more than a year
16 overdue. This type of egregious delay from NMFS in responding to EcoRights' FOIA requests and
17 appeals was the subject of two previous actions against NMFS by EcoRights and Our Children's Earth
18 Foundation ("OCE"). They sought and obtained a declaration from a branch of this court that NMFS had
19 a past pattern and practice of violating FOIA's deadlines in response to EcoRights' and OCE's FOIA
20 requests. *Our Children's Earth Found., v. Nat'l Marine Fisheries Serv.*, Nos. 14-4365 & 14-1130, 2015
21 U.S. Dist. LEXIS 143392 ("*OCE III*"), at *29 (N.D. Cal. Oct. 21, 2015). The court ordered NMFS to
22 comply with FOIA's deadlines in response to future requests due to the court's finding that NMFS "has
23

24 ¹ Defined broadly, "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or
25 collect[.]" 16 U.S.C. § 1532(19). "Harm" is defined in the regulations as "an act which actually kills or
26 injures wildlife" and includes "significant habitat modification or degradation where it actually kills or
injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or
sheltering." 50 C.F.R. § 17.3.

27 ² The Evolutionarily Significant Unit of Central Valley Spring-run Chinook Salmon; the Distinct
28 Population Segment of Central Valley Steelhead; and the Southern Distinct Population Segment of
North American Green Sturgeon are the three ESA-listed species in the Yuba River. These three species
spend a significant amount of their life cycle in the ocean and thus come under NMFS's jurisdiction.

1 failed to do so previously and the potential that these offenses might continue." *Our Children's Earth*
2 *Found. v. Nat'l Marine Fisheries Serv.*, 2015 U.S. Dist. LEXIS 94997 ("*OCE II*"), at *33 (N.D. Cal. July 20,
3 2015) However, once again NMFS has flouted FOIA's deadlines in response to a request from
4 EcoRights.

5 EcoRights sent its request to NMFS to learn what NMFS is doing to exercise its regulatory
6 authority to curb the harms to the Yuba's listed fish species that the Corps and its licensees may be
7 perpetuating and to advocate for greater NMFS involvement in addressing these environmental harms.
8 However, EcoRights has been hampered in these efforts by NMFS's continuing disregard for FOIA's
9 mandates. Declaratory and injunctive relief are necessary to bring NMFS back within the law and to allow
10 EcoRights to receive the information that it critically needs in a timely fashion and to which it is entitled
11 under FOIA.

12 **II. STATEMENT OF FACTS**

13 On December 6, 2016, EcoRights, via counsel, sent a FOIA request to NMFS seeking three
14 categories of documents: 1) documents containing input NMFS West Coast Region staff provided to
15 NOAA³ headquarters detailing the impacts of a Corps memo known as the Stockdale Memo. The
16 Stockdale Memo lays out strict guidelines limiting Corps ESA section 7 consultations with NMFS and
17 the U.S. Fish and Wildlife Service; 2) documents to or from NMFS counsel Chris Kiefer related to a
18 draft letter from NMFS to the Corps entitled "Endangered Species Act Section 7(a)(2) Concurrence
19 Letter for the U.S. Army Corps of Engineers' (Corps) Ongoing Operation and Maintenance of
20 Englebright Dam and Reservoir on the Yuba River" ("Englebright concurrence letter"); and 3)
21 documents in the possession of any NOAA Fisheries Office, Department and/or Division, including any
22 NOAA law enforcement division, related to whether any entities or individuals may have caused or did
23 cause, or may be causing, or are causing unauthorized take of threatened or endangered fish species in
24 the Yuba River in the vicinity of Englebright Dam, Narrows 1 and 2 powerplants, Daguerre Point Dam
25 and the Hallwood-Cordua Diversion, including but not limited to, any and all documents generated by,
26

27 _____
28 ³ NOAA is the National Oceanic and Atmospheric Administration. NMFS is an agency within NOAA.

1 sent by, or received by NOAA law enforcement agent, Don Tanner. Declaration of Christopher Hudak
2 In Support of Plaintiff's Motion for Summary Judgment ("Hudak Decl.") ¶ 2, Ex. 1.

3 On December 14, 2016 NMFS sent a letter to EcoRights counsel, Christopher Hudak,
4 acknowledging receipt of the request on December 12, 2016 and assigning it tracking number DOC-
5 NOAA-2017-000257. *Id.* ¶ 3, Ex. 2. The acknowledgement letter stated that NMFS was extending the
6 time for its response by ten business days because the agency needed to search for and collect the
7 requested records from field facilities or other establishments separate from the office processing the
8 request. *Id.*

9 On February 13, 2017 NMFS sent EcoRights a final determination partially granting and
10 partially denying EcoRights' request. *Id.* ¶ 4, Ex. 3. NMFS stated it had located 309 documents
11 responsive to the request and had released 239 of these documents in their entirety, via FOIAonline. *Id.*
12 NMFS partially withheld 54 documents under claims of attorney work product, attorney-client privilege,
13 deliberative process exemptions pursuant to 5 U.S.C. 552(b)(5) ("Exemption 5") and the right to privacy
14 exemption pursuant to 5 U.S.C. § 552(b)(6) ("Exemption 6"). *Id.* NMFS's final determination also stated
15 that 16 documents that had originated from other agencies were referred to those agencies for release
16 determination and direct response to EcoRights. *Id.*

17 On March 10, 2017 EcoRights appealed NMFS's determination to the Office of the General
18 Counsel of the Department of Commerce ("DOC Counsel"). *Id.* ¶ 5, Ex. 4. The appeal challenged the
19 adequacy of the search and the redactions in ten records totaling 87 pages. *Id.*, Ex. 4, Ex. 5. The appeal
20 contended that NMFS: 1) improperly withheld information under vague and unjustified claims of
21 deliberative process and attorney-client privilege exemptions; 2) withheld information with no
22 exemption claim; 3) had not shown the existence of foreseeable harm to an interest protected by
23 Exemptions 5 and 6 that would permit the agency to withhold information under these exemptions under
24 the standard of the FOIA Improvement Act of 2016; and 4) failed to segregate factual material and make
25 partial disclosures where possible. *Id.*, Ex. 4.

26 EcoRights' appeal contended NMFS's search was inadequate because none of the documents
27 NMFS had released were from the NOAA Office of Law Enforcement ("OLE") although EcoRights had
28 specifically asked for OLE documents and EcoRights had reason to know that at least one OLE agent

1 (Don Tanner) had responsive records. *Id.* ¶ 6, Ex. 4. The 20 business days deadline for NMFS to provide
2 its final determination for EcoRights' appeal was April 7, 2017. 5 U.S.C. §552(a)(6)(A)(ii).

3 On March 13, 2017 the DOC Counsel's Office acknowledged receipt of EcoRights appeal.
4 Hudak Decl. ¶ 7, Ex. 6. On July 18, 2017, four months after the statutory deadline for the appeal
5 determination, NMFS posted to FOIAonline two redacted emails responsive to EcoRights' request. *Id.* ¶
6 8. EcoRights was not notified that NMFS had released these two documents on FOIAonline. *Id.* The two
7 redacted documents posted to FOIAonline on July 18, 2017 were also released to EcoRights in the initial
8 document release on February 13, 2017, but NMFS's approach to redactions in these two emails has
9 been inconsistent. One email, addressed to OLE Spent Agent Don Tanner, was released without any
10 redactions in the first document production. Declaration of Patricia Linn In Support of Plaintiff's Motion
11 For Summary Judgment ("Linn Decl.") ¶ 4, Ex. A. A near duplicate of the email, along with Agent
12 Tanner's reply, was also released in the first document production with redactions pursuant to
13 Exemption 6. *Id.*, Ex. B. Although Agent Tanner's name was redacted, information identifying the
14 author of the email as being from the OLE, and his cell phone number, was not redacted. *Id.* The version
15 posted to FOIAonline in July 2017 was redacted pursuant to Exemptions 6 and 7(C) and the information
16 identifying the author of the email as being from the OLE and the cell phone number was redacted. *Id.*,
17 Ex. C. Similarly, the second email posted in July 2017 had a recipient's name redacted pursuant to
18 Exemption 6 in the initial document release. *Id.*, Ex. D. In the version of this email released in July 2017
19 NMFS asserted that Exemption 7(C) also applied to the recipient's name. *Id.*, Ex. E. *Compare* Ex. A
20 with Ex. B and Ex. C; *also compare* Ex. D with Ex. E.

21 On October 2, 2017 EcoRights' counsel, Christopher Hudak, sent an email to NMFS FOIA
22 officers and the DOC Counsel's office requesting an update on the status of the appeal. Hudak Decl. ¶ 9,
23 Ex. 7. The DOC Counsel did not respond and NMFS provided information about a different, unrelated
24 request but not the appeal. *Id.* On October 25, 2017 Mr. Hudak sent another email to NMFS FOIA
25 officers and the DOC Counsel's office requesting that NMFS provide the final appeal determination by
26 November 3, 2017 and warned that if the determination was not provided by that date EcoRights might
27 seek judicial relief. *Id.*, Ex. 8.

1 On October 30, 2017 Michael Bogomolny, Acting Chief, Information Law Division, of the DOC
2 Counsel's Office responded to EcoRights' October 25, 2017 request and stated that he expected
3 EcoRights would have the appeal determination "this week." *Id.* ¶ 11, Ex. 9. However, the DOC
4 Counsel's office did not provide the appeal determination that week. *Id.* On January 31, 2018 EcoRights'
5 counsel, Patricia Linn, sent another email to the DOC Counsel's office requesting a status update. Linn
6 Decl. ¶ 2, Ex. F. Mr. Bogomolny responded that same day stating he would provide "a full status update
7 before the end of the week." *Id.* However, he did not. *Id.* Instead, on February 2, 2018 he sent yet
8 another email stating he was "committing to releasing a final determination of the appeal in this matter
9 next week." *Id.* However he did not release the determination that week. *Id.* As of the date of this
10 Motion the DOC Counsel has not released the appeal determination and it is 378 days overdue. *Id.* ¶ 5.

11 **III. STANDARD OF REVIEW**

12 FOIA cases typically are decided by motions for summary judgment. *Yonemoto v. Dep't. of*
13 *Veterans Affairs*, 686 F.3d 681, 687 (9th Cir. 2012), *overruled on other grounds by Animal Legal*
14 *Defense Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016) (internal quotation marks
15 omitted); *see also Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009);
16 *S. Yuba River Citizens League, v. Nat'l Marine Fisheries Serv.* ("SYRCL"), 06-2845, 2008 WL
17 2523819, at *4 (E.D. Cal. June 20, 2008). Plaintiffs may bring summary judgment at any time seeking to
18 establish that a federal agency has violated FOIA. Fed. R. Civ. P. 56(c); *Lane v. Department of Interior*,
19 523 F.3d 1128, 1134 (9th Cir. 2008). Summary judgment is appropriate "if the pleadings, depositions,
20 answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is
21 no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of
22 law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

23 The burden is on the agency to demonstrate, not the requester to disprove, that the materials
24 sought under FOIA have not been "improperly withheld." *United States Department of Justice v. Tax*
25 *Analysts*, 492 U.S. 136, 142 n.3 (1989); *National Ass'n of Gov't Employees v. Campbell*, 593 F.2d 1023,
26 1027 (D.C. Cir. 1978); *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). The government may not rely
27 upon "conclusory and generalized allegations of exemptions." *Vaughn v. Rosen*, 484 F.2d 820, 826
28 (D.C. Cir. 1973). Moreover, courts do not defer to a federal agency's determination that the requested

1 information falls under a particular FOIA exemption. *Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1127
2 (9th Cir. 2007).

3 **IV. ARGUMENT**

4 **A. Declaratory Judgment is Warranted That NMFS Violated FOIA's Deadlines.**

5 To ensure that the public is kept current concerning its government's activities and can timely
6 acquire current information government agencies possess, Congress imposed strict deadlines for agency
7 responses to FOIA requests. Within 20 working days, federal agencies must provide a determination that
8 (1) informs the requester as to the disposition of its FOIA request, i.e., whether records will be provided
9 or withheld and if the latter, why, and (2) that informs the requester of a right to appeal to the agency
10 head any decision not to provide requested records. 5 U.S.C. § 552(a)(6)(A)(i). Agencies must resolve
11 appeals of FOIA determinations within 20 working days after the receipt of an appeal.

12 5 U.S.C. §552(a)(6)(A)(ii).

13 FOIA requires an agency to have completed its search, collected and reviewed all responsive
14 records, and notified a requester as to its determination of which records will be produced, which will be
15 withheld, and which exemptions will apply, within the 20 working days. 5 U.S.C. § 552(a)(6)(A)(i);
16 *Citizens for Responsibility and Ethics in Washington v. Federal Election Com'm* ("CREW"), 711 F.3d
17 180, 186-89 (D.C. Cir. 2013); *Our Children's Earth Found., v. Nat'l Marine Fisheries Serv.*, 85 F. Supp.
18 3d 1074, 1089-91 (N.D. Cal. 2015) ("*OCE I*"). FOIA further requires agencies to provide requested
19 records "promptly." 5 U.S.C. § 552(a)(3)(A); *CREW*, 711 F.3d at 188 (prompt production "typically
20 would mean within days or a few weeks of a 'determination,' not months or years.").

21 Federal agencies at most can extend FOIA's 20 working days deadline by an additional ten
22 working days by informing the requester that "unusual circumstances" necessitate such an extension and
23 when the agency will respond. 5 U.S.C. § 552(a)(6)(B)(i). Under FOIA "unusual circumstances" means
24 the need (1) to search for and collect requested records from locations separate from the office
25 processing the request; (2) to search for, collect, and appropriately examine a voluminous amount of
26 separate and distinct records; or (3) for consultation with another agency having a substantial interest in
27 the determination of the request. *Id.*

1 EcoRights has exhausted its administrative remedies due to NMFS's failure to provide its final
2 appeal determination within FOIA's deadlines. 5 U.S.C. § 552(a)(6)(C)(i).⁴ EcoRights submitted its
3 appeal to the DOC Counsel on March 10, 2017. Hudak Decl. ¶ 5, Ex. 4. DOC Counsel acknowledged
4 receipt of the appeal on March 13, 2017. *Id.* ¶ 7, Ex. 6. Under FOIA NMFS had 20 business days from
5 March 13, 2017 to make its appeal determination. 5 U.S.C. § 552(a)(6)(A)(ii). That meant April 10, 2017
6 was the deadline for NMFS's appeal determination. However, *more than one year past the statutory*
7 *deadline* NMFS has yet to provide the determination. EcoRights inquired in October 2017 and January
8 2018 when the determination would be made, and although both times DOC Counsel told EcoRights
9 that the determination would be issued within a week it never was. Hudak Decl. ¶ 11; Linn Decl. ¶ 2.

10 NMFS's egregiously overdue appeal determination and its failure to produce all non-exempt
11 information promptly constitutes improper withholding and entitles EcoRights to a declaratory judgment
12 that NMFS has violated 5 U.S.C. § 552(a)(6)(A)(ii), and 5 U.S.C. § 552(a)(3)(A). Declaratory judgment
13 is proper when there are purely legal questions at issue and the judgment will clarify legal issues to the
14 parties and the public. *Natural Res. Def. Council, Inc. v. EPA* ("NRDC"), 966 F.2d 1292, 1300 (9th
15 Cir.1992) (granting declaratory judgment because "[t]he court must uphold adherence to the law, and
16 cannot condone a failure of an executive agency to conform to express statutory requirements");
17 *see also Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1172–73 (9th Cir. 2002). EcoRights'
18 requested declaratory judgment establishing that NMFS has failed to make a timely appeal
19 determination and promptly produce all non-exempt information will "delineate[] important rights and
20 responsibilities" and will be of "significant educational and lasting importance" by helping to ensure that
21 NMFS adheres to FOIA's mandatory response deadlines in responding to EcoRights' future FOIA
22 requests. *NRDC*, 966 F.2d at 1299. EcoRights has legally cognizable rights in receiving a timely response
23 to its FOIA appeal and has *per se* been injured by NMFS's failure to provide a timely response. *FEC v.*
24 *Akins*, 524 U.S. 11, 21 (1998) (a "plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain
25 information which must be publicly disclosed pursuant to a statute."); *Long v. U.S. I.R.S.*, 693 F.2d 907,

26
27 ⁴ If the agency fails to provide its appeal determination within the 20 working days mandated by FOIA
28 and the requester initiates a court action, the Department of Commerce administrative appeal process
may continue. 15 C.F.R. § 4.10(e).

1 910 (9th Cir. 1982) ("unreasonable delays in disclosing non-exempt documents violate the intent and
2 purpose of the FOIA, and the courts have a duty to prevent these abuses."); *see also Ecological Rights*
3 *Found. v. Fed. Emergency Mgmt. Agency ("EcoRights")*, No. 16-05254, 2017 U.S. Dist. LEXIS 197451,
4 at *30 (N.D. Cal. Nov. 30, 2017) (granting declaratory judgment that agency's failure to comply with
5 FOIA's time limits was, by itself, a violation of FOIA); *OCE I*, 85 F. Supp. 3d at 1090 (same); *OCE II*,
6 2015 U.S. Dist. LEXIS 94997, at *26-27 (same); *Gilmore v. U.S. Dep't of Justice*, 33 F. Supp. 2d 1184,
7 1187- 88 (N.D. Cal. 1998) (same).

8 **B. NMFS's Search Was Inadequate.**

9 NMFS must conduct a reasonable search for documents responsive to EcoRights' FOIA request
10 with methods that are reasonably expected to produce all existing documents. 5 U.S.C. § 552(a)(3)(C);
11 *Zemansky v. United States EPA*, 767 F.2d 569, 571 (9th Cir. 1985); *OCE I*, 85 F. Supp.3d at 1082.
12 NMFS's search must be more than perfunctory and NMFS must follow obvious leads to discover
13 requested documents. *Valencia-Lucana v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999). "The
14 court applies a 'reasonableness' test to determine the 'adequacy' of a search methodology, consistent
15 with congressional intent tilting the scale in favor of disclosure." *Morley v. CIA*, 508 F.3d 1108, 1114
16 (D.C. Cir. 2007) (internal citations omitted). The agency has the burden to demonstrate performance of an
17 adequate search. *Steinberg v. Dept. of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). To prevail on summary
18 judgment, NMFS "must demonstrate beyond material doubt" that its search was reasonable." *Nation*
19 *Magazine, Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir.1995) (internal citation
20 omitted).

21 EcoRights' FOIA request sought three categories of records including "any and all NOAA
22 Fisheries documents from January 1, 2000 to the present in the possession of any NOAA Fisheries
23 Office, Department, and/or Division, including any NOAA law enforcement division, related to
24 whether any entities or individuals may have caused or did cause, or may be causing, or are causing
25 unauthorized take of threatened or endangered fish in the Yuba River at, or in the vicinity of,
26 Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, and the Hallwood-Cordua
27 Diversion including but not limited to any and all documents generated by, sent by, or received by
28 NMFS Law Enforcement agent, Don Tanner." Hudak Decl., Ex. 1. In its February 13, 2017

1 determination NMFS indicated that it had located 309 documents responsive to the request. *Id.*, Ex. 3.
2 However, none of the records originally released were from the OLE. Linn Decl. ¶ 6.

3 The OLE enforces the ESA and other laws, designed to protect marine life and their habitat, to
4 ensure these resources are available for future generations. *See* [https://](https://www.fisheries.noaa.gov/topic/enforcement)
5 www.fisheries.noaa.gov/topic/enforcement. EcoRights is seeking records from the OLE to determine,
6 what if anything, the OLE has done, within its mission to protect and conserve threatened fish species, to
7 investigate possible unauthorized take of ESA listed fish species in the Yuba River and to enforce the
8 ESA's ban on such take. Documents that NMFS has released in response to EcoRights' request show that
9 over the last several years Special Agent Tanner is aware of and may be officially investigating flow
10 fluctuations at Narrows 1 and 2 powerplants near Englebright Dam that have harmed protected fish
11 species by stranding them in isolated pools not connected to the river channel. Linn Decl. ¶ 6, Ex. G. A
12 document that NMFS released in response to another environmental organization's request (Friends of
13 the River) shows that Agent Tanner is also investigating poaching at the Yuba River and has been on at
14 least one site visit to the Yuba. *Id.*, Ex. H. Therefore, it is likely Agent Tanner and/or others within the
15 OLE have records responsive to EcoRights' request. However, NMFS did not locate and release these
16 records because Agent Tanner and the OLE did not search for records responsive to EcoRights' request
17 for information related to possible unauthorized take of threatened Yuba River fish. *Id.* In EcoRights and
18 OCE's previous FOIA litigation against NMFS the court found that the agency's search was inadequate
19 because the OLE had not searched for responsive records:

20
21 ...documents produced in Plaintiffs' parallel litigation against Stanford demonstrate that the
22 Fisheries Service's Office of Law Enforcement in Monterey, California had an open
23 investigation between at least 2009 and 2013 into the Endangered Species Act "take" of the
24 Steelhead by the Searsville Dam. Documents from that investigation clearly fall within the
25 scope of Plaintiffs' first and third FOIA requests, which sought, among other things, any
26 documents in the Fisheries Service's possession related to the impact of the Searsville Dam
27 on the Steelhead. Yet it is undisputed that Plaintiffs' requests were not forwarded to the
28 Office of Law Enforcement and no searches took place there... This renders the Fisheries
Service's searches in response to Plaintiffs' first and third requests inadequate.

29 *OCE I*, 85 F. Supp. 3d at 1083-84 (internal citations omitted). It appears NMFS has repeated this
unlawful behavior in the instant case. Even if OLE did perform a search, its search was clearly

1 inadequate as evidenced by records documenting the involvement of Agent Tanner in investigating
2 potential unauthorized take of Yuba River protected fish species but a dearth of records produced related
3 to those investigations.

4 By presenting evidence that there are more responsive records than NMFS produced, EcoRights
5 has presented "positive indications of overlooked materials," thus shifting the summary judgment
6 burden to NMFS to justify its search. *Valencia-Lucana*, 180 F.3d at 326. *See also Campbell v. United*
7 *States Dep't of Justice*, 164 F.3d 20, 28 (D.C.Cir.1998) (search was inadequate when agency's disclosed
8 documents revealed that searching other records systems might uncover the documents sought); *Center for*
9 *National Security Studies v. United States Department of Justice*, 215 F. Supp.2d 94, 110 (D.D.C.2002)
10 (finding search inadequate where disclosed document clearly indicated existence of earlier, relevant
11 undisclosed documents); *SYRCL*, 2008 WL 2523819, *15, n. 8 (the existence of unreleased but
12 responsive documents might bear on adequacy of search). If NMFS does not provide affidavits in its
13 Opposition explaining how its searches for records responsive to EcoRights request were reasonably
14 thorough, then the Court must award summary judgment that NMFS failed to perform an adequate
15 search.

16 **C. Declaratory Judgment Is Warranted That NMFS's Withholding Of Records
Without Adequate Explanation Violates FOIA.**

17 FOIA requires that an agency release documents unless the document falls under a specifically
18 enumerated exemption. 5 U.S.C. § 552. "[T]hese limited exemptions do not obscure the basic policy that
19 disclosure, not secrecy, is the dominant objective of the Act,"; "[c]onsistent with the Act's goal of broad
20 disclosure, these exemptions have been consistently given a narrow compass." *Dep't of Interior v.*
21 *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001) (internal citations omitted); *see also*
22 *Assembly of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). Moreover, the FOIA
23 Improvement Act of 2016, enacted on June 30, 2016, made significant amendments to FOIA, including
24 changes further tightening the standard by which NMFS must evaluate withholdings. *See* Department of
25 Justice Office of Information Policy Summary of the FOIA Improvement Act of 2016, available at
26 <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016> ("OIP FOIA 2016 Summary").
27 The FOIA Improvement Act dictates that agencies must do more than simply demonstrate a document
28

1 falls within a FOIA exemption; agencies may now withhold information only if disclosure *would harm*
2 *an interest protected by an exemption* – what is referred to as the “foreseeable harm standard.” 5 U.S.C.
3 § 552(a)(8)(A)(i); OIP FOIA 2016 Summary (emphasis added).⁵

4 Government agencies bear the burden of proof to show that any withheld documents are properly
5 exempt from disclosure. 5 U.S.C. § 552(a)(4)(B); *Yonemoto*, 686 F.3d at 688; *Willamette Industries, Inc.*
6 *v. U.S.*, 689 F.2d 865, 868 (9th Cir. 1982). When an agency withholds documents under a claim of
7 exemption, it must “notify the person making such request of such determination and *the reasons*
8 *therefor.*” 5 U.S.C. § 552(a)(6)(A)(i)(I) (emphasis added); *Oglesby v. United States Dep’t of Army*, 920
9 F.2d 57, 65 (D.C. Cir. 1990). The agency must provide enough information, presented with sufficient
10 detail, clarity, and verification, so that the requester can fairly determine what has not been produced
11 and why and the court can decide whether the exemptions claimed justify the nondisclosure. *Fiducia v.*
12 *U.S. Dep’t of Justice*, 185 F.3d 1035, 1043 (9th Cir. 1999). Conclusory statements that exemptions apply
13 are not enough to overcome FOIA's strong presumption in favor of disclosure. *See Nat’l Ass’n of Home*
14 *Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002).

15 NMFS has not met its burden to show that the 12 records at issue in this case were lawfully
16 redacted pursuant to Exemptions 5, 6, and 7(C). NMFS must, at the very least, at the administrative level
17 identify the information withheld and the basis for withholding that information. However NMFS has
18 failed to identify the specific exemption claimed for two documents that were redacted, merely
19 identifying “(b)(5)” as the exemption claimed. *See Hudak Decl.*, Ex. 5 at 11, 13. Exemption “(b)(5)”
20 could mean attorney-client privilege, attorney work product, or deliberate process privilege. One
21 document is redacted without any exemption identified. *Id.* at 15. NMFS's determination also does not
22 adequately indicate the volume of material withheld as required by 5 U.S.C. § 552(a)(6)(F). *Id.*, Ex. 3.
23 The determination states 54 documents have been partially withheld but EcoRights does not know how
24 many documents and how many pages were withheld under attorney-client privilege, how many were
25 withheld under attorney work product, how many were withheld under deliberative process privilege,
26 and how many were withheld under Exemption 6. *Id.*

27 _____
28 ⁵ Department of Homeland Security FOIA regulations effective December 22, 2016 acknowledge the
codification of the foreseeable harm standard. *See* 81 Fed. Reg. 83625 (Nov. 22, 2016).

1 NMFS also has not explained what foreseeable harm to an interest protected by Exemptions 5, 6,
2 and 7(C) might result if redacted information is disclosed, and has not indicated whether it made any
3 attempt to review the records for segregable factual information and release any purely factual material.
4 *Id.* NMFS withheld in full 53 pages out of the 89 pages of information at issue without any indication
5 the agency had determined there was no factual material in those 53 pages that could be segregated and
6 released. *See Ex. 5 at 20-35; 49-69; and 73-88.*

7 By failing to identify the specific privilege under Exemption 5 claimed, failing to identify the
8 foreseeable harm to a protected interest that might result from disclosure, failing to estimate the volume
9 of material withheld, and failing to explain whether all segregable material had been released NMFS did
10 not provide an adequate explanation, at the administrative level, why its Exemption 5, 6 and 7(C)
11 withholdings are justified, in violation of 5 U.S.C. § 552(a)(6)(A)(i)(I). Declaratory judgment is
12 therefore warranted that NMFS's approach of providing only conclusory statements concerning the
13 information it is withholding does not comport with 5 U.S.C. § 552(a)(6)(A)(i)(I). *See Campbell*, 164
14 F.3d at 30-31; *Wiener v. FBI*, 943 F. 2d 972, 978-79 (9th Cir. 1991) (government may not respond to a
15 FOIA request with boilerplate or conclusory statements; rather, it must provide “tailored reasons” for
16 withholding documents). This will incentivize NMFS in the future to provide sufficiently detailed
17 explanations why it contends the information it withholds is indeed FOIA exempt. Requesters can then
18 evaluate NMFS's FOIA exemption claims and pursue meaningful administrative appeals *before seeking*
19 *recourse to the courts*. This will further increase the likelihood that NMFS will carefully look at whether
20 its justification for withholding information is truly defensible. The requested declaration is appropriate
21 as it will “delineate[] important rights and responsibilities” by helping to ensure that NMFS only
22 withholds information with proper justification when responding to EcoRights future FOIA requests.
23 *NRDC*, 966 F.2d at 1299.

24 With respect to NMFS's withholdings in the ten records at issue in the appeal and the
25 withholdings in the two records posted to FOIAonline in July 2017 the agency must, in response to this
26 Motion, either release the documents in full or come forward with a *Vaughn* index and agency affidavits
27 justifying why the withheld information is exempt from disclosure. *Judicial Watch, Inc. v. Food & Drug*
28 *Admin.*, 449 F.3d 141, 146 (D.C. Cir. 2006); *King v. U.S. Dept. of Justice*, 830 F.2d 210, 219 (D.C. Cir.

1 1987); *see also Vaughn*, 484 F.2d at 826-28. The *Vaughn* index must identify: (1) each record withheld,
2 (2) the statutory exemption claimed, and (3) include a particularized explanation of how disclosure of
3 the particular information would damage the interest protected by the claimed exemption. *Vaughn*, 484
4 F.2d at 827; *see also Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 188 (D.D.C. 2013) (“an agency
5 must provide in its declaration and *Vaughn* index precisely tailored explanations for each withheld
6 record at issue”) (internal citations omitted).

7 **D. NMFS Cannot Claim A Valid Deliberative Process Privilege Exemption.**

8 The purpose of the deliberative process privilege is to allow agencies to engage in internal
9 debates without the inhibition that would be caused by public scrutiny. *NLRB v. Sears Roebuck*, 421
10 U.S. 132, 150-151 (1975). For the privilege to apply, the communication at issue must be both
11 “predecisional,” i.e., precede an agency decision, and “deliberative.” *Ancient Coin Collectors Guild v.*
12 *U.S. Dep't. of State*, 641 F.3d 504, 513 (D.C. Cir. 2011); *Judicial Watch*, 449 F.3d at 151; *Nat'l Wildlife*
13 *Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988). Documents merely applying published
14 law to factual information and/or simply explaining agency decisions are neither. *Brinton v. Dep't of*
15 *State*, 636 F.2d 600, 605 (D.C. Cir. 1980); *Judicial Watch v. United States HHS*, 27 F. Supp. 2d 240,
16 245 (D.C. 1998). Documents explaining an already-decided policy decision are, in fact, “at the heart of
17 what should be released under FOIA.” *Nat'l Day Laborer Organizing Network v. ICE*, 811 F. Supp. 2d
18 713, 741 (S.D.N.Y. 2011).

19 The deliberative process privilege is a qualified privilege under FOIA. *FTC v. Warner*
20 *Communications*, 742 F.2d 1156, 1161 (9th Cir. 1984). A litigant may obtain deliberative documents if
21 his or her need for the materials and accurate fact-finding override the government’s interest in non-
22 disclosure. *Id.*; *United States v. Leggett & Platt*, 542 F.2d 655, 658 (6th Cir. 1976), *cert. denied*, 430
23 U.S. 945 (1977). Among the factors for this determination are the relevance of the information, the
24 government’s role in the litigation, and the extent to which disclosure would hinder frank discussion.
25 *Warner*, 742 F.2d at 1161. Where disclosure has already occurred, the government has little interest in
26 secrecy. *Starkey v. DOI*, 238 F. Supp. 2d 1188, 1193 (S.D. Cal. 2002) (public availability of documents
27 waived exemptions). *See also Goodrich v. EPA*, 593 F. Supp. 2d 184, 192 (D.C. 2009) (EPA’s failure to
28 “jealously guard” its protected information cut against it); *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir.

1 2007) (disclosure may be compelled even over otherwise valid agency exemption claim when agency
2 has effectively revealed information).

3 Recent guidance on the FOIA Improvement Act provides that agencies should further scrutinize
4 documents that may fall within the deliberative process privilege to determine whether a discretionary
5 release is appropriate. Department of Commerce FOIA regulations mandate that NMFS make
6 discretionary releases of exempt information when required to do so in accordance with the FOIA
7 Improvement Act. 15 C.F.R. § 4.1(a). Even if the withheld information at issue here is exempt from
8 disclosure, which it is not, discretionary releases are appropriate. EcoRights' request was specifically
9 tailored to gather information about government decision-making and, more importantly, the federal
10 government's compliance with its own laws – in this case, the ESA. Information about government
11 decision-making and consultation that is required by law is exactly the type of information that FOIA
12 was intended to disclose to the public. Such disclosure ensures that citizens are informed and their
13 government is held accountable. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868
14 (D.C.Cir.1980). NMFS's inclination to withhold such information under a claim of deliberative process
15 privilege is contrary to the mandates of FOIA and all the more suspect in the absence of any kind of
16 description or justification.

17 It appears that the records at issue that NMFS has redacted under deliberative process contain
18 predecisional information that was later adopted or incorporated by NMFS and is therefore not exempt
19 from disclosure, *i.e.* information in: 1) an October 30, 2013 email, subject "Re: Yuba BA" from NMFS
20 Fish Biologist Gary Sprague; 2) a draft letter from NMFS to Environmental Advocates attorney
21 Christopher Sproul responding to Mr. Sproul's comments on the Corps' 2013 Yuba River Biological
22 Assessments ("Yuba BAs") and concerning the ESA consultation process for the Corps' Yuba River
23 Operations; 3) a January 30, 2014 email, subject "Re: Yuba Consultation" from Sacramento River
24 Basin Chief, Howard Brown; 4) a January 31, 2014 email, subject "Update on Yuba Consultations with
25 U.S. Army Corps" from Mr. Brown; and 5) two drafts of the Englebright concurrence letter. Hudak
26 Decl., Ex. 5 at 11, 13, 15, 16-17, 19-36, 47-70. NMFS has a duty to disclose these records in full. An
27 agency cannot withhold predecisional materials when the final decisionmaker expressly adopts or
28

1 incorporates them by reference. *NLRB v. Sears*, 421 U.S. 132 (1975); *Swisher v. Department of the Air*
2 *Force*, 660 F.2d 369 (8th Cir. 1981).

3 NMFS and the Corps completed the Yuba River ESA consultation at issue in these documents
4 nearly four years ago. NMFS cannot demonstrate why it needs to keep the information in these
5 documents secret, especially where NMFS's decisions pertaining to this ESA consultation with the
6 Corps are already so publicly known. NMFS and the Corps have publicly released numerous documents
7 which have already revealed a great deal about these agencies' consideration of their ESA section 7
8 obligations concerning the Corps' Yuba River project--and shown that NMFS and the Corps decided not
9 to engage in formal ESA section 7 consultation over much of the Corps' ongoing operation and
10 maintenance of its two Yuba River dams and other Yuba activities because of the Corps' conclusions
11 concerning the limits of its discretionary authority. Linn Decl. ¶ 8. For example, NMFS's 2014 Yuba River
12 Biological Opinion and NMFS's Englebright concurrence letter have publicly disclosed this information. *Id.*,
13 Ex. J, Ex. K. NMFS and the Corps have also disclosed this information in their briefing in a lawsuit brought
14 by Friends of the River against the agencies. *See Friends of the River v. Nat'l Marine Fisheries Serv.*, No. 16-
15 00818, Dkt. 39 at 9-11 (E.D. Cal. June 23, 2017). In response to Friends of the River's FOIA requests, NMFS
16 has also released numerous documents commenting on the consultation, the sufficiency of the Yuba BAs,
17 and drafts of the Englebright concurrence letter. Linn Decl. ¶ 8, Ex. L. Given how public NMFS's
18 decisionmaking pertaining to this consultation has been, it is unlikely there is content in the documents that
19 NMFS has a legitimate need to keep secret. Where disclosure has already occurred, the government has
20 little interest in secrecy. *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007); *EcoRights*, 2017 U.S. Dist.
21 LEXIS197451, at *15-16 (information already disclosed by another agency not protected under
22 deliberative process). If NMFS's response to this Motion fails to demonstrate how releasing each
23 particular record would expose the agency's decision making process in a way that would discourage
24 candid discussion, and justify how disclosure would harm NMFS as required by the FOIA Improvement
25 Act, the Court should issue declaratory judgment and order NMFS to release all information withheld
26 under deliberative process. *EcoRights*, 2017 U.S. Dist. LEXIS 197451, at *16-17, *34; *Elec. Frontier*
27 *Found. v. CIA*, 09-3351, 2013 U.S. Dist. LEXIS 142146, at *47-52, *93 (N.D. Cal. 2013).

1 **E. NMFS Cannot Claim a Valid Attorney-Client Privilege Exemption**

2 The attorney-client privilege protects from discovery "confidential communications between
3 attorneys and clients, which are made for the purpose of giving legal advice." *United States v. Richey*,
4 632 F.3d 559, 566 (9th Cir. 2011); *see also EcoRights*, 2017 U.S. Dist. LEXIS 197451, at *17-18
5 (agency failed to show withheld information was related to the giving or receiving of legal advice or was
6 a confidential communication); *OCE III*, 2015 U.S. Dist. LEXIS 143392, at *21 ("an otherwise
7 unprivileged document does not gain any protections simply because it was sent to a lawyer for review").
8 For the attorney-client privilege to apply, there must be some indicia that the agency was dealing with its
9 attorneys as would any private party seeking legal advice to protect personal interests. *Coastal States*,
10 617 F.2d at 863. If communications with attorneys are not confidential, have already been made public,
11 or are not made in the context of an attorney-client relationship they are not protected by attorney-client
12 privilege. *In re Sealed Case*, 676 F.2d 793, 808-9 (D.C. Cir. 1982). The attorney-client privilege covers
13 only confidential communications between attorney and client. *Id.* Thus, information other than
14 "communications," or communications that do not involve both attorney and client, are not protected. *Id.*
15 The fact that a person is a lawyer does not make all communications with that person privileged. *United*
16 *States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996). "Because it impedes full and free discovery of the
17 truth, the attorney-client privilege is strictly construed." *Weil v. Inv./Indicators, Research & Mgmt, Inc.*,
18 647 F.2d 18, 24 (9th Cir. 1981).

19 It appears that attorney-client privilege does not apply to the information that NMFS has
20 redacted. There is no indication that communications were kept confidential and they may have been
21 disclosed to a third party. Voluntary disclosure by the client to a third party breaches the confidentiality
22 of the attorney-client relationship and therefore waives the privilege, not only as to the specific
23 communication disclosed but often as to all other communications relating to the same subject matter.
24 *Id.*; *In re United Mineworkers Employment Benefit Plans*, 159 F.R.D. 307, 310 (D.D.C. 1994). NMFS
25 has provided no basis for finding that the withheld information was related to the giving or receiving of
26 legal advice. Moreover, it appears that much of the withheld information constitutes official policy
27 statements rather than confidential attorney-client communications. *See Hudak Decl.*, Ex. 5 at 73-88.
28 Policy statements are not protected by attorney-client privilege. *In re Sealed Case*, 676 F. 2d at 808-9. If

1 in its Opposition NMFS fails to adequately explain how the attorney-client privilege applies the Court
2 should issue declaratory judgment and order NMFS to release all information withheld under this
3 exemption. *See EcoRights*, 2017 U.S. Dist. LEXIS 197451, at *18-22.

4 **F. NMFS Cannot Claim Exemptions 6 and 7(C) Apply to Withheld Records.**

5 FOIA Exemption 6 "protects from disclosure information about individuals: (1) that constitutes
6 personnel, medical files and similar files, and (2) the disclosure of which would constitute a clearly
7 unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); *Am. Immigration Lawyers Ass'n v.*
8 *Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016); *EcoRights*, 2017 U.S. Dist.
9 197451, at *22. In evaluating the application of Exemption 6, courts "balance the public interest in
10 disclosure against the interest Congress intended the exemption to protect." *Cameranesi v. U.S. Dep't of*
11 *Def.*, 856 F.3d 626, 637 (9th Cir. 2017) (internal quotation marks and citation omitted). NMFS must
12 show a personal privacy interest that is "nontrivial." *Yonemoto*, 686 F.3d at 694 (a threat to privacy that is
13 conceivable on some generalized conjectural level is not sufficient to justify invoking Exemption 6).

14 NMFS has not demonstrated that the names, email addresses, and/or cell phone information
15 withheld under Exemption 6 constitute personnel information and that revealing this information would
16 invade personal privacy. *See Linn Decl. Exs. A-D*. Looked at in the light of the strict standard for
17 withholding documents under Exemption 6, such a claim appears meritless. FOIA's "presumption
18 favoring disclosure [] is at its zenith under Exemption 6." *Nat'l Ass'n of Home Builders*, 309 F.3d at 37
19 (internal citation omitted); *see also Lawyers' Comm. for Civil Rights of S.F. Bay Area v. Dep't of the*
20 *Treasury*, No. 07-2590, 2008 WL 4482855, at *20 (N.D. Cal. Sept. 30, 2008) ("The burden remains on
21 the agency to justify any withholdings under Exemption 6 since the presumption in favor of disclosure
22 under this exemption is as strong as that with other exemptions.").

23 That these records presumably reveal the name and business email address or cell phone number
24 of an agency employee is insufficient to make the redacted information "personnel" records subject to
25 Exemption 6; the names, business email addresses, and phone numbers of NMFS employees performing
26 tasks in the ordinary course of their official duties are not "personnel" records. *Aguirre v. SEC*, 551 F.
27 Supp. 2d 33, 54 (D.D.C. 2008) ("Correspondence does not become personal solely because it identifies
28 government employees."); *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257

1 (D.D.C. 2005) (document merely revealing employee names and work telephone numbers is not "similar
2 to a 'personnel' or 'medical' file"); *Gordon v. FBI*, 390 F. Supp. 2d 897, 902 (N.D. Cal. 2004) (names of
3 agency employees are not personal information about those employees that meets Exemption 6
4 threshold), summary judgment granted, 388 F. Supp. 2d 1028, 1040-42 (N.D. Cal. 2005) (Exemption 6
5 does not apply to the names of agency's "lower-level" employees; "[t]he [agency] still has not
6 demonstrated that an employee's name alone makes a document a personnel" or 'similar file").

7 Even if NMFS could somehow show a substantial privacy interest in removing the names of
8 certain NMFS staff from the emails, its invocation of Exemption 6 would still fail the next step in
9 judicial analysis, a balancing of NMFS's privacy interest against the public's interest in the disclosure of
10 the information. *Cameranesi*, 856 F.3d at 637. EcoRights' interest here outweighs any conceivable
11 NMFS privacy interest in hiding its staff's identities. It is difficult if not impossible for EcoRights to
12 reconstruct the dialogue within and among NMFS staff and other government agencies regarding the
13 ESA matters at issue with the NMFS staff identities redacted. This information serves an important
14 public interest because it allows EcoRights and the public to scrutinize whether NMFS staff are carrying
15 out their statutory duties under the ESA to protect the Yuba's threatened fish species. Therefore, the
16 Court should find that the important public interest in releasing the emails in full outweighs the very
17 minimal privacy interest involved.

18 Exemption 7(C) authorizes the withholding of "records or information compiled for law
19 enforcement purposes" only to the extent they "could reasonably be expected to constitute an
20 unwarranted invasion of personal privacy . . ." 5 U.S.C. § 552(b)(7)(C). There is no indication that the
21 redacted emails at issue were compiled for NOAA law enforcement purposes. The emails are from
22 NMFS fishery biologist, Larry Thompson, to a number of NMFS staff, including apparently OLE agent
23 Don Tanner, or another agent within the OLE, about a letter to the Federal Energy Regulatory
24 Commission ("FERC") that Thompson wrote in early 2014, on behalf of NMFS, regarding salmon
25 stranding events in the Yuba River. *See* Linn Decl., Exs A-E. The information about the salmon
26 stranding events does not appear to have been compiled for NOAA law enforcement purposes, but rather
27 to inform FERC about the events because FERC has regulatory authority over the entities that own the
28 powerplants causing the stranding events. For the exemption to apply NMFS must demonstrate that

1 including the OLE agent(s) in these emails was for a valid law enforcement purpose and explain that
2 purpose. NMFS must further explain why releasing the names, work email addresses and phone
3 numbers of OLE agents under these circumstances is an unwarranted personal privacy invasion,
4 especially given NMFS's release of OLE agent Don Tanner's name in other documents provided to
5 EcoRights and Friends of the River, other agencies identifying him in official reports, and his public
6 identification in the news media in connection with ESA compliance matters. Linn Decl. Exs G-I.

7 Unless NMFS, in opposition to this Motion, comes forward with evidence substantiating the
8 claim that the information redacted in these emails falls within Exemptions 6 and 7(C), and explaining
9 how NMFS's interests would be harmed by the information's release, the Court must issue a declaration
10 that NMFS has improperly invoked Exemption 6 and Exemption 7(C), contrary to the requirements of
11 FOIA (as amended by the FOIA Improvement Act) and enjoin NMFS to release the information
12 withheld under these two exemptions. *See EcoRights*, 2017 U.S. Dist. LEXIS 197451, at *27. (Note: if
13 NMFS does in fact come forward with such ostensible evidence, discovery or *in camera* review may be
14 appropriate to probe the veracity of such assertions). *Fiducia*, 185 F.3d at 1043; *Lion Raisins, Inc. v.*
15 *U.S. Department of Agriculture*, 636 F. Supp. 2d 1081, 1107 (E.D. Cal 2009).

16 **G. NMFS Has a Duty to Segregate Out Non-Exempt Factual Materials.**

17 FOIA requires that "any reasonably segregable portion of a record" must be released after
18 application of the Act's nine exemptions. 5 U.S.C. § 552(b); *Roth v. U.S. Dep't of Justice*, 642 F.3d
19 1161, 1167, (D.C. Cir. 2011). The FOIA Improvement Act further added that an agency shall "consider
20 whether partial disclosure of information is possible whenever the agency determines that a full
21 disclosure of a requested record is not possible." 5 U.S.C. § 552(a)(8)(A)(ii). It appears likely that
22 NMFS has not complied with 5 U.S.C. § 552(b)'s requirement that when asserting a document contains
23 materials exempt from disclosure the agency must segregate and release any purely factual material. *See*
24 *Roth*, 642 F.3d at 1186- 87; *see also Natural Res. Def. Council v. U.S. Dep't of Def.*, 442 F.Supp.2d 857,
25 872 (C.D. Cal. 2006); *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980). For example, NMFS
26 withheld in full 53 pages without any indication the agency had determined there was no factual material
27 in those pages that could be segregated and released. If NMFS's Opposition does not include affidavits
28 sufficiently documenting compliance with this requirement, the Court should order NMFS to release in

1 their entirety the ten redacted documents at issue in EcoRights' appeal. *See Center for Biological*
2 *Diversity v. Office of Management and Budget*, 07-4997, 2008 WL 5129417, at *9 (N.D. Cal. 2008).

3 **H. NMFS Should Be Enjoined to Comply With FOIA's Mandates.**

4 The Court has authority to issue an injunction requiring agencies to take corrective action to
5 come into compliance with existing FOIA obligations and to deter future FOIA violations that are likely
6 to occur. 5 U.S.C. § 552(a)(4)(B); *Long*, 693 F.2d at 909; *see also United States v. An Article of Drug*,
7 661 F.2d 742, 747 (9th Cir. 1981). Given NMFS's more than year long delay in responding to
8 EcoRights' appeal, injunctive relief is a proper remedy. *See, e.g., OCE II*, 2015 U.S. Dist. LEXIS 94997, at
9 *33 (enjoining NMFS to respond to plaintiffs' pending and future FOIA requests within statutory
10 deadlines); *SYRCL*, 2008 WL 2523819, at *17 (same); *see also Elect. Privacy Info. Ctr. v. Dep't of*
11 *Justice*, 416 F. Supp. 2d. 30, 43 (D.D.C. 2006) (ordering agency to process plaintiff's expedited FOIA
12 request within 20 days). Injunctive relief in a FOIA context is appropriate where the public would be
13 benefited by the disclosure. *Long*, 693 F.2d at 909. In making this determination, courts consider
14 whether “there has been a voluntary cessation of allegedly illegal conduct, [whether] ... prolonged delays
15 have repeatedly hindered the timely disclosure of non-exempt documents, ... the likelihood of
16 recurrence, ... the good faith of any expressed intent to comply, the effectiveness, if any, of the
17 discontinuance and the character of past violations.” *Id.* These factors weigh in favor of granting an
18 injunction. In the past NMFS failed, for the most part by exceedingly large margins, to respond within
19 FOIA's deadlines to EcoRights' requests and appeals. Despite an order from a branch of this court
20 NMFS has not ceased its practice of untimely responses. Therefore, NMFS should be enjoined to
21 comply with FOIA's deadlines in responding to EcoRights future requests and appeals.

22 In regards to NMFS's withholding of information under Exemptions 5, 6, and 7(C), if in
23 opposition to this Motion, NMFS fails to produce an adequate *Vaughn* index that justifies NMFS's
24 withholdings in the 12 records at issue, then the Court should further enjoin NMFS to promptly release
25 in full these 12 records. *See e.g. EcoRights*, 2017 U.S. Dist. LEXIS 197451, at * 27 (ordering agency to
26 produce all documents redacted pursuant to Exemptions 5 and 6 within two weeks of the date of the
27 order). NMFS should further be ordered to perform a renewed search and to promptly release any non-
28 exempt records responsive to EcoRights' request.

1 EcoRights has been hindered by NMFS's year long delay in responding to EcoRights' appeal,
2 NMFS's unreasonable search for responsive records, and its inadequate explanations for withholding
3 information. NMFS has not provided more than boilerplate, conclusory explanations for the withholding
4 of records and apparently intends in the future to continue to do so until faced with legal action.
5 Additionally, EcoRights is a public advocacy group that *inter alia*, intends to continue its advocacy
6 work on behalf of ESA-listed anadromous fish that are within NMFS's jurisdiction, and thus will almost
7 certainly send additional FOIA requests to NMFS in the future. Linn Decl. ¶ 10. Accordingly, there is a
8 likelihood that NMFS's FOIA violations will recur.

9 **V. CONCLUSION**

10 For the reasons stated above EcoRights requests that the Court grant declaratory judgment
11 establishing that NMFS violated FOIA by: (1) failing to provide the determination for EcoRights appeal
12 within the deadline mandated by 5 U.S.C. § 552(a)(6)(A)(ii); (2) not providing all non-exempt
13 information promptly as mandated by 5 U.S.C. § 552(a)(3)(A); (3) not performing an adequate,
14 reasonable search for responsive records; (4) failing to provide a legally adequate explanation, at the
15 administrative level, for finding information exempt from disclosure; and (5) unlawfully withholding
16 non-exempt information. EcoRights further requests that the Court issue appropriate injunctive relief
17 requiring NMFS to: (1) immediately release all withheld information that is not exempt from disclosure;
18 (2) perform an additional search for documents responsive to EcoRights' request that are in NMFS's
19 possession at the time NMFS performs its new search, including a search of files at the OLE; (3)
20 produce responsive records located in the new search within 20 working days of the Court's order; and
21 (4) respond to EcoRights future FOIA requests and appeals in accord with the deadlines imposed by 5
22 U.S.C. § 552(a)(6)(A) and 5 U.S.C. § 552(a)(3)(A).

23
24 Date: April 20, 2018

Respectfully submitted,

25 /s/Patricia Linn

26 Patricia Linn

Attorney for Plaintiff

27 Ecological Rights Foundation
28

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16

17 ECOLOGICAL RIGHTS FOUNDATION, a
non-profit corporation,

18
19 Plaintiff,

20 v.

21 NATIONAL MARINE FISHERIES SERVICE,
22

23 Defendant.
24

Case No. 3:18-cv-00888-JSC

**DECLARATION OF PATRICIA LINN
IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

1 I, Patricia Linn, hereby declare and state as follows:

2 1. I represent Plaintiff Ecological Rights Foundation ("EcoRights") in the above-referenced action.

3 I make this Declaration in Support of Plaintiff's Motion for Summary Judgment.

4 2. On Wednesday January 31, 2018 I sent an email to the Department of Commerce General
5 Counsel's office ("DOC Counsel") requesting a status update on the determination for EcoRights
6 Freedom of Information Act ("FOIA") appeal sent on March 10, 2017. In response to the January 31,
7 2018 email Michael Bogomolny, Acting Chief, Information Law Division, of the DOC Counsel's Office
8 sent me an email on January 31, 2018 stating he would provide "a full status update before the end of the
9 week." The end of the week was Friday, February 2, 2018. Rather than a full status update, on February
10 2, 2018 Mr. Bogomolny sent me an email stating he was "committing to releasing a final determination
11 of the appeal in this matter next week." Mr. Bogolmony did not release the appeal determination in the
12 week following his February 2, 2018 email nor communicate with me any way during that week.
13 EcoRights filed the complaint in this matter on February 10, 2018. Attached hereto as Exhibit F is a true
14 and correct copy of the email chain between myself and the DOC Counsel's office between January 31,
15 2018 and February 13, 2018.

16
17
18 3. On March 23, 2018 I sent EcoRights' confidential settlement proposal to Jennifer Wang,
19 Department of Justice counsel for the National Marine Fisheries Service ("NMFS") in this matter. On
20 March 28, 2018 Ms. Wang sent me an email stating that she had forwarded the settlement proposal to
21 the agency. On April 3, 2018 Ms. Wang provided NMFS's response indicating the agency was not in
22 agreement with EcoRights' settlement proposal. Given that the parties were at an impasse EcoRights
23 moved forward with its motion for summary judgment.

24
25 4. I have reviewed all of the documents that NMFS released to EcoRights on February 13, 2017
26 and the two documents NMFS posted to FOIAonline on July 18, 2017. The two redacted documents
27 posted to FOIAonline on July 18, 2017 were also released to EcoRights in the initial document release
28

1 on February 13, 2017, but NMFS's approach to redactions in these two emails has been inconsistent.
2 One email, addressed to a Special Agent in the NOAA¹ Office of Law Enforcement ("OLE"), Don
3 Tanner, was released without any redactions in the first document production. Attached hereto as
4 Exhibit A is a true and correct copy of this document. A near duplicate of the email, along with Agent
5 Tanner's reply, was also released in the first document production with redactions pursuant to
6 Exemption 6. Attached hereto as Exhibit B is a true and correct copy of this document. Although Agent
7 Tanner's name was redacted, information identifying the author of the email as being from the OLE, and
8 his cell phone number, was not redacted. The version posted to FOIAonline in July 2017 was redacted
9 pursuant to Exemptions 6 and 7(C) and the information identifying the author of the email as being from
10 the OLE and the cell phone number was redacted. Attached hereto as Exhibit C is a true and correct
11 copy of this document. Similarly, the second email had a recipient's name redacted pursuant to
12 Exemption 6 in the initial February 2017 document release. Attached hereto as Exhibit D is a true and
13 correct copy of this document. In the version of this email released in July 2017 NMFS asserted that
14 Exemption 7(C) also applied to the recipient's name. Attached hereto as Exhibit E is a true and correct
15 copy of the version of this email released in July 2017 with redactions pursuant to Exemptions 6 and
16 7(C).
17
18

19 5. As of the date of this motion for summary judgment the DOC Counsel has not released the
20 appeal final determination and it is 378 days overdue.

21 6. OLE Special Agent Don Tanner is identified in several unredacted documents that NMFS
22 provided to EcoRights in February 2017 which show that over the last several years Agent Tanner is
23 aware of and may be officially investigating flow fluctuations at Narrows 1 and 2 powerplants near
24 Englebright Dam that have harmed protected fish species by stranding them in isolated pools not
25
26

27 ¹ National Oceanographic and Atmospheric Administration.

1 connected to the river channel. Attached hereto as Exhibit G are true and correct copies of two such
2 emails. I have added highlighting to direct the Court to pertinent passages. A document that NMFS
3 released in response to a request from another environmental organization, Friends of the River, shows
4 that Agent Tanner may also be investigating poaching at the Yuba River and has been on at least one
5 site visit to the Yuba. Attached hereto as Exhibit H is a true and correct copy of the email released to
6 Friends of the River. I have added highlighting to direct the Court's attention to pertinent passages. As
7 these emails show, it is likely Agent Tanner and/or others within the OLE have records responsive to
8 EcoRights' request. However, the records released do not appear to be from Agent Tanner's files or from
9 any other files within the OLE.
10

11 7. Special Agent Tanner is publicly known as a NOAA law enforcement officer and may be readily
12 identified as such by searching the internet. For example, he is identified in a San Francisco Bay
13 Regional Water Quality Control Board report and in news media accounts of his NOAA enforcement
14 actions. Attached hereto as Exhibit I are true and correct copies of these documents, in pertinent part,
15 which I located in a brief internet search. I have added highlighting to direct the Court to the pertinent
16 passages.
17

18 8. NMFS and the U.S. Army Corps of Engineers ("Corps") have publicly released numerous
19 documents which have already revealed a great deal about these agencies' consideration of their
20 Endangered Species Act ("ESA") section 7 obligations concerning the Corps' Yuba River dams and
21 other activities--and shown that the Corps and NMFS decided not to formally consult under ESA section
22 7 over much of the Corps' ongoing operation and maintenance of its two Yuba River dams and other
23 Yuba activities because of the Corps' conclusions concerning the limits of its discretionary authority. For
24 example, the 2014 Yuba River Biological Opinion ("BiOp") and Englebright Concurrence have publicly
25 disclosed this information. Attached hereto as Exhibit J is a true and correct excerpt of NMFS's 2014
26 BiOp discussing the "Section 7 Setting" for the Corps' Yuba River activities. Attached hereto as Exhibit
27

1 K is a true and correct excerpt of the Englebright Concurrence. I have added highlighted to Exhibits J
2 and K to direct the Court to pertinent passages.

3 9. In response to FOIA requests from Friends of the River NMFS has released numerous
4 documents commenting on the consultation with the Corps on its Yuba River activities, the sufficiency
5 of the biological assessments for the Corps' Yuba River dams, draft sections of the 2014 BiOp, and
6 drafts of the Englebright concurrence letter. Attached hereto as Exhibit L is a true and correct excerpt of
7 an index from NMFS listing some of the hundreds of documents it released in response to Friends of the
8 River's request for records concerning the 2014 BiOp consultation.

10 10. EcoRights is a public advocacy group that intends to continue its advocacy work on behalf of
11 ESA-listed anadromous fish that are within NMFS's jurisdiction, and thus will almost certainly send
12 additional FOIA requests to NMFS in the future.

13 11. I declare under penalty of perjury under the laws of the United States that the foregoing is true
14 and correct, and that this Declaration was executed on April 20, 2018 in Mill Valley, California.

15
16
17 /s/ Patricia Linn
18 Patricia Linn
19 Counsel for Plaintiff
20 Ecological Rights Foundation
21
22
23
24
25
26
27

Linn Declaration

EXHIBIT A

From: Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>
Sent: Thursday, February 13, 2014 8:38 AM
To: Don Tanner - NOAA Federal
Cc: Steve Edmondson - NOAA Federal; Kathryn Kempton - NOAA Federal; Maria Rea - NOAA Federal; Howard Brown - NOAA Federal
Subject: Fwd: FERC Receipt of Filing in P-2246-000, et al.:
Attachments: NMFS re Salmon Strandings Yuba P2246 FINAL 2-12-14.pdf

Hi Don,

Please see the attached NMFS letter, filed in the FERC proceeding for the Yuba River Project (FERC Project No. 2246). It pertains to the Chinook salmon strandings downstream of Englebright Dam that you and I discussed in November of 2013.

See especially the text on p. 12, where we request a response from FERC regarding any salmon carcass remains that may have been collected and retained.

We also request documentation such as transcripts of interviews with on-site personnel and managers, emails, photographs, videos, etc. The Yuba County Water Agency (project licensee) did provide some photos of both live stranded salmon and salmon carcasses at the site, but we felt there may be additional information not yet shared with NMFS.

I will keep you abreast of the FERC response to our letter.

Regards,

Larry

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

From: <efiling@ferc.gov>
Date: Wed, Feb 12, 2014 at 9:29 PM
Subject: FERC Receipt of Filing in P-2246-000, et al.:
To: larry.thompson@noaa.gov, efilingacceptance@ferc.gov

Confirmation of Receipt

This is to confirm receipt by the FERC Office of the Secretary of the following electronic submission:

- Submission ID: 460589
- Docket(s) No.: P-2246-000, et al.:
- Filed By: NOAA Fisheries Service, West Coast Region
- Signed By: Steven Edmondson
- Filing Desc: Comments of NOAA Fisheries Service, West Coast Region, on the December 26, 2013, response of the Yuba County Water Agency, to the Commission's November 25, 2013, information request about salmon stranding incidents downstream of P-2246.

-Submission Date/Time: 2/13/2014 12:22:44 AM

-Filed Date: 2/13/2014 8:30:00 AM

Additional detail about your filing is available via the following link:

<https://ferconline.ferc.gov/SubmissionStatus.aspx?hashcode=qDqoP1pASi777IWvUd8rA>

You will receive an email, shortly, concerning the status of your submission.

Thank you for participating in the FERC Electronic Filing System. If you have any questions, or if you detect errors in your submission or the FERC-generated PDF, please contact FERC at:

E-Mail: efiling@ferc.gov mailto:efiling@ferc.gov (do not send filings to this address)

Voice Mail: [202-502-8258](tel:202-502-8258).

--

Larry Thompson

Fishery Biologist

NOAA Fisheries West Coast Region

U.S. Department of Commerce

Office Phone: 916-930-3613

Postal Address: NOAA Fisheries, 650 Capitol Mall, Rm 5100, Sacramento, CA 95814

larry.thompson@noaa.gov



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Linn Declaration

EXHIBIT B



b(6)

Fwd: FERC Receipt of Filing in P-2246-000, et al.:

2 messages

Larry Thompson - NOAA Federal <larry.thompson@noaa.gov> Thu, Feb 13, 2014 at 8:37 AM

To: [Redacted] b(6)

Cc: Steve Edmondson - NOAA Federal <Steve.Edmondson@noaa.gov>, Kathryn Kempton - NOAA Federal <kathryn.kempton@noaa.gov>, Maria Rea - NOAA Federal <Maria.Rea@noaa.gov>, Howard Brown - NOAA Federal <howard.brown@noaa.gov>

H [Redacted] b(6)

Please see the attached NMFS letter, filed in the FERC proceeding for the Yuba River Project (FERC Project No. 2246). It pertains to the Chinook salmon strandings downstream of Englebright Dam that you and I discussed in November of 2013.

See especially the text on p. 12, where we request a response from FERC regarding any salmon carcass remains that may have been collected and retained.

We also request documentation such as transcripts of interviews with on-site personnel and managers, emails, photographs, videos, etc. The Yuba County Water Agency (project licensee) did provide some photos of both live stranded salmon and salmon carcasses at the site, but we felt there may be additional information not yet shared with NMFS.

I will keep you abreast of the FERC response to our letter.

Regards,

Larry

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

From: <eFiling@ferc.gov>
Date: Wed, Feb 12, 2014 at 9:29 PM
Subject: FERC Receipt of Filing in P-2246-000, et al.:
To: larry.thompson@noaa.gov, eFilingAcceptance@ferc.gov

Confirmation of Receipt

This is to confirm receipt by the FERC Office of the Secretary of the following electronic submission:

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- Docket(s) No.: P-2246-000, et al.:
- Filed By: NOAA Fisheries Service, West Coast Region
- Signed By: Steven Edmondson
- Filing Desc: Comments of NOAA Fisheries Service, West Coast Region, on the December 26, 2013, response of the Yuba County Water Agency, to the Commission's November 25, 2013, information request about salmon stranding incidents downstream of P-2246.
- Submission Date/Time: 2/13/2014 12:22:44 AM
- Filed Date: 2/13/2014 8:30:00 AM

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<https://ferconline.ferc.gov/SubmissionStatus.aspx?hashcode=qDqoP1pASi777IWvUd8rA>

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Thank you for participating in the FERC Electronic Filing System. If you have any questions, or if you detect errors in your submission or the FERC-generated PDF, please contact FERC at:


E-Mail: efiling@ferc.gov <mailto:efiling@ferc.gov> (do not send filings to this address)
Voice Mail: 202-502-8258.

--
Larry Thompson
Fishery Biologist
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office Phone: 916-930-3613
Postal Address: NOAA Fisheries, 650 Capitol Mall, Rm 5100, Sacramento, CA 95814
larry.thompson@noaa.gov



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 **NMFS re Salmon Strandings Yuba P2246 FINAL 2-12-14.pdf**
13042K

[Redacted] b(6)

Thu, Feb 13, 2014 at 9:55 AM

To: Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>

Thanks Larry.

I'm keeping track of your reports.

[Redacted] b(6)

NOAA Fisheries/OLE
650 Capital Mall, 5-100
Sacramento, CA 95814
(916) 871-4862 (cell)

[Redacted] b(6)

Linn Declaration

EXHIBIT C



(b)(6), (b)(7)(C)

Fwd: FERC Receipt of Filing in P-2246-000, et al.:

2 messages

Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>

Thu, Feb 13, 2014 at 8:37 AM

To: (b)(6), (b)(7)(C)

Cc: Steve Edmondson - NOAA Federal <Steve.Edmondson@noaa.gov>, Kathryn Kempton - NOAA Federal <kathryn.kempton@noaa.gov>, Maria Rea - NOAA Federal <Maria.Rea@noaa.gov>, Howard Brown - NOAA Federal <howard.brown@noaa.gov>

H (b)(6), (b)(7)(C)

Please see the attached NMFS letter, filed in the FERC proceeding for the Yuba River Project (FERC Project No. 2246). It pertains to the Chinook salmon strandings downstream of Englebright Dam that you and I discussed in November of 2013.

See especially the text on p. 12, where we request a response from FERC regarding any salmon carcass remains that may have been collected and retained.

We also request documentation such as transcripts of interviews with on-site personnel and managers, emails, photographs, videos, etc. The Yuba County Water Agency (project licensee) did provide some photos of both live stranded salmon and salmon carcasses at the site, but we felt there may be additional information not yet shared with NMFS.

I will keep you abreast of the FERC response to our letter.

Regards,

Larry

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

From: <eFiling@ferc.gov>

Date: Wed, Feb 12, 2014 at 9:29 PM

Subject: FERC Receipt of Filing in P-2246-000, et al.:

To: larry.thompson@noaa.gov, eFilingacceptance@ferc.gov

Confirmation of Receipt

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- Filed By: NOAA Fisheries Service, West Coast Region
- Signed By: Steven Edmondson
- Filing Desc: Comments of NOAA Fisheries Service, West Coast Region, on the December 26, 2013, response of the Yuba County Water Agency, to the Commission's November 25, 2013, information request about salmon stranding incidents downstream of P-2246.
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You will receive an email, shortly, concerning the status of your submission.

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E-Mail: efiling@ferc.gov <mailto:efiling@ferc.gov> (do not send filings to this address)
Voice Mail: 202-502-8258.

--
Larry Thompson
Fishery Biologist
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office Phone: 916-930-3613
Postal Address: NOAA Fisheries, 650 Capitol Mall, Rm 5100, Sacramento, CA 95814
larry.thompson@noaa.gov



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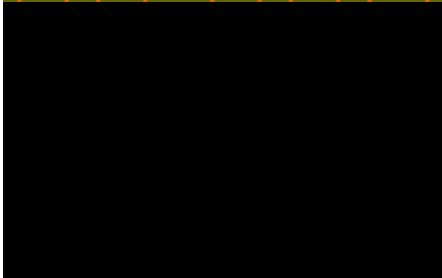
 **NMFS re Salmon Strandings Yuba P2246 FINAL 2-12-14.pdf**
13042K

(b)(6), (b)(7)(C)
To: Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>

Thu, Feb 13, 2014 at 9:55 AM

Thanks Larry.

I'm keeping track of your reports.

(b)(6), (b)(7)(C)


Linn Declaration

EXHIBIT D



(b)(6) (b)(7)

Letter re: Yuba Salmon Stranding Events, V 1.0

1 message

Larry Thompson - NOAA Federal <larry.thompson@noaa.gov> Fri, Jan 17, 2014 at 4:45 PM

To: Steve Edmondson - NOAA Federal <Steve.Edmondson@noaa.gov>

Cc: Thomas Holley - NOAA Federal <thomas.holley@noaa.gov>, John Wooster - NOAA Federal <john.wooster@noaa.gov>, Kathryn Kempton - NOAA Federal <kathryn.kempton@noaa.gov>

Bcc: (b)(6)

To all,

Please see attached. One of the most difficult letters I've ever had to produce... and not done yet!

Please comment using track changes.

Thanks,

LT

P.S. Please let me know if you need additional, related docs, other than attached.

/This and all associated messages and attachments are intended for internal discussions within the U.S. government and should not be forwarded or copied to recipients outside the U.S. government without the consent of this office.

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--

Larry Thompson

Fishery Biologist

NOAA Fisheries West Coast Region

U.S. Department of Commerce

Office Phone: [916-930-3613](tel:916-930-3613)

Postal Address: NOAA Fisheries, 650 Capitol Mall, Rm 5100, Sacramento, CA 95814

larry.thompson@noaa.gov



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11 attachments



P2140598_Partial and Full operating.jpg
1030K



NMFS Comments Yuba Salmon Strandings_Yuba Project_P2246_V1.0_1-17-14.docx

44K



20131226-5064(29012262)_YCWA response 12-26-13.pdf

5138K



TM 7-11.pdf

7634K



Narrows2_Fact_Sheet.pdf

59K



FERC Order - 2005 - 1122 - Approval of Narrows 2 Full Flow Bypass.pdf

159K



ACOE and PG&E Agreement.pdf

310K



License_Narrows 1_2-11-93.rtf

288K



Partial Bypass photo from NMFS ISR Comments_Yuba Project P2246_FINAL_1-28-12-2.pdf

80K



Hoobler Photo from NMFS ISR Comments_Yuba Project P2246_FINAL_1-28-12.pdf

136K



20131202-5044(28951448)_Updated Study Report_12-2-13.pdf

379K

Linn Declaration

EXHIBIT E



(b)(6), (b)(7)(C)

Letter re: Yuba Salmon Stranding Events, V 1.0

1 message

Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>

Fri, Jan 17, 2014 at 4:45 PM

To: Steve Edmondson - NOAA Federal <Steve.Edmondson@noaa.gov>

Cc: Thomas Holley - NOAA Federal <thomas.holley@noaa.gov>, John Wooster - NOAA Federal <john.wooster@noaa.gov>, Kathryn Kempton - NOAA Federal <kathryn.kempton@noaa.gov>

Bcc: (b)(6), (b)(7)(C)

To all,

Please see attached. One of the most difficult letters I've ever had to produce... and not done yet!

Please comment using track changes.

Thanks,

LT

P.S. Please let me know if you need additional, related docs, other than attached.

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--

Larry Thompson

Fishery Biologist

NOAA Fisheries West Coast Region

U.S. Department of Commerce

Office Phone: 916-930-3613

Postal Address: NOAA Fisheries, 650 Capitol Mall, Rm 5100, Sacramento, CA 95814

larry.thompson@noaa.gov



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11 attachments



P2140598_Partial and Full operating.jpg
1030K



NMFS Comments Yuba Salmon Strandings_Yuba Project_P2246_V1.0_1-17-14.docx
44K



20131226-5064(29012262)_YCWA response 12-26-13.pdf
5138K



TM 7-11.pdf
7634K



Narrows2_Fact_Sheet.pdf
59K



FERC Order - 2005 - 1122 - Approval of Narrows 2 Full Flow Bypass.pdf
159K



ACOE and PG&E Agreement.pdf
310K



License_Narrows 1_2-11-93.rtf
288K



Partial Bypass photo from NMFS ISR Comments_Yuba Project P2246_FINAL_1-28-12-2.pdf
80K



Hoobler Photo from NMFS ISR Comments_Yuba Project P2246_FINAL_1-28-12.pdf
136K



20131202-5044(28951448)_Updated Study Report_12-2-13.pdf
379K

Linn Declaration
EXHIBIT F



Patricia Linn <patricialinn19@gmail.com>

status update for DOC-NOAA-2017-000257

9 messages

Patricia Linn <patricialinn19@gmail.com>
To: FOIAppeals@doc.gov

Wed, Jan 31, 2018 at 10:26 AM

Ms. Kelton,

The above referenced appeal was received in your office on March 13, 2017. The response to the appeal is long overdue. Please advise me when we will receive DOC's final determination.

Thank you,
Patricia Linn

Appeals, FOIA <foiaappeals@doc.gov>
To: Patricia Linn <patricialinn19@gmail.com>

Wed, Jan 31, 2018 at 2:50 PM

Patricia,

I will look into this and provide you with a full status update before the end of the week.

Sincerely,

Michael Bogomolny

Michael Bogomolny

Acting Chief, Information Law Division

mbogomolny@doc.gov (202) 482-0703

United States Department of Commerce
Office of the General Counsel

From: Patricia Linn [mailto:patricialinn19@gmail.com]
Sent: Wednesday, January 31, 2018 1:27 PM
To: Appeals, FOIA <foiaappeals@doc.gov>
Subject: status update for DOC-NOAA-2017-000257

[Quoted text hidden]

Appeals, FOIA <foiaappeals@doc.gov>
To: "Appeals, FOIA" <foiaappeals@doc.gov>, Patricia Linn <patricialinn19@gmail.com>

Fri, Feb 2, 2018 at 3:12 PM

Patricia,

I am committing to releasing a final determination in the appeal for this matter next week.

Sincerely,

Michael Bogomolny

Michael Bogomolny

Acting Chief, Information Law Division

mbogomolny@doc.gov (202) 482-0703

United States Department of Commerce
Office of the General Counsel

From: Appeals, FOIA

Sent: Wednesday, January 31, 2018 5:50 PM

To: Patricia Linn <patricialinn19@gmail.com>

Subject: RE: status update for DOC-NOAA-2017-000257

[Quoted text hidden]

Appeals, FOIA <foiaappeals@doc.gov>

To: "Appeals, FOIA" <foiaappeals@doc.gov>, Patricia Linn <patricialinn19@gmail.com>

Tue, Feb 13, 2018 at 10:20 AM

Patricia,

My apologies - I was on sick leave on Friday and Monday. I am getting approval/signature for the final determination.

Sincerely,

Michael Bogomolny

Michael Bogomolny

Acting Chief, Information Law Division

mbogomolny@doc.gov (202) 482-0703

United States Department of Commerce
Office of the General Counsel

From: Appeals, FOIA
Sent: Friday, February 02, 2018 6:13 PM
To: Appeals, FOIA <foiaappeals@doc.gov>; Patricia Linn <patricialinn19@gmail.com>

[Quoted text hidden]

[Quoted text hidden]

Patricia Linn <patricialinn19@gmail.com>
To: "Appeals, FOIA" <foiaappeals@doc.gov>

Tue, Feb 13, 2018 at 11:50 AM








Michael,

A complaint has been filed in the U.S. District Court, Northern District of California and the summons and case opening documents have been sent to the agency head, U.S. Attorney's office and the Attorney General. A judge has been assigned and initial case management deadlines have been set. Please see the attached for all the case opening documents.

Patricia Linn
Law Office of Patricia Linn
115 Oakdale Avenue
Mill Valley, CA 94941

[Quoted text hidden]

8 attachments

-  **initial case mgt. scheduling order.pdf**
149K
-  **JSC-Standing-Order-12.18.17.pdf**
71K
-  **Notice_of_MJ_Assignment_Election_Form.pdf**
591K
-  **settlementstandingorder.pdf**
12K
-  **Standing_Order_All_Judges_1.17.2017.pdf**
59K
-  **ECF_Reg_Info.pdf**
48K
-  **summons -sent.pdf**
260K
-  **filed complaint.pdf**
219K

Patricia Linn <patricialinn19@gmail.com>
To: csproul@enviroadvocates.com, Fred Evenson <evenson@ecologylaw.com>

Tue, Feb 13, 2018 at 11:52 AM

[Quoted text hidden]

Linn Declaration

EXHIBIT G

From: Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>
Sent: Wednesday, October 21, 2015 9:36 AM
To: Anna Ewing
Cc: Gary Sprague - NOAA Federal; Steve Edmondson - NOAA Federal; Lynch, MaryLisa@Wildlife
Subject: Fwd: Potential fish rescue on the Yuba

Hi Anna,

I just spoke with Don Tanner (NOAA Law Enforcement), and he asked me if CDFW has been contacted about this event. This is why I am forwarding this email to you.

Thanks,

Larry

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

From: Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>
Date: Wed, Oct 21, 2015 at 9:19 AM
Subject: Re: Potential fish rescue on the Yuba
To: Gary Sprague - NOAA Federal <gary.sprague@noaa.gov>
Cc: "Howard.Brown" <Howard.Brown@noaa.gov>, Jeff McLain <Jeff.McLain@noaa.gov>, Jonathan Ambrose - NOAA Federal <jonathan.ambrose@noaa.gov>, "Edmondson, Steve" <steve.edmondson@noaa.gov>, Thomas Holley <thomas.holley@noaa.gov>, John Wooster <john.wooster@noaa.gov>, Don Tanner - NOAA Federal <don.tanner@noaa.gov>, John Aedo <john.aedo@ferc.gov>

Hi Gary,

My first thought is this has happened several times (that we know) in the past few years, and has been reported to FERC's Office of Compliance. It is not clear that FERC has been contacted about this current event, and so I am copying John Aedo (FERC) on this email.

My second thought is that the stranded fish may be ESA-listed spring-run Chinook. My understanding is our (NMFS) protocol is to contact NOAA Law Enforcement about the potential unauthorized take of ESA-listed species. For this reason I am copying Don Tanner (NOAA Law Enforcement) on this email, and will also phone him in the coming few minutes.

Thanks,

Larry

On Wed, Oct 21, 2015 at 9:08 AM, Gary Sprague - NOAA Federal <gary.sprague@noaa.gov> wrote:
Hello,

I just got a call from Geoff Rabone at Yuba County Water Agency. The Narrows II powerhouse is currently shut down, and 9 Chinook are isolated in the pool below the Narrows II full bypass and powerhouse. While there is some small surface flow, it does not provide enough depth for fish to easily move downstream. The

substrate at the location is not good for spawning, and subject to scour from powerhouse/valve operations. YCWA is looking at a few options for addressing getting the fish downstream:

1. Move some rocks downstream of the pool, to create a better path for fish to move downstream.
2. Use divers and a seine to collect and transport the Chinook to the flowing part of the river.
3. Add some water to the area (there are concerns that this would attract more fish to the pool)

YCWA is talking about potentially implementing option number 2 today or later this week (likely not before tomorrow). I told Geoff that option 1 sounds best, but if they go with option 2, they need to contact Jeff McLain, our fish rescue coordinator (I then found out Jeff is out of the office today and tomorrow).

Any thoughts or guidance? I am always up for some field work.

Gary

Gary R. Sprague
Fish Biologist
NOAA Fisheries West Coast Region
U.S. Department of Commerce
650 Capitol Mall, Suite 5-100
Sacramento, CA 95814-4706
[\(916\) 930-3615](tel:9169303615) fax [\(916\) 930-3629](tel:9169303629)
gary.sprague@noaa.gov
<http://www.westcoast.fisheries.noaa.gov/>



--

Larry Thompson
Fishery Biologist
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office Phone: [916-930-3613](tel:9169303613)
Postal Address: NOAA Fisheries, 650 Capitol Mall, Rm 5100, Sacramento, CA 95814
larry.thompson@noaa.gov



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Larry Thompson

Fishery Biologist

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U.S. Department of Commerce

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From: Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>
Sent: Tuesday, July 22, 2014 8:51 AM
To: Gary Sprague - NOAA Federal
Cc: Edmondson, Steve; Thomas Holley; John Wooster; Howard.Brown
Subject: Re: Yuba Narrows II bypass valve stranding pool
Attachments: 20131226-5064(29012262)_YCWA response 12-26-13.pdf; NMFS re Salmon Strandings Yuba P2246 FINAL 2-12-14.pdf

Hi Gary,

Please see attachments.

The first is a response from YCWA (Dec. 2013) to FERC -- prompted by an email I sent to FERC (Compliance and Licensing Offices) after learning (second-hand) about Chinook strandings in Oct. 2013. NMFS was never notified by YCWA of this incident. You can see photos of the shot-rock bar that YCWA now proposes to remove. FYI, the hydro staff has received no plan of work from YCWA, and no contact about this project from FERC staff (even though the channel is critical habitat for SRCS and CV steelhead, and the facility causing the effect, the full flow bypass valve, is FERC licensed). Our staff has received no contact from the USACOE, who issue permits for in-river modifications and for the hydro projects.

The second attachment is a NMFS hydro staff letter (Feb. 2014), which was filed with FERC, and directed to their Compliance staff. To reduce file size, I did not include all attachments to this letter. This correspondence outlines the many issues relevant to the stranding of anadromous fishes downstream of Englebright Dam under the existing license, and the actions causing them. FERC has never responded to our letter.

Let's keep in contact on this, in the event that FERC or the Corps contacts our office to initiate ESA consultation. FYI, in November 2013 (after first learning of the stranding) I reported the incident to NOAA Law Enforcement (Don Tanner). It was not my decision, but I would have kept him more tightly "in the loop" on this, to leverage comprehensive action toward a solution. The action now proposed by YCWA (through the RMT) is pertinent to only one of many stranding issues (as outlined in the hydro staff letter).

LT

On Tue, Jul 15, 2014 at 4:46 PM, Gary Sprague - NOAA Federal <gary.sprague@noaa.gov> wrote:
Hello,

I met with YCWA today today on site to discuss their plans to address the stranding pool across from the Narrows II powerhouse, associated with the operation of the Narrows II bypass valve.

YCWA plans to airlift a small piece of power equipment (backhoe/front end loader) to the site and regrade the area where adult salmon stranding has occurred. They plan to do this (Sept 15- Oct 1) for about three days during an outage when all flows will be provided by the Narrows Project.

I advised they to include measures to minimize effects of releases of hazardous materials and have a response plan and materials in place.

Without going into all of the details my thoughts are this should be a fix for the problem that will last at least until the next big spill, and maybe longer.

This meeting was scheduled while I was on leave, and I was already in the vicinity. I expect after the Corps process this project will have a short turn around in order to do it this year and take advantage of this year's low flows.

Does anyone have any questions or comments?

Howard and Steve, did you determine to whom this project would be assigned? Howard and I discussed it briefly, while I was working on 4 letters, just prior to vacation, and my memory is failing me.

Thank you,
Gary

Gary R. Sprague
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U.S. Department of Commerce
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Sacramento, CA 95814-4706
[\(916\) 930-3615](tel:9169303615) fax [\(916\) 930-3629](tel:9169303629)
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EXHIBIT H

From: Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>
Sent: Thursday, September 25, 2014 7:48 AM
To: Steve Edmondson - NOAA Federal
Subject: Yuba Visit w Tanner

Hi Steve,

A couple of weeks ago I discussed visiting the lower Yuba with Don Tanner. The subject was "poaching" that is apparently happening. I also wanted him to view the Narrows 2 area, to discuss the stranding hazards and shot rock (as he may attend the future FERC public meeting on the subject).

Late yesterday, I retrieved a voice mail from Don asking if I would go up there with him today. Our plan is to let the rain pass a bit this morning, and then drive up.

I want to show him the access areas (Hallwood, Sycamore Grove, Hammond Grove, Highway 20 Bridge, UC Davis property, Englebright Reservoir overlook, etc.

We should be finished by mid to late-afternoon. Don will phone me @ 8 this morning, and I will adjust my Google Calendar based on his plans.

LT

--

Larry Thompson

Fishery Biologist

NOAA Fisheries West Coast Region

U.S. Department of Commerce

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EXHIBIT I

EDMUND G. BROWN, JR.
GOVERNORMATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION**San Francisco Bay Regional Water Quality Control Board****INSPECTION REPORT**

To: Point Buckler Club, LLC Case File
Place ID 816826

From: Benjamin Martin, Environmental Scientist
Agnes Farres, Environmental Scientist
Brian Thompson, CHG, CEG, Senior Engineering Geologist
Dyan Whyte, PG, Assistant Executive Officer

Prepared on: **April 19, 2016**

Approved by:

Subject: Inspection of Point Buckler Island, Suisun Marsh, Solano County

On March 2, 2016, staff members of the San Francisco Bay Regional Water Quality Control Board (Water Board) performed an inspection of Point Buckler Island (Island), an approximately 51-acre island owned by Point Buckler Club, LLC (Point Buckler Club) that is located off the western tip of Simmons Island in the Suisun Marsh, Solano County (Figure 1).

Dyan Whyte, Brian Thompson, Agnes Farres, and Benjamin Martin conducted the inspection with two scientists (Peter Baye, Coastal Ecologist/Botanist and Stuart Siegel, Professional Wetland Scientist), a topographical survey crew from CLE Engineering, Inc. (Daniel Gillenwater, James Kulpa, Darren Gewant, Kyle Berger, and Justin Dankle) and **representatives of the National Oceanic and Atmospheric Administration (Don Tanner, Special Agent)** and U.S. Environmental Protection Agency (Paul Jones, Life Scientist).

The purpose of the inspection was to assess conditions at the Island resulting from unauthorized construction of levees and placement of fill into waters of the United States. The Water Board issued a Notice of Violation to Point Buckler Club on July 28, 2015, informing it that the diking off and filling of tidal marsh areas and the removal of critical flow to the interior of Point Buckler Island were unauthorized activities in violation of the Clean Water Act and the California Water Code. Objectives for the inspection included the following:

- Investigating water quality
- Surveying topography and mapping the extent of fill material;
- Documenting site activities; and
- Assessing the condition of wetlands soil and vegetation.

Dr. Tom F. Yarnal, Chair | Bruce H. Wolfe, Executive Officer

1815 Clay St., Suite 1400, Oakland, CA 94612 | www.waterboards.ca.gov/sanfranciscobay

Point Buckler Island, Solano County
March 2, 2016 Inspection Report

April 18, 2016

This inspection report contains observations by Water Board staff and results of the water quality investigation. A separate report is being prepared by the accompanying scientists and CLE Engineering to present findings from the topographical survey, mapping, and wetland assessment.

Summary of Events

- **Island Access** - Water Board staff attempted on multiple occasions to obtain voluntary access from Point Buckler Club to inspect the Island in February, prior to warm weather that would induce extensive vegetation growth. Since timely access was not granted, the March 2, 2016, inspection was conducted under an administrative inspection warrant issued on February 24, 2016, (Case No. MiSC002135) by Judge Harry S. Kinnicutt, Superior Court of California, Solano County. Water Board staff executed the inspection warrant in coordination with the Solano County Sheriff's Department (Marine Patrol members Sergeant Raymond Dudley, Deputy Jaime Garcia, Deputy Michael Otto, and Deputy Brian Miller).
- **7:45 – 10:30 (approximate time)** - **The Solano County Sheriff's Department transported Regional Water Board staff, Paul Jones, and Don Tanner to the Island in two Marine Patrol boats.** Early morning fog delayed arrival of the sheriff's deputies at the Pittsburg Marina. Prior to departure, we held a safety meeting which covered boat safety, potential hazards associated with the inspection, and a plan for sheriff deputies to secure the Island before we disembarked from the boats. On route we picked up Don Tanner and were joined by the scientists and CLE Engineering, Inc.

Note: The inspection was originally scheduled for February 26, 2016, but Water Board staff concerns about safety were elevated the day after the inspection warrant was issued. On February 25, 2016, we received reports that someone matching John Sweeney's description was firing off a gun on the island. Gunfire was not expected because a duck club has not been actively operating at the Island and duck season closed in January. Before scheduling an inspection with us, the Solano County Sheriff's Department conducted a threat assessment. On the day of the inspection, deputies told inspectors to remain in the boats until safety procedures were followed to secure the Island.

Upon arrival at the Island, Sheriff's deputies made contact with Terry Huffman and Robert Perrera, President and Wetlands Regulatory Scientist of Huffman-Broadway Group, Inc., respectively, who stated that Point Buckler Club's attorney, Mr. Lawrence Bazel, had requested that they be present during the inspection. Deputies secured the Island, then we disembarked, offloaded equipment, and met with the survey crew, who arrived on a separate boat, and Peter Baye, who arrived by kayak. Peter Baye started his inspection by kayaking around the perimeter of the Island while we setup a staging area on the levee at the southern end of the Island.

- **10:30 – 12:30 (approximate time)** - CLE Engineering, Inc. started its topographical survey while Water Board staff, Stuart Siegel, Peter Baye, Paul Jones, and **Don Tanner performed a reconnaissance of the Island, and began documenting observations.** We generally walked



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SARSAS -SAVE AUBURN RAVINE SALMON AND STEELHEAD

THE GOAL OF SARSAS IS TO RETURN SALMON AND STEELHEAD RUNS TO THE ENTIRE FIFTY MILE LENGTH OF THE AUBURN RAVINE AND TO CREATE THE CONDITIONS SO THE SALMON CAN SPAWN IN THE CITY OF AUBURN IN AUBURN SCHOOL PARK PRESERVE. SO DOING IS A PROJECT THAT WILL TAKE MUCH MONEY, WORK AND VOLUNTEER HOURS SO IF YOU WANT TO HELP, SIGN UP ON THE COMMENT SECTION OF ANY POSTING. AUBURN, CALIFORNIA, IS LOCATED IN PLACER COUNTY APPROXIMATELY THIRTY-FIVE MILES EAST OF SACRAMENTO ON HIGHWAY 80. PLEASE HELP US.

THURSDAY, OCTOBER 13, 2011

NOAA Special Agent Don Tanner is the Winner - SARSAS King Salmon Award for OUTSTANDING ACHIEVEMENT in returning anadromous fishes to the Auburn Ravine

The SKSA is given to a person whose collaborative efforts have resulted in a significant and distinguished advancement toward the goal of SARSAS, which is to return salmon and steelhead to the entire length of the AR.

NOAA Special Agent Don Tanner, using gracious and collaborative law enforcement methods, was able to work amiably with the eight dam owners on the AR downstream of the City of Lincoln and with their wholehearted assistance open the Auburn Ravine to fish passage from October 15 to April 15 of each year to allow Fall Run Chinook to migrate upstream toward spawning gravels.

For the first time in decades, his efforts resulted in a significant number of salmon reaching Auburn Ravine Park in Lincoln, where their upstream migration was stopped by the NID Lincoln Gauging Station. Seeing Agent Tanner's success with salmon, Nevada Irrigation District, contributed \$250k of their own money toward the \$850K cost, and will install a fish ladder on the LGS this Sept./Oct. to allow salmon to reach spawning gravels upstream of Lincoln. NID is currently planning and designing fish passage over their Hemphill Dam, which will allow fish to migrate many miles upstream to the NID Gold Hill Dam, which hopefully will be retrofitted for fish passage in the near future.

Agent Tanner's achievement is vital to the success of returning salmon and steelhead to the entire length of the AR and he continues to constantly monitor the Ravine and works toward making his agency realize the infinite possibility of the AR as a significant tributary to the Sacramento River for salmon and steelhead spawning, thereby helping to keep the threatened steelhead population robust and the salmon

NID'S GOLD HILL DIVERSION DAM IS THE LARGEST BARRIER ON THE AUBURN RAVINE, WHICH HAS ELEVEN OTHERS!



How Can Fish Get Over this Barrier? WE WILL FIND A WAY WORKING TOGETHER, COLLABORATIVELY FOR THE BENEFIT OF MAN AND FISH!

BLOG ARCHIVE

- ▶ 2014 (1)
- ▶ 2013 (49)
- ▶ 2012 (31)
- ▼ 2011 (14)
 - ▶ December (1)
 - ▼ October (6)

[Warming Water Could be the End of Salmon](#)

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[SARSAS Mission Statement](#)

[SARSAS Strategic Plan for Returning Salmon and Ste...](#)

[NOAA Special Agent Don Tanner is the Winner - SARSA...](#)

population from extinction.

Agent Tanner’s efforts working with the South Sutter Water District resulted in SSWD securing funds from Family Water Alliance to install a Fish Screen at the opening of the Pleasant Grove Canal “to prevent”, to quote SARSAS Fish Passage Expert Ron Ott, “up to 90 % of anadromous fishes returning to the Pacific Ocean to mature from being entrained and die in agriculture fields”.

Agent Tanner’s achievement is exceptional, unique and distinguished and shows how one person, who accepts his responsibility and works ethically and collaboratively to achieve a goal can succeed to a monumental degree, inspiring another entities and individuals to contribute to the SARSAS goal.

Agent Tanner’s contribution to the SARSAS goal is unparalleled and laudatory in the highest degree. He is the most deserving first recipient of the SARSAS King Salmon Award.

SARSAS Secretary Kathie Harris will present Don Tanner the award for Outstanding Achievement toward Returning Salmon and Steelhead to the Auburn Ravine.

POSTED BY SHUNDAHAI AT 9:28 PM

SARSAS Update on Progress in Returning Salmon and ...

- ▶ [August](#) (2)
- ▶ [March](#) (5)
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By **Jim Johnson**, *Monterey Herald*

POSTED: 01/25/18, 6:42 PM PST | UPDATED: ON 01/25/2018

0 COMMENTS

Monterey >> A federal investigation is under way to assess the potential damage from the discharge of millions of gallons of raw sewage into the Monterey Bay National Marine Sanctuary.

On Thursday, National Oceanic and Atmospheric Administration special agent Don Tanner confirmed the investigation will be conducted into the incident involving the spill of up to 4.9 million gallons of untreated wastewater into the bay from the Monterey One Water treatment plant.

Tanner said the focus will be on determining the “potential impact on natural resources” in the marine sanctuary. He said there is a potential for fines and penalties, but that would be determined by legal counsel after the investigation is completed.

Monterey One Now Government Affairs Director Mike McCullough said Tanner met with agency representatives on Thursday to ask questions and was given an overview of the incident.

An investigation is already being conducted by the agency and a third party consulting firm, Pinnacle ART, and a draft report has already been submitted to the Central Coast regional water board, according to McCullough.

The draft report has recommended adding surveillance cameras to allow agency staff to monitor the treatment plant and infrastructure, which experienced the equipment malfunction allowing the sewage to flow into the ocean for more than eight hours between Friday night and Saturday morning last week.

The investigations are expected to take weeks to complete.

The spill and its aftermath comes with the agency in the midst of building a \$100 million advanced wastewater treatment plant designed to produce about 3,500 acre-feet of potable water to be pumped into the Seaside basin for later use by Monterey Peninsula residents as part of a replacement water supply to offset the state-ordered Carmel River pumping cutback. The plant is supposed to be ready to

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EXHIBIT J

description and addresses all of the information necessary to evaluate the effects of the action on listed species and critical habitat.

(F) 2012 Biological Opinion

On November 6, 2012, the Yuba County Water Agency submitted a 60 day notice of intent to sue the Corps and NMFS, pursuant to section 11(g) of the Endangered Species Act. The intent to sue was based on alleged violations of the Endangered Species Act and its implementing regulations. In a letter dated November 13, 2012, the South Yuba River Citizens League submitted a 60 day notice of intent to sue the Corps for allegedly not implementing reasonable and prudent alternative actions and allegedly unauthorized take of species listed under the Federal Endangered Species Act.

At the request of the Corps, on November 27, 2012, NMFS modified the schedule for implementation of the reasonable and prudent alternative in the February 29, 2012 BiOp. The schedule modifications were based on new information about the Corps authorities and ability to meet the schedules in the BiOp.

On January 11, 2013, the South Yuba River Citizens League filed for relief under the Administrative Procedure Act regarding the extensions of time given to the Corps by NMFS. The South Yuba River Citizens League requested an injunction and order for NMFS to rescind its November 27, 2012, letter. On January 28, 2013, the South Yuba River Citizens League and Friends of the River filed an amended complaint for declaratory and injunctive relief against NMFS and the Corps. The amended complaint requested the same relief as the January 11, 2013, filing and requested the Court to find the Corps in violation of the Endangered Species Act.

(III) BACKGROUND

(A) Section 7 Setting

The Corps' authorized operations and maintenance (O&M) and planning activities associated with the proposed action includes making minor modifications to the fish ladders at Daguerre Point Dam. The Corps' O&M of the fish ladders at Daguerre Point Dam does not include major ladder reconfigurations or reconstruction. According to the Corps Regulation (No. 1165-2-119) titled "Modifications to Completed Projects" (Corps 1982), such activities would require additional Congressional authorization and appropriation of necessary funding. Consequently, the proposed action is comprised of O&M of the existing fish passage facilities at Daguerre Point Dam, and specified conservation measures.

The Corps has identified the following authorities as governing their discretion and the proposed action (Corps 2013b):

- (1) The California Debris Act (Ch 183, §1, 27 Stat. 507,
- (2) The Rivers and Harbors Act of 1935, Public Law No. 409,

- (3) Flood Control Act of 1970, Section 216,
- (4) National Dam Inspection Act of 1972,
- (5) Water Resources Development Act 1986, Section 906(b), Section 1106, and Section 1135,
- (6) Water Resources Development Act 1996, Section 206,
- (7) National Dam Safety Program Act of 1996 (Public Law 92-367),
- (8) Public Law 109-460, and
- (9) Engineer Regulation 1105-1-100, Appendix G, paragraph 13(c).

The Chief of Engineers has authority to modify projects without further authorization from Congress within strictly defined limits, i.e., as long as the scope of the project, including the function and purpose of the project, and the area served by the project, is not materially changed. This understanding, set forth in detail in a 1951 report by the Chief of Engineers, was approved in the report of a special subcommittee to the House Public Works Committee in 1952, Report on the Civil Functions Program of the Corps of Engineers, United States Army to the House Committee on Public Works, 82d Congress, 2d Session 1 (1952) (Corps 2013b).

The Corps requested ESA consultation in two separate BAs submitted to NMFS on October 22, 2013:

- (1) U.S. Army Corps of Engineers Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River (Corps 2013a), and
- (2) U.S. Army Corps of Engineers Authorized Operation and Maintenance of Existing Fish Passage Facilities at Daguerre Point Dam on the Lower Yuba River (Corps 2013b).

Previous ESA consultations have been conducted addressing various Corps projects and their activities on the Yuba River (see Consultation History above). Those consultations encompassed activities at both Englebright Dam and Daguerre Point Dam (projects). However, the October 22, 2013, submittal was limited to the Corps' discretionary activities associated with Englebright Dam and reservoir and a separate BA was submitted at the same time for the Corps' discretionary activities associated with Daguerre Point Dam. The Corps evaluated these projects separately in two BAs because "each dam has a separate authorization and appropriation, and because the actions at Englebright and Daguerre are wholly separate and are not dependent upon each other to operate."

The Corps limited their proposed action in the Daguerre Point Dam BA to discretionary actions, and determined that the proposed action may affect and is likely to adversely affect CV spring-run Chinook salmon, and CCV steelhead. The Corps determined that adverse effects to CV spring-run Chinook salmon critical habitat, and CCV steelhead critical habitat are discountable and/or insignificant. For the southern DPS of green sturgeon the Corps determined that the proposed action may affect, but is not likely to adversely affect green sturgeon and its critical habitat. Discretionary actions for which the Corps determined the effects were: "may affect, but is not likely to adversely affect", or "may affect and is likely to adversely affect", or "discountable, or insignificant", were carried forward in the Corps request for consultation.

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EXHIBIT K

to the comments and meetings, the Corps deconstructed its proposed action to more clearly identify which activities were subject to “discretionary Federal involvement or control” and therefore subject to the requirements of ESA Section 7 as described in 50 CFR 402.03 and which were non-discretionary and would therefore not be included in the Corps’ request for consultation.

At the request of the Corps, on November 27, 2012, NMFS modified the schedule for implementation of the reasonable and prudent alternative in the February 29, 2012, biological opinion. The schedule modifications were based on new information about the Corps’ authorities and the ability to meet the schedules in the biological opinion.

On January 11, 2013, the South Yuba River Citizens League filed for relief under the Administrative Procedure Act regarding the extensions of time given to the Corps by NMFS. The South Yuba River Citizens League requested an injunction and order for NMFS to rescind its November 27, 2012, letter. On January 28, 2013, the South Yuba River Citizens League and Friends of the River filed an amended complaint for declaratory and injunctive relief against NMFS and the Corps. The amended complaint requested the same relief as the January 11, 2013, filing and requested the Court to find the Corps in violation of the Endangered Species Act.

Current Consultation

On February 26, 2013, the Corps sent a letter to NMFS requesting reinitiation of formal consultation “for ongoing activities at Englebright and Daguerre Point Dams, and for operation of the fish ladders at Daguerre Point Dam.” On April 11, 2013, NMFS provided a written response to the Corps identifying the necessary information for reinitiation of formal consultation under section 7 of the Endangered Species Act. As set forth in 50 CFR §402.16, reinitiation of formal consultation is appropriate where discretionary Federal agency involvement or control over an action has been retained (or is authorized by law) and if:

- (1) The amount or extent of taking specified in any incidental take statement is exceeded;
- (2) New information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (3) The agency action is subsequently modified in a manner that causes an effect to the listed species that was not considered in the biological opinion; or
- (4) A new species is listed or critical habitat is designated that may be affected by the action.

In this case, the Corps had determined that reinitiation of consultation was necessary in order for the Corps to provide NMFS with additional information and clarification on subjects that included the following:

- (1) To more accurately and specifically define the scope of the Corps’ authorities and discretion, for purposes both of appropriately defining the proposed action and ensuring that any RPA measures are within the scope of the Corps’ legal authority and jurisdiction. *See* 50 C.F.R. § 402.02.

- (2) To more clearly define the scope of the proposed action area, and the determination of which other activities are interrelated and interdependent with the proposed action.
- (3) To provide additional information regarding the nature of the Corps' proposed activities at Englebright and Daguerre Point Dams.
- (4) To provide the most recent scientific and technical information regarding the listed species and the effects of the proposed action on them.

In order to meet the requirements of 50 CFR 402.14(c), to initiate formal consultation; and 50 CFR 402.14(d), to provide the best scientific and commercial data available; NMFS recommended that the Corps develop an updated biological assessment to evaluate the potential effects of the action on listed species and designated critical habitat, pursuant to 50 CFR 402.12. NMFS identified that consultation would begin once NMFS received a final biological assessment that included a proposed project description and addressed all of the information necessary to evaluate the effects of the action on listed species and critical habitat.

As described above, the Corps provided two biological assessments on October 22, 2013:

- (1) U.S. Army Corps of Engineers Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River; and
- (2) U.S. Army Corps of Engineers Authorized Operation and Maintenance of Existing Fish Passage Facilities at Daguerre Point Dam on the Lower Yuba River.

Previous ESA consultations have been conducted addressing various Corps projects and their activities on the Yuba River. Those consultations encompassed activities at both Englebright Dam and Daguerre Point Dam (projects). For this consultation, the Corps submitted a BA for the Corps' discretionary activities associated with Englebright Dam and Reservoir. A separate BA was submitted at the same time for the Corps' discretionary activities associated with Daguerre Point Dam. The Corps evaluated activities at these projects separately, because each dam has a separate authorization and appropriation, and because the actions at Englebright and Daguerre are wholly separate and are not dependent upon each other to operate. The proposed action that is the subject of this consultation is described in the Corps' BA (2013a) and summarized under the Proposed Action section of this letter.

Environmental Baseline

The environmental baseline is an analysis of the effects of past and ongoing human and natural factors leading to the current status of the species in the action area. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process (50 CFR§402.02).

Distinguishing differences between the proposed action and the environmental baseline requires careful consideration of an agency's discretion and lack of discretion. To help inform the distinctions, we applied the following key analytic considerations:

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EXHIBIT L

0.7.1324.9918.2	File				
0.7.1324.9924	Message	9302013	Brian Ellrott - NOAA Fed	Gary Sprague - NOAA	Re: Yuba flows
0.7.1324.9939	Message	1272014	Steve Edmondson <ste	Tom Holley <thom	Re: YSF call
0.7.1324.9941	Message	1272014	Larry Thompson - NOAA	Thomas Holley - NOAA	First Draft and Template, Comments on Yuba Project Updated St
0.7.1324.9941.1	File				
0.7.1324.9941.2	File				
0.7.1324.9941.3	File				
0.7.1324.9944	Message	10152013	Howard Brown - NOAA	Gary Sprague - NOAA	Fwd: Deguerre Point Dam/Yuba County Irrigation District
0.7.1324.9945	Message	10152013	Gary Sprague - NOAA	Howard Brown - NOAA	Re: Yuba check in
0.7.1324.9946	Message	10152013	Howard Brown - NOAA	Olsen, Randy P SPK	Yuba check in
0.7.1324.9947	Message	10152013	Gary Sprague - NOAA	Howard.Brown <h	Yuba deconstruction diagram
0.7.1324.9947.1	File				
0.7.1324.9948	Message	10162013	Will Stelle - NOAA Fed	Howard Brown - NOAA	Re: Yuba Consultation
0.7.1324.9949	Message	10152013	Howard Brown - NOAA	Will Stelle - NOAA	Yuba Consultation
0.7.1324.9949.1	File				
0.7.1324.9950	Message	10182013	Gary Sprague - NOAA	Alice Berg <alice.b	New dam film
0.7.1324.9951	Message	10172013	Richard Wantuck - NOAA	Maria Rea - NOAA	Re: October 17, 2013 YSF TWG - CANCELLED
0.7.1324.9951.1	File				
0.7.1324.9952	Message	10162013	Gary Sprague - NOAA	Grothe, Doug SPK	Fwd: NMFS comments on Yuba BA
0.7.1324.9952.1	File				
0.7.1324.9952.2	File				
0.7.1324.9952.3	File				
0.7.1324.9952.4	File				
0.7.1324.9953	Message	10182013	Gary Sprague - NOAA	Grothe, Doug SPK	Draft Schedule for Yuba Biop
0.7.1324.9953.1	File				
0.7.1324.9954	Message	10212013	Maria Rea - NOAA Fed	gary.sprague@noaa	Brief Will on Yuba - Maria's office
0.7.1324.9954.1	File				
0.7.1324.9955	Message	10182013	Richard Wantuck - NOAA	Maria Rea - NOAA	Re: October 17, 2013 YSF TWG - CANCELLED
0.7.1324.9955.1	File				
0.7.1324.9956	Message	10242013	Gary Sprague - NOAA	Grothe, Doug SPK	Yuba schedule, and today's meeting
0.7.1324.9957	Message	10292013	Gary Sprague - NOAA	Edmondson, Steve	Corps' Yuba BAs
0.7.1324.9958	Message	10292013	Larry Thompson - NOAA	Gary Sprague - NOAA	Re: Corps' Yuba BAs
0.7.1324.9959	Message	10292013	Gary Sprague - NOAA	Larry Thompson - NOAA	Re: Corps' Yuba BAs
0.7.1324.9960	Message	10302013	Maria Rea - NOAA Fed	gary.sprague@noaa	Internal Yuba Briefing with Will - Delta Room

0.7.1324.9960.1	File				
0.7.1324.9961	Message	10292013	Gary Reedy <gary@sy	Traci Van Thull <tr	press release re Corps new BAs for Yuba River dams
0.7.1324.9961.1	File				
0.7.1324.9961.2	File				
0.7.1324.9962	Message	10312013	Tom Johnson <trjllc@	Beth Campbell <el	FW: Yuba Otolith grant deliverable
0.7.1324.9962.1	File				
0.7.1324.9963	Message	10312013	Gary Sprague - NOAA	Grothe, Doug SPK	Yuba BiOp meetings
0.7.1324.9966	Message	11042013	Duane Massa <dmassa	Gary Reedy <gary	RE: RMT Meeting Tues Oct 1 HDR Gateway
0.7.1324.9966.1	File				
0.7.1324.9968	Message	11082013	Nicolette Root - NOAA	Gary Sprague - NO	Yuba BiOp Stakeholder Meeting 12/13/13
0.7.1324.9969	Message	11082013	Gary Sprague - NOAA	Grothe, Doug SPK	Yuba contacts
0.7.1324.9971	Message	11082013	Maria Rea - NOAA Fed	Gary Sprague - NO	Re: Yuba BiOp meeting summary
0.7.1324.9975	Message	11142013	Steve Edmondson <ste	Howard Brown - N	Re: New draft agenda for Yuba meeting with Will Stelle
0.7.1324.10003	Message	1272014	Michael Harty <jmhart	Steve Edmondson	RE: Alternate
0.7.1324.10004	Message	1272014	Steve Edmondson <ste	Michael Harty <jm	Re: Alternate
0.7.1324.10005	Message	1272014	Steve Edmondson <ste	Michael Harty <jm	Alternate
0.7.1324.10007	Message	11142013	Steve Edmondson <ste	Howard Brown - N	Re: New draft agenda for Yuba meeting with Will Stelle
0.7.1324.10008	Message	11142013	Howard Brown - NOAA	Steve Edmondson	Re: New draft agenda for Yuba meeting with Will Stelle
0.7.1324.10012	Message	11142013	Howard Brown - NOAA	Steve Edmondson	Re: New draft agenda for Yuba meeting with Will Stelle
0.7.1324.10016	Message	11142013	Gary Sprague - NOAA	Curt Aikens <caike	Yuba Biological Opinion meeting
0.7.1324.10016.1	File				
0.7.1324.10017	Message	11142013	Steve Rothert <srothe	Gary Sprague - NO	RE: Yuba Biological Opinion meeting
0.7.1324.10018	Message	11142013	Steve Rothert <srothe	Gary Sprague - NO	RE: Yuba Biological Opinion meeting
0.7.1324.10019	Message	11142013	Caleb Dardick <caleb@	Steve Rothert <src	RE: Yuba Biological Opinion meeting
0.7.1324.10021	Message	11142013	Steve Edmondson <ste	Howard Brown - N	Re: New draft agenda for Yuba meeting with Will Stelle
0.7.1324.10022	Message	11142013	Gary Sprague - NOAA	Caleb Dardick <cal	Re: Yuba Biological Opinion meeting
0.7.1324.10024	Message	1272014	Larry Thompson - NOA	John Wooster - NC	Comments on USR, Enclosure B, v 1.2
0.7.1324.10024.1	File				
0.7.1324.10025	Message	11142013	Caleb Dardick <caleb@	Gary Sprague - NO	RE: Yuba Biological Opinion meeting
0.7.1324.10025.1	File				
0.7.1324.10026	Message	11152013	Gary Sprague - NOAA	Howard.Brown <h	Fwd: Yuba Biological Opinion meeting
0.7.1324.10026.1	File				
0.7.1324.10027	Message	11152013	Gary Sprague - NOAA	Steve Edmondson	Re: FYI DIRECT: Yuba update
0.7.1324.10028	Message	1282014	Larry Thompson - NOA	Gary Sprague - NO	Re: YCWA FERC license

0.7.1324.10029	Message	11152013	Gary Sprague - NOAA	Maria Rea - NOAA	Re: Yuba BiOp meeting summary
0.7.1324.10030	Message	11152013	Maria Rea - NOAA Fed	gary.sprague@noa	Internal Yuba Briefing with Will - Delta Room
0.7.1324.10030.1	File				
0.7.1324.10032	Message	11202013	Bratovich, Paul <paul.b	Duane Massa <dm	New temp language
0.7.1324.10035	Message	11202013	Rene Henery <rhenery	Bratovich, Paul <p	RE: New temp language
0.7.1324.10035.1	File				
0.7.1324.10036	Message	11202013	Curt Aikens <caikens@	Gary Sprague - NO	RE: Yuba Biological Opinion meeting
0.7.1324.10037	Message	11202013	Gary Sprague - NOAA	Curt Aikens <caike	Re: Yuba Biological Opinion meeting
0.7.1324.10038	Message	11202013	Gary Sprague - NOAA	Steve Rothert <src	Re: Yuba BA
0.7.1324.10039	Message	11202013	Gary Sprague - NOAA	Steve Rothert <src	Re: Yuba BA
0.7.1324.10041	Message	11202013	Steve Rothert <srothe	Gary Sprague - NO	RE: Yuba BA
0.7.1324.10042	Message	11212013	Gary Sprague - NOAA	Steve Rothert <src	Re: Yuba BA
0.7.1324.10044	Message	11212013	Gary Sprague - NOAA	Bryan Begun - NO	Re: Yuba River mapping from Daguerre to Englebright
0.7.1324.10045	Message	11212013	Gary Sprague - NOAA	bcenter@friendso	Re: Yuba Biological Opinion meeting
0.7.1324.10045.1	File				
0.7.1324.10047	Message	11212013	Bob Center <bcenter7	Gary Sprague - NO	RE: Yuba Biological Opinion meeting
0.7.1324.10048	Message	1292014	Larry Thompson - NOA	Thomas Holley - N	Action: Draft Comments on USR, Yuba Proejct P-2246
0.7.1324.10048.1	File				
0.7.1324.10048.2	File				
0.7.1324.10048.3	File				
0.7.1324.10049	Message	12022013	Aimee Moore - NOAA	Steve Edmondson	Maria would like to discuss Yuba Strategy at 3pm today...
0.7.1324.10050	Message	12022013	Gary Sprague - NOAA	Aimee Moore - NO	Re: Maria would like to discuss Yuba Strategy at 3pm today...
0.7.1324.10051	Message	12022013	Maria Rea - NOAA Fed	gary.sprague@noa	Discuss Yuba Strategy - Sacramento Rm or call-in
0.7.1324.10051.1	File				
0.7.1324.10058	Message	12022013	Maria Rea - NOAA Fed	gary.sprague@noa	Yuba BiOp Schedule - Maria's office
0.7.1324.10058.1	File				
0.7.1324.10059	Message	12022013	Gary Sprague - NOAA	Steve Edmondson	Re: Chart
0.7.1324.10059.1	File				
0.7.1324.10059.2	File				
0.7.1324.10060	Message	12062013	Curt Aikens <caikens@	Gary.Sprague@no	Support for FERC flow deviation
0.7.1324.10062	Message	12062013	Gary Reedy <gary@sy	Gary Sprague - NO	RE: Yuba Biological Opinion meeting
0.7.1324.10063	Message	12062013	Bob Center <bcenter7	Gary Sprague - NO	FW: Yuba Biological Opinion meeting
0.7.1324.10064	Message	12062013	Howard Brown - NOAA	Gary Sprague - NO	Fwd: Yuba Biological Opinion meeting
0.7.1324.10066	Message	12092013	Gary Sprague - NOAA	Bob Center <bcent	Re: FW: Yuba Biological Opinion meeting

0.7.1324.10067	Message	12092013	Gary Sprague - NOAA	Nicolette Root - NOAA	Re: Yuba BiOp Stakeholder Meeting 12/13/13
0.7.1324.10068	Message	12092013	Gary Sprague - NOAA	Curt Aikens <caikens@noaa.gov>	Re: Yuba Biological Opinion meeting
0.7.1324.10068.1	File				
0.7.1324.10069	Message	12092013	Nicolette Root - NOAA	gary.sprague@noaa.gov	Out of the Office Re: Yuba BiOp Stakeholder Meeting 12/13/13
0.7.1324.10070	Message	12102013	Nicolette Root - NOAA	Gary Sprague - NOAA	Re: Yuba BiOp Stakeholder Meeting 12/13/13
0.7.1324.10071	Message	12102013	Gary Sprague - NOAA	Nicolette Root - NOAA	Re: Yuba BiOp Stakeholder Meeting 12/13/13
0.7.1324.10076	Message	1302014	Steve Edmondson <stedmond@noaa.gov>	Larry Thompson - NOAA	Re: Cover Letter for Signature, Yuba USR comments
0.7.1324.10076.1	File				
0.7.1324.10100	Message	12192013	Howard Brown - NOAA	Grothe, Doug SPK	Yuba Coordination Meetings
0.7.1324.10101	Message	12192013	Nicolette Root - NOAA	Gary Sprague - NOAA	Daguerre & Englebright
0.7.1324.10105	Message	12202013	Steve Edmondson <stedmond@noaa.gov>	Maria Rea <maria.rea@noaa.gov>	FYI: Water Board Interest in Fish Passage Studies
0.7.1324.10107	Message	1302014	Steve Edmondson <stedmond@noaa.gov>	Aimee Moore - NOAA	Re: Please send me your Priorities & External meetings by tomorrow
0.7.1324.10108	Message	1302014	Aimee Moore - NOAA	eidd@pge.com <eidd@pge.com>	Re: P-2246-058. Comments on the Updated Study Report and Technical
0.7.1324.10108.1	File				
0.7.1324.10109	Message	1302014	Steve Edmondson <stedmond@noaa.gov>	William Foster - NOAA	RESPONSE: : review a 3.2 version of Daguerre letter: I like this or
0.7.1324.10109.1	File				
0.7.1324.10113	Message	12202013	Steve Edmondson - NOAA	gary.sprague@noaa.gov	Out of Office Re: FYI: Water Board Interest in Fish Passage Studies
0.7.1324.10114	Message	12202013	Steve Edmondson <stedmond@noaa.gov>	Gary Sprague - NOAA	Re: FYI: Water Board Interest in Fish Passage Studies
0.7.1324.10121	Message	1312014	Gary Sprague - NOAA	Maria Rea <maria.rea@noaa.gov>	YCWA request: Yuba R flows.
0.7.1324.10121.1	File				
0.7.1324.10121.2	File				
0.7.1324.10121.3	File				
0.7.1324.10121.4	File				
0.7.1324.10127	Message	1022014	Gary Sprague - NOAA	Steve Edmondson	Re: Invitation: Meet w/ Mary Lisa re Yuba @ Tue Jan 7, 2014 10a
0.7.1324.10128	Message	12312013	Maria Rea - NOAA Fed	gary.sprague@noaa.gov	Yuba Meeting - Maria's office
0.7.1324.10128.1	File				
0.7.1324.10129	Message	1022014	Steve Edmondson - NOAA	gary.sprague@noaa.gov	Meet w/ Mary Lisa re Yuba
0.7.1324.10129.1	File				
0.7.1324.10130	Message	1022014	Steve Edmondson - NOAA	gary.sprague@noaa.gov	Out of Office Re: Invitation: Meet w/ Mary Lisa re Yuba @ Tue Jan 7, 2014 10a
0.7.1324.10131	Message	1032014	Steve Edmondson <stedmond@noaa.gov>	Gary Sprague - NOAA	Re: Invitation: Meet w/ Mary Lisa re Yuba @ Tue Jan 7, 2014 10a
0.7.1324.10132	Message	1062014	Curt Aikens <caikens@noaa.gov>	gary.sprague@noaa.gov	RE: IMPORTANT RMT MEETING
0.7.1324.10134	Message	1062014	Howard Brown - NOAA	gary.sprague@noaa.gov	Yuba Consultation meeting
0.7.1324.10134.1	File				
0.7.1324.10136	Message	1062014	Wilcox, Carl@Wildlife	Aimee.Moore@noaa.gov	RE: Invitation: Pre-call with DFW & NMFS Regarding Yuba - 1-877

Hudak Declaration
EXHIBIT 1

ENVIRONMENTAL ADVOCATES

ATTORNEYS AT LAW

5135 ANZA STREET
SAN FRANCISCO, CA 94121
(415) 533-3376
Fax: (415) 358-5695
E-mail: csproul@enviroadvocates.com
christopherwhudak@gmail.com

December 6, 2016

*Via Electronic Mail through FOIAonline**
<https://foiaonline.regulations.gov>

Ana Liza S. Malabanan
Regional FOIA Coordinator of
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
West Coast Region
501 West Ocean Blvd
Long Beach, CA 90802-4213
E-mail: ana.liza.malabanan@noaa.gov

National Marine Fisheries Service
National Oceanic and Atmospheric Administration
Public Reference Facility (OFA56)
1315 East West Highway (SSMC3)
Room 10730
Silver Spring, Maryland 20910
E-mail: FOIA@noaa.gov

Re: FOIA Request

To Whom It May Concern,

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and relevant Department of Commerce, National Marine Fisheries Service (“NMFS”) regulations, Ecological Rights Foundation (EcoRights’) (via counsel), hereby requests that NMFS provide all responsive records (“documents”) that are in the files maintained by NMFS personnel or offices on the date that NMFS staff conducts their searches for the documents responsive to this request.¹

Definitions

¹ See *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983); *Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002); *Oregon Natural Desert Ass'n v. Gutierrez*, 419 F. Supp. 2d 1284, 1288 (D. Or. 2006) (federal agencies must release all documents in their possession through the date they conduct the review of their files for documents responsive to FOIA requests).

1. The term "You" or "Your" as used herein refers to the NATIONAL MARINE FISHERIES SERVICE ("NMFS"), PENNY PRITZKER, as Secretary of Commerce, and/or any person acting or purporting to act on their behalf.
2. The term "document" or "documents" as used herein means all written, typewritten, drawn or printed material or record of any type or description and all information kept or recorded on magnetic or electronic media, including, without limitation, correspondence, letters, agreements, contracts, memoranda of agreement or understanding, electronic mail (including both messages sent and received from NMFS personnel), telegrams, inter- and intra-office communications, forms, reports, studies, working papers, handwritten or other notes, phone records, logs, diaries, minutes, spreadsheets, computation sheets, data sheets, transcripts, drawings, sketches, plans, leases, invoices, index cards, checks, check registers, maps, charts, graphs, bulletins, circulars, pamphlets, notices, summaries, books, photographs, sound recordings, videotapes, rules, photocopied or computer-related materials, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations of them, and all forms of written or recorded matter to which You have access or of which You have any knowledge, or copies of such documents where originals are not available. The terms "document" or "documents" includes all matter that relates in whole or in part to the subject referred to in this request. Where a document has been prepared in several copies that are not identical, or where, by reason of subsequent modification, addition or notation, they are no longer identical, each non-identical copy shall be considered a separate document. Handwritten or other notations of any kind on a copy render it a non-identical copy.
3. The term "related to" as used herein includes comprising, constituting, containing, evidencing, setting forth, summarizing, alluding to, responding to, commenting upon, discussing, supporting, refuting, showing, disclosing, explaining, mentioning, analyzing, recording, reflecting upon, or characterizing, either directly or indirectly, in whole or in part.
4. The term "Stockdale Memo" means the June 11, 2013 Memorandum, subject ESA Guidance, from Corps Chief Counsel, Earl Stockdale, to all Corps counsel, HQ, Dist, Center, Lab, and FOA Offices [attached as Exhibit 1 for your reference].
5. The term "Chris Yates email" refers to the July 24, 2014 email from Chris Yates, NOAA Federal, subject: Fwd:Response to COE Stockdale memo [attached as Exhibit 2 for your reference]..
6. The term "draft Englebright concurrence letter" refers to the draft letter to the Corps entitled "Endangered Species Act Section 7(a)(2) Concurrence Letter for the U.S. Army Corps of Engineers' (Corps) Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River" [attached as Exhibit 3 for your reference].
7. The term "unauthorized take" means take that is prohibited by section 9 of the Endangered Species Act.

The foregoing definitions, used below in quotation marks, refer to the terms as defined above.

Requests for Documents

EcoRights requests that "You" please provide the following "documents":

1. Any and all "documents" "related to" the "Chris Yates email" concerning input he, and any NMFS West Coast Region staff provided to NOAA HQ on the impact of the "Stockdale Memo." This request is only for the input on the impact of the "Stockdale Memo" that Chris Yates provided to NOAA HQ and the input on the impact of the "Stockdale Memo" the NMFS West Coast Region staff provided to NOAA HQ and is not a broader request for other documents related to the "Stockdale memo." This request is only for "documents" generated on or prior to July 24, 2014.
2. Any documents to or from NMFS staff Chris Kiefer "related to" the "draft Englebright concurrence letter."
3. Any and all NOAA Fisheries "documents" from January 1, 2000 to the present, in the possession of any NOAA Fisheries Office, Department, and/or Division, including any NOAA law enforcement division, "related to" whether any entities or individuals may have caused or did cause, or may be causing, or are causing "unauthorized take" of threatened or endangered anadromous fish in the Yuba River at, or in the vicinity of, Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, and the Hallwood-Cordua Diversion including but not limited to any and all "documents" generated by, sent by, or received by NMFS Law Enforcement agent, Don Tanner.

15 C.F.R. section 4.6(b) requires NMFS to issue a written determination to EcoRights within twenty working days that this request was received and logged in by NMFS stating which of the requested records will, and which will not, be released and the reason for any denial of any portion of this request. As provided by 15 C.F.R. section 4.6(c), NMFS may extend this obligation by furnishing written notice to the requestor as soon as practicable stating the reasons for such extension and the date by which the office expects to be able to issue a determination. The period may be so extended only when absolutely necessary, only for the period required, and only when one or more of the following unusual circumstances require the extension: (1) there is a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (2) there is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or (3) there is a need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of NMFS.

EcoRights requests that to the extent that NMFS can do so, EcoRights be furnished with electronic copies of the above documents in lieu of paper copies (to minimize the expense and burden of copying). EcoRights points out that FOIA requires NMFS to provide copies of requested documents "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B).

We request that NMFS provide electronic copies of its response to this request, as well as any responsive documents that NMFS is able to transmit via e-mail, to Christopher Hudak and Christopher Sproul and I at the following e-mail addresses:

Christopher Hudak: christopherwhudak@gmail.com
Christopher Sproul: csproul@enviroadvocates.com

Please send any documents that must be sent via regular mail to the following address:

Christopher Hudak
Christopher Sproul
Environmental Advocates
5135 Anza St.
San Francisco, California, 94121

Your staff may contact me at (510) 502-5742 or christopherwhudak@gmail.com to further discuss this request. Thank you for your prompt attention to this matter.

Sincerely,

Christopher Hudak
Attorney for Ecological Rights Foundation

Encl.: Attachment 1 (Fee Waiver Request)

Pursuant to 5 U.S.C. section 552(a)(4)(A)(iii) and 15 C.F.R. section 4.11(k), EcoRights hereby requests a fee waiver for all copying costs, mailing costs, and other costs related to locating and tendering the documents, in accord with the attached fee waiver statement.

Hudak Declaration
EXHIBIT 2



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
501 West Ocean Boulevard, Suite 4200
Long Beach, California 90802-4213

December 14, 2016

Christopher Hudak
Environmental Advocates
208 Panoramic Way
Berkeley, CA 94704

Re: FOIA Request DOC-NOAA-2017-000257

Dear Christopher Hudak:

This letter acknowledges receipt of your Freedom of Information Act (FOIA) request.

Your request was entered into FOIAonline, our request tracking database, on December 12, 2016. Your request tracking number is DOC-NOAA-2017-000257.

You requested:

1. Any and all "documents" "related to" the "Chris Yates email" concerning input he, and any NMFS West Coast Region staff provided to NOAA HQ on the impact of the "Stockdale Memo." This request is only for the input on the impact of the "Stockdale Memo" that Chris Yates provided to NOAA HQ and the input on the impact of the "Stockdale Memo" the NMFS West Coast Region staff provided to NOAA HQ and is not a broader request for other documents related to the "Stockdale memo." This request is only for "documents" generated on or prior to July 24, 2014.
2. Any documents to or from NMFS staff Chris Kiefer "related to" the "draft Englebright concurrence letter."
3. Any and all NOAA Fisheries "documents" from January 1, 2000 to the present, in the possession of any NOAA Fisheries Office, Department, and/or Division, including any NOAA law enforcement division, "related to" whether any entities or individuals may have caused or did cause, or may be causing, or are causing "unauthorized take" of threatened or endangered anadromous fish in the Yuba River at, or in the vicinity of, Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, and the Hallwood-Cordua Diversion including but not limited to any and all "documents" generated by, sent by, or received by NMFS Law Enforcement agent, Don Tanner.

Fee waiver is pending by the NOAA FOIA Officer for this request.

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 need to search for and collect the requested records from field facilities or other establishments separate from the office processing the request. We are choosing to invoke this 10 day extension for this request.

Please contact us if you are interested in narrowing the scope of your request. Narrowing your request will help expedite its processing.

If you have questions regarding your request, please contact Shawn Martin at Shawn.Martin@noaa.gov or call (916) 930-3792.

Sincerely,

Shawn Martin
West Coast Region FOIA Team Lead



Hudak Declaration
EXHIBIT 3



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

Christopher Hudak
208 Panoramic Way
Berkeley, CA 94704

FEB 13 2017

Re: FOIA Request DOC-NOAA-2017-000257

Dear Christopher Hudak:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on December 12, 2016, in which you requested:

1. Any and all "documents" "related to" the "Chris Yates email" concerning input he, and any NMFS West Coast Region staff provided to NOAA HQ on the impact of the "Stockdale Memo." This request is only for the input on the impact of the "Stockdale Memo" that Chris Yates provided to NOAA HQ and the input on the impact of the "Stockdale Memo" the NMFS West Coast Region staff provided to NOAA HQ and is not a broader request for other documents related to the "Stockdale memo." This request is only for "documents" generated on or prior to July 24, 2014.
2. Any documents to or from NMFS staff Chris Kiefer "related to" the "draft Englebright concurrence letter."
3. Any and all NOAA Fisheries "documents" from January 1, 2000 to the present, in the possession of any NOAA Fisheries Office, Department, and/or Division, including any NOAA law enforcement division, "related to" whether any entities or individuals may have caused or did cause, or may be causing, or are causing "unauthorized take" of threatened or endangered anadromous fish in the Yuba River at, or in the vicinity of, Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, and the Hallwood-Cordua Diversion including but not limited to any and all "documents" generated by, sent by, or received by NMFS Law Enforcement agent, Don Tanner.

We have located **309** documents responsive to your request. **239** of these documents are being released to you in their entirety at

<https://foiaonline.regulations.gov:443/foia/action/public/view/request/810733c7>.



54 documents responsive to your request are being partially withheld under the following exemptions:

- 5 U.S.C.552(b)(5), attorney client work product.
- 5 U.S.C.552(b)(5), attorney client privilege.
- 5 U.S.C.552(b)(5), deliberative process.
- 5 U.S.C. § 552(b) (6), are withheld because the individuals' right to privacy outweighs the general public's interest in seeing personally identifying information.

16 documents originated from other agencies. We have referred those documents to the following offices for a release determination and direct response to you:

- 1 document to U.S. Department of Justice
- 3 documents to U.S. Army Corps of Engineers
- 11 documents to U.S. Fish and Wildlife Service
- 1 document to U.S. Federal Energy Relicensing Commission

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@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 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 Shawn Martin at Shawn.Martin@noaa.gov or by phone at (916) 930-3792 or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,



Alan Risenhoover,
Acting Deputy Assistant Administrator
for Regulatory Programs

Hudak Declaration
EXHIBIT 4

ENVIRONMENTAL ADVOCATES
ATTORNEYS AT LAW

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christopherwhudak@gmail.com

March 10, 2017

Via Email only

Assistant General Counsel For Litigation
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 Act Appeal of Request No. DOC-NOAA-2017-000257

Dear Assistant General Counsel,

Ecological Rights Foundation (“EcoRights”), via its public interest counsel at Environmental Advocates, hereby appeals the determination of the National Marine Fisheries Service (“NMFS”) in response to EcoRights’ FOIA request dated December 6, 2016 (No. DOC-NOAA-2017-000257) (“the request”). As discussed further below, EcoRights objects that NMFS has not made a reasonable search for responsive documents and has improperly withheld documents without adequate justification that the documents are exempt from disclosure under FOIA, and has likely failed to segregate factual material and make partial disclosures where possible.

I. Inadequate Search

In the request, which is attached as **Exhibit 1** to this appeal, EcoRights made specific requests for records related to three categories of information:

1. the Chris Yates email concerning input he and any NMFS West Coast region staff provided to NOAA HQ on the impact of the "Stockdale Memo;"
2. any documents to or from NMFS staff Chris Kiefer related to the "draft Englebright concurrence letter;"
3. any and all NOAA fisheries documents from January 1, 2000 to the present in the possession of any NOAA Fisheries Office, Department, and/or Division, including any NOAA law enforcement division related to unauthorized take in the vicinity of

Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, and the Hallwood-Cordua Diversion, including, but not limited to, any and all documents generated by, sent by, or received by NMFS Law Enforcement agent, Don Tanner.

In its February 13th response letter (attached as **Exhibit 2**) (“the letter”), NMFS indicated that it had located 309 documents responsive to the request. However, none of the documents released in full or in part are from the NOAA Office of Law Enforcement (“OLE”) although item #3 specifically requested any and all documents in the possession of OLE. EcoRights knows from documents NMFS released in response to another FOIA request that OLE agent, Don Tanner, at the very least, has information related to take at Englebright Dam and the Narrows 1 and 2 Powerhouses. However NMFS' search did not locate this information, evidence that NMFS' search was not adequate. EcoRights requests that NMFS perform a thorough search of OLE files and release any and all documents responsive to item #3.

II. Improper Withholding

EcoRights appeals the improper withholding of information in the **Exhibit 3** documents (attached) under vague and unjustified claims of deliberative process and attorney-client privilege exemptions, and withholding of information with no exemption claim.

A. Statutory Background

FOIA requires that an agency disclose documents to any person except where the document falls under a specifically enumerated exemption. 5 U.S.C. § 552 (2002). “[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act”; “[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7-8 (U.S. 2001) (internal citations omitted). The courts have emphasized the narrow scope of these exemptions and “the strong policy of the FOIA that the public is entitled to know what its government is doing and why.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

As NMFS is no doubt aware, on June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016, which made significant amendments to FOIA effective on June 30, 2016. EcoRights would like to remind NMFS that the amendments include changes to the standard by which NMFS must evaluate FOIA withholdings. Under the amendments, 5 U.S.C § 552(a)(8)(A) now provides as follows:

An agency shall –

(i) withhold information under this section only if –

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)

(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information [...]

Thus, NMFSs has a duty in preparing responses to EcoRights' FOIA request not to withhold documents unless foreseeable harm exists, to consider partial disclosure, and to take reasonable steps to segregate nonexempt information. Exemptions are read narrowly and the government bears the burden of proving exemptions apply. 5 U.S.C. § 552(a)(4)(b); *see Milner v. Dep't of the Navy*, 562 U.S. 562, 563 (U.S. 2011). NMFSs must also comply with the other recently amended sections of FOIA.

B. NMFS May Not Withhold Responsive Information Without a Verified Exemption.

Government agencies bear the burden of proof to show that any withheld information is exempt from the duty to disclose. 5 U.S.C. § 552(a)(4)(B); *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 132 (D.D.C. 2013). When an agency decides to withhold documents under a claim of exemption, it must notify the person making such request of such determination **and the reasons therefor**. 5 U.S.C. § 552(a)(6)(A)(i). Thus NMFS must, at the very least, at the administrative level identify the information withheld and the basis for withholding that information. However NMFS has failed to identify the specific exemption claimed for several documents that were redacted. *See* Exhibit 3. One document is redacted without any basis for the withholding identified. Other documents identify (b)(5) as the exemption claimed. However, exemption (b)(5) could mean attorney-client privilege, attorney work product doctrine, or deliberate process doctrine. In addition to failing to identify the specific exemption claimed for several documents NMFS failed to offer any explanation why the withholdings in all of the documents in Exhibit 3 are justified.

C. NMFS Cannot Claim a Valid Deliberative Process Privilege Exemption.

The purpose of the deliberative process privilege is to allow agencies to engage in internal debates without the inhibition that would be caused by publicity. *NLRB v. Sears Roebuck*, 421 U.S. 132, 150-151 (1973). For the privilege to apply, the communication at issue must be both "predecisional," i.e., precede an agency decision, and "deliberative." *Ancient Coin Collectors Guild v. U.S. Dep't. of State*, 641 F.3d 504, 513 (D.C. Cir. 2011); *Judicial Watch v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Documents merely applying published law to factual information and/or simply explaining agency decisions are neither. *Brinton v. Dep't of State*, 636 F.2d 600, 605 (D.C. Cir. 1980); *Judicial Watch v. HHS*, 27 F. Supp. 2d 240, 245 (D.C. 1998). Documents explaining an already-decided policy decision are, in fact, "at the heart of what should be released under FOIA." *Nat'l Day Laborer Organizing Network v. ICE*, 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011).

The deliberative process privilege is a qualified privilege under FOIA. *FTC v. Warner Communications*, 742 F.2d 1156, 1161 (9th Cir. 1984). A litigant may obtain deliberative documents if his or her need for the materials and accurate fact-finding override the government's interest in non-disclosure. *Id.*; *United States v. Leggett & Platt*, 542 F.2d 655, 658 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977). Among the factors for this determination are the relevance of the information, the government's role in the litigation, and the extent to which disclosure would hinder frank discussion. *Warner*, 742 F.2d at 1161. Where disclosure has already occurred, the government has little interest in secrecy. *Goodrich v. EPA*, 593 F. Supp. 2d 184, 192 (D.C. 2009) (EPA's failure to "jealously guard" its protected information cut against it); *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (disclosure may be compelled even over otherwise valid agency exemption claim when agency has effectively revealed information).

Again, recent guidance on the FOIA Improvement Act provides that agencies should further scrutinize documents that may fall within the deliberative process privilege to determine whether a discretionary release is appropriate. Such releases are “fully consistent with the purpose of the FOIA to make available to the public records which reflect the operations and activities of the government.” EcoRights’ request was specifically tailored to gather information about government decision-making and, more importantly, the federal government’s compliance with its own laws – in this case, the Endangered Species Act. Information about government decision-making and consultation that is required by law is exactly the type of information that FOIA was intended to disclose to the public. Such disclosure ensures that citizens are informed and their government is held accountable. *See Coastal States*, 617 F.2d at 868. NMFS’ inclination to withhold such information under a claim of deliberative process privilege is contrary to the mandates of FOIA and all the more suspect in the absence of any kind of description or justification.

Information may not be withheld “merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears” – in other words, these do not constitute foreseeable harm to a protected interest. S. Rep. No. 114-4 at 3.¹ NMFS’ broad and indiscriminate withholding of documents under the deliberative process privilege is out of step with the FOIA Improvement Act and recent FOIA guidance encouraging discretionary disclosures of information protected by the deliberative process privilege.

NMFS’ tactic of merely labeling information as exempt pursuant to deliberative process privilege without any explanation does not meet NMFS’ burden of justifying its claim of exemption. If any of the records contain predecisional materials that were later adopted or incorporated by NMFS then NMFS has a duty to disclose them. An agency cannot withhold predecisional materials when the final decisionmaker expressly adopts or incorporates them by reference. *NLRB v. Sears*, 421 U.S. 132 (1975); *Swisher v. Department of the Air Force*, 660 F.2d 369 (8th Cir. 1981).

D. NMFS Cannot Claim a Valid Attorney-Client Privilege Exemption

For the attorney client privilege to apply, there must be some indicia that the agency was dealing with its attorneys as would any private party seeking legal advice to protect personal interests. *Coastal States*, 617 F.2d at 863. NMFS has not provided information establishing that this privilege applies here, as required by 5 U.S.C. § 552(a)(6)(A)(i). NMFS has not provided sufficient information describing the information withheld, and a particularized explanation for why the information withheld falls within the exemption. It has also not explained how release of the information would harm an interest protected by the exemption, as required by the FOIA Improvement Act.

In the present case, NMFS has not justified its claim of privilege. It may very well be the case that NMFS has withheld information that constitutes official statements and published policy rather than confidential attorney-client communications. If communications with attorneys are not confidential, have already been made public, or are not made in the context of an attorney-client relationship they are not protected by attorney-client privilege. *In re Sealed Case*,

¹ Available at <https://www.congress.gov/congressional-report/114th-congress/senate-report/4/1>

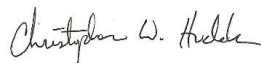
676 F.2d 793, 808-9 (D.C. Cir. 1982). The attorney-client privilege covers only confidential communications between attorney and client. *Id.* Thus, information other than "communications," or communications that do not involve both attorney and client, are not protected. *Id.* Furthermore, voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter. *Id.*; *In re United Mineworkers Employment Benefit Plans*, 159 F.R.D. 307, 310 (D.D.C. 1994) ("It is well settled that any disclosure of documents inconsistent with the confidential nature of the attorney-client relationship waives the attorney-client privilege not only as to the documents actually disclosed, but also as to all other communications related to the same subject matter"). NMFS has not provided any description of the information withheld under this privilege, nor has it provided adequate justification for its claim that the privilege applies.

III. NMFS Has a Duty to Segregate Out Non-Exempt Factual Materials and Consider Partial Disclosure

EcoRights is concerned that NMFS has perhaps not complied with 5 U.S.C. § 552(b)'s requirement that when asserting a document contains materials exempt from disclosure the agency must segregate out from the document any purely factual material not exempt from disclosure or the requirement of U.S.C § 552(a)(8)(A) that the agency consider partial disclosure. *NRDC v. U.S. Dep't of Def.*, 442 F. Supp. 2d 857, 872 (C.D. Cal. 2006); *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980). The agency's letter makes no mention of any attempt by NMFS to review the documents for segregable factual information. EcoRights requests that NMFS review the redacted records in Exhibit 3, and then segregate out and release any purely factual material.

EcoRights requests that you send your response to this appeal via electronic mail to me at christopherwhudak@gmail.com and to Christopher Sproul at csproul@enviroadvocates.com. If you have any questions or would like to discuss the agency's response to this appeal you may reach me at (510) 502-5742.

Sincerely,



Christopher Hudak
Environmental Advocates for
Ecological Rights Foundation

Hudak Declaration
EXHIBIT 5



West Coast Region
Routing & Tracking Ledger Sheet

NMFS Tracking # (PCTS#): WCR-2013-3

NMFS Regional Administrative Record # SWR2013SA00279

Project Title: Englebright Dam and Reservoir

Request Rcv'd Date: 10/22/2013 Consultation Initiation Date: 10/22/2013
Initial receipt (stamp date). Signifies a complete initiation package.

Estimated Response Date: 05/12/2014
Calculated from the Initiation Date.

ESA-§7 (<input type="radio"/> ESA & EFH <input checked="" type="radio"/> ESA only)	MSA-EFH (<input type="radio"/> EFH only)
<input checked="" type="radio"/> May Affect – Not Likely to Adversely Affect (NLAA) <input type="radio"/> May Affect – Likely to Adversely Affect (LAA)	<input type="radio"/> May Adversely Affect
<input type="radio"/> Tech Assistance <input checked="" type="radio"/> Informal <input type="radio"/> Formal <input type="radio"/> Gen Correspondence <input type="radio"/> Emergency <input type="radio"/> Programmatic <input type="radio"/> Conference <input type="radio"/> Add'l Info/Nonconcurrency	<input type="radio"/> Tech Assistance/Early Coordination <input type="radio"/> Abbreviated <input type="radio"/> Emergency <input type="radio"/> Programmatic <input type="radio"/> Expanded <input type="radio"/> General Concurrence <input type="radio"/> Existing Procedures

Action Agencies Proposed Effect Determination:

Consultation Type:

Lead Action Agency: Corps Action Agency Line Office: _____
 Action Agency Contact Info: _____ Applicant #: _____
 NMFS Branch/Team: Sacramento River Branch Action Agency Unique ID #: _____
 NMFS Project Lead: Gary Sprague

Is this a reinitiation? Original consultation(s) #: Yes , 151422SWR2006SA00071

Is the project part of a Programmatic? Notification (no Review) Notification (Biologist Review) Programmatic #: _____

Related Consultations #: _____

Comments: Attorney-Client Privileged

Electronic Path & Filename: TO THE CORPS.
2013_Englebright Dam and Reservoir_IF.docx

Review Sign-off			
Letter of Concurrence/Other	Biological Opinion with a General Counsel Waiver	Biological Opinion requiring General Counsel review	Biological Opinion with a Jeopardy or Adv Mod Conclusion
Biologist	Biologist	Biologist	Biologist
<u>G. Sprague 17Dec2013</u>	_____	_____	_____
First-line supervisor	First-line supervisor	First-line supervisor	First-line supervisor
<u>Howard Brown 14Mar2013</u>	_____	_____	_____
QA/QC Reviewer* (if requested)	QA/QC Reviewer * (if requested)	QA/QC Reviewer *	QA/QC Reviewer *
<u>Rob Nielsen 4/23/14</u>	_____	_____	_____
General Counsel (if required)	Second-line supervisor (if requested)	Second-line supervisor	Second-line supervisor
_____	_____	_____	_____
GC Review Requested	ARA (if requested)	Regional Section7 Coordinator (if requested)	Regional Section7 Coordinator (if requested)
_____	_____	_____	_____
Sign & Date in the Appropriate Field(s) (signature certifies review was conducted in adherence to the 2013 Quality Assurance Plan)		General Counsel	General Counsel
		_____	_____
*the Division Section 7 Coordinator may conduct this review or aid the QA/QC Reviewer		ARA	ARA
		_____	_____



Elevation memo attached

RA (if requested)	RA
_____	_____

West Coast Region
Routing & Tracking Ledger Sheet

NMFS Tracking # (PCTS#): WCR-2013-3

NMFS Regional Administrative Record # SWR2013SA00279

Project Title: Englebright Dam and Reservoir

Request Rcv'd Date: 10/22/2013
Initial receipt (stamp date).

Consultation Initiation Date: 10/22/2013
Signifies a complete initiation package.

Estimated Response Date: 0512/2014
Calculated from the Initiation Date.

ESA-§7 (<input type="radio"/> ESA & EFH <input checked="" type="radio"/> ESA only) <input checked="" type="radio"/> May Affect – Not Likely to Adversely Affect (NLAA) <input type="radio"/> May Affect – Likely to Adversely Affect (LAA) <input type="radio"/> Tech Assistance <input checked="" type="radio"/> Informal <input type="radio"/> Formal <input type="radio"/> Gen Correspondence <input type="radio"/> Emergency <input type="radio"/> Programmatic <input type="radio"/> Conference <input type="radio"/> Add'l Info/Nonconcurrency	MSA-EFH (<input type="radio"/> EFH only) <input type="radio"/> May Adversely Affect <input type="radio"/> Tech Assistance/Early Coordination <input type="radio"/> Abbreviated <input type="radio"/> Emergency <input type="radio"/> Programmatic <input type="radio"/> Expanded <input type="radio"/> General Concurrence <input type="radio"/> Existing Procedures
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Action Agencies Proposed Effect Determination:

Consultation Type:

Lead Action Agency: Corps Action Agency Line Office: _____
 Action Agency Contact Info: _____ Applicant #: _____
 NMFS Branch/Team: Sacramento River Branch Action Agency Unique ID #: _____
 NMFS Project Lead Gary Sprague

Is this a reinitiation? Original consultation(s) #: Yes , 151422SWR2006SA00071

Is the project part of a Programmatic? Notification (no Review) Notification (Biologist Review) Programmatic #: _____

Related Consultations #:

Comments: Non-routine informal sufficiency review letter. S7 & GC Review needed.

Electronic Path & Filename:

2013_Englebright Dam and Reservoir_IF.docx

Review Sign-off			
Letter of Concurrence/Other	Biological Opinion with a General Counsel Waiver	Biological Opinion requiring General Counsel review	Biological Opinion with a Jeopardy or Adv Mod Conclusion
Biologist <u>G. Sprague</u> <u>04Dec2013</u>	Biologist _____	Biologist _____	Biologist _____
First-line supervisor <u>H.B.</u> <u>04Dec2013</u>	First-line supervisor _____	First-line supervisor _____	First-line supervisor _____
QA/QC Reviewer* (if requested) _____	QA/QC Reviewer * (if requested) _____	QA/QC Reviewer * _____	QA/QC Reviewer * _____
General Counsel (if required) _____	Second-line supervisor (if requested) _____	Second-line supervisor _____	Second-line supervisor _____
GC Review Requested	ARA (if requested) _____	Regional Section7 Coordinator (if requested) _____	Regional Section7 Coordinator (if requested) _____
Sign & Date in the Appropriate Field(s) (signature certifies review was conducted in adherence to the 2013 Quality Assurance Plan)		General Counsel _____	General Counsel _____

000003

*the Division Section 7 Coordinator may conduct this review or aid the QA/QC Reviewer

Elevation memo attached

ARA	ARA
RA (if requested)	RA

Category & Subcategory of Activity: Identify all categories as apply. To be completed by the biologist

- | | | | | |
|---|---|--|--|---|
| <ul style="list-style-type: none"> <input type="checkbox"/> Agriculture <input type="checkbox"/> Confined animal <input type="checkbox"/> Erosion control <input type="checkbox"/> Grazing <input type="checkbox"/> Irrigation <input type="checkbox"/> Nutrient <input type="checkbox"/> Pesticide <input type="checkbox"/> Roads <input type="checkbox"/> Wildlife <input type="checkbox"/> Artificial Propagation <input type="checkbox"/> Aquaculture <input type="checkbox"/> Hatchery <input type="checkbox"/> Fishery <input type="checkbox"/> Fishery Management Action <input type="checkbox"/> MSA Action-EFH Designation <input type="checkbox"/> MSA Action-Fishing Gear Impacts <input type="checkbox"/> Non-MSA Action <input type="checkbox"/> Forestry <input type="checkbox"/> Bridge <input type="checkbox"/> Culvert <input type="checkbox"/> Log Transportation <input type="checkbox"/> Pesticide <input type="checkbox"/> Pre-commercial | <ul style="list-style-type: none"> Forestry (continued...) <input type="checkbox"/> Prescribed burning <input type="checkbox"/> Recreation <input type="checkbox"/> Regeneration <input type="checkbox"/> Roads <input type="checkbox"/> Site Preparation <input type="checkbox"/> Timber Harvest <input type="checkbox"/> Vegetation <input type="checkbox"/> Wildfire <input type="checkbox"/> Marine Mammal <input type="checkbox"/> Incidental Harassment Authorization <input type="checkbox"/> Take Reduction Plan <input type="checkbox"/> Military <input type="checkbox"/> Acoustic Testing <input type="checkbox"/> Navy Training Exercise <input type="checkbox"/> Pier Repairs <input type="checkbox"/> Shoreline Modifications <input type="checkbox"/> Drydock Operations <input type="checkbox"/> Mining <input type="checkbox"/> Exploratory Drilling <input type="checkbox"/> Hard Rock Mining <input type="checkbox"/> Gravel Mining <input type="checkbox"/> Placer Mining <input type="checkbox"/> Sand Mining | <ul style="list-style-type: none"> <input type="checkbox"/> Ocean <input type="checkbox"/> Beach Renourishment <input type="checkbox"/> Disposal <input type="checkbox"/> Geotechnical exploration <input type="checkbox"/> Sanctuary <input type="checkbox"/> Shoreline Stabilization <input type="checkbox"/> Research <input type="checkbox"/> Fish Monitoring <input type="checkbox"/> Fishery <input type="checkbox"/> Listed Species <input type="checkbox"/> Marine Mammals <input type="checkbox"/> Restoration <input type="checkbox"/> Estuary <input type="checkbox"/> Fish Passage <input type="checkbox"/> Marine <input type="checkbox"/> Marsbes <input type="checkbox"/> Riverine <input type="checkbox"/> Watershed <input type="checkbox"/> Waterway <input type="checkbox"/> Wetland | <ul style="list-style-type: none"> <input type="checkbox"/> Transportation <input type="checkbox"/> Airport <input type="checkbox"/> Bridge <input type="checkbox"/> Culvert <input type="checkbox"/> Moorage <input type="checkbox"/> Port/ terminal/ harbor/ marina <input type="checkbox"/> Railroad <input type="checkbox"/> Recreational Boating <input type="checkbox"/> Right-of-way <input type="checkbox"/> Road/ highway <input type="checkbox"/> Ship/ vessel/ aircraft operation <input type="checkbox"/> Utility <input type="checkbox"/> Hydropower <input type="checkbox"/> Oil and Gas <input type="checkbox"/> Pipeline <input type="checkbox"/> Power Plant <input type="checkbox"/> Refinery <input type="checkbox"/> Tidal Power <input type="checkbox"/> Transmission Line <input type="checkbox"/> Water Supply, Municipal <input type="checkbox"/> Wave Power <input type="checkbox"/> Wind | <ul style="list-style-type: none"> <input type="checkbox"/> Water Quality <input type="checkbox"/> Aquatic Criteria <input type="checkbox"/> NPDES <input type="checkbox"/> Registration <input type="checkbox"/> Stormwater Drainage <input type="checkbox"/> TMDLs <input type="checkbox"/> Wastewater <input type="checkbox"/> Waterway <input type="checkbox"/> Boat/ dock/ pier <input type="checkbox"/> Breakwater/ Groin <input type="checkbox"/> Channel reconstruction <input checked="" type="checkbox"/> Dam (non-power) <input type="checkbox"/> Dredging <input type="checkbox"/> Excavation <input type="checkbox"/> Fill <input type="checkbox"/> Flood Control <input type="checkbox"/> Geotechnical exploration <input type="checkbox"/> Shoreline stabilization <input type="checkbox"/> Special event <input type="checkbox"/> Streambank stabilization <input type="checkbox"/> Wetland <input type="checkbox"/> Dredge <input type="checkbox"/> Fill |
|---|---|--|--|---|

Species: Identify all species included in consultation & the associated Proposed Effect Determination

ESA-Listed Pacific Salmon & Associated Proposed Effect Determination

- | | | |
|---|--|---|
| <p>Salmon, Chinook (<i>O. tshawytscha</i>)</p> <ul style="list-style-type: none"> California Coastal <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Central Valley Spring-run <input type="checkbox"/> LAA <input checked="" type="checkbox"/> NLAA Lower Columbia River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Puget Sound <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Sacramento River Winter-run <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Snake River Fall-run <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Snake River Spring/Summer-run <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Upper Columbia River Spring-run <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Upper Willamette River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA | <p>Salmon, coho (<i>O. kisutch</i>)</p> <ul style="list-style-type: none"> Central California Coast <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Lower Columbia River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Oregon Coast <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Southern Oregon/Northern California Coast <input type="checkbox"/> LAA <input type="checkbox"/> NLAA <p>Salmon, sockeye (<i>Oncorhynchus nerka</i>)</p> <ul style="list-style-type: none"> Ozette Lake <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Snake River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA <p>Salmon, chum (<i>O. keeta</i>)</p> <ul style="list-style-type: none"> Columbia River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Hood Canal Summer-run <input type="checkbox"/> LAA <input type="checkbox"/> NLAA | <p>Steelhead (<i>O. mykiss</i>)</p> <ul style="list-style-type: none"> California Central Valley <input type="checkbox"/> LAA <input checked="" type="checkbox"/> NLAA Central California Coast <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Lower Columbia River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Middle Columbia River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Northern California <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Puget Sound <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Snake River Basin <input type="checkbox"/> LAA <input type="checkbox"/> NLAA South-Central California Coast <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Southern California <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Upper Columbia River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Upper Willamette River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA |
|---|--|---|

Other ESA-Listed Species & Associated Proposed Effect Determination

- Whale**
- Killer (*Orcinus orca*) - Southern Resident DPS LAA NLAA
 - Humpback (*Megaptera novaeangliae*) LAA NLAA
 - Blue (*Balaenoptera musculus*) LAA NLAA
 - Fin (*Balaenoptera physalus*) LAA NLAA
 - Sei (*Balaenoptera borealis*) LAA NLAA
 - Sperm (*Physeter macrocephalus*) LAA NLAA
 - North Pacific Right (*Eubalaena japonica*) LAA NLAA
- Turtle**
- Green (*Chelonia mydas*) LAA NLAA
 - Leatherback (*Dermochelys coriacea*) LAA NLAA
 - Loggerhead (*Caretta caretta*) - North Pacific DPS LAA NLAA
 - Olive Ridley Sea (*Lepidochelys olivacea*) LAA NLAA
- Rockfish**
- Bocaccio (*Sebastes paucispinus*) - Puget Sound/Georgia Basin LAA NLAA
 - Canary (*S. pinniger*) - Puget Sound/Georgia Basin LAA NLAA
 - Yelloweye (*S. ruberrimus*) - Puget Sound/Georgia Basin LAA NLAA
- Sea lion, Steller (*Eumetopias jubatus*) - East of 144° Longitude** LAA NLAA
- Fur seal, Guadalupe (*Arctocephalus townsendi*)** LAA NLAA
- Eulachon (*Thaleichthys pacificus*)-Southern DPS** LAA NLAA
- Sturgeon, green (*Acipenser medirostris*)-Southern DPS** LAA NLAA
- Black abalone (*Haliotis cracherodii*)** LAA NLAA
- White abalone (*Haliotis sorenseni*)** LAA NLAA

Coordination with PRD consistent with guidance memo for:

- ESA-Listed Marine Mammal (6-19-2013; not CA) Eulachon (04-08-2010 memo) Puget Sound Rockfish (04-08-2010 memo)

EFH: Indicate which FMPs have designated EFH in project area

- X Pacific Coast Salmon FMP Pacific Coast Groundfish FMP
 U.S. West Coast Fisheries for Highly Migratory Species FMP Coastal Pelagic Species FMP

Location:

HUC – 6th Field
 (or smallest relevant HUC): 18020107, 18020125

Datum - Lat/Long
 (in decimal degrees): -121.269160398854, 39.23987334440326 to -121.2089063371089, 39.29474022258458

State(s): _____ **County(s)(optional):** _____

- Oregon Idaho Washington
 Montana Alaska California

Final Decision Info

Date Technical Assistance Ended? _____

NMFS ESA Final Conclusion 50 CFR Part § 402.02

- Not Likely to Adversely Affect

Listed Species

- X No Jeopardy
 Jeopardy

Designated Critical Habitat

- X No Adverse Modification
 Adverse Modification
 No Effect

If jeopardy conclusion, identify species with non-jeopardy conclusion: _____

If multiple effects, identify species with NLAA determination: _____

EFH Final Conclusion and Conservation Recommendations 50 CFR Part 600.810(a)

- | | |
|---|---|
| <ul style="list-style-type: none"> <input type="radio"/> Would Adversely Affect – No Comment
There are adverse effects, but no practical EFH conservation recommendations available to avoid, or reduce the magnitude of these effects <input type="radio"/> Would Adversely Affect – Conservation Recommendations
Adverse effects mean any impacts that reduce quality and/or quantity of EFH.
Total # issued by NMFS _____ of which _____ is/are a subset of ESA terms & conditions that are applicable to EFH. | <ul style="list-style-type: none"> <input type="radio"/> Would <u>Not</u> Adversely Affect
As originally proposed, the project would not adversely affect EFH <input type="radio"/> Would <u>Not</u> Adversely Affect – Due to NMFS Action
Due to NMFS involvement to reduce the effects of the project during early coordination or consultation, all adverse effects were avoided. <input type="radio"/> Recommendations provided through non-EFH authority. <input type="radio"/> Not reviewed/no response by NMFS |
|---|---|
- Number of EFH Conservation Recommendations Accepted: _____
 If action agency is non-responsive, please fill in "0"

- Is project monitoring required?** YES NO
Is there an impact to HAPCs? YES NO

EFH FY2011 Habitat Conservation Performance Measure Reporting Requirements:

Was the Action Modified per NMFS Advice? YES NO
 (If you do not want to enter data in these additional fields, then do not enter an answer to "Was the Action Modified per NMFS Advice?")

Determine the acres of NOAA trust resources protected due to NMFS efforts: **Acres of Habitat Protected:** _____
 "Habitat protected" means NOAA trust resource habitats where NMFS's actions have reduced or averted threats to habitat. May include temporary protection from one or more threats and protections that overlap in time and space. **Remember** - A project should **not** be counted more than once!

Date of Receipt of confirmation that action has been modified _____
 Please enter the date you determine whether the Action Agency accepted or rejected your recommendations. You must enter the date, even if your answer above is "No." If your EFH Conservation Recommendations are identical to your ESA Terms & Conditions, then the above date will be the date of your decision document. The final response date can be a final response letter or email, a copy of an issued permit, a Record of Decision, a revised project description from the action agency or applicant that reflects modifications per NMFS advice, and/or a memo to the file from the consulting Biologist documenting how the action is modified.

Type of Documentation of Project Modification: Check one below

000005

- Biological Opinion
- Copy of Issued Permit
- Revised project description from Federal Action Agency
- Final response Letter or email from Federal Action Agency
- Other: email, phone call, etc.
- Record of Decision

Complete Docket/ Project File

Complete Docket/ Project file submitted to Record Administrator. Biologist _____ Date: _____

Incomplete, Intends to provide a complete Docket/ Project file on _____ Date: _____

General Counsel Review

Oregon, Washington & Idaho

The decision meets all five of the following criteria to waive GC legal review as described in the Delegation of Authority:

Attorney-Client Privileged

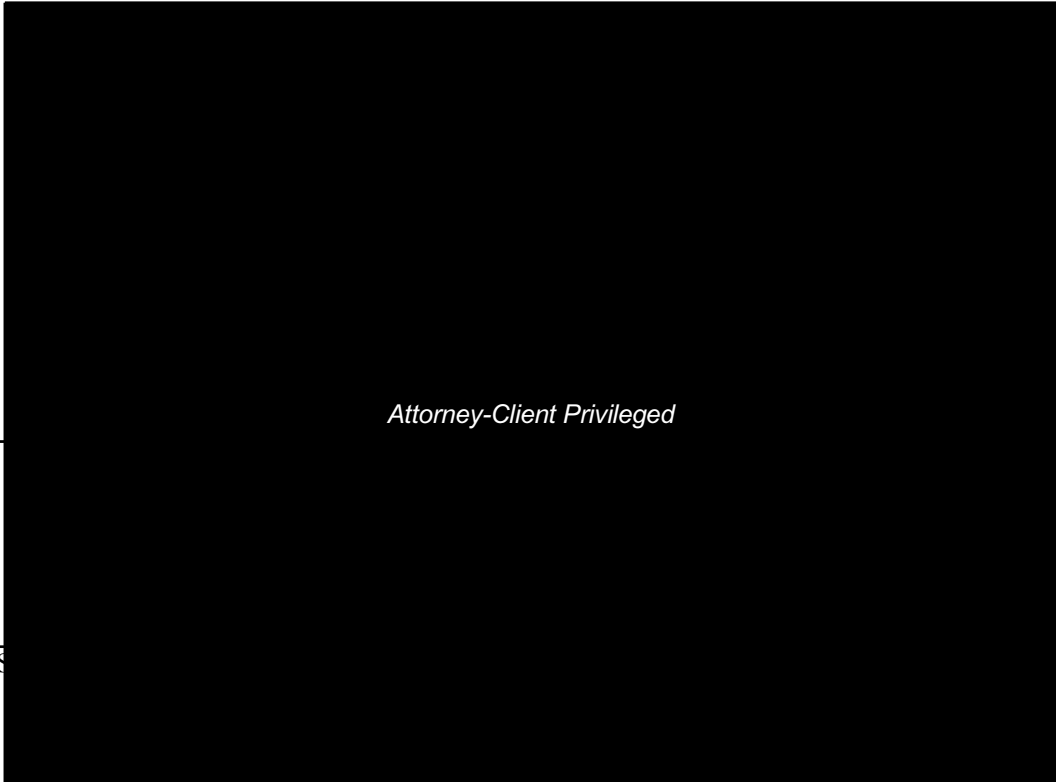
California

Attorney-Client Privileged

Attorney-Client Privileged

Attorney-Client Privileged

Lead Biologist, Office:	Gary Sprague
GC Reviewer:	
Date GC Received Draft:	
Date GC Provided Comments:	
Date GC Received Revised Draft:	
Date GC Waived/Cleared:	



Attorney-Client Privileged

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no

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1.

Attorney-Client Privileged

2.

3.

4.

5.

From: Christopher Keifer - NOAA Federal <christopher.keifer@noaa.gov>
Sent: Wednesday, October 30, 2013 9:56 AM
To: Gary Sprague - NOAA Federal
Cc: Howard Brown - NOAA Federal
Subject: Re: Yuba BA

b5

On Wed, Oct 30, 2013 at 7:38 AM, Gary Sprague - NOAA Federal <gary.sprague@noaa.gov> wrote:
Hello Christopher,

b5

Gary

Gary R. Sprague
Fish Biologist
NOAA Fisheries West Coast Region
U.S. Department of Commerce
650 Capitol Mall, Suite 5-100
Sacramento, CA 95814-4706
[\(916\) 930-3615](tel:9169303615) fax [\(916\) 930-3629](tel:9169303629)
gary.sprague@noaa.gov
<http://www.westcoast.fisheries.noaa.gov/>

On Tue, Oct 29, 2013 at 5:26 PM, Christopher Keifer - NOAA Federal <christopher.keifer@noaa.gov> wrote:
Gents -

Attorney-Client Privileged

Thanks!

--

Christopher Keifer
Attorney
NOAA Office of General Counsel, Southwest Section
U.S. Dep't of Commerce
Long Beach, CA
[\(562\) 980-4076](tel:(562)980-4076)

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--

Christopher Keifer
Attorney
NOAA Office of General Counsel, Southwest Section
U.S. Dep't of Commerce
Long Beach, CA
(562) 980-4076

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From: Howard Brown - NOAA Federal <howard.brown@noaa.gov>
Sent: Thursday, January 30, 2014 11:56 AM
To: Christopher Keifer - NOAA Federal
Cc: Gary Sprague - NOAA Federal
Subject: Re: Yuba Consultation

Chris,

[REDACTED]

b5

[REDACTED]

Howard

On Thu, Jan 30, 2014 at 11:06 AM, Christopher Keifer - NOAA Federal <christopher.keifer@noaa.gov> wrote:
Gentlemen -

[REDACTED]

b5

[REDACTED]

Thanks!
Christopher

--
Christopher Keifer
Attorney
NOAA Office of General Counsel, Southwest Section
U.S. Dep't of Commerce
Long Beach, CA
[\(562\) 980-4076](tel:(562)980-4076)

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--

Howard L. Brown

Sacramento River Basin Chief
NOAA Fisheries, West Coast Region
U.S. Department of Commerce
(916) 930-3608
Howard.Brown@noaa.gov



www.westcoast.fisheries.noaa.gov

From: Howard Brown - NOAA Federal <howard.brown@noaa.gov>
Sent: Friday, January 31, 2014 12:08 PM
To: Will Stelle - NOAA Federal; Maria Rea - NOAA Federal; Judson Feder - NOAA Federal; Adam Issenberg - NOAA Federal
Cc: Gary Sprague - NOAA Federal; Christopher Keifer - NOAA Federal; Steve Edmondson - NOAA Federal
Subject: Update on Yuba Consultations with U.S. Army Corps

Folks,

I am writing with a brief update to our policy and legal team on the status of the Section 7 consultation with the U.S. Army Corps. I will be setting up a coordination call soon, but want to provide this update in the meantime.

The Corps sent us final BAs for certain operations and maintenance activities associated with Daguerre and Englebright Dams. NMFS staff completed a sufficiency review of the BAs and found them to be complete for the initiation of consultation. As expected, the Corps broke their actions in to two separate consultations based on separate authorities for Englebright and Daguerre, and also based on the different determination they reached regarding their effects. The Corps concluded NLAA for Englebright actions and LAA for Daguerre. [REDACTED]

As of right now, we are on track with our planning schedule. We are drafting consultation documents, meeting with the Corps Sacramento District staff and there are no issues that have required elevation. We plan to conclude both consultations at the same time, at or before the court ordered deadline of May 12.

Please let me know if you have any questions.

Howard

--

Howard L. Brown
Sacramento River Basin Chief
NOAA Fisheries, West Coast Region
U.S. Department of Commerce
(916) 930-3608
Howard.Brown@noaa.gov



www.westcoast.fisheries.noaa.gov

Christopher Sproule, Esq.
Environmental Advocates

5135 Anza Street
San Francisco, CA 94121

Dear Mr. Sproule:

I am writing in response to your letter dated December 20, 2013, regarding your comments on the U.S. Army Corps of Engineers (Corps) 2013 Biological Assessments for the Operations on the Yuba River. You wrote to discuss the Endangered Species Section 7 consultation process for the Corps' operations on the Yuba River and to discuss the two biological assessments that pertain to the ongoing consultation. You also are requesting NOAA's National Marine Fisheries Service (NMFS) to engage the South Yuba River Citizen's League and Friends of the River in a collaborative process and work together to craft a legal and adequate biological opinion that comports with the Endangered Species Acts (ESA) mandate that all Federal agencies ensure their actions do not jeopardize the survival of Federally listed species.

deliberative process

deliberative process

If you have any comments or questions, please direct them to Gary Sprague. He can be reached at (916) 930-3615, or via email at Gary.Sprague@noaa.gov.

Sincerely,

William W. Stelle, Jr.
Regional Administrator

cc: Copy to File ARN: 151422SWR2013SA00280
SYRCL
Dan Pollack
Lisa Clay

From: Howard Brown - NOAA Federal <howard.brown@noaa.gov>
Sent: Wednesday, February 05, 2014 12:47 PM
To: Christopher Keifer - NOAA Federal
Cc: Gary Sprague - NOAA Federal; Alice Berg - NOAA Affiliate
Subject: Response to Environmental Advocates
Attachments: Environmental Advocates Comment Letter to NMFS re 2013 BA_12_20-13.pdf; Stelle response to Environmental Advocates.docx

Chris,

Attorney-Client Privileged

Thanks
Howard

--

Howard L. Brown
Sacramento River Basin Chief
NOAA Fisheries, West Coast Region
U.S. Department of Commerce
(916) 930-3608
Howard.Brown@noaa.gov



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DRAFT DRAFT DRAFT For action agency review and NMFS deliberation
DRAFT DRAFT DRAFT For action agency review and NMFS deliberation

Review Draft Predecisional Confidential Do not distribute

In response refer to:
WCR-2013-3

Doug Grothe
Park Ranger
Harry L. Englebright Lake
U.S. Army Corps of Engineers
P.O. Box 6
Smartsville, CA 95977-0006


Re: Endangered Species Act Section 7(a)(2) Concurrence Letter for the U.S. Army Corps of Engineers' (Corps) Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River.

Dear Mr. Grothe:

On October 22, 2013, NOAA's National Marine Fisheries Service (NMFS) received your request for a written concurrence that the U.S. Army Corps of Engineers' (Corps) Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River may affect, but is not likely to adversely affect, Federally listed threatened Central Valley spring-run Chinook salmon (*Onchorynchus tshawytscha*), threatened California Central Valley (CV) steelhead (*Onchorynchus mykiss*), threatened southern distinct population segment (DPS) of North American green sturgeon (*Acipenser medirostris*), and designated critical habitat. The Corps has requested concurrence with their determinations. This response to your request was prepared by NMFS pursuant to section 7(a)(2) of the ESA, implementing regulations at 50 CFR 402, and agency guidance for preparation of letters of concurrence.

deliberative process

DRAFT DRAFT DRAFT For action agency review and NMFS deliberation



deliberative process

DRAFT DRAFT DRAFT For action agency review and NMFS deliberation

deliberative process

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deliberative process

DRAFT DRAFT DRAFT For action agency review and NMFS deliberation

deliberative process

DRAFT DRAFT DRAFT For action agency review and NMFS deliberation

deliberative process

If you have any questions concerning this project, or require additional information, please contact Gary Sprague at (916) 930-3615, or via email at: Gary.Sprague@noaa.gov.

Sincerely,

DRAFT

cc: Randy P. Olsen
Chief, Operations and Readiness Branch
U.S. Army Corps of Engineers, Sacramento District
1325 J Street
Sacramento, CA 95814

Lisa H. Clay
Senior Assistant District Counsel
U.S. Army Corps of Engineers, Sacramento District
1325 J Street
Sacramento, CA 95814

bcc: CHRON file

ARN: SWR2013SA00280

DRAFT DRAFT DRAFT For action agency review and NMFS deliberation

References

National Marine Fisheries Service. 2009. Public Draft Recovery Plan for the Evolutionarily Significant Units of Sacramento River Winter-Run Chinook Salmon and Central Valley Spring-Run Chinook Salmon, and the Distinct Population Segment of Central Valley Steelhead. National Marine Fisheries Service, Southwest Regional Office, Sacramento, California. October 2009.

National Marine Fisheries Service. 2012. Biological Opinion for the U.S. Army Corps of Engineers' Operation and Maintenance of Englebright and Daguerre Point Dams and Englebright Reservoir on the Yuba River.

U.S. Army Corps of Engineers. 2012. Biological Assessment for the U.S. Army Corps of Engineers Ongoing Operation and Maintenance of Englebright and Reservoir, and Daguerre Point Dam on the Lower Yuba River.

U.S. Army Corps of Engineers. 2013a. U.S. Army Corps of Engineers Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River.

U.S. Army Corps of Engineers. 2013b. U.S. Army Corps of Engineers Authorized Operation and Maintenance of Existing Fish Passage Facilities at Daguerre Point Dam on the Lower Yuba River.

USGS. 2003. Bathymetric and Geophysical Surveys of Englebright Lake, Yuba-Nevada Counties, California 2003. Open-File Report 03-383. United States Geological Survey. Prepared by J. R. Childs, N. P. Snyder, and M. A. Hampton.



West Coast Region
Routing & Tracking Ledger Sheet

NMFS Tracking # (PCTS#): WCR-2013-3

NMFS Regional Administrative Record # SWR2013SA00279

Project Title: Englebright Dam and Reservoir

Request Rcv'd Date: 10/22/2013
Initial receipt (stamp date).

Consultation Initiation Date: 10/22/2013
Signifies a complete initiation package.

Estimated Response Date: 05/12/2014
Calculated from the Initiation Date.

ESA-§7 (<input type="radio"/> ESA & EFH <input checked="" type="radio"/> ESA only)	MSA-EFH (<input type="radio"/> EFH only)
<input checked="" type="radio"/> May Affect – Not Likely to Adversely Affect (NLAA) <input type="radio"/> May Affect – Likely to Adversely Affect (LAA)	<input type="radio"/> May Adversely Affect
<input type="radio"/> Tech Assistance <input checked="" type="radio"/> Informal <input type="radio"/> Formal <input type="radio"/> Gen Correspondence <input type="radio"/> Emergency <input type="radio"/> Programmatic <input type="radio"/> Conference <input type="radio"/> Add'l Info/Nonconcurrency	<input type="radio"/> Tech Assistance/Early Coordination <input type="radio"/> Abbreviated <input type="radio"/> Emergency <input type="radio"/> Programmatic <input type="radio"/> Expanded <input type="radio"/> General Concurrence <input type="radio"/> Existing Procedures

Action Agencies Proposed Effect Determination:

Consultation Type:

Lead Action Agency: <u>Corps</u>	Action Agency Line Office: _____
Action Agency Contact Info: _____	Applicant #: _____
NMFS Branch/Team: <u>Sacramento River Branch</u>	Action Agency Unique ID #: _____
NMFS Project Lead: <u>Gary Sprague</u>	

Is this a reinitiation? Original consultation(s) #: Yes, 151422SWR2006SA00071

Is the project part of a Programmatic? Notification (no Review) Notification (Biologist Review) Programmatic #: _____

Related Consultations #: _____

Comments:



Attorney-Client Privileged

Electronic Path & Filename: TO THE CORPS.
2013_Englebright Dam and Reservoir_IF.docx

Review Sign-off			
Letter of Concurrence/Other	Biological Opinion with a General Counsel Waiver	Biological Opinion requiring General Counsel review	Biological Opinion with a Jeopardy or Adv Mod Conclusion
Biologist	Biologist	Biologist	Biologist
<u>G. Sprague 17Dec2013</u>	_____	_____	_____
First-line supervisor	First-line supervisor	First-line supervisor	First-line supervisor
<u>Howard Brown 14Mar2013</u>	_____	_____	_____
QA/QC Reviewer* (if requested)	QA/QC Reviewer * (if requested)	QA/QC Reviewer *	QA/QC Reviewer *
<u>Rob Nielsen 4/23/14</u>	_____	_____	_____
General Counsel (if required)	Second-line supervisor (if requested)	Second-line supervisor	Second-line supervisor
<u>Christopher Keifer 8 MAY 14</u>	_____	_____	_____
GC Review Requested	ARA (if requested)	Regional Section7 Coordinator (if requested)	Regional Section7 Coordinator (if requested)
_____	_____	_____	_____
Sign & Date in the Appropriate Field(s) (signature certifies review was conducted in adherence to the 2013 Quality Assurance Plan)		General Counsel	General Counsel
		_____	_____
		ARA	ARA
		_____	_____

*the Division Section 7 Coordinator may conduct this review or aid the QA/QC Reviewer



Elevation memo attached

RA (if requested)	RA
_____	_____

West Coast Region
Routing & Tracking Ledger Sheet

NMFS Tracking # (PCTS#): WCR-2013-3

NMFS Regional Administrative Record # SWR2013SA00279

Project Title: Englebright Dam and Reservoir

Request Rcv'd Date: 10/22/2013
Initial receipt (stamp date).

Consultation Initiation Date: 10/22/2013
Signifies a complete initiation package.
Estimated Response Date: 0512/2014
Calculated from the Initiation Date.

ESA-§7 (<input type="radio"/> ESA & EFH <input checked="" type="radio"/> ESA only) <input checked="" type="radio"/> May Affect – Not Likely to Adversely Affect (NLAA) <input type="radio"/> May Affect – Likely to Adversely Affect (LAA) <input type="radio"/> Tech Assistance <input checked="" type="radio"/> Informal <input type="radio"/> Formal <input type="radio"/> Gen Correspondence <input type="radio"/> Emergency <input type="radio"/> Programmatic <input type="radio"/> Conference <input type="radio"/> Add'l Info/Nonconcurrency	MSA-EFH (<input type="radio"/> EFH only) <input type="radio"/> May Adversely Affect <input type="radio"/> Tech Assistance/Early Coordination <input type="radio"/> Abbreviated <input type="radio"/> Emergency <input type="radio"/> Programmatic <input type="radio"/> Expanded <input type="radio"/> General Concurrence <input type="radio"/> Existing Procedures
---	---

Action Agencies Proposed Effect Determination:

Consultation Type:

Lead Action Agency: Corps Action Agency Line Office: _____
 Action Agency Contact Info: _____ Applicant #: _____
 NMFS Branch/Team: Sacramento River Branch Action Agency Unique ID #: _____
 NMFS Project Lead: Gary Sprague

Is this a reinitiation? Original consultation(s) #: Yes , 151422SWR2006SA00071
 Is the project part of a Programmatic? Notification (no Review) Notification (Biologist Review) Programmatic #: _____
 Related Consultations #: _____

Comments: Non-routine informal sufficiency review letter. S7 & GC Review needed.

Electronic Path & Filename: 2013_Englebright Dam and Reservoir_IF.docx

Review Sign-off			
Letter of Concurrence/Other	Biological Opinion with a General Counsel Waiver	Biological Opinion requiring General Counsel review	Biological Opinion with a Jeopardy or Adv Mod Conclusion
Biologist <u>G. Sprague</u> <u>04Dec2013</u>	Biologist _____	Biologist _____	Biologist _____
First-line supervisor <u>H.B</u> <u>04Dec2013</u>	First-line supervisor _____	First-line supervisor _____	First-line supervisor _____
QA/QC Reviewer* (if requested) _____	QA/QC Reviewer * (if requested) _____	QA/QC Reviewer * _____	QA/QC Reviewer * _____
General Counsel (if required) _____	Second-line supervisor (if requested) _____	Second-line supervisor _____	Second-line supervisor _____
GC Review Requested	ARA (if requested) _____	Regional Section7 Coordinator (if requested) _____	Regional Section7 Coordinator (if requested) _____
Sign & Date in the Appropriate Field(s) (signature certifies review was conducted in adherence to the 2013 Quality Assurance Plan)		General Counsel _____	General Counsel _____

000039

*the Division Section 7 Coordinator may conduct this review or aid the QA/QC Reviewer

Elevation memo attached

ARA	ARA
RA (if requested)	RA

Category & Subcategory of Activity: Identify all categories as apply. To be completed by the biologist

- | | | | | |
|---|---|--|--|---|
| <ul style="list-style-type: none"> <input type="checkbox"/> Agriculture <input type="checkbox"/> Confined animal <input type="checkbox"/> Erosion control <input type="checkbox"/> Grazing <input type="checkbox"/> Irrigation <input type="checkbox"/> Nutrient <input type="checkbox"/> Pesticide <input type="checkbox"/> Roads <input type="checkbox"/> Wildlife <input type="checkbox"/> Artificial Propagation <input type="checkbox"/> Aquaculture <input type="checkbox"/> Hatchery <input type="checkbox"/> Fishery <input type="checkbox"/> Fishery Management Action <input type="checkbox"/> MSA Action-EFH Designation <input type="checkbox"/> MSA Action-Fishing Gear Impacts <input type="checkbox"/> Non-MSA Action <input type="checkbox"/> Forestry <input type="checkbox"/> Bridge <input type="checkbox"/> Culvert <input type="checkbox"/> Log Transportation <input type="checkbox"/> Pesticide <input type="checkbox"/> Pre-commercial | <ul style="list-style-type: none"> Forestry (continued...) <input type="checkbox"/> Prescribed burning <input type="checkbox"/> Recreation <input type="checkbox"/> Regeneration <input type="checkbox"/> Roads <input type="checkbox"/> Site Preparation <input type="checkbox"/> Timber Harvest <input type="checkbox"/> Vegetation <input type="checkbox"/> Wildfire <input type="checkbox"/> Marine Mammal <input type="checkbox"/> Incidental Harassment Authorization <input type="checkbox"/> Take Reduction Plan <input type="checkbox"/> Military <input type="checkbox"/> Acoustic Testing <input type="checkbox"/> Navy Training Exercise <input type="checkbox"/> Pier Repairs <input type="checkbox"/> Shoreline Modifications <input type="checkbox"/> Drydock Operations <input type="checkbox"/> Mining <input type="checkbox"/> Exploratory Drilling <input type="checkbox"/> Hard Rock Mining <input type="checkbox"/> Gravel Mining <input type="checkbox"/> Placer Mining <input type="checkbox"/> Sand Mining | <ul style="list-style-type: none"> <input type="checkbox"/> Ocean <input type="checkbox"/> Beach Renourishment <input type="checkbox"/> Disposal <input type="checkbox"/> Geotechnical exploration <input type="checkbox"/> Sanctuary <input type="checkbox"/> Shoreline Stabilization <input type="checkbox"/> Research <input type="checkbox"/> Fish Monitoring <input type="checkbox"/> Fishery <input type="checkbox"/> Listed Species <input type="checkbox"/> Marine Mammals <input type="checkbox"/> Restoration <input type="checkbox"/> Estuary <input type="checkbox"/> Fish Passage <input type="checkbox"/> Marine <input type="checkbox"/> Marsbes <input type="checkbox"/> Riverine <input type="checkbox"/> Watershed <input type="checkbox"/> Waterway <input type="checkbox"/> Wetland | <ul style="list-style-type: none"> <input type="checkbox"/> Transportation <input type="checkbox"/> Airport <input type="checkbox"/> Bridge <input type="checkbox"/> Culvert <input type="checkbox"/> Moorage <input type="checkbox"/> Port/ terminal/ harbor/ marina <input type="checkbox"/> Railroad <input type="checkbox"/> Recreational Boating <input type="checkbox"/> Right-of-way <input type="checkbox"/> Road/ highway <input type="checkbox"/> Ship/ vessel/ aircraft operation <input type="checkbox"/> Utility <input type="checkbox"/> Hydropower <input type="checkbox"/> Oil and Gas <input type="checkbox"/> Pipeline <input type="checkbox"/> Power Plant <input type="checkbox"/> Refinery <input type="checkbox"/> Tidal Power <input type="checkbox"/> Transmission Line <input type="checkbox"/> Water Supply, Municipal <input type="checkbox"/> Wave Power <input type="checkbox"/> Wind | <ul style="list-style-type: none"> <input type="checkbox"/> Water Quality <input type="checkbox"/> Aquatic Criteria <input type="checkbox"/> NPDES <input type="checkbox"/> Registration <input type="checkbox"/> Stormwater Drainage <input type="checkbox"/> TMDLs <input type="checkbox"/> Wastewater <input type="checkbox"/> Waterway <input type="checkbox"/> Boat/ dock/ pier <input type="checkbox"/> Breakwater/ Groin <input type="checkbox"/> Channel reconstruction <input checked="" type="checkbox"/> Dam (non-power) <input type="checkbox"/> Dredging <input type="checkbox"/> Excavation <input type="checkbox"/> Fill <input type="checkbox"/> Flood Control <input type="checkbox"/> Geotechnical exploration <input type="checkbox"/> Shoreline stabilization <input type="checkbox"/> Special event <input type="checkbox"/> Streambank stabilization <input type="checkbox"/> Wetland <input type="checkbox"/> Dredge <input type="checkbox"/> Fill |
|---|---|--|--|---|

Species: Identify all species included in consultation & the associated Proposed Effect Determination

ESA-Listed Pacific Salmon & Associated Proposed Effect Determination

- | | | |
|---|--|---|
| <p>Salmon, Chinook (<i>O. tshawytscha</i>)</p> <ul style="list-style-type: none"> California Coastal <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Central Valley Spring-run <input type="checkbox"/> LAA <input checked="" type="checkbox"/> NLAA Lower Columbia River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Puget Sound <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Sacramento River Winter-run <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Snake River Fall-run <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Snake River Spring/Summer-run <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Upper Columbia River Spring-run <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Upper Willamette River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA | <p>Salmon, coho (<i>O. kisutch</i>)</p> <ul style="list-style-type: none"> Central California Coast <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Lower Columbia River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Oregon Coast <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Southern Oregon/Northern California Coast <input type="checkbox"/> LAA <input type="checkbox"/> NLAA <p>Salmon, sockeye (<i>Oncorhynchus nerka</i>)</p> <ul style="list-style-type: none"> Ozette Lake <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Snake River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA <p>Salmon, chum (<i>O. keeta</i>)</p> <ul style="list-style-type: none"> Columbia River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Hood Canal Summer-run <input type="checkbox"/> LAA <input type="checkbox"/> NLAA | <p>Steelhead (<i>O. mykiss</i>)</p> <ul style="list-style-type: none"> California Central Valley <input type="checkbox"/> LAA <input checked="" type="checkbox"/> NLAA Central California Coast <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Lower Columbia River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Middle Columbia River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Northern California <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Puget Sound <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Snake River Basin <input type="checkbox"/> LAA <input type="checkbox"/> NLAA South-Central California Coast <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Southern California <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Upper Columbia River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA Upper Willamette River <input type="checkbox"/> LAA <input type="checkbox"/> NLAA |
|---|--|---|

Other ESA-Listed Species & Associated Proposed Effect Determination

- Whale**
- Killer (*Orcinus orca*) - Southern Resident DPS LAA NLAA
 - Humpback (*Megaptera novaeangliae*) LAA NLAA
 - Blue (*Balaenoptera musculus*) LAA NLAA
 - Fin (*Balaenoptera physalus*) LAA NLAA
 - Sei (*Balaenoptera borealis*) LAA NLAA
 - Sperm (*Physeter macrocephalus*) LAA NLAA
 - North Pacific Right (*Eubalaena japonica*) LAA NLAA
- Turtle**
- Green (*Chelonia mydas*) LAA NLAA
 - Leatherback (*Dermochelys coriacea*) LAA NLAA
 - Loggerhead (*Caretta caretta*) - North Pacific DPS LAA NLAA
 - Olive Ridley Sea (*Lepidochelys olivacea*) LAA NLAA
- Rockfish**
- Bocaccio (*Sebastes paucispinus*) - Puget Sound/Georgia Basin LAA NLAA
 - Canary (*S. pinniger*) - Puget Sound/Georgia Basin LAA NLAA
 - Yelloweye (*S. ruberrimus*) - Puget Sound/Georgia Basin LAA NLAA
- Sea lion, Steller (*Eumetopias jubatus*) - East of 144° Longitude** LAA NLAA
- Fur seal, Guadalupe (*Arctocephalus townsendi*)** LAA NLAA
- Eulachon (*Thaleichthys pacificus*)-Southern DPS** LAA NLAA
- Sturgeon, green (*Acipenser medirostris*)-Southern DPS** LAA NLAA
- Black abalone (*Haliotis cracherodii*)** LAA NLAA
- White abalone (*Haliotis sorenseni*)** LAA NLAA

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Coordination with PRD consistent with guidance memo for:

- ESA-Listed Marine Mammal (6-19-2013; not CA) Eulachon (04-08-2010 memo) Puget Sound Rockfish (04-08-2010 memo)

EFH: Indicate which FMPs have designated EFH in project area

- X Pacific Coast Salmon FMP Pacific Coast Groundfish FMP
U.S. West Coast Fisheries for Highly Migratory Species FMP Coastal Pelagic Species FMP

Location:

HUC - 6th Field (or smallest relevant HUC): 18020107, 18020125

Datum - Lat/Long (in decimal degrees): -121.269160398854, 39.23987334440326 to -121.2089063371089, 39.29474022258458

State(s): County(s)(optional):

- Oregon Idaho Washington
Montana Alaska x California

Final Decision Info

Date Technical Assistance Ended?

NMFS ESA Final Conclusion 50 CFR Part § 402.02

- Not Likely to Adversely Affect

Listed Species

- X No Jeopardy
Jeopardy

Designated Critical Habitat

- X No Adverse Modification
Adverse Modification
No Effect

If jeopardy conclusion, identify species with non-jeopardy conclusion:
If multiple effects, identify species with NLAA determination:

EFH Final Conclusion and Conservation Recommendations 50 CFR Part 600.810(a)

- Would Adversely Affect - No Comment
Would Adversely Affect - Conservation Recommendations
Would Not Adversely Affect
Would Not Adversely Affect - Due to NMFS Action
Recommendations provided through non-EFH authority.
Not reviewed/no response by NMFS
Is project monitoring required?
Is there an impact to HAPCs?

EFH FY2011 Habitat Conservation Performance Measure Reporting Requirements:

Was the Action Modified per NMFS Advice? YES NO
(If you do not want to enter data in these additional fields, then do not enter an answer to "Was the Action Modified per NMFS Advice?")

Determine the acres of NOAA trust resources protected due to NMFS efforts: Acres of Habitat Protected:
"Habitat protected" means NOAA trust resource habitats where NMFS's actions have reduced or averted threats to habitat. May include temporary protection from one or more threats and protections that overlap in time and space. Remember - A project should not be counted more than once!

Date of Receipt of confirmation that action has been modified
Please enter the date you determine whether the Action Agency accepted or rejected your recommendations. You must enter the date, even if your answer above is "No." If your EFH Conservation Recommendations are identical to your ESA Terms & Conditions, then the above date will be the date of your decision document. The final response date can be a final response letter or email, a copy of an issued permit, a Record of Decision, a revised project description from the action agency or applicant that reflects modifications per NMFS advice, and/or a memo to the file from the consulting Biologist documenting how the action is modified.

Type of Documentation of Project Modification: Check one below

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- Biological Opinion*
- Copy of Issued Permit*
- Revised project description from Federal Action Agency*
- Final response Letter or email from Federal Action Agency*
- Other: email, phone call, etc.*
- Record of Decision*

Complete Docket/ Project File

Complete Docket/ Project file submitted to Record Administrator. Biologist _____ Date: _____

Incomplete. Intends to provide a complete Docket/ Project file on _____ Date: _____

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Attorney-Client Privileged

Attorney-Client Privileged

Attorney-Client Privileged

Lead Biologist, Office:	Gary Sprague
GC Reviewer:	
Date GC Received Draft:	
Date GC Provided Comments:	
Date GC Received Revised Draft:	
Date GC Waived/Cleared:	



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Attorney-Client Privileged

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In response refer to:
WCR-2013-3

Colonel Michael J. Farrell
District Commander
U.S. Army Corps of Engineers, Sacramento District
1325 J Street
Sacramento District, CA 95814-2922
~~Doug Grothe~~
~~Park Manager~~
~~Ranger~~
~~Harry L. Englebright Lake~~
~~U.S. Army Corps of Engineers~~
~~P.O. Box 6~~
~~Smartsville, CA 95977-0006~~

Commented [L1]: Transmittal letter was signed by the District Commander, not Doug.

Re: Endangered Species Act Section 7(a)(2) Concurrence Letter for the U.S. Army Corps of Engineers' (Corps) Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River.

Dear ~~Mr. Grothe~~ Colonel Farrell:

On October 22, 2013, NOAA's National Marine Fisheries Service (NMFS) received your request for a written concurrence that the U.S. Army Corps of Engineers' (Corps) Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River may affect, but is not likely to adversely affect, Federally listed threatened Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*), threatened California Central Valley (CV) steelhead (*Oncorhynchus mykiss*), threatened southern distinct population segment (DPS) of North American green sturgeon (*Acipenser medirostris*), and designated critical habitat. The Corps has requested concurrence with their determinations. ~~This response to your request was prepared by NMFS prepared its response to the Corps' request~~ pursuant to section 7(a)(2) of the ESA, implementing regulations at 50 CFR 402, and agency guidance for preparation of letters of concurrence.

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This letter underwent pre-dissemination review using standards for utility, integrity, and objectivity in compliance with applicable guidelines issued under the Data Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106-554). The concurrence letter will be available through NMFS' Public Consultation Tracking System, <https://pcts.nmfs.noaa.gov/pcts-web/homepage.pcts> . A complete record of this consultation is on file at the NMFS California Central Valley Area Office.


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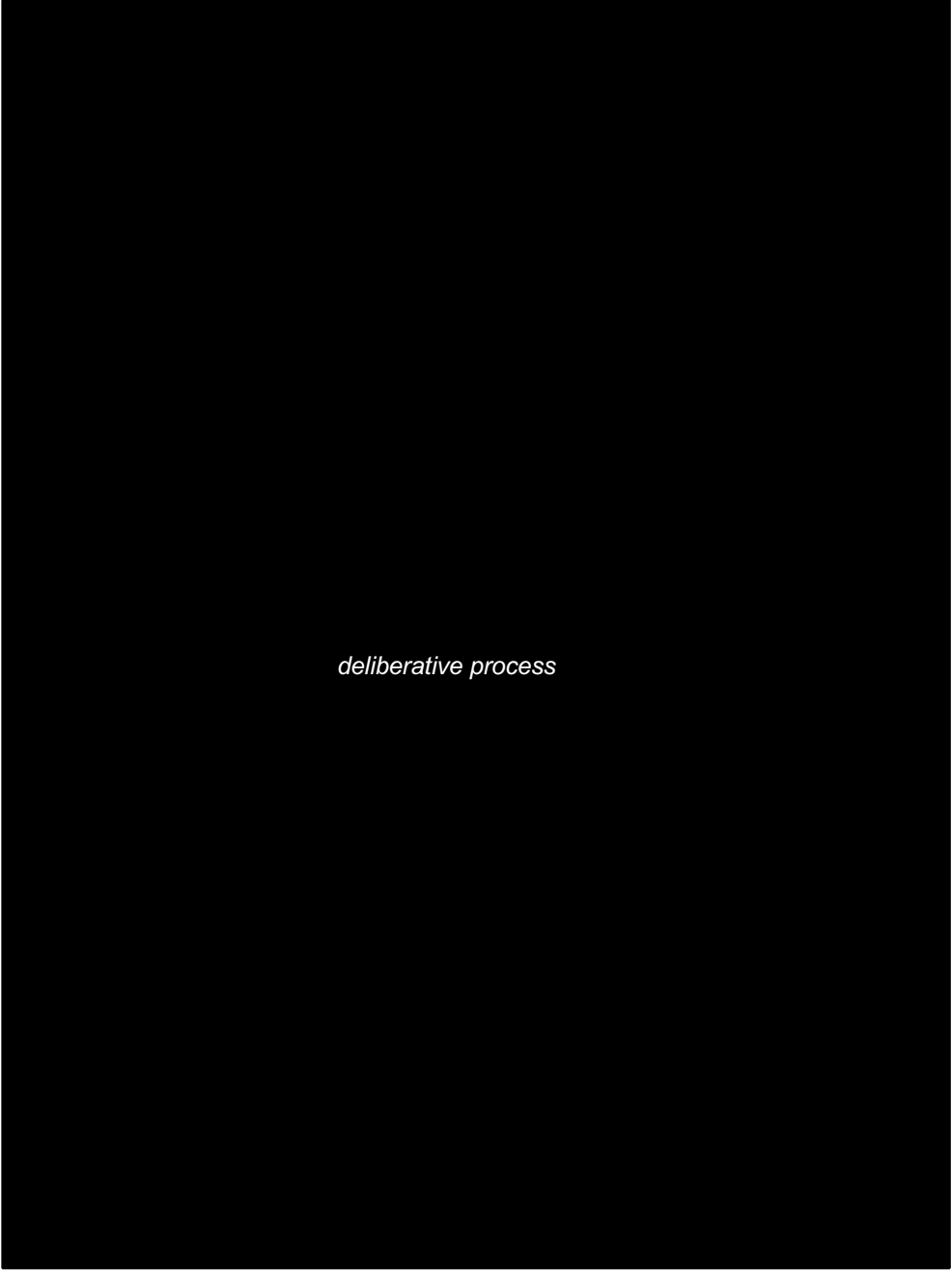
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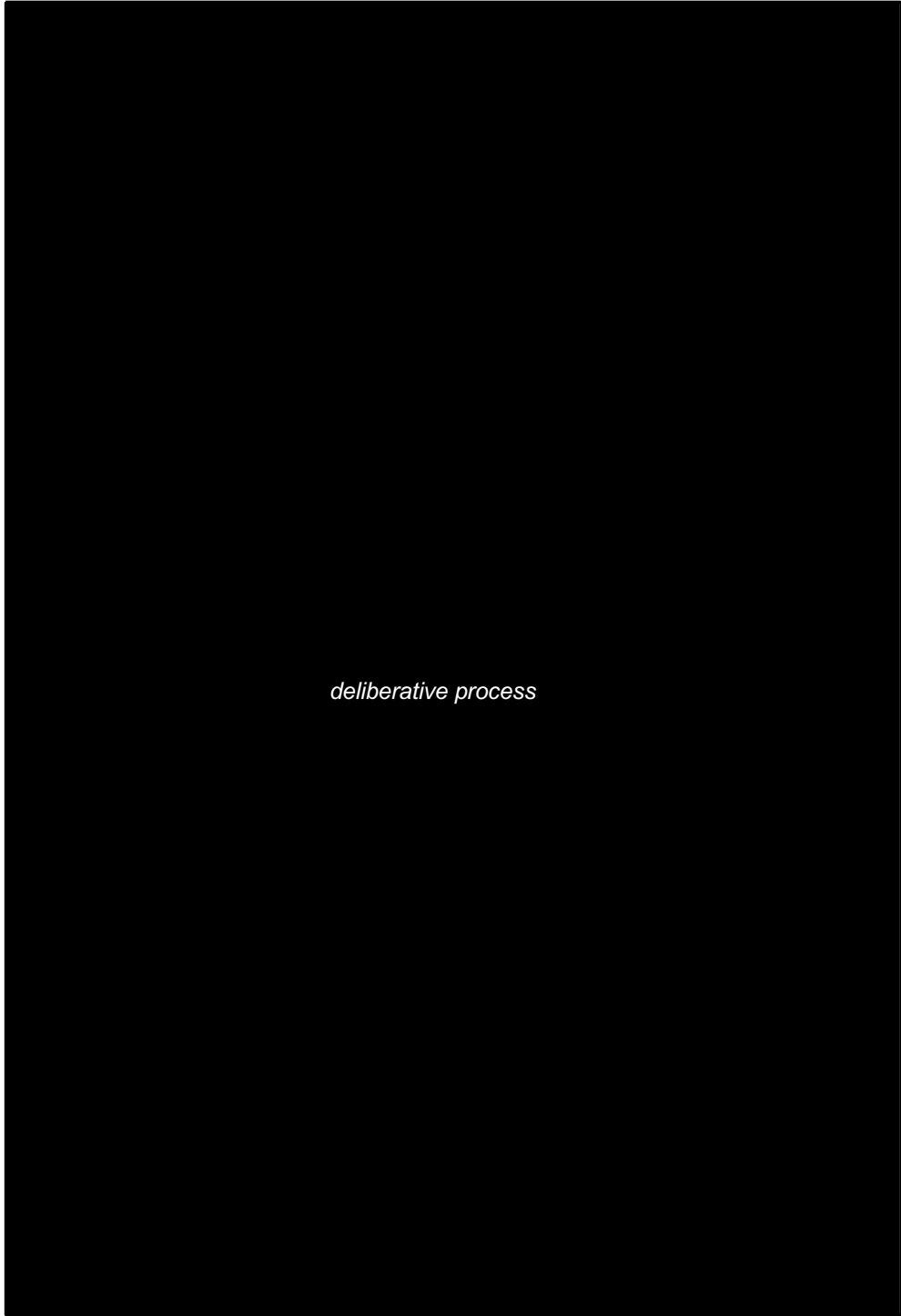
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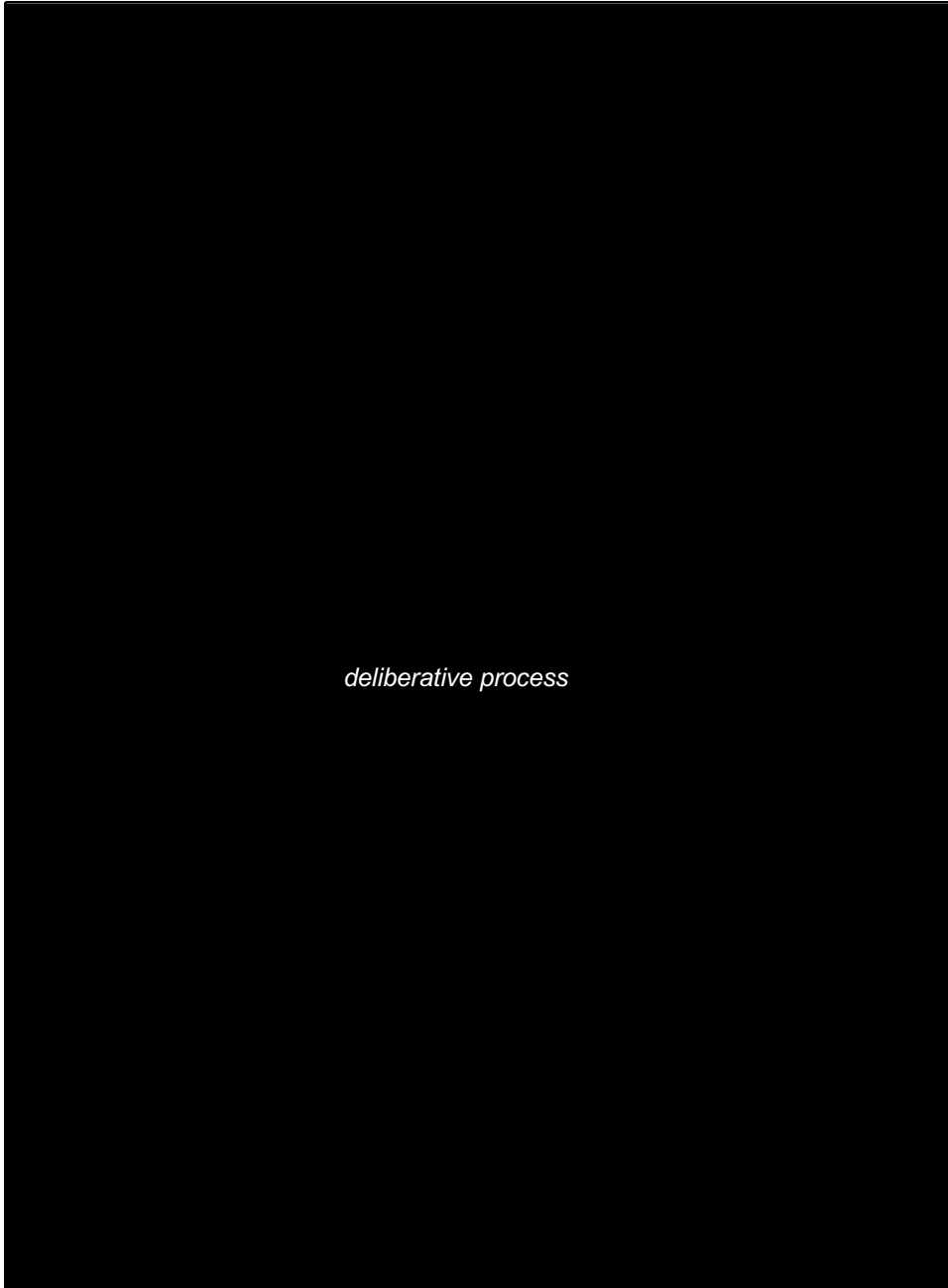


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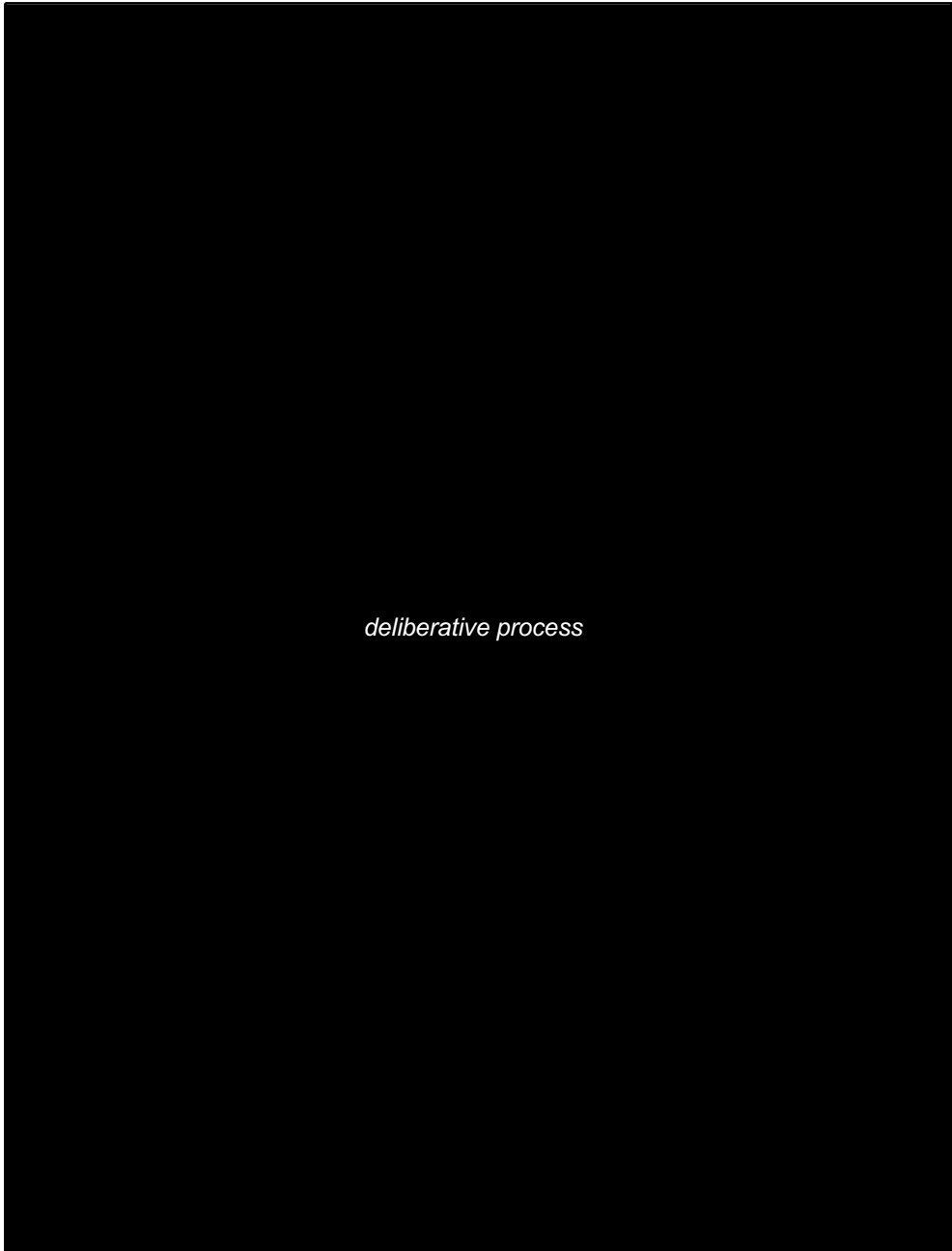
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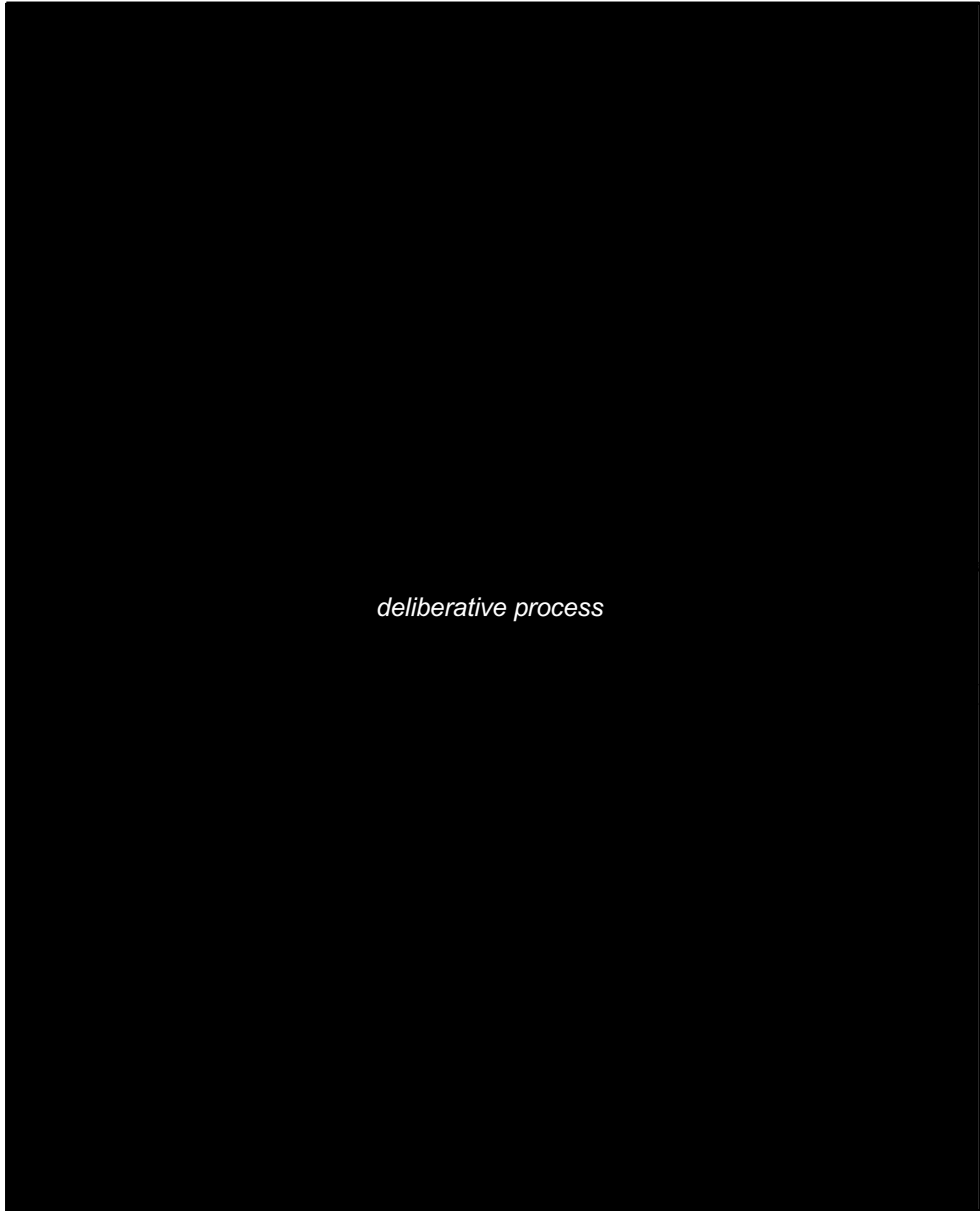
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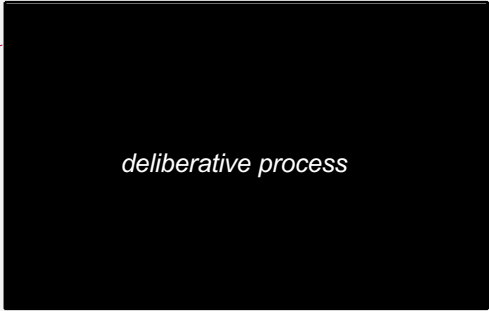


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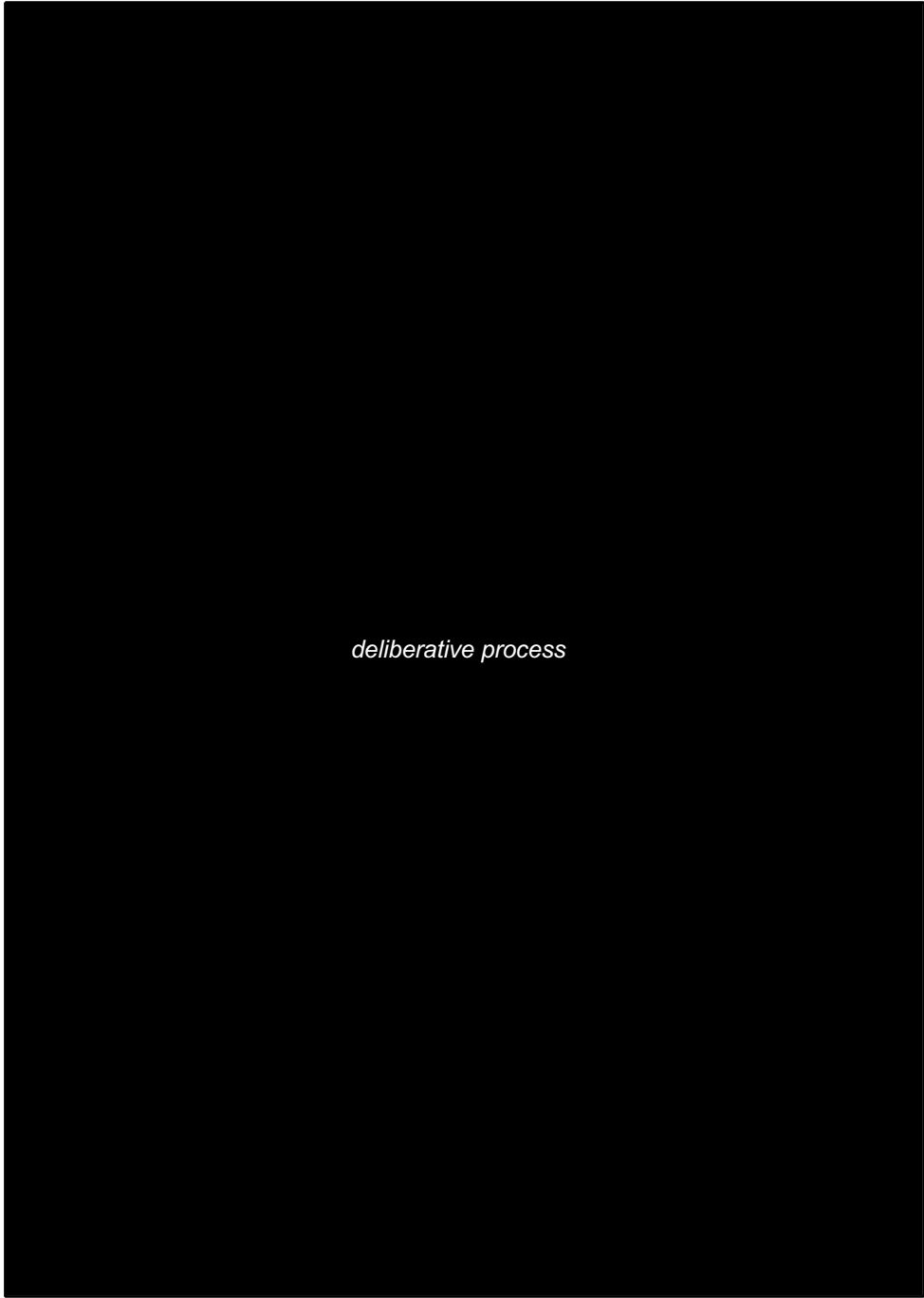
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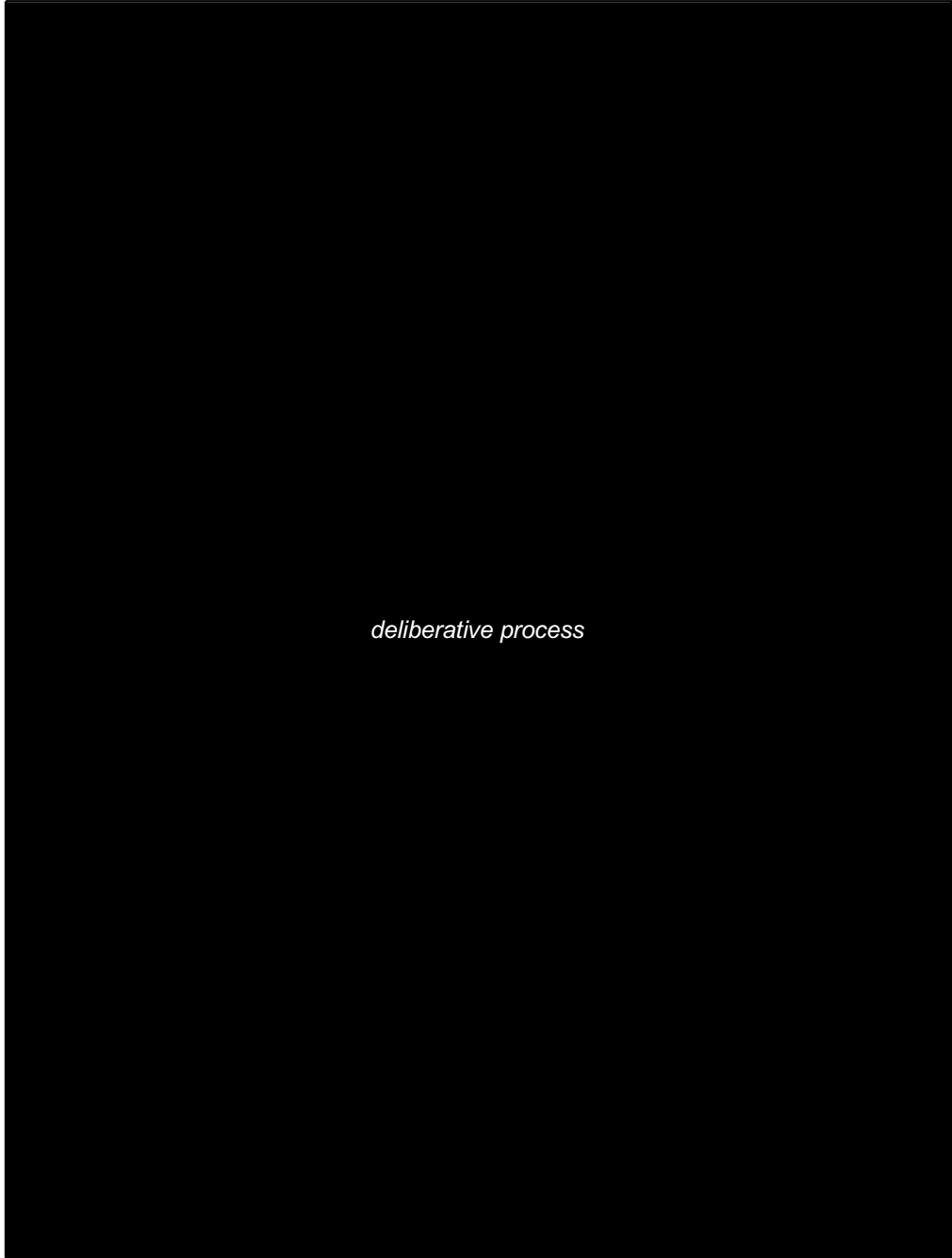
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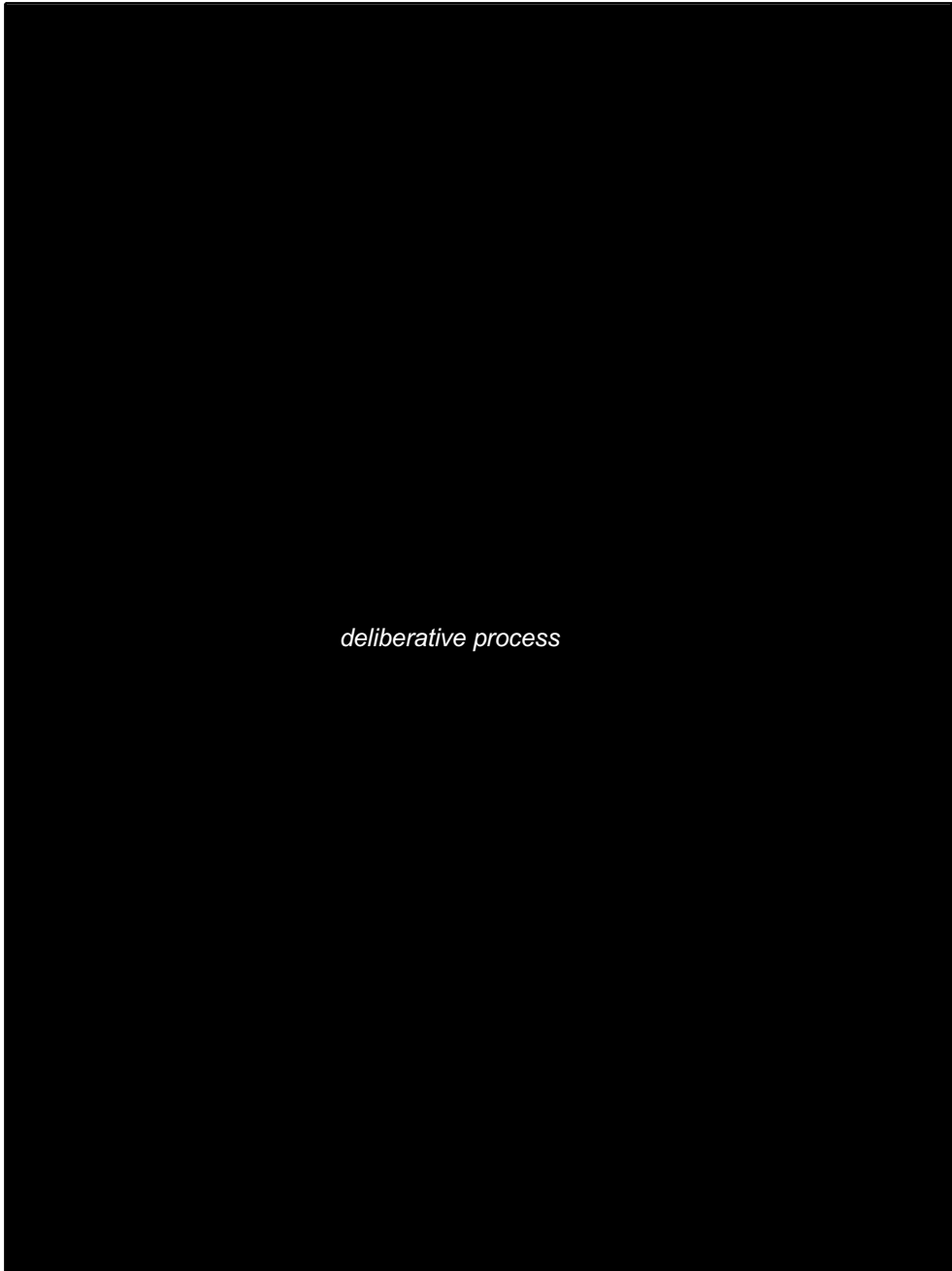
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If you have any questions concerning this project, or require additional information, please contact Gary Sprague at (916) 930-3615, or via email at: Gary.Sprague@noaa.gov.

Sincerely,

[William W. Stelle, Jr.](#)
[Acting Regional Administrator](#)

cc: Randy P. Olsen
Chief, Operations and Readiness Branch

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U.S. Army Corps of Engineers, Sacramento District
1325 J Street
Sacramento, CA 95814

Lisa H. Clay
Senior Assistant District Counsel
U.S. Army Corps of Engineers, Sacramento District
1325 J Street
Sacramento, CA 95814

bcc: CHRON file

ARN: SWR2013SA00280

References

National Marine Fisheries Service. ~~201409~~. ~~Public Draft~~ Recovery Plan for the Evolutionarily Significant Units of Sacramento River Winter-Run Chinook Salmon and Central Valley Spring-Run Chinook Salmon, and the Distinct Population Segment of Central Valley Steelhead. National Marine Fisheries Service, Southwest Regional Office, Sacramento, California. ~~October 2009~~ ~~April~~ 2014.

National Marine Fisheries Service. 2012. Biological Opinion for the U.S. Army Corps of Engineers' Operation and Maintenance of Englebright and Daguerre Point Dams and Englebright Reservoir on the Yuba River.

U.S. Army Corps of Engineers. 2012. Biological Assessment for the U.S. Army Corps of Engineers Ongoing Operation and Maintenance of Englebright and Reservoir, and Daguerre Point Dam on the Lower Yuba River.

U.S. Army Corps of Engineers. 2013a. Biological Assessment for the U.S. Army Corps of Engineers' Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River.

U.S. Army Corps of Engineers. 2013b. Biological Assessment for the U.S. Army Corps of Engineers' Authorized Operation and Maintenance of Existing Fish Passage Facilities at Daguerre Point Dam on the Lower Yuba River.

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[U.S. Army Corps of Engineers. 2013c. Contingency Plan and Emergency Response Procedures](#)

USGS. 2003. Bathymetric and Geophysical Surveys of Englebright Lake, Yuba-Nevada Counties, California 2003. Open-File Report 03-383. United States Geological Survey. Prepared by J. R. Childs, N. P. Snyder, and M. A. Hampton.

[M&E . 2013. Yuba River Management Team](#)

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Legal Analysis:

Analyzing Ongoing Projects Under Section 7 of the Endangered Species Act (ESA)

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Hudak Declaration
EXHIBIT 6

From: **Kelton, Cindy (Federal)** <ckelton@doc.gov>

Date: Mon, Mar 13, 2017 at 5:45 AM

Subject: Freedom of Information Act Appeal of FOIA Request No. DOC-NOAA-2017-000257 - Acknowledgement

To: Christopher Hudak <christopherwhudak@gmail.com>

General Counsel for Litigation, Employment and Oversight

U.S. Department of Commerce

14th and Constitution Avenue NW Room 5898-C

Washington, DC 20230

Dear Mr. Hudak:

This is to acknowledge receipt of your Freedom of Information Act (5 U.S.C. § 552) (FOIA) appeal email received in our office on March 10, 2017. In accordance with the FOIA and Departmental regulations, a final determination will be issued by the Assistant General Counsel for Litigation, Employment and Oversight. Your appeal has been assigned to Counsel.

If you have any questions about this matter, you may contact me at the above address or at 202-482-5772.

Thanks,

Cindy Kelton

Administrative Assistant

Department of Commerce

Office of General Counsel

LEO/FOIA Group

202-482-8103

Hudak Declaration
EXHIBIT 7

From: **Shawn Martin - NOAA Federal** <shawn.martin@noaa.gov>
Date: Mon, Oct 2, 2017 at 5:29 PM
Subject: Re: Status Update Request
To: Christopher Hudak <christopherwhudak@gmail.com>
Cc: ckelton@doc.gov, FOIAAppeals@doc.gov, FOIA Office - NOAA Service Account <FOIA@noaa.gov>

Mr. Hudak,

Good afternoon. Request DOC-NOAA-2017-000811 was closed on 6/14/2017. NMFS provided all responsive documents for this request and all records can be accessed at <https://foiaonline.regulati ons.gov:443/foia/action/ public/view/request/811f266e> . I have attached a copy of the Final Action Letter for your convenience.

If you have any further questions please let me know.

Shawn

On **Mon, Oct 2, 2017** at 4:57 PM, Christopher Hudak <christopherwhudak@gmail.com> wrote:

Dear NMFS FOIA Officer(s),

On behalf of Ecological Rights Foundation ("EcoRights"), I **write to request a status update on a** FOIA request and a **FOIA appeal**.

The request was made to NMFS on March 15, 2017, and assigned number DOC-NOAA-2017-000811 by NMFS. The initial request and NMFS's acknowledgment are attached. EcoRights has not yet received a final determination on this request.

The appeal of FOIA request DOC-NOAA-2017-000257 was made to NMFS on March 10, 2017. The appeal acknowledgment from NMFS is attached. EcoRights has not yet received an appeal determination.

Thank you for your attention to this request and appeal. Please do not hesitate to contact me if you have any questions.

Regards,

Christopher Hudak, Esq.
Counsel for EcoRights

--

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--

Shawn Martin

*Information Technology Specialist/
West Coast Region FOIA Team Lead*

NOAA Fisheries West Coast Region

U.S. Department of Commerce

Office: (916) 930-3792

Mobile: (916) 719-0293

shawn.martin@noaa.gov



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- [Download](#)

FAL 2017-000811 .pdf

Hudak Declaration
EXHIBIT 8

From: **Christopher Hudak** <christopherwhudak@gmail.com>
Date: Wed, Oct 25, 2017 at 1:22 PM
Subject: Re: Status Update Request
To: ckelton@doc.gov, Shawn.Martin@noaa.gov, FOIAAppeals@doc.gov, FOIA Office - NOAA Service Account <FOIA@noaa.gov>

Dear FOIA Officers,

On October 2, 2017 I sent you a request for a status update on Ecological Rights Foundation's (EcoRights) March 10, 2017 appeal of the National Marine Fisheries Services (NMFS)'s determination that it had produced all non-exempt records responsive to EcoRights' December 6, 2016 Freedom of Information Act ("FOIA") request. NMFS acknowledged that it received the appeal on March 10, 2017 and assigned the appeal no. DOC-NOAA-2017-000257. I have not received any response to my October 2, 2017 request for an update on the status of the appeal.

FOIA requires NMFS to have made a determination with respect to an appeal within 20 business days after receipt of the appeal. 5 U.S.C. § 552(a)(6)(A)(ii). However, NMFS has not made its appeal determination within the statutory deadline and is in violation of FOIA.

EcoRights requests that NMFS provide its final determination for appeal no. DOC-NOAA-2017-000257 by November 3, 2017 and make all non-exempt documents promptly available as required by FOIA. If NMFS continues to delay providing its appeal determination EcoRights may seek judicial relief. Federal courts have granted declaratory relief for an agency's failure to provide determinations within FOIA's statutory deadline. *See e.g. Our Children's Earth Foundation et al., v. Nat'l Marine Nat'l Marine Fisheries Serv., et al.*, 2015 WL 4452136 at *8 (N.D. Cal July 20, 2015); *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 2008 WL 2523819, at *5 (E.D. Cal. Jun. 20, 2008). EcoRights may also seek judicial relief if NMFS has not adequately searched for, or is withholding documents that are not exempt from disclosure.

Thank you for your prompt attention to this matter.

Regards,
Christopher W. Hudak
Counsel for EcoRights

Hudak Declaration
EXHIBIT 9

From: **Bogomolny, Michael (Federal)** <MBogomolny@doc.gov>
Date: Mon, Oct 30, 2017 at 8:08 AM
Subject: RE: Status Update Request
To: Christopher Hudak <christopherwhudak@gmail.com>
Cc: "Appeals, FOIA" <foiaappeals@doc.gov>

Mr. Hudak,

First off, my apologies. Although we try to respond to FOIA appeals within the 20 business day statutory timeframe, we do have a backlog right now which we are trying to address as rapidly as possible. I appreciate your opening lines of communication between us in an effort to get your matter resolved. I am also sorry we overlooked your email of October 2.

I have received a recommendation in your appeal. I expect that you will have a response this week. Just as a clarification, NOAA/NMFS does not respond to appeals, that is done by the Office of the General Counsel of the Department of Commerce.

Sincerely,
Michael Bogomolny

Michael Bogomolny

Acting Chief, Information Law Division
mbogomolny@doc.gov (202) 482-0703
United States Department of Commerce
Office of the General Counsel

From: Christopher Hudak [mailto:christopherwhudak@gmail.com]
Sent: Wednesday, October 25, 2017 4:22 PM
To: Kelton, Cindy (Federal) <ckelton@doc.gov>; Martin, Shawn (Federal) <Shawn.Martin@NOAA.GOV>; Appeals, FOIA <foiaappeals@doc.gov>; FOIA Office - NOAA Service Account <FOIA@noaa.gov>
Subject: Re: Status Update Request

Dear FOIA Officers,

On October 2, 2017 I sent you a request for a status update on Ecological Rights Foundation's (EcoRights) March 10, 2017 appeal of the National Marine Fisheries Services (NMFS)'s determination that it had produced all non-exempt records responsive to EcoRights' December 6, 2016 Freedom of Information Act ("FOIA") request. NMFS acknowledged that it received the appeal on March 10, 2017 and assigned the appeal no. DOC-NOAA-2017-000257. I have not received any response to my October 2, 2017 request for an update on the status of the appeal.

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Thank you for your prompt attention to this matter.

Regards,
Christopher W. Hudak
Counsel for EcoRights

On Mon, Oct 2, 2017 at 4:57 PM, Christopher Hudak <christopherwhudak@gmail.com> wrote:
Dear NMFS FOIA Officer(s),

On behalf of Ecological Rights Foundation ("EcoRights"), I write to request a status update on a FOIA request and a FOIA appeal.

The request was made to NMFS on March 15, 2017, and assigned number DOC-NOAA-2017-000811 by NMFS. The initial request and NMFS's acknowledgment are attached. EcoRights has not yet received a final determination on this request.

The appeal of FOIA request DOC-NOAA-2017-000257 was made to NMFS on March 10, 2017. The appeal acknowledgment from NMFS is attached. EcoRights has not yet received an appeal determination.

Thank you for your attention to this request and appeal. Please do not hesitate to contact me if you have any questions.

Regards,

Christopher Hudak, Esq.
Counsel for EcoRights

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1 Christopher Sproul (State Bar No. 126398)
ENVIRONMENTAL ADVOCATES
2 5135 Anza Street
San Francisco, California 94121
3 Telephone: (415) 533-3376
Facsimile: (415) 358-5695
4 Email: csproul@enviroadvocates.com

5 Patricia Linn (State Bar No. 253015)
Law Office of Patricia Linn
6 115 Oakdale Avenue
Mill Valley, CA 94941
7 Telephone: (415) 388-2303
Email: patricialinn19@gmail.com

8 Fredric Evenson (State Bar No. 198059)
Law Offices of Fredric Evenson
9 109 Quarry Lane
Santa Cruz, CA 95060
10 Telephone: (831) 454-8216
Facsimile: (415) 358-5695
11 Email: ecorights@earthlink.net

12 Attorneys for Plaintiff
ECOLOGICAL RIGHTS FOUNDATION

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 ECOLOGICAL RIGHTS FOUNDATION,

18 Plaintiff,

19 v.

20 NATIONAL MARINE FISHERIES SERVICE,

22 Defendant.

No. 3:18-cv-00888 JSC

[PROPOSED] ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

Hearing date: May 31, 2018

Time: 9:00am

Location: Courtroom F, 15th Floor

28

ORDER

1
2 Having considered the memoranda and evidence, and good cause appearing, the Court HEREBY
3 ORDERS that Plaintiff's Motion for Summary Judgment is GRANTED. The Plaintiff is granted
4 declaratory judgment that the National Marine Fisheries Service ("NMFS") violated FOIA by: (1) not
5 providing the determination for Plaintiff's appeal within the deadline mandated by 5 U.S.C. §
6 552(a)(6)(A)(ii); (2) not providing all non-exempt responsive records promptly as mandated by 5 U.S.C.
7 § 552(a)(3)(A); (3) failing to perform an adequate search; (4) failing to provide an adequate explanation,
8 at the administrative level, for finding information exempt from disclosure; and (5) unlawfully
9 withholding non-exempt information.

10 The Plaintiff is further granted an injunction requiring NMFS to: (1) immediately produce all
11 records this Court finds have been unlawfully withheld; (2) perform an additional search for documents
12 responsive to EcoRights' request that are in NMFS's possession at the time NMFS performs its new
13 search, including a search of files at the NOAA Office of Law Enforcement; (3) produce responsive
14 records located in the new search within 20 working days of this Order; and (4) respond to EcoRights'
15 future FOIA requests and appeals in accord with the deadlines imposed by 5 U.S.C. § 552(a)(6)(A) and
16 5 U.S.C. § 552(a)(3)(A).

17
18 Dated: _____

Hon. Jacqueline Scott Corley
United States District Court Judge

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ECOLOGICAL RIGHTS FOUNDATION

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15 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
16

17 ECOLOGICAL RIGHTS FOUNDATION, a
non-profit corporation,

18
19 Plaintiff,

20 v.

21 NATIONAL MARINE FISHERIES SERVICE,
22

23 Defendant.
24

Case No. 3:18-cv-00888-JSC

**DECLARATION OF CHRISTOPHER
HUDAK IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

1 I, Christopher Hudak, hereby declare and state as follows:

2 1. I represent Plaintiff Ecological Rights Foundation (“EcoRights”) in the above-referenced action.

3 I make this Declaration in Support of Plaintiff’s Motion for Summary Judgment.

4 2. On December 6, 2016 I sent a FOIA request to the National Marine Fisheries Service ("NMFS"),
5 on behalf of EcoRights, seeking three categories of documents: 1) documents containing input NMFS
6 West Coast Region staff provided to NOAA headquarters detailing the impacts of a U.S Army Corps of
7 Engineers ("Corps") memo known as the Stockdale Memo. The Stockdale Memo laid out strict
8 guidelines limiting Corps Endangered Species Act Section 7 consultations with NMFS and the U.S. Fish
9 and Wildlife Service; 2) documents to or from NMFS counsel Chris Kiefer related to a draft letter from
10 NMFS to the Corps entitled “Endangered Species Act Section 7(a)(2) Concurrence Letter for the U.S.
11 Army Corps of Engineers’ (Corps) Ongoing Operation and Maintenance of Englebright Dam and
12 Reservoir on the Yuba River;” and 3) documents in the possession of any NOAA Fisheries Office,
13 Department and/or Division, including any NOAA law enforcement division, related to whether any
14 entities or individuals may have caused or did cause, or may be causing, or are causing unauthorized
15 take of threatened or endangered fish species in the Yuba River in the vicinity of Englebright Dam,
16 Narrows 1 and 2 powerplants, Daguerre Point Dam and the Hallwood-Cordua Diversion, including but
17 not limited to, any and all documents generated by, sent by, or received by NOAA law enforcement
18 agent, Don Tanner. Attached hereto as Exhibit 1 is a true and correct copy of EcoRights' request.

19
20
21 3. On December 14, 2016 NMFS sent me a letter acknowledging receipt of the request on
22 December 12, 2016 and assigning it tracking number DOC-NOAA-2017-000257. The
23 acknowledgement letter stated that NMFS was extending the time for its response by ten business days
24 because the agency needed to search for and collect the requested records from field facilities or other
25 establishments separate from the office processing the request. Attached hereto as Exhibit 2 is a true and
26 correct copy of NMFS's acknowledgment letter.

27
28 4. On February 13, 2017 NMFS sent me the final determination for EcoRights' request. NMFS

1 stated it had located 309 documents responsive to the request and had released 239 of these documents
2 in their entirety, via FOIAonline. Fifty-four documents were partially withheld under attorney work
3 product, attorney client privilege, deliberative process exemptions pursuant to 5 U.S.C. 552(b)(5)
4 ("Exemption 5") and the right to privacy exemption pursuant to 5 U.S.C. § 552(b)(6) ("Exemption 6").
5 The final determination also stated that 16 documents that had originated from other agencies were
6 referred to those agencies for release determination and direct response to EcoRights. Attached hereto as
7 Exhibit 3 is a true and correct copy of the February 13, 2017 final determination.

8
9 5. On March 10, 2017 I sent EcoRights' appeal of NMFS's final determination to the Office of the
10 General Counsel of the Department of Commerce ("DOC Counsel"). EcoRights' appeal challenged the
11 adequacy of the search and the redactions in ten records totaling 87 pages. The appeal contended that
12 NMFS: 1) had failed to make a reasonable search for responsive documents; 2) had improperly withheld
13 documents under vague and unjustified claims of deliberative process and attorney-client privilege
14 exemptions; 3) had withheld information with no exemption claim; 4) had not shown the existence of
15 foreseeable harm to an interest protected by Exemptions 5 and 6 that would permit the agency to
16 withhold information under these exemptions; and 5) had failed to segregate factual material and make
17 partial disclosures where possible. Attached hereto as Exhibit 4 is a true and correct copy of EcoRights'
18 appeal. Attached hereto as Exhibit 5 is a true and correct copy of the ten records at issue in the appeal.¹

19
20 6. EcoRights' appeal contended NMFS's search was inadequate because none of the documents
21 NMFS had released were from the NOAA Office of Law Enforcement ("OLE") although EcoRights had
22 specifically asked for OLE documents and EcoRights had reason to know that at least one OLE agent
23 (Don Tanner) had responsive documents.

24
25 7. On March 13, 2017 the DOC Counsel's Office acknowledged receipt of EcoRights appeal.
26 Attached hereto as Exhibit 6 is a true and correct copy of the DOC Counsel's acknowledgment. The

27
28 ¹ Exhibit 5 was also an exhibit to the appeal. EcoRights has inserted bates numbers in the bottom right
corner of the documents for the Court's ease of reference to individual documents.

1 statutory deadline for NMFS's appeal determination was April 7, 2017.

2 8. I am aware that on July 18, 2017 NMFS posted to FOIAonline two redacted emails responsive to
3 EcoRights' request. I was not notified that NMFS had released these two documents on FOIAonline.

4 9. On October 2, 2017 I sent an email to NMFS FOIA officers and the DOC Counsel's office
5 requesting an update on the status of the appeal. The DOC Counsel did not respond. NMFS provided
6 information about a different, unrelated request but not the appeal. Attached hereto as Exhibit 7 is a true
7 and correct copy of my October 2, 2017 email. I have added yellow highlighting to direct the Court's
8 attention to the pertinent passages.
9

10 10. On October 25, 2017 I sent another email to NMFS FOIA officers and the DOC Counsel's office
11 which requested that NMFS provide the final appeal determination by November 3, 2017 and warned
12 that if the determination was not provided by that date EcoRights might seek judicial relief. Attached
13 hereto as Exhibit 8 is a true and correct copy of my October 25, 2017 email.

14 11. On October 30, 2017 Michael Bogomolny, Acting Chief, Information Law Division, of the DOC
15 Counsel's Office responded to my October 25, 2017 status update request and stated that he expected
16 EcoRights would have the appeal determination "this week." However, the DOC Counsel's office did
17 not provide the appeal determination that week. Attached hereto as Exhibit 9 is a true and correct copy
18 of Mr. Bogomolny's October 30, 2017 email.
19

20 12. I declare under penalty of perjury under the laws of the United States that the foregoing is true
21 and correct, and that this Declaration was executed on April 19, 2018 in New Sharon, Maine.
22

23
24 /s/ Christopher Hudak
25 Christopher W. Hudak
26 Counsel for Plaintiff
27 Ecological Rights Foundation
28

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From: Aimee Moore - NOAA Federal <aimee.moore@noaa.gov>
Sent: Wednesday, April 23, 2014 2:40 PM
To: Caracoza, Julia
Cc: Judson Feder - NOAA Federal; Keifer, Christopher; gary.sprague@noaa.gov; Brown, Howard; Anita Deguzman - NOAA Affiliate; Aimee Moore - NOAA Federal
Subject: Englebright Dam and Reservoir Informal Consultation attached for GC Review
Attachments: Yuba 2014 Englebright Dam Project Informal Letter.docx; 2013_Englebright Dam and Reservoir_IF.docx

Good afternoon,

I am transmitting this letter for GC review, and have attached the following:

Yuba 2014 Englebright Dam Project Informal Letter. docx - Letter for review

2013_Englebright Dam and Reservoir_IF.docx - this is the Ledger. It is on the old Word Doc format because that is how it was originally prepared, and then the project lead made modifications to it for this specific project, so I just left it on that form.

Thanks,

--

Aimee Moore
Administrative Office Support

*NOAA Fisheries West Coast Region
U.S. Department of Commerce
650 Capitol Mall, Suite 5-100
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ENVIRONMENTAL ADVOCATES

ATTORNEYS AT LAW

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December 20, 2013

Via Email and Certified Mail

Penny Pritzker
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

William Stelle
Regional Administrator West Coast Region
National Marine Fisheries Service
7600 Sand Point Way Northeast
Seattle, WA 98115
Will.Stelle@noaa.gov

Re: Comments on the 2013 Biological Assessments for the United States Army Corps of Engineers Operations on the Yuba River

Dear Secretary Pritzker and Mr. Stelle:

I am writing on behalf of the South Yuba River Citizens League ("SYRCL") and Friends of the River ("FOR"). On December 13, 2013 representatives from SYRCL and FOR met with representatives from NMFS to discuss the consultation process for the new biological opinion for the Army Corps of Engineers' ("Corps") operations on the Yuba River and to discuss the two biological assessments issued by the Corps as part of that process: the *Biological Assessment for the U.S. Army Corps of Engineers Ongoing Operation and Maintenance of Englebright Dam and Reservoir* ("Englebright BA"), and the *Biological Assessment for the U.S. Army Corps of Engineers Authorized Operations and Maintenance of Existing Fish Passage Facilities at Daguerre Point Dam* (Oct. 2013) ("Daguerre BA").

At the meeting SYRCL and FOR were informed that NMFS may concur with the Corps' conclusion in the Englebright BA that Englebright does not adversely impact threatened fish species in the Yuba River and that therefore formal consultation for Englebright would not be required. SYRCL and FOR strongly disagree with the Corps' conclusions in the BA which are based on an erroneous interpretation of the law.

The failure of the Corps to analyze the impacts caused by the continued existence of Englebright Dam ("Englebright") and Daguerre Point Dam ("Daguerre") as part of the impacts of the federal agency action under consultation violates Endangered Species Act ("ESA") Section 7. As a result of this failure, the Englebright BA's conclusion that the Corps' operation

and maintenance of Englebright Dam does not adversely affect threatened Yuba River fish species or their critical habitat is arbitrary and capricious.

Similarly, the Daguerre BA's conclusion that formal Section 7 consultation on the Corps' operation and maintenance of Daguerre is narrowly limited to operation and maintenance activities affecting the Daguerre fish ladders is arbitrary and capricious. Neither BA includes as part of the formal consultation the numerous adverse impacts that Englebright, Daguerre, and Yuba River water diversions licensed by the Corps cause the Listed Species and their critical habitat. These adverse impacts have been extensively analyzed as impacts of the agency action under consultation in all four previous biological opinions. SYRCL and FOR's comments to the Englebright and Daguerre BAs are attached to this letter.

If NMFS issues a letter of concurrence agreeing with the Corps' assessment that Englebright causes no adverse impacts and that formal consultation for Englebright is not necessary SYRCL and FOR may challenge that decision in court. However, since NMFS has not yet formally issued a concurrence letter there is still time to steer the consultation back on track.

In a letter from Will Stelle dated December 9, 2013 Mr. Stelle stated that NMFS has made a commitment to meeting with stakeholders during the consultation process. SYRCL and FOR urge NMFS to schedule a series of meetings with stakeholders so they can work collaboratively with NMFS to craft a legally adequate biological opinion that comports with the ESA's mandate that all federal agencies ensure their actions do not jeopardize the survival and recovery of threatened species.

Sincerely,



Christopher Sproul
Environmental Advocates
(415) 533-3376

cc:

Howard Brown, National Marine Fisheries Service
Chris Keifer, National Marine Fisheries Service
Gary Sprague, National Marine Fisheries Service
Daniel Pollack, United States Department of Justice
Lisa Clay, United States Army Corps of Engineers

**SYRCL AND FRIENDS OF THE RIVER COMMENTS ON THE ARMY CORPS OF
ENGINEERS OCTOBER 22, 2013 BIOLOGICAL ASSESSMENTS FOR
ENGLEBRIGHT AND DAGUERRE POINT DAMS**

I. Introduction

The Yuba River flows from the Sierra Nevada Mountains to the Feather River near Marysville. The Corps operates two dams on the Yuba River: Englebright and Daguerre. Englebright, located 24 miles upstream of the Yuba's confluence with the Feather, is considered the dividing point between the Upper and Lower Yuba Rivers. Englebright is 260 feet tall and has no fish ladders, and thus completely blocks fish passage to the upper Yuba River. *See* Biological Opinion for the Operation of Englebright and Daguerre Point Dams on the Yuba River, California at 2 (Nov. 21, 2007) (hereinafter "2007 BiOp"). Daguerre is a 25 foot tall debris dam located approximately 12 miles downstream of Englebright. *Id.* at 3. Daguerre is impassable to fish except through two rudimentary fish ladders. *Id.* at 4. The Corps permits several water diversions along the Yuba River on its land, including the South Yuba-Brophy Diversion ("Brophy Diversion"), which is owned and operated by the Yuba County Water Agency ("YCWA"). *Id.* at 3. Englebright, Daguerre and the Brophy Diversion (collectively, "the Project") adversely affect three species of anadromous fish listed as threatened under the ESA: the Evolutionarily Significant Unit ("ESU")¹ of Central Valley spring-run Chinook salmon ("spring Chinook"); the Distinct Population Segment of Central Valley steelhead ("steelhead"); and the southern Distinct Population Segment of North American green sturgeon ("green sturgeon") (collectively the "Listed Species") in several ways.

NMFS has issued four biological opinions concerning the Project, in 2002, April 2007, November 2007, and February 2012 ("2012 BiOp"). All four of the biological opinions framed the relevant agency action to include Englebright, Daguerre, and the Brophy Diversion. *Id.* at 2-3; Administrative Record ("AR")² 9417-21; AR 9529-32; AR 6223-6227; AR 7227-45. 2012 BiOp at 11. Further, the biological opinions have all analyzed the adverse impacts to the Listed Species that stem from Englebright, Daguerre, and the Brophy Diversion's existence as impacts of the agency action subject to consultation. 2007 BiOp at 24-28; AR 7227-44; AR 9438-43. 2012 BiOp at 166- 194. Thus, NMFS has always defined Englebright and Daguerre Dams and the Brophy Diversion as the agency action at issue.

The Corps has issued five biological assessments concerning its Yuba River Project. The first three biological assessments analyzed the adverse impacts to the Listed Species that stem

¹ An ESU can be comprised of a single population within a species, multiple populations within a species, or all of the individuals within a species. As defined by NMFS, "[a] population must satisfy two criteria to be considered an ESU: 1) It must be substantially reproductively isolated from other conspecific population units, and 2) It must represent an important component in the evolutionary legacy of the species." The ESU concept was developed by NMFS scientists and published as both a NOAA Technical Memorandum (Waples 1991a) and as a peer reviewed scientific journal article (Waples 1991b).

² Citations to the AR refer to the administrative record filed by NMFS in connection with the issuance of the 2007 BiOp.

from Englebright, Daguerre, and the Brophy Diversion's existence as impacts of the agency action. However, in the fourth Biological Assessment, submitted to NMFS in January 2012 ("2012 BA"), the Corps took a "new approach."

In the 2012 BA the Corps separated the impacts of the Project on the Listed Species stemming from the "continued presence" of Englebright and Daguerre from the impacts caused by the Corps' "operations and maintenance" activities at Englebright and Daguerre. 2012 BA at 6-4. Only impacts caused by the "operations and maintenance" activities were considered to be impacts of the agency action under consultation. Impacts caused by the "continued presence" of the dams were included in the environmental baseline and not considered part of the action under consultation. *Id.* Using this approach the 2012 BA concluded that the impacts caused by the Project were limited and did not jeopardize the continued existence of the Listed Species or adversely modify their critical habitat. *Id.* at 2-5, 9-5, 9-8, and 9-10.

The 2012 biological opinion concluded that the Corps' "new approach" in the January 2012 BA was not correct and that the agency action under consultation did include the Corps' perpetuation of the continued existence of Englebright and Daguerre. The 2012 BiOp concluded that the numerous adverse impacts of Englebright and Daguerre are jeopardizing the existence of the Listed Species and adversely modifying their critical habitat. *Id.* at 209- 10. The 2012 BiOp states that in order to avoid jeopardizing the Listed Species the Corps must implement numerous reasonable and prudent measures to mitigate Englebright and Daguerre's adverse impacts, as well as impacts caused by the Brophy Diversion and other water diversions licensed by the Corps. *Id.* at 210.

Although the Corps "conditionally accepted" the 2012 BiOp, it continued to assert in a series of meetings with NMFS that the scope of the agency action undergoing consultation did not include the Corps' perpetuation of the existence of Englebright and Daguerre. After persuading NMFS to reinitiate consultation, the Corps issued two new biological assessments in October 2013. Once again, as explained below, the Corps has incorrectly asserted in these biological assessments that the adverse impacts caused by the continued existence of Englebright and Daguerre are not impacts of the agency action under consultation. NMFS should once again refuse to accept the Corps' definition of the agency action, and should confirm that the analysis and conclusions in the 2012 BiOp still stand.

II. The Impacts Caused By The Continued Existence of Daguerre and Englebright Are Part of the Agency Action Undergoing Consultation.

A. The First Three Biological Assessments and all the Biological Opinions for this Project Correctly Defined the Agency Action As Including the Impacts Caused by the Continued Existence of Englebright and Daguerre.

The first three biological assessments issued by the Corps and all four of the biological opinions issued by NMFS defined the agency action under consultation to include the impacts stemming from the continued future existence of Englebright and Daguerre. Specifically, the 2007 BiOp stated that the federal action covered by the BiOp includes "the continuation of current Corps operations associated with Englebright and Daguerre Point Dams." 2007 BiOp at

2. While the 2007 BiOp did not expressly indicate what NMFS meant by Corps “operations” of Englebright and Daguerre, in context, it is clear that NMFS meant the continued existence of these dams to be part of the federal project covered by the 2007 BiOp and the continuing, future impacts on the Listed Species caused by the dams’ existence to be impacts of this project.

The 2007 BiOp’s “Effects of the Action” section expressly identifies the on-going adverse impacts to the Listed Species caused by the continuing existence of Englebright and Daguerre to be impacts of the Project. *Id.* at 24-27. The 2007 BiOp drew a contrast between the past impacts stemming from Englebright and Daguerre, *i.e.*, the preexisting environmental conditions caused by factors other than the federal project at issue, and the continuing impacts in the future from Englebright and Daguerre—which the 2007 BiOp identified as impacts of the Project. *Id.* at 18, 24-27.

Specifically, the 2007 BiOp identified the impacts of the project to include the following eight impacts that unmistakably stem solely from Englebright and Daguerre’s continuing existence:

- (1) Englebright will continue into the future to totally block spring Chinook and steelhead access to the Upper Yuba’s abundant, high-quality habitat;
- (2) Englebright will continue into the future to cut off access to the numerous upstream tributaries to the Yuba River above Englebright which would otherwise provide refuge during catastrophic events in the Yuba River—thus making it more likely that a singular adverse event could “significantly reduce or completely decimate” the Yuba River’s surviving population of spring Chinook and steelhead;
- (3) Englebright will continue in the future to reduce the genetic diversity and reproductive success of spring Chinook by causing the forced overlapping use of spawning areas below Englebright by both spring Chinook and fall Chinook;
- (4) Englebright will continue in the future to trap gravel and woody debris from migrating downstream to the Yuba River reach below Englebright, leading to a paucity of gravel and woody debris in this reach; spring Chinook and steelhead need gravels and woody debris for spawning and rearing;
- (5) Daguerre will continue in the future to impede upstream passage of adult spring Chinook and steelhead because, while Daguerre has fish ladders, numerous design deficiencies in these fish ladders reduce the ability of these adult salmonids to pass the dam;
- (6) Without remedial measures, Daguerre’s existence will continue in the future to cause a large gravel and sediment bar to form upstream of the dam which would choke off flows through Daguerre’s rudimentary fish ladders and greatly reduce the ability of migrating fish to reach the Yuba River’s main channel;

(7) Daguerre will continue in the future to harm juvenile spring Chinook and steelhead during their downstream migration by creating a large plunge pool at the base of Daguerre where predators prey on juveniles disoriented by their plunge over the face of the dam;

(8) Because green sturgeon cannot ascend the fish ladders at Daguerre, Daguerre will continue in the future to prevent green sturgeon from accessing the Yuba River's suitable spawning and rearing habitat above Daguerre.

Id. at 24-27.

Similarly the 2012 BiOp's "Effects of the Action" section defines the agency action as including the impacts caused by the continued existence of Englebright and Daguerre: "The purpose of the project is to maintain and perpetuate the existence of the Daguerre Point Dam with impaired fish passage (and no passage for green sturgeon) and Englebright Dam without fish passage. These dams are the primary drivers of baseline conditions that have resulted in the Yuba River populations of spring-run Chinook salmon, Central valley steelhead, and green sturgeon to be in the condition they are in today. Migration blockage and impairment, little to no access to refugia, high predation, extraordinarily poor conditions for reproduction, and a depauperate food web are all mortality factors resulting in low viability and high risk of local extinction of these species." 2012 BiOp at 166.

NMFS's interpretation in the 2012 BiOp – that the relevant federal project for ESA section 7 consultation purposes includes Englebright and Daguerre's continued future existence – is reasonable and is due judicial deference given NMFS's similar prior interpretation in the November 2007, April 2007 and 2002 BiOps. *See Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1337- 38 (2013) (Absence of any indication that agency's current view of its regulation was a change from prior practice or a post hoc justification adopted in response to litigation was reason to accord *Auer* deference to agency's interpretation.); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F.3d 1224, 1237 (9th Cir. 2007) (*citing Regents of Univ. of Cal. v. Shalala*, 82 F.3d 291, 294 (9th Cir. 1996)). If NMFS reverses course in the new consultation, ignoring the four previous biological opinions it has issued for this Project, it would have a heavy burden to justify doing so. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928 (9th Cir. 2008) (*citing INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference")).

B. The Corps "New Approach" Taken in the 2012 and 2013 BAs Is Contrary to Law.

1. The Impacts Associated With the Ongoing Existence of Englebright and Daguerre Are Subject to ESA Section 7 Consultation.

The Ninth Circuit's decision in *Pac. Rivers Council v. Thomas* supports finding that the ongoing maintenance of Englebright and Daguerre constitute a federal project subject to ESA section 7 consultation obligations. 30 F.3d 1050 (9th Cir. 1994). In *Pac. Rivers Council*, the

Ninth Circuit held that U.S. Forest Service (“USFS”)’s land resource management plans (“LRMPs”) governing timber sales, range activities, and road building projects in forests that were potentially harming ESA protected chinook salmon constituted “ongoing agency action” that triggered ESA section 7 consultation obligations so long as the plans remained in place. *Id.* at 1056. The Ninth Circuit held that the fact that the USFS had adopted the LRMPs before NMFS designated the salmon species in issue as ESA-protected species was immaterial given that these prior adopted plans were still in existence and would continue to govern activity in the future that impacted the salmon. *Id.* Notably, the Ninth Circuit found the LRMPs analogous to the partially constructed Tellico Dam that the Supreme Court in *TVA v. Hill* had found constitutes an agency action over the federal agency’s objections that the partially built dam was preexisting. *Id.* at 1054-55. The Ninth Circuit observed, “there is little doubt that Congress intended to enact a broad definition of agency action in the ESA” and further reasoned (*quoting TVA v. Hill*, 437 U.S. 153 (1978)), that “Congress foresaw that [ESA] § 7 would, on occasion, require agencies to *alter ongoing projects* in order to fulfill the goals of the Act.” *Id.* (citation omitted) (emphasis added).

Englebright and Daguerre are analogous to the LRMPs at issue in *Pac. Rivers Council* and certainly analogous to the dam at issue in *TVA v. Hill*. Even though Englebright and Daguerre were constructed prior to NMFS’s designation of the Listed Species as ESA-protected species, the maintenance/continued existence of these dams will continue to adversely impact these Listed Species and thus should be deemed to be ongoing federal actions for purposes of ESA section 7 consultation duties.

The Corps erroneously contends that the Ninth Circuit decision in *Nat’l Wildlife Fed’n* mandates a contrary result. In a passing reference without any detailed analysis, *Nat’l Wildlife Fed’n* indicated that the impacts attributed to the existence of preexisting dams did not have to be included as impacts of the federal project analyzed in the biological opinion at issue in that case. 524 F.3d at 930. To square *Nat’l Wildlife Fed’n* with the holdings and more detailed reasoning in the Ninth Circuit’s *Pac. Rivers Counsel* decision and the Supreme Court’s *TVA v. Hill* decision, *Nat’l Wildlife Fed’n* should be read as affirming the approach in the previous BiOps: while the past impacts on the Listed Species caused by Englebright and Daguerre’s existence can be deemed part of the applicable environmental baseline rather than part of the federal project’s impacts, the future, continuing impacts caused by Englebright and Daguerre’s continued existence should be seen as impacts of the federal project that must properly be analyzed in an ESA section 7 biological opinion.

- 2. The Corps’ Ongoing Operations and Maintenance Activities Ensure the Continuing Existence of Englebright and Daguerre.**
 - a. Federal Regulations Establish that Operation and Maintenance Activities Are Necessary to Ensure the Continued Existence of Dams.**

The management of federal dams is governed by a variety of statutes, regulations, and guidelines promulgated over several decades. A series of catastrophic dam failures, including the 1976 failure of the Teton Dam in Idaho, a federal earth embankment dam over 300 feet high,

activated intense public and governmental attention on the issue of dam safety. This led to congressional and federal investigations, new state and federal legislation on dam safety, and the promulgation of new guidelines for executive branch agencies like the Corps.

A presidential memorandum in 1977 called for all federal agencies with responsibility for dams to conduct internal investigations of their operating procedures and report the findings to an inter-agency coordinating committee, which in turn submitted a report for review by an independent panel of experts on dam safety. The result was the issuance of a new standard in dam management called the “Federal Guidelines for Dam Safety” (1979, reissued 2004) (“Guidelines”).

The Guidelines established new criteria and procedures for federal agencies involved in the design, construction, operation, and regulation of dams. Among other things, the Guidelines establish operation, maintenance, inspection, and reporting (collectively, “O&M”) procedures for all federal agencies responsible for managing dams. The Guidelines recognize that O&M activities are a critical step in maintaining the ongoing structural integrity and safe operation of dams.

The Guidelines call for a variety of inspections, both formal and informal, regular and periodic, as a central component of a dam safety program. The Guidelines say:

The purpose of a periodic inspection program is to verify throughout the operating life of the project the structural integrity of the dam and appurtenant structures, assuring protection of human life and property. Periodic inspections disclose conditions which might disrupt operation or threaten dam safety, in time for them to be corrected.

Guidelines at 39.

In addition to formal inspections, the guidelines call for informal inspections to maintain “continuous surveillance of the dam.” *Id.* at 40. During these inspections, “[p]articular attention should be given to detecting evidence of (or changes in) leakage, erosion, sinkholes, boils, seepage, slope instability, undue settlement, displacement, tilting, cracking, deterioration, and improper functioning of drains and relief wells.” *Id.* at 41. The Guidelines emphasize the importance of this inspection process: “The personnel performing these inspections should be properly trained and made aware of the *heavy reliance placed upon them, and the great importance and absolute necessity* of their careful inspection and reporting.” *Id.* at 40 (emphasis added).

The Guidelines discuss the need for inspectors to review and evaluate instrumentation data gathered from the series of instruments that are required to be placed throughout a dam to monitor the condition of the dam on an ongoing basis. The Guidelines state clearly why this is necessary: “Careful examination of instrumentation data on a continuing basis may reveal a possible critical condition.” *Id.* at 42.

The Guidelines leave no doubt about the critical importance of the inspection program in

ensuring the ongoing safe operation of a dam. The Guidelines state: “The inspection program could reveal those deficiencies or potential deficiencies which, if uncorrected, *could eventually lead to failure of the dam.*” *Id.* at 43 (emphasis added). When the inspection process reveals these type of problems, the Guidelines require the federal agency to take “[h]igh priority corrective action” to avoid the possibility of “failure of the dam within a short period of time.” *Id.*

The Guidelines apply to the Corps and have been incorporated into Corps regulations. The 2012 BA provides that the action under consultation in the Yuba River includes the “[o]ngoing infrastructure maintenance at Englebright Dam,” which is comprised of actions related to dam maintenance, safety, and dam security. 2012 BA at 3-3. The 2012 BA indicates that the Corps’ duties with respect to dam maintenance and security are described in a document entitled “Engineering and Design Safety of Dams – Policy and Procedure,” ER 1110-2-1156, Regulation No. 1110-2-1156 (2003) (“Regulation”). 2012 BA at 3-3. The Regulation states: “The purpose and intent of this regulation is to ensure that responsible officials at all levels within the decentralized organization of the Corps of Engineers implement and maintain a strong dam safety program in compliance with ‘Federal Guidelines for Dam Safety’.” Regulation at 1-1.

Like the Guidelines, the Regulation underscores the critical importance of O&M activities in fulfilling this purpose. It states: “Rigorous and continuous vigilance, checking, and inspection, for as long as the dam is operational, are necessary for dam safety as problems may occur following many years of trouble-free operation.” *Id.* at 5-1. The Regulations describe the O&M Manual, which provides guidance and instructions to project personnel for proper operation and maintenance of the facility. *Id.* The Regulations require that all facilities have instrumentation systems to measure various metrics, including “hydrostatic pressure, embankment seepage, foundation underseepage, and displacement of major elements of the structure.” *Id.* at 5-2. The Regulations further require scheduled maintenance, repair, and replacement of instrumentation as part of “the normal plan of operation.” *Id.*

When the inspection process reveals evidence of dam distress, the Regulation requires immediate reporting, all the way to the Corps Commander if necessary. *Id.* at 5-3. Common evidence of distress includes increases in seepage quantities, unusual movement or cracking of structures, changes in flows from foundation drains, and other issues. *Id.* at 5-3 to 5-5. The Regulation establishes procedures for addressing the situation, including remedial measures if required. *Id.* at 5-3. The Regulation indicates that the Corps has ongoing authorization to undertake “[n]ormal repair and rehabilitation work” as part of the “the regular O&M Program.” *Id.* at 5-6.

Consistent with the importance of inspections to ensure dam safety, the Regulation contains detailed provisions to guide the Corps in fulfilling its dam inspection obligations. Like the Guidelines, the Regulation requires formal, periodic inspections, as well as informal inspections on a continuous basis. *Id.* at 6-3. The purpose of the inspection program “is to identify and report abnormal conditions and evidence of distress in accordance with training instructions and guidance.” *Id.*; *see also id.* at Appendix F (describing periodic inspection program). Any unusual conditions that seem critical or dangerous must be reported immediately. *Id.* at 6-3. Reports of dangerous conditions must be “based on a detailed, systematic technical

inspection and evaluation of each structure and its individual components regarding its safety, stability, structural integrity and operational adequacy.” *Id.* at 6-5.

b. The Operation and Maintenance of Englebright and Daguerre Serve to Maintain the Continued Existence of the Dams.

The discussion of O&M activities in the 2012 BA establishes a clear connection between O&M activities and the continued structural integrity of Englebright and Daguerre. With regard to Englebright, the 2012 BA states the general Corps duty to “maintain in good order and repair Englebright Dam and outlet facilities in accordance with its authorized purposes.” 2012 BA at 3-3. Consistent with the Guidelines and the Regulation, the Corps undertakes this duty by conducting an inspection program consisting of annual pre-flood inspections and periodic inspections every 5 years. *Id.* The 2012 BA states that the purpose of the periodic inspections is to “evaluate the condition of the critical components of Englebright Dam in order to assure the safety, continuing structural integrity, and operational adequacy of the structure.” *Id.* Consistent with the purposes of inspection programs provided in the Guidelines and Regulation, the Corps undertakes periodic inspections of Englebright with the express purpose of assuring the continuing structural integrity of Englebright Dam.

The 2012 BA also describes numerous ways in which the annual pre-flood inspections serve to maintain the continued existence of the dam. Specifically, the 2012 BA provides the following summary of inspections of the crest of Englebright:

- “Overflow and non-overflow sections of the crest are checked for signs of distress, surface delamination, concrete deterioration and movement of the training wall.”
- “The downstream face of the dam is inspected for signs of cracking, seepage, and other structural problems that could affect the structural integrity of the dam. As reported in the Pre-flood Inspection Report (Corps 2008a), the downstream face of the dam was inspected from the abutments using binoculars. No significant changes were noted in the old cracks and spalls reported in previous inspections. No major cracks were found that would affect the structural integrity of the dam. The previously identified areas having small amounts of seepage show no signs of progression. The fig tree growing between Monoliths 16 and 17 at Joint P is still present, but not causing any structural problem that will require immediate removal, although removal at a future time was planned. Monolith 8 appears to be slightly undercut due to spillway discharge. There is a leak or spring at the base of the left abutment in the vicinity of monolith 17 and 18. Near the left side of the dam, monoliths 18 – 24 appear to have more cracks than other monoliths.
- “Upstream and downstream areas of the left and right abutments are checked for notable movement, instability, seepage and debris.”
- “Corps gatehouse interior and gate chamber, and the bulkhead gate are inspected for signs of concrete deterioration, distress, and misalignment.”
- “The adit portal, including internal and external examination of the concrete bulkhead wall, the projecting conduit and the riveted dished head closure of the projecting conduit are inspected for possible structural or corrosion problems.”
- “The Reservoir Rim is inspected from a Corps patrol boat.
- “New and/or previously identified relief landslides are located, photographed, compared

to aerial photos and occasionally identified for further monitoring to determine whether a landslide has the potential to present a hazard to the dam from slope-failure induced seiches or to affect nearby roadways.”

Id. at 3-3 to 3-4 (emphasis added). These statements make clear that inspections conducted by the Corps are necessary to ensure that Englebright remains in good operational condition, free of cracking, movement, instability, deterioration, surface delamination, distress, corrosion, seepage, leaks, springs, landslide hazards, and other structural problems that could affect the structural integrity of the dam. The Corps’ own statements therefore establish that the operation and maintenance of the dam is inextricably linked to maintaining the ongoing existence of the dam.

The 2012 BA also makes clear that ongoing operation and maintenance is necessary to ensure the continued existence of Daguerre. The Daguerre Point Dam O&M Manual calls for periodic inspections to ensure the “serviceability of the facility during flood conditions.” *Id.* at 3-8. These inspections occur immediately prior to the beginning of the flood season and immediately after each high water period. *Id.* These ongoing inspection and maintenance activities are required to address, among other things:

- “Daguerre Point Dam Structure
- “Daguerre Point Dam Fishways
- . . .
- “Condition of the concrete (e.g., erosion, pop-out, movement and vibration, cracks in or settlement of concrete in overflow and non-overflow sections).
- “Excessive abrasion of concrete.
- “Rock and derrick stone backfills.
- “Foundation and backfill drainage. The outlets of all drains shall be inspected when river stages permit access to them, and shall be cleaned a minimum of every 5 years or more often if required. At other times the drainage manholes at either end of the overflow section shall be inspected and cleaned a minimum of every 3 years or more often if required.
- “Record water level in drainage manholes, and check drainage pipe outlets, if accessible.
- . . .
- “Corrective action taken since the last inspection.
- . . .
- “Cracks or settlement of concrete structures.”

Id. at 3-8 to 3-9. Thus, as with Englebright, the Corps’ inspections of Daguerre are necessary to ensure the continued existence of the dam by assessing the presence of cracking, erosion, movement, settlement or abrasion of concrete, drainage at the foundation of the dam, and other information related to the structural integrity of the dam and fishways. These activities are therefore directly related to maintaining the ongoing existence of Daguerre. Indeed, Daguerre has washed out in the past and then been rebuilt by the Corps, events which are likely to be repeated in the future. *See* COE 1444.³ The 2012 BA’s reference to the Corps taking periodic

³ The administrative record compiled by the Corps in connection with the November 2007 BiOp is referred to herein as “COE” followed by the page number.

“corrective action” relating to these issues further demonstrating that the Corps is actively involved in taking steps to maintain the ongoing existence of Daguerre.⁴

Read together, the Guidelines, Regulation, and 2012 BA establish that the ongoing operation and maintenance of Englebright and Daguerre is essential to maintaining the ongoing existence of the dams by ensuring that the Corps will identify the conditions that could lead to dam failure and act to ensure they do not occur. This is the very purpose of the operation and maintenance requirements set forth in the Guidelines and Regulation. Guidelines at 39; Regulation at 5-1, 6-3; 2012 BA at 3-3. Therefore, the Corps’ attempt to separate the ongoing operation and maintenance of the dams (for which it seeks to consult under ESA Section 7), from the ongoing existence of the dams (which it claims to be part of the environmental baseline), is contrary to law.

Even if the Corps took no affirmative action to keep the dams from falling into disrepair and eventual collapse, simply allowing the dams to continue to exist under Corps ownership and control should properly be seen as an on-going federal project under the reasoning of *Pac. Rivers Council* and *TVA v. Hill*. In *Pac. Rivers Council*, the Ninth Circuit did not find that the USFS had to be taking any affirmative action to perpetuate the LRMPs’s existence (such as periodically renewing the LRMPs following their pre-ESA adoption) for the LRMPs to be on-going federal actions. Similarly, the Supreme Court in *TVA v. Hill* did not find that TVA had to take affirmative steps to ensure the Tellico Dam’s continued existence for the dam to constitute an on-going federal project.

C. Even If the Corps Was Not Required to Consult on the Impacts of the Dams’ Existence, the Corps Will Still Be Liable for Those Impacts Under ESA Section 9.

Even if the Corps were not required to include the existence of the dams as part of the agency action undergoing consultation, the Corps still has a duty to avoid causing unlawful “take” of a listed species under ESA Section 9. The impacts caused by the passive existence of the dams, even if not part of the agency action will still expose the Corps to liability under ESA Section 9 for the unlawful taking being caused by the dams.

It is axiomatic in American common law that with ownership of property and fixtures comes responsibility for the injuries that the condition of this property and fixtures foreseeably and proximately causes. This responsibility exists even if the landowner’s affirmative actions did not cause the injury; mere ownership of the harmful properties is sufficient for liability. *See, e.g.*, Restatement 2d Torts § 342; William L. Prosser, Law of Torts § 41, at 237 (4th ed. 1971) (tort liability can stem from “not only positive acts and active physical forces, but also pre-existing passive conditions which have played a material part in bringing about the event. In particular, it covers the defendant’s omissions as well as his acts.”); *Wilson v. City of New Bedford*, 108 Mass. 261, 265-67 (1871) (defendant who constructs dam and impounds water on his own land is liable

⁴ The Corps administrative record provides additional evidence of the Corps’ active inspection and repair of Englebright and Daguerre. *See, e.g.*, COE 4-15; COE 865-70; COE 586-93; COE 714-17.

for injuries resulting to adjoining land caused by the natural passage of water through the soil from defendant's land, citing seminal common law case *Rylands v. Fletcher*, Law Rep. 3 H. L. 330). Congress is well understood to legislate against the backdrop provided by the common law. *Greenlaw v. U.S.*, 128 S. Ct. 2559, 2568 (2008). Accordingly, when Congress enacted ESA section 9 making it "unlawful for any person to . . . take" any ESA-protected species (except under specified narrow circumstances), Congress must be presumed to have made it unlawful for a property owner to maintain its property in a fashion that caused take to the species, even if the harm to the species was not caused by specific affirmative actions of the property owner.

This interpretation is consistent with ESA regulations defining "take" as including both acts *and omissions* that cause harm to a threatened or endangered species. *See* ESA Section 7 Consultation Handbook at 4-46 (1998) (noting definition of "harass" under ESA Section 9 includes "an intentional or negligent act or omission" that creates the likelihood of injury). Thus, the Corps would be liable for omissions due to the failure to correct the impacts caused by the passive existence of Englebright and Daguerre, even in the absence of any active conduct to maintain those dams' existence.

Interpreting the ESA in a contrary fashion, as allowing unfettered harm to ESA-protected species caused passively by pre-existing structures, would be contrary to Congress' broad remedial intent in enacting the ESA to protect endangered and threatened species. As the United States District Court for the Eastern District of California recognized in ruling on the merits of the previous lawsuit:

[T]his court must give greater weight to the protective purpose of the ESA and to the Ninth Circuit's history of application and interpretation of the statute. The Congressionally-stated purpose of the ESA is to conserve "the ecosystems upon which endangered species and threatened species depend." ESA § 2(b); 16 U.S.C. § 1531(b). Courts have held that the ESA should be construed in light of this purpose [*citing Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 699 (1995)].

Order Denying Federal Defendants' Motion to Dismiss at 24-25 (ECF No. 252) (May 5, 2009).

At least one district court decision supports that ESA section 9 liability can attach when a preexisting federal structure causes take of an ESA-protected species. In *Nat'l Wildlife Fed'n v. Nat'l Park Serv.*, the court analyzed whether a long-existing campground maintained by the National Park Service ("NPS") was causing take of ESA-protected grizzly bears in violation of ESA Section 9. 669 F. Supp. 384 (D. Wyo. 1987). The court held that the campground was not causing such an impact and found no liability—but in analyzing whether the campground was causing such an impact, the court tacitly accepted that ESA section 9 liability would exist if a preexisting campground was causing such a take. *Id.* at 389.

Extensive case law under the federal Clean Water Act ("CWA")⁵ further supports the point. CWA cases have repeatedly held that defendants have "discharged" pollutants in violation

⁵ 33 U.S.C. §§ 1251 et seq.

of the CWA even without the defendants doing anything active to release pollutants into waters. The courts have found CWA liability when defendants own property and fixtures that are being maintained in such condition that natural forces passively lead to the discharge of pollutants from the property and fixtures without CWA permit authorization. *See, e.g., Committee To Save Mokelumne River v. East Bay Mun. Utility Dist.*, 13 F.3d 305 (9th Cir. 1993) (defendant liable where polluted water impounded behind defendant's dam sometimes spilled over dam spillway and flowed down into the river); *Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980) (coal mining company liable when rainfall passively caused overflow of sediment basins built by defendant to catch mine tailings runoff and flow deposited silt and acid materials into creek); *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) (gold leaching operation liable when fast melting snow passively caused sumps storing sodium cyanide-sodium hydroxide leachate solution to overflow into creek); *S.F. Baykeeper v. Tidewater Sand & Gravel Co.*, 46 ERC 1780, 1784 (N.D. Cal. 1997) (discharges from industrial yard and from settling ponds passively caused by rainfall are CWA regulated discharges); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642 (E.D. Pa. 1981) (liquid leachate from a landfill which entered a nearby creek by natural phenomena such as rainfall and gravity, once channeled or collected, constitutes CWA regulated discharge; intent of operator irrelevant); *see also U.S. v. Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 621 (3d Cir. 1967) (finding liability under the Refuse Act where a discharge from a shore facility flowed passively by force of gravity over land into a waterway).

As well documented in all of the biological opinions for the Project, Englebright and Daguerre are beyond doubt perpetuating take of the Listed Species in numerous ways. *See e.g.* 2007 BiOp at 24-28. Accordingly, the Corps would be clearly liable under ESA section 9 for the take perpetuated by Englebright and Daguerre's continuing existence without the safe harbor of a NMFS-issued ITS. Thus, even if the Corps did not have a mandatory duty under ESA section 7 to seek a biological opinion and attendant ITS addressing the impacts from Englebright and Daguerre's continued existence, the Corps had legal reason to seek such a biological opinion and ITS.

Indeed, it would seem that the Corps, if it were to reflect more deeply on the matter, would wish to change the position it has taken in the Englebright and Daguerre BAs. The scope of the incidental take protection afforded by an ITS is defined by the agency action undergoing consultation. *See* 50 CFR § 402.14(i). If the federal project did not include the impacts associated with the ongoing existence of Englebright and Daguerre, then the BiOp and ITS could not conceivably be read as extending any incidental take authorization for the taking of ESA protected species that the existence of the dams causes. The 2012 BA itself well-documents that the continued existence of the dams is causing take of the Listed Species. *See* 2012 BA at 8-1 to 8-30. As discussed above, any actor owning or controlling structures that passively take endangered species must be seen as liable for this take. Following the Corps' position to its logical conclusion, the Corps *per se* lacks any incidental take authorization for, and could be held liable for, the take caused by the continued existence of Englebright and Daguerre. And in the absence of an ITS from NMFS, the Corps will have no assurance that any actions it may take to attempt to minimize these impacts will be sufficient to avoid liability under ESA Section 9.⁶

⁶ Moreover, even if the Englebright and Daguerre BAs theory were correct that NMFS was not mandated to issue such a biological opinion and ITS, it would be odd to read ESA section 7 as

D. The Impacts of the Brophy Diversion Are Part of the Agency Action Under Consultation.

The first four biological assessments, including the 2012 BA correctly defined the agency action under consultation to include the “issuance and administration of new and existing permits, licenses and easements to . . . non-federal entities for their operations of water diversion facilities at the dams . . .” *See e.g.* 2012 BA at 8-30; *see also id.* at 8-41. One such diversion is the Brophy Diversion operated by YCWA. The first four biological assessments (and biological opinions) properly recognized that the ongoing impacts caused by the Brophy Diversion are considered to be impacts of the agency action undergoing consultation.

Specifically, the 2007 BiOp identifies the following two impacts from the Brophy Diversion as ongoing impacts stemming from the Corps’ licensing of the Diversion:

(1) Because the Brophy Diversion lacks a fish screen which meets NMFS and California Department of Fish and Game fish screening criteria and fails to provide adequate sweeping flows through the diversion, the Brophy Diversion will continue in the future to cause impingement of juveniles within the diversion’s rock weir and entrainment of juveniles in the diversion pool behind the weir; and

(2) The Brophy Diversion’s continued existence will continue to create a deep, slow-moving pool next to the diversion’s weir which promotes predation on emigrating juvenile spring Chinook and steelhead.

2007 BiOp at 27-28.⁷ *See also* 2012 BiOp at 254, 257.

However, the 2013 BA deviates from the previous four consultation and takes a different, erroneous approach. The 2013 BA concludes that the Brophy Diversion's impacts should not be part of the current consultation because renewal of the expired right of way license to YCWA for access to the Brophy Diversion Canal and Facilities, will be a "future action" by the Corps and is only subject to consultation at the time of renewal. 2013 BA at 1-50. This argument is erroneous because it ignores that the Corps is currently *administering* an *existing* license that authorizes the Brophy Diversion to operate on federal land. The 2012 BiOp correctly distinguished between the Corps' issuance of a long term easement to YCWA to operate the Brophy Diversion, which was included as part of the action under consultation, from a separate ESA consultation in the future

forbidding NMFS from issuing a biological opinion and ITS that provided the Corps with incidental take authorization. It would be incongruent to hold that the Corps can be granted incidental take authorization for active “projects” it carries out, but not for the passive existence of conditions on its property that cause both take of ESA-listed species and Corps’ liability under ESA section 9.

⁷ The 2007 BiOp further identifies diversion of water from the Yuba River, which reduces the aquatic habitat for the Listed Species, as an adverse impact of Brophy Diversion’s operations. 2007 BiOp at 29.

concerning the impacts to Listed Species from YCWA's future construction of a new fish screen at the Brophy Diversion.

NMFS' interpretation in the 2012 BiOp is reasonable and is due judicial deference given NMFS' (and the Corps') similar prior interpretation in all four previous consultations on this Project. *See Nat'l Wildlife Fed'n*, 481 F.3d at 1237. ESA section 7 expressly mandates that a federal agency consult with NMFS concerning the impacts of actions "authorized" by the federal agency that may adversely affect ESA-listed anadromous or marine fish species.⁸ *See, e.g., Conner v. Burford*, 848 F. 2d 1441, 1452 (9th Cir. 1988) (ESA consultation process triggered when Forest Service notified FWS that Forest Service sale of oil and gas leases on National Forest land might affect threatened and endangered species living there).

The Corps has not cited to any case law supporting its position that it need not perform ESA section 7 consultation when it has authorized a structure on federal land that has on ongoing adverse impact on an ESA-listed species. Again, such a result would be contrary to Congress' broad remedial intent in enacting the ESA to protect endangered and threatened species. *See Order Denying Federal Defendants' Motion to Dismiss* at 24-25.

III. The New BiOp Must Include Reasonable and Prudent Measures or Alternatives to Require The Corps To Implement Fish Passage Above Englebright and Daguerre.

A. The ESA Provides For Unequivocal Mandates That a Federal Agency Is Obligated to Respect Regardless of Specific Congressional Appropriations.

ESA section 7(a)(2), 33 U.S.C. § 1536(a)(2), specifically requires that each federal agency, using the best scientific and commercial data available, insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened species or result in the adverse modification of critical habitat. *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994) (ordering U.S. Forest Service to complete new plan analyzing impact of agency action on listed species, noting that under ESA section 7(a)(2) "An agency cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species"); *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990); *see also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (U.S. 1978) (enjoining construction of dam by federal agency specifically authorized by Congressional appropriation, noting "[The ESA's] very words affirmatively command all federal agencies "to insure that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result in the destruction or modification of habitat of such species . . .*"). There is nothing in the ESA, any other statute, or federal court case law remotely suggesting that an agency can be excused from the duty to take steps needed to ensure that its actions do not jeopardize the continued existence of a species because Congress has not expressly appropriated the funding needed for those steps. To the contrary, applicable case law makes clear that this duty must be met regardless of the status of congressional appropriations. Notably, in *TVA v. Hill*, the Supreme Court enjoined the completion of a dam specifically

⁸ Such fish species are within NMFS's jurisdiction. Other ESA-listed species are within the U.S. Fish and Wildlife Service's jurisdiction.

authorized by Congressional appropriation, effectively holding that wherever the ESA has a contrary mandate, it takes precedence over any legal duty or right conveyed by a Congressional appropriation.

District courts within the Ninth Circuit have consistently ruled that lack of sufficient budget appropriations does not excuse federal agencies from complying with the ESA. *See Center for Biological Diversity v. Kempthorne*, 2008 WL 205253 (N.D. Cal 2008) (FWS's claimed inability to meet statutory requirements of ESA because of lack of allocated resources is not a cognizable concern. Congress has directed that ESA protection be given to endangered species); *Center for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174 (D. Ariz. 2003) (FWS budgetary constraints do not relieve it from obeying court's order to designate critical habitat for Mexican spotted owl); *Biodiversity Legal Foundation v. Badgley*, 1999 WL 1042567 (D.Or.1999), *rev'd on other grounds*, 309 F.3d 1166 (9th Cir.2002) (resource limitations do not excuse FWS's failure to comply with statutorily imposed deadline to make listing decisions within 12 months after receipt of petition); *Marbled Murrelet v. Babbitt*, 918 F. Supp. 318 (W.D.Wash.1996) (federal defendants failed to carry their burden of proving impracticability of compliance with court order requiring them to make final designation of critical habitat for marbled murrelet by specified deadline, despite claimed lack of adequate funding).

In *Loudner v. United States*, the Eighth Circuit ruled that a federal agency, in that instance the Fish and Wildlife Service, may not avoid its mandatory duties under the ESA "on the grounds that the budget and staff of the Department of Interior are inadequate." 108 F.3d 896, 903 n.7 (8th Cir. 1997). As explained by the Eighth Circuit, "the United States may not evade the law simply by failing to appropriate enough money to comply with it." *Id.*

Federal courts have issued affirmative injunctions under the ESA requiring federal agencies to take specific actions to comply with the ESA without a showing that those actions were expressly authorized by a Congressional appropriation. For example, in *SYRCL, et al. v. NMFS, et al.*, District Court Judge Karlton ordered the Corps to implement several injunctive measures, including the installation of fish grates on the Daguerre Dam fish ladders, without there being a specific Congressional appropriation authorizing these measures. *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. Civ. S-06-2845 LKK/JFM, 2011 U.S. Dist. LEXIS 81594, at *23-59 (E.D. Cal. July 26, 2011); *see also NRDC v. Kempthorne*, 2007 WL 4462391 (E.D. Cal.) (ordering increased sampling and monitoring of delta smelt, and specific flow rates in rivers within the CVP and SWP); *Oregon Natural Desert Ass'n v. Tidwell*, 2010 WL 546429 (D. Or. 2010) (requiring additional monitoring, fencing, and active herd management to keep livestock from further damaging steelhead critical habitat). Such outcomes are firmly in keeping with well-established law that lack of a legislative appropriation cannot be a defense to complying with a duty imposed by a substantive federal statute, including federal environmental laws. *Bylinski v. City of Allen Park*, 8 F. Supp.2d 965, 969-70 (E.D. Mich. 1998), *aff'd Bylinski v. City of Allen Park*, 169 F.3d 1001 (6th Cir. 1999), *cert. denied*, 527 U.S. 1037 (1999); *see also Missouri v. Jenkins*, 495 U.S. 33, 55 (1990).

In the past, the Corps has contended that the Anti-Deficiency Act precludes the Corps from spending money on a fish passage study or fish passage improvements absent an express congressional authorization to do so. This contention is without merit. The Anti-Deficiency Act

does not expressly modify the Corps duties under the ESA and excuse compliance with the non-discretionary terms of ESA Section 7(a)(2). As noted by the court in *Center For Biological Diversity v. Norton*, when the FWS argued that requiring it to abide by the court's order to designate critical habitat by the specified deadline would violate the Anti-Deficiency Act, the court noted that "[d]efendant's argument regarding the Anti-Deficiency Act ignores the fact that in order to comply with the Anti-Deficiency Act, Defendant must be permitted to continue its ongoing 10-year violation of the ESA." The Court held that FWS's argument was unavailing because the existence of a court order is a complete defense to prosecution under the Anti-Deficiency Act. 304 F. Supp. 2d at 1180.

Notably, the Corps' contention that the Anti-Deficiency Act prevents them from complying with RPMs has been inconsistent—signaling that the contention is made more for convenience in opposing measures that the Corps wishes to resist rather than conviction. For example, the Corps has not contended that the Anti-Deficiency Act precludes the Corps from funding and implementing terms and conditions requiring placement of gravel and large wood into the Yuba River, even though there was no express congressional authorization for such measures.

B. The Corps' Interpretation of Its Authorities As Severely Limiting Its Responsibilities Under the ESA To Protect the Listed Species is Erroneous

The Corps contends that its responsibilities, as well as its abilities to conduct operations at Englebright and Daguerre are governed by the authorizing statutes that created the dams, such that Corps actions that could potentially positively affect listed fish species or habitat in the Yuba River are limited. Daguerre BA at 1-10. The Corps' interpretation of the limits of its authority is erroneous.

Englebright Dam was authorized by the Rivers and Harbors Act of 1935. 2012 BA at 3-1. Englebright's original purpose was to trap sediment originating in upstream areas. *Id.* Daguerre Point Dam was authorized by the Rivers and Harbors Act of 1902. 2007 BiOp at 3. Its original purpose was to retain hydraulic mining debris. *Id.* Since the initial authorizations for construction and operation of Englebright and Daguerre, other laws have been passed that impose legal mandates on Corps operations and maintenance of dams, among these the Fish and Wildlife Coordination Act ("FWCA"), 16 U.S.C. §§ 661-666c (2006) and the Corps of Engineers Master Manual No. 1110-2-3600, for Management of Water Control Systems, Nov. 30, 1987 (Manual). The Manual guides all Corps field offices and acknowledges that the FWCA has added fish and wildlife conservation as a "purpose" of all Corps dams. The Manual says: "The Fish and Wildlife Coordination Act of 1958 as amended, provides that fish and wildlife receive equal consideration with other project purposes and be coordinated with other features of water resource development programs. Manual at 2-23

Therefore, whatever the purposes of Englebright and Daguerre dams were when initially authorized, they now include the additional purpose of fish and wildlife conservation. The Water Resources Development Act of 1990 ("WRDA 1990") reinforces the mandate that protection of the environment is one of the Corps' affirmative duties, stating, "The Secretary shall include environmental protection as one of the primary missions of the Corps of Engineers in planning,

designing, constructing, *operating, and maintaining* water resources projects. 36 U.S.C. § 2316 (2006) (emphasis added).

In compliance with WRDA 1990, the Corps has included environmental restoration and protection policies in its Digest of Water Resources Policies and Authorities ("Digest"), EP 1165-2-1, July 30, 1999. Chapter 19 of the Digest describes "the linkage among the various environmental statutes and the programs and policies established by the recent Water Resources Development Acts, such that the Corps role in ecosystem restoration and protection is more clearly defined." Digest at 19-1. Included in the chapter is a summary of the Endangered Species Act, and the duties it imposes upon federal agencies. The ESA section 7 consultation process is explained. A separate section in the chapter, entitled "Legal Basis for Mitigation of Damages to Fish and Wildlife Resources" summarizes the Corps' policy on "when the Corps must provide mitigation for adverse impacts on the environment, including fish and wildlife resources". The Digest notes that "reasonable and prudent measures *must be complied with* in order to construct *and/or operate* a project. . ." Digest at 19-14 (emphasis added).

The Water Resources Development Act of 2007 ("WRDA 2007"), is another law that provides the Corps with authority to conduct studies and undertake projects to aid Listed Species on the Yuba River. WRDA 2007 states in pertinent part:

(a) The Secretary [of the Army] is authorized to review water resources projects constructed by the Secretary to determine the need for modifications in the structures and operations of such projects for the purpose of improving the quality of the environment in the public interest and to determine if the operation of such projects has contributed to the degradation of the quality of the environment.

(b) Authority to make modifications. The Secretary is authorized to carry out a program for the purpose of making such modifications in the structures and operations of water resources projects constructed by the Secretary which the Secretary determines (1) are feasible and consistent with the authorized project purposes, and (2) will improve the quality of the environment in the public interest.

(c) Restoration of environmental quality. (1) In general. If the Secretary determines that construction of a water resources project by the Secretary or operation of a water resources project constructed by the Secretary has contributed to the degradation of the quality of the environment, the Secretary may undertake measures for restoration of environmental quality and measures for enhancement of environmental quality that are associated with the restoration, through modifications either at the project site or at other locations that have been affected by the construction or operation of the project, if such measures do not conflict with the authorized project purposes.

33 U.S.C. Section 2309(a)-(c). Given that it is the clearly stated policy of the Corps that RPMs

must be complied with because of the mandates in the FWCA and the WRDAs, the Corps' contention that it lacks authority to require fish passage improvements that are RPMs in a biological opinion is contrary to law.

In the past, the Corps has contended that it cannot complete studies necessary to design fish passage improvements that would secure passage of the Listed Species past Daguerre and/or Englebright Dams and implement such improvements until it obtains additional authority and funding from Congress. The Corps has also contended that it cannot undertake a Daguerre Point Dam fish passage reconnaissance study (which is the first phase of a feasibility study) until the Corps receives specific Congressional authority and funding for the reconnaissance study. 2012 BA at 3-44. This contention is erroneous. There are two statutes identified in the Corps' policy guidance manual, known as the Continuing Authorities Program ("CAP"), under which the Corps is authorized to plan, design, and implement water resources projects for environmental improvements *without additional project specific congressional authorization*. CAP at F-3, F-5. The WRDA of 1986, Section 1135, 33 U.S.C § 2309(a), provides authority for aquatic ecosystem restoration projects. The WRDA of 1996, Section 206, 33 USC § 2330, provides authority for project modifications for improvement of the environment. CAP at F-3, F-5.

The CAP describes two ways in which feasibility studies for CAP projects can be initiated. Feasibility studies *may* be initiated through legislative action. CAP at F-13. However, *normally*, the feasibility phase is initiated "based on receipt of a letter from a potential non-Federal sponsor stating its desire to participate in a solution, and acknowledging its financial responsibilities for the study and the project, if one is recommended." *Id.* Seven years ago, the California Department of Water Resources provided such a letter to the Corps in order to continue the ongoing Daguerre Point Dam Fish Passage Improvement Project which was going through the NEPA process in order to identify a preferred alternative for fish passage at the dam. Despite receiving this letter, the Corps has continued to erroneously maintain that it must receive specific authorization from Congress to undertake a reconnaissance study.

A Corps decision to act or not, based on its interpretation of the limits of its authority, is subject to judicial review under the APA. See *In re MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d 1160 (11th Cir. 2011). In that case the 11th Circuit held that the Corps' decision to reject a request from the state of Georgia for more water supply was based on a clear error of law. The court also held that the Corps's interpretation that the authorizing statute for Buford Dam did not give the Corps authority to release more water to Georgia was erroneous, in part because the Corps had not considered the supplemental authority provided by the Water Supply Act. *Id.* at 1193-4. Therefore, it is incumbent upon the Corps here to consider all of the authorities governing its operations and maintenance of dams on the Yuba River in making a decision about how to proceed with Corps actions.

Notably, the *Tri State Water Rights* court did not accord the Corps' interpretation of its authority any deference because the Corps' interpretation kept changing. *Id.* A similar situation has occurred on the Yuba River, with the Corps initially committing to a Daguerre Fish Passage Improvement Study and NEPA process culminating in selection of a preferred alternative, and then four years into the process suddenly deciding it did not have the authority to proceed.

The 2012 BiOp also discusses the numerous authorities the Corps can utilize to implement actions to benefit the Listed Species. 2012 BiOp at 211- 214. In sum, the Corps plainly has a duty under ESA section 7(a)(1) and (2) to utilize its authorities and to ensure that its actions do not jeopardize the continued existence of the Listed Species. This duty extends to securing fish passage past the Corps' dams given that available science conducted by NMFS's own scientists has made plain that securing effective passage for the Listed Species past these dams is necessary for these species' survival and recovery. Given this plain Corps duty, NMFS not only can, but must include reasonable and prudent alternatives in the new biological opinion for the Corps to design and implement fish passage past Daguerre and Englebright Dams. A valid biological opinion must include all reasonable and prudent alternatives or reasonable and prudent measures needed to avoid jeopardy to the survival of an ESA-protected species. *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) (citing *Sierra Club v. Marsh*, 816 F.2d 1376, (9th Cir. 1987)); see also *S. Yuba River League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, (E.D. Cal. 2010) (noting that ecological surrogates in an ITS must reflect all forms of harm being caused by the project).

IV. Conclusion

The failure of the Corps to analyze the impacts caused by the continued existence of Englebright Dam ("Englebright") and Daguerre Point Dam ("Daguerre") as part of the impacts of the federal agency action under consultation violates Endangered Species Act ("ESA") Section 7. As a result of this failure, the Englebright BA's conclusion that the Corps' operation and maintenance of Englebright Dam does not adversely affect threatened Yuba River fish species or their critical habitat is arbitrary and capricious.

Similarly, the Daguerre BA's conclusion that formal Section 7 consultation on the Corps' operation and maintenance of Daguerre is narrowly limited to operation and maintenance activities affecting the Daguerre fish ladders is arbitrary and capricious. Neither BA includes as part of the formal consultation the numerous adverse impacts that Englebright, Daguerre, and Yuba River water diversions licensed by the Corps cause the Listed Species and their critical habitat. These adverse impacts have been extensively analyzed as impacts of the agency action under consultation in all four previous biological opinions. The Corps cannot legally justify the change in interpretation of its ESA duty to ensure that agency actions do not jeopardize threatened species in the Yuba River.

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From: Christopher Keifer - NOAA Federal <christopher.keifer@noaa.gov>
Sent: Monday, May 12, 2014 4:46 PM
To: Gary Sprague - NOAA Federal; Howard Brown - NOAA Federal
Subject: Englebright Ledger
Attachments: 2013_Englebright Dam and Reservoir_IF.docx

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Christopher Keifer
Attorney
NOAA Office of General Counsel, Southwest Section
U.S. Dep't of Commerce
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Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Friday, May 25, 2018 12:45 PM
To: Stacey Nathanson - NOAA Federal
Subject: JW Declaration
Attachments: Dkt. 16 - Motion for Summary Judgment.pdf; Dkt. 16 - 1 Graff Declaration.pdf

(b) (5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
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(b)(6) (C)

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

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

Exhibit A

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.)	
_____)	

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. Additionally, this declaration includes the search terms, locations and parameters agreed upon with the plaintiffs and utilized by those who conducted the search. 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 the Department of Commerce in the above-captioned lawsuit.

3. This declaration provides background information on the development of a paper entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* ("Hiatus Paper" or "the Paper"), which was published in June 2015 in the journal *Science* and is the focus of the FOIA request at issue in this case. It also explains NOAA's search for records responsive to Plaintiff's FOIA request and the FOIA exemptions applied in processing the responsive records. A *Vaughn* index (Exhibit 1) provides a detailed description of information withheld by NOAA and challenged by Plaintiff, as well as NOAA's basis for those withholdings.

I. BACKGROUND

4. The National Centers for Environmental Information (NCEI), located within the NOAA's National Environmental Satellite, Data, and Information Service (NESDIS), develops use-inspired datasets, products and reports that describe average weather conditions (and changes therein) over the United States and the globe. NCEI acts as the "Nation's Scorekeeper" regarding the trends and anomalies of weather and climate, focusing on essential climatic elements such as temperature and rainfall, as well as extreme events such as hurricanes and droughts.

5. NCEI produces and maintains datasets for global ocean areas and global land areas. Changes in surface temperature over long periods are studied using several datasets that are continuously maintained and updated. There are separate datasets for the ocean and the land, which are then merged to create a global dataset.

6. Scientists throughout the government, including at agencies other than NOAA and researchers outside of the government, use NOAA's temperature datasets for a variety of purposes, including for climatic research and climate assessments. NCEI scientists are continually working on improving these datasets to provide scientists and the public with the most up-to-date and accurate information.

7. NCEI scientists periodically interpret and analyze global datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. NCEI scientists use the most recent information from these datasets to propose new scientific theories and also re-evaluate earlier conclusions reached within the scientific community in light of new or updated data.

8. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data, work which is consistent with the mission of NOAA. Nine NOAA scientists contributed to this paper: Thomas Karl (the lead author), Dr. Anthony Arguez, Dr. Boyin Huang, Mr. Jay Lawrimore, Mr. James McMahon, Dr. Matthew Menne, Dr. Thomas Peterson, Dr. Russell Vose, and Dr. Huai-min Zhang. Thomas Karl is the former Director of NCEI. Jay Lawrimore, Dr. Russell Vose, and Dr. Huai-min Zhang are supervisory scientists at NCEI. Dr. Anthony Arguez and Dr. Matthew Menne are climate scientists at NCEI. Since the publication

of the paper, Dr. Thomas Karl and Dr. Thomas Peterson have retired, and Mr. James McMahon no longer works at NCEI.

9. The Intergovernmental Panel on Climate Change (IPCC) released a report in stages between September 2013 and November 2014 that concluded that the upward global surface temperature trend from 1998-2012 was lower than the upward global surface temperature trend from 1951-2012. This apparent observed slowing was dubbed the “hiatus.”

10. There were significant developments related to the alleged “hiatus” in the two years immediately following the release of the IPCC report. In particular, both 2013 and 2014 were among the top-five warmest years on record for the globe. In addition, NOAA scientists made significant improvements to its sea surface temperature dataset, one of the largest being a correction that accounted for the difference in data collected from buoys and ships. (Until the mid-1970s, ships were used to measure sea surface temperatures; since then, buoys have increasingly been used.) Scientists developed a method to correct for the difference between these two observing systems, and incorporated those corrections into its dataset and subsequently the paper that is the subject of this request.

11. On or about October 31, 2014, Director Karl shared with a group of NOAA scientists a draft of a paper that he had worked on himself, inspired by some of the papers exchanged previously by the NCEI scientists. The draft developed an idea for properly accounting for the “hiatus,” based on the additional two years of global temperature data and the improvements to NOAA’s sea surface temperature dataset. Director Karl asked the scientists to provide feedback to his draft.

12. The scientists who received the draft responded with feedback in various forms, including exchanging drafts of the paper with edits done via track changes and sending emails providing feedback.

13. Until the paper was submitted to *Science*, many drafts and revisions were exchanged along with emails and one-on-one discussions about various aspects of the paper, including: suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on implications of other researchers' work, and so on. Such collaboration via drafts and discussions in emails and orally is standard practice at NCEI.

14. On or about December 23, 2014, a NOAA author submitted the draft paper to *Science* via an online portal.

15. *Science* follows a formal peer review process that is described on their public website. See <http://www.sciencemag.org/authors/peer-review-science-publications>. Peer reviewers are subject matter experts in the topic of the submitted paper who are able to use their expertise to evaluate the scientific rigor and merit of the paper.

16. Peer reviewers provide feedback on an array of issues, including making an overall recommendation as to whether the paper should be published, in view of *Science*'s mission and also providing more detailed critique on a range of issues. These issues include the technical rigor of the data and methods used and whether the conclusions of the report are novel or similar to work already published. See <http://www.sciencemag.org/sites/default/files/REinstr13.pdf>.

17. According to *Science*, their peer review process is anonymous. The identities of reviewers are never revealed to authors, and reviewers are instructed not to identify themselves to any entity, including the press. Reviews are shared only with the author, potentially other reviewers (for cross-comment), and the Board of the journal. See <http://www.sciencemag.org/authors/peer-review-science-publications>.

18. Reviewers are expressly instructed to treat the submitted manuscript as privileged and confidential:

The submitted manuscript is a privileged communication and must be treated as a confidential document. Please destroy all copies of the manuscript after review. Please do not share the manuscript with any colleagues without the explicit permission of the editor. Reviewers should not make personal or professional use of the data or interpretations before publication without the authors' specific permission (unless you are writing an editorial or commentary to accompany the article).

<http://www.sciencemag.org/authors/peer-review-science-publications>.

19. This is reinforced in the journal's Instructions to Peer Reviewers of reports, which states:

Confidentiality: We expect reviewers to protect the confidentiality of the manuscript and ensure that it is not disseminated or exploited. Please destroy your copy of the manuscript when you are done. Only discuss the paper with a colleague with permission from the editor. We do not disclose the identity of our reviewers.

<http://www.sciencemag.org/sites/default/files/REinstr13.pdf>.

20. The authors received via email the first round of reviews from *Science* on or about February 26, 2015. In this case, *Science* sent the manuscript to five peer reviewers. These reviewers provided their comments anonymously to NOAA through *Science*, as is standard in the peer review process for *Science*.

21. After determining the best response to all of the peer reviewer comments, the authors submitted the revised manuscript and a response to reviewer comments to *Science* via the online submission portal on or about March 27, 2015. See Categories C and D of part 2 of the *Vaughn* Index.

22. On or about April 22, 2015, the authors received the second round of reviews from *Science* via email. The authors developed responses to this second round of comments, made revisions accordingly, and submitted the revised manuscript and response to reviewer comments to *Science* via the online portal on or about May 5, 2015. *See id.*

23. After submitting the revised manuscript, the authors received notice that it would be published, received galley proofs, and approved them. On June 4, 2015, the paper was published online on the *Science* website. This was followed up by publication in the printed volume of *Science* on June 26, 2015 (Volume 348, Issue 6242, at 1469).

II. ADMINISTRATIVE PROCESSING OF PLAINTIFF'S REQUEST

24. Plaintiff's FOIA request was addressed to NOAA, which is located within the Department of Commerce ("the Department"). The request sought, in relevant part:

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.

25. When NOAA officials first reviewed the request, they determined that it did not reasonably describe the records sought. NOAA and the Department, through counsel, conferred with Plaintiff's counsel to negotiate a clear description of the materials sought.

26. During the course of those discussions, NOAA indicated to Plaintiff that it understood Plaintiff's request to reflect an interest in the Hiatus Paper. Defendant suggested Plaintiff modify the FOIA request to call for a search for all documents and communications referring to the Hiatus Paper from October 1, 2014 through June 4, 2015. Defendant offered to search the files of the nine authors of the Study. Plaintiff confirmed its interest in the Hiatus Paper, but indicated that it sought only records referring to the topics listed in its initial FOIA request.

27. The parties ultimately "reached an agreement regarding the scope of the request and the relevant search parameters," which was memorialized in the Second Joint Status Report, submitted to this Court on March 1, 2016. Regarding the documents at issue in this litigation, the parties agreed that:

"Defendant will search the records of the nine authors of the June 4, 2015 study entitled Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus published in Science ("Karl Study") for records referring to the Karl Study and that contain the following search terms:

(1) "NMAT" and "Night Marine Air Temperatures";

(2) "ISTU", "ICOADS", and "sea ice";

(3) "satellite", "Advanced Very High Resolution Radiometer", "AVHRR", "Advanced Microwave Scanning Radiometer", and "AMSR".

For items 1, 2, and 3 of Plaintiff's FOIA request, the timeframe for the searches will be October 1, 2014 to June 4, 2015."

See Second Joint Status Report, ECF No. 10.

28. In the Third Joint Status Report, submitted to this Court on March 22, 2016, the parties agreed that NOAA, through the Department, would produce responsive, non-exempt records, as described above, to Plaintiff by May 27, 2016. *See* ECF No. 11.

29. On May 27, 2016, the Department released 102 pages of material in its entirety and 90 partially redacted pages. Defendant withheld in their entirety 8,013 pages of records. *See* May 27 Cover Letter (Exhibit 2); *see also* Fourth Joint Status Report, ECF No. 12. In that letter, NOAA informed Plaintiff that "[b]ecause the request sought records of multiple custodians, there is a significant amount of duplicative material in the responsive records." Exhibit 2.

30. NOAA made a supplemental release of records on September 16, 2016, providing Plaintiff with an additional 44 pages of released material after further review the records identified and described in the letter accompanying the May 27, 2016, production, 7 of which were partially redacted because they included Tom Karl's personal telephone number.

31. After the September release, NOAA continued to evaluate the responsiveness and exemption status of the records that had been identified. Contemporaneously with this filing (on December 15), NOAA is releasing another 62 records providing Plaintiff with additional records that were previously withheld.

32. Because of the further segregation and responsiveness review NOAA conducted that led to the release of additional material to the Plaintiff, the page counts in the May 27 cover letter (and also the Fourth Joint Status Report) originally provided to Plaintiff are no longer accurate. A complete listing of all records withheld in full or in part pursuant to an exemption is reflected in the attached *Vaughn* Index.

II. THE SEARCH PROCESS

33. After NOAA and Plaintiffs, through counsel, reached an agreement as to the terms of the search for this FOIA request, it was determined that the records requested resided within one office: NCEI. NCEI's headquarters is located in Asheville, North Carolina. This determination was based on the fact that all of the agreed-upon custodians work or had worked within NCEI during the time in which responsive records were created.

34. The nine authors of the Hiatus Paper were Thomas R. Karl, Anthony Arguez, Boyin Huang, Jay H. Lawrimore, James R. McMahon, Matthew J. Menne, Thomas C. Peterson, Russell S. Vose, and Huai-Min Zhang.

35. NOAA instructed eight of the nine authors (record custodians) that were still within NCEI to conduct a search in accordance with the parameters agreed to by the parties and memorialized in the Second Joint Status Report. NOAA specified that custodians must search their email, electronic, and paper records.

36. Each records custodian still at NCEI¹ searched his own records in accordance with these instructions. As such, all search terms and parameters of the search as agreed upon by the Plaintiff were utilized by NOAA in the search of the files where responsive records were likely to be filed.

37. There were no common areas to be searched at NCEI because the authors all kept their own files separate.

38. After the custodians collected their records, they were forwarded for responsiveness and exemption review.

39. The search conducted was reasonably calculated to uncover all relevant, non-duplicative documents.

40. The Department compiled two sets of bates-numbered files, which included, in addition to the partially redacted and fully withheld email records, placeholder pages, which are discussed further in Paragraph 49. One bates-numbered file reflects the email records, and the other bates-numbered file reflects documents, as contained on parts 1 and 2 of the *Vaughn*.

41. Each record was evaluated separately for responsiveness, and each email was deemed to be one record.

42. In the case of an email with attachment(s), responsiveness determinations were made independently for that email and any attachment(s) to that email.

43. For email records that were joined with other emails in a chain, NOAA deemed responsive any email that related to the Paper and contained an agreed-upon search term as well

¹ One custodian (Thomas Peterson) had retired by the time of the search. His archived email inbox and outbox were searched by another author who was still with NOAA at the time. No additional, non-duplicative records created by Mr. Peterson that are responsive to this request are known to have existed following the retirement of Mr. Peterson.

as other, surrounding emails that were related to or provided important context for the email that contained the search term. If an email appeared to directly relate to the subject matter of the request in an email containing the search term, a case-by-case determination was made in good faith and in the effort to maximize transparency as to whether that record was responsive even though not technically within the search terms outlined in the Second Joint Status Report.

44. The search was reasonably calculated to uncover all relevant documents and there are no known locations where additional, non-duplicative, responsive material is likely to be found. Accordingly, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched.

III. The Vaughn Index

45. I have read the *Vaughn* index attached as Exhibit 1 and reviewed the documents referenced in that index. Based on my review of the documents and on information provided me in the course of my official duties, I have determined that the material redacted from the referenced documents falls within the enumerated FOIA exemptions identified in the index.

46. The *Vaughn* index is divided into two parts. The first part covers responsive emails that were withheld or redacted. It identifies each record by Bates stamp numbers (which correspond to the numbering on records provided to Plaintiff), the originator, the recipient(s), the date of the record, the title of the email, the exemption invoked, and the basis for withholding.

47. Due to how the email records are stored in and were printed from the user's email accounts, some email records are duplicative but certain copies truncate the metadata for that record email (e.g., the sender, recipient, subject line, who was cc'd on the records). Sometimes

NOAA was able to reconstruct the information by looking to duplicate instances that were printed differently, or by going to the original files. We have generally inferred that the subject line that prints at the top of the printed email chain carried through for individual email records connected to that string of emails.

48. The second part of the *Vaughn* index covers non-email documents that were withheld in their entirety, except for a relatively small number of documents that were released to Plaintiffs upon further review. These documents consist almost exclusively of five categories of records. Records that fell into one of the five categories are labeled in the *Vaughn* index by a letter that corresponds to a category. The few exceptions that do not fall into one of the five categories have a more detailed description.

49. The *Vaughn* index reflects occasional “gaps” in the Bates stamp numbering. For example, *Vaughn* part one reflects an entry for bates page 1, and the next entry is for bates page 4. Such “gaps” exist for three reasons. First, not all pages had redacted information. Only pages with redacted information are accounted for on the *Vaughn*. Second, NOAA, in an effort to be transparent during production, included pages that served as “placeholders” for records in email chains that were removed because those records were either non-responsive or were fully withheld under Exemption 5. For example, if one page with responsive records was produced with redactions, followed by four fully withheld pages of records, the four fully withheld pages were represented in the production by a placeholder page that indicated four pages of material had been withheld as either not responsive or as exempt under Exemption 5. That placeholder page was bates stamped during the initial production, but NOAA has not listed it in the *Vaughn*

index. And third, NOAA removed bates-marked documents that were non-responsive that had been inadvertently bates stamped during the initial production. The withheld records, if responsive, are represented elsewhere in the *Vaughn* index.

50. As reflected in the first part of the *Vaughn* index, NOAA withheld or redacted emails under Exemption 5 because they are protected by the deliberative process privilege. *See, generally, Vaughn* part 1. These records are inter-agency or intra-agency communications. The bulk of this information reflects the predecisional and deliberative exchange of ideas and recommendations among scientists within and outside NOAA as NOAA scientists developed and edited the Hiatus Paper or discussed the underlying analysis of the datasets for purposes of developing the paper. The information also includes communications among NOAA personnel carrying out related agency deliberations such as development of public communications and presentations to Congress. The communications are, unless otherwise indicated, among NOAA personnel and reflect agency deliberations or input to agency determinations. These deliberations were in preparation for agency decisions, including how to analyze and present the data and interpretation. A relatively small number of the deliberative communications reflect input from non-federal scientists who were contacted either by one of the authors or by the journal *Science* to provide feedback and input on the Paper. These non-federal scientists provided NOAA's scientists input for the agency's ongoing processes of developing the Hiatus Paper, as well as providing input for the agency's potential updating of underlying datasets and analysis based on those datasets. Additionally, one scientist provided input to inform the agency's development of a communications plan for the paper.

51. In addition to the emails redacted or withheld, NOAA withheld drafts of the Hiatus Paper. *See Vaughn* part two Category A. These documents are inter-agency or intra-agency drafts. This category includes the drafts of the “supplementary materials” that accompanied the Hiatus Paper and were made available for download by *Science* upon publication of the Paper. Category A in the *Vaughn* Index sometimes lists the draft paper text, figures and supplementary materials as one entry and sometimes separately. These were pre-decisional drafts that contained the 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 expert reviewers’ comments on earlier drafts of the paper. Disclosure of deliberative draft documents that were not ultimately finalized or adopted by NOAA risks confusing the public concerning NOAA’s position and also risks data or statements being taken out of context. Disclosure of these deliberative draft materials would also seriously undermine the quality and integrity of NOAA’s decisionmaking process, by deterring NOAA staff or experts outside the agency who are collaborating in development of the agency’s work from expressing their candid views on the development of data analysis and presentation.

52. NOAA also withheld documents that contain questions for discussion and draft graphs that were circulated by an author and created for author discussions during the development of the Hiatus Paper. *See Vaughn* part two Category E. These records are inter-agency or intra-agency documents. These documents are deliberative and pre-decisional, as they

reflect NOAA scientists' deliberations as to what constitutes the best data analysis and presentation for the Hiatus Paper.

53. NOAA also withheld drafts of a cover letter from Tom Karl to *Science* magazine in response to peer review comments. *See Vaughn* part two Category B. These records are inter-agency or intra-agency drafts. These drafts are predecisional and deliberative in that they include discussions and exchanges among authors in determining what to include, and how to present, their formal letter to accompany their peer review responses. The draft cover letters to *Science* contain edits or otherwise do not include the final wording of the letter, reflecting that the scientists' approach had not been finalized at that point.

54. NOAA also withheld draft responses to peer reviewers enlisted by *Science* as part of that journal's peer review process. *See Vaughn* Index part two Category C. These records are inter-agency or intra-agency drafts. These drafts reflect pre-decisional discussions and proposed responses to peer review comments. The drafts contain opinions and recommendations of one or more NOAA authors; draft language, data, and data interpretation for consideration by other authors; comments on previous drafts of the responses to peer reviewers; and/or responses to other authors' comments on earlier drafts of the responses to peer reviewers. These drafts helped the NOAA authors determine how best to respond to comments provided during the peer review process initiated by the submission of the Hiatus Paper to *Science* for potential publication. These documents are internal, pre-decisional drafts that reflect the view of NOAA authors as to how to present their response to peer review feedback.

55. NOAA also withheld the final responses to peer reviewers enlisted by *Science* as part of that journal's peer review process. See *Vaughn* Index Part 2 Category D. These records are inter-agency or intra-agency documents. These documents are predecisional and deliberative because they are responses to constructive criticism and advice submitted by scientific experts as part of the confidential peer review process for papers submitted to scientific journals. The responses were submitted as part of a process to assist in the authors' deliberations regarding whether and in what form to publish the paper. Confidentiality is important to the peer review process, and disclosure of the responses to peer reviews would discourage the sharing of candid thoughts of both the reviewers and of the scientists.

56. In addition to this formal peer review, NOAA's authors also welcomed the assistance of informal peer review from a limited group of scientific experts in evaluating the underlying datasets and developing the Hiatus Paper. It is common for NOAA scientists to seek input from other qualified experts to get a second opinion on a working hypothesis or to provide expertise that an author's affiliated organization may lack. Sometimes those scientists are employed outside the federal government, but they share the common goal with NOAA of advancing scientific inquiry and developing accurate information on climate science.

57. This collegial relationship and shared goals lays the groundwork for an author to reach out for the kind of honest, confidential feedback necessary to formulate a sustainable, justified scientific conclusion.

58. Each of these scientists who offered their assistance is highly regarded in their specialized fields. Their prior work represents a portion of the prior published literature on the

alleged hiatus. Some of those works were consulted by the team in developing the “hiatus” paper and were cited as references in it.

59. One of the outside scientists who contributed (and is listed in the “Acknowledgements” section of the Hiatus Paper) is Dr. Gerald (Jerry) A. Meehl, an affiliate with the National Center for Atmospheric Research (NCAR), which is a National Science Foundation Federally Funded Research and Development Center. *See* <https://www2.ucar.edu/about-us/quick-facts>. In November 2014, Director Karl emailed Dr. Meehl and invited him to comment on drafts of the paper, and he provided insights and feedback in response. *See* Bates 66 (11/27/14) (released).

60. If a paper is expected to get an unusual amount of attention, a journal may seek pre-publication reactions from experts in the field outside of that journal’s formal peer review process. On occasion, those experts who are contacted by the journal will then directly communicate with the author(s) of the article and share their thoughts on the article.

61. These communications provide important feedback to the authors on the Hiatus Paper and often provide information, relied upon by NOAA, about the external expert’s own related recent or ongoing work. These communications provide input to the continuous, ongoing work to update and improve datasets and trend analyses, as described in Paragraphs 5 through 7.

62. One outside scientist who provided input (and is cited in the references for the Hiatus Paper) is Dr. Kevin E. Trenberth, who (like Dr. Meehl) is also affiliated with the NCAR. Dr. Trenberth was contacted for his expertise by a journalist prior to publication of the Hiatus Paper and asked to provide comment on the paper. Dr. Trenberth then contacted Director Karl

by email to provide feedback and discuss implications of the conclusion in light of other literature. *See* Bates 379 (6/1/15). As discussed in paragraph 61, above, this type of input provides important feedback and also helps inform the continuous, ongoing work to update and improve datasets and trend analyses. In part, this information was also provided to inform NOAA in its deliberations as it formulated its public communications messaging for the Hiatus Paper. *See* Bates 381-382 (6/1/15).

63. Last, Dr. Kevin Cowtan, who is affiliated with the University of York in the United Kingdom, is an outside scientist who contacted Dr. Boyin and Director Karl, after being contacted by a writer at *Science* who was seeking comment on the paper before publication, during the embargo period. *See* Bates 292-293 (6/2/15). Those emails indicate that all participants understood and respected that there was an embargo on publicly disseminating or discussing the work until it was officially released on June 4. *See, e.g.*, Bates 295 (6/2/15). Director Karl indicated in an email that he would like to continue to review and incorporate Dr. Cowtan's work in NOAA's ongoing work. *See* Bates 295-296 (6/2/15). As discussed in paragraph 61, above, this type of input provides important feedback and also helps inform the continuous, ongoing work to update and improve our datasets and trend analyses.

64. Disclosure of any of this information that is pre-decisional and deliberative would inhibit candid internal discussions and expressions of ideas, recommendations, criticism, and judgments regarding the development of scientific theories and presentations of information to the public and to Congress. Disclosure of the details of these confidential discussions, drafts, and responses, could reasonably be expected to chill the open and frank exchange of comments

and opinions that occurs between NOAA scientists and a limited group of qualified outside experts at such times. It would also inhibit candid internal discussions and the expression of recommendations and judgments regarding preferred courses of action for agency personnel.

65. To the extent the redacted or withheld information contains some factual material, the authors' selection and presentation of that factual material reflects the agency's deliberative process and is therefore protected from disclosure. Singling out a particular data point in the course of a deliberative discussion reflects a preliminary judgment or argument rather than an assertion of scientific fact. There is a risk of misconstruing or taking out of context an instance where one piece of information has been singled out for purposes of an informal discussion.

66. With regard to information withheld pursuant to exemption (b)(6), NOAA has determined that the individual privacy interests outweighed the public interest in disclosure.

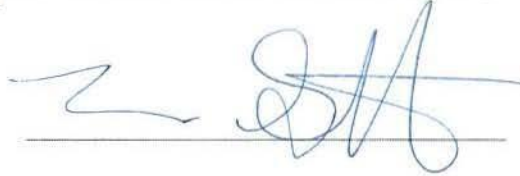
67. I am further satisfied that NOAA has reasonably concluded that there was no additional non-exempt, responsive information that could be reasonably segregated and released to the plaintiff.

IV. CONCLUSION

In summary, the Department conducted thorough searches of all components that were reasonably likely to maintain responsive records and withheld only reasonably segregable information under exemption (b)(5) and (b)(6). Additionally, the search was reasonably calculated to uncover all relevant documents, and there are no known locations where additional, non-duplicative, responsive material is likely to be found.

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 4th day of December, 2016, Silver Spring, Maryland.

A handwritten signature in blue ink, consisting of a stylized 'M' followed by a large, looped 'G' and 'A'.

Mark H. Graff

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

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant U.S. Department of Commerce hereby moves for summary judgment on all of Plaintiff's claims. This motion is supported by a statement of material facts as to which there is no genuine issue, a memorandum of points and authorities, the Declarations of Mark Graff and Dr. Richard Spinrad, and a *Vaughn* index. A proposed order is attached.

Dated: December 15, 2016

Respectfully submitted,

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

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

In this Freedom of Information Act (“FOIA”), Plaintiff Judicial Watch requested from the National Oceanographic and Atmospheric Administration (“NOAA”), a component of the Department of Commerce, records relating to different temperature metrics and datasets.¹ The parties conferred and reached an agreement regarding the scope of the request and relevant search parameters. Using those agreed-upon parameters, NOAA conducted a search and ultimately produced responsive, non-exempt material.

Plaintiff now challenges the adequacy of NOAA’s search and all of its redactions and withholdings. But as discussed more fully herein, NOAA conducted a search that was reasonably calculated to locate all non-duplicative records in its possession responsive to Plaintiff’s request. Moreover, all of the challenged information and records that NOAA withheld were properly exempt from production. The Court should therefore grant summary judgment in favor of the Department of Commerce.

FACTUAL BACKGROUND

I. The Hiatus Paper

The FOIA request at issue centers around a June 4, 2015 study authored by NOAA scientists and published in the journal *Science* entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Hiatus Paper” or “the Paper”). Between September 2013 and November 2014, the Intergovernmental Panel on Climate Change (“IPCC”) released a report in stages that concluded that the upward global surface temperature trend from 1998-2012

¹ The FOIA request also sought communications between NOAA and the House of Representatives Committee on Science, Space, and Technology. The agency made a separate production of these records, which Plaintiff’s counsel indicated in writing that Plaintiff did not intend to challenge. Therefore, this motion for summary judgment and accompanying documents do not address the agency’s response to that aspect of the request.

was lower than that from 1951-2012. Declaration of Mark Graff (“Graff Decl.”) Decl. ¶ 9 (attached herein as Exhibit A). The apparent observed slowing of the global surface temperatures was dubbed the “hiatus.” *Id.* The Hiatus Paper, drafted after that report by a team of NOAA scientists, sought to properly account for the alleged “hiatus.”

NOAA’s National Centers for Environmental Information (“NCEI”) produces and maintains datasets for global ocean areas and global land areas. *Id.* ¶ 6. Scientists throughout the government, including scientists at agencies other than NOAA, and outside of the government, use the sea surface temperature and land surface temperature datasets for a variety of purposes, including for climatic research and climate assessments. *Id.* NCEI scientists continually work to improve the datasets to provide the public the most up-to-date and accurate information. *Id.* There were two significant developments related to the “hiatus” after the IPCC’s report. In particular, 2013 and 2014 were two of the five warmest years on record for the globe. *Id.* ¶ 10. Also, NOAA scientists made significant improvements to its sea surface temperature dataset, one of largest being a correction that accounted for the difference in data collected from ships and buoys. *Id.* Buoys have been increasingly used since the 1970s to measure sea surface temperatures, and scientists developed a method to correct for the difference between these two observing systems and incorporated those corrections into the dataset. *Id.*

NCEI scientists regularly interpret and analyze datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. *Id.* ¶ 7. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data. *Id.* ¶ 8.

Around late October 2014, Tom Karl, then the Director of NCEI, circulated a draft paper to a group of NOAA scientists that developed an idea for properly accounting for the alleged “hiatus” based on the additional two years of global temperature data and the improvements to

NOAA's sea surface temperature dataset. *Id.* ¶ 11. Karl sought feedback on the draft paper, and a team of scientists at NOAA worked to develop a manuscript. *See id.* ¶¶ 11-13. Many drafts and revisions were exchanged among these scientists, along with emails discussing various aspects of the paper or its content, including suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on the implications of other researchers' work, and so on. *Id.* ¶ 13. Such collaboration via discussions and drafts is standard practice at NCEI. *Id.* ¶ 13.

In December 2014, the authors submitted the draft paper to the journal *Science*. *Id.* ¶ 14. Once there, the draft paper went through the journal's peer review process, in which five anonymous peer reviewers weighed in on the manuscript. *Id.* ¶ 20. When the authors received feedback, they discussed internally how to respond in writing to the comments they received, and also revised the manuscript to address the questions and concerns raised. *See id.* ¶ 21. After a second round of peer review, NOAA received word that the article would be published, and *Science* published the Paper on its website on June 4, 2015. *Id.* ¶ 23.

II. The FOIA Request and NOAA's Response

Plaintiff's FOIA request, dated October 30, 2015, sought in relevant part:

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.

Graff Decl. ¶ 24; *see also* Answer, ECF No. 8-1.

Upon review of the request, NOAA officials determined that it did not reasonably describe the records requested. Graff Decl. ¶ 25. Through counsel, NOAA conferred with Plaintiff to negotiate a clear description of the material sought. *Id.* During the course of those discussions, NOAA indicated to Plaintiff that it understood the request to reflect an interest in the Hiatus Paper and accordingly suggested modifying the request to call for a search for all documents and communications referring to the Hiatus Paper from its nine authors. *Id.* ¶ 26. Plaintiff confirmed its interest in that study, but indicated that it sought only records referring to the topics listed in its initial FOIA request. *Id.*

The parties ultimately “reached an agreement regarding the scope of the request and relevant search parameters.” Second Joint Status Report, ECF No. 10 at 2. For Plaintiff’s FOIA request, NOAA agreed to search the records of the nine authors of the Hiatus Paper for records referring to that paper and that contain one of the following search terms: “NMAT,” “Night Marine Air Temperatures,” “ISTI,” “ICOADS,” “sea ice,” “satellite,” “Advanced Very High Resolution Radiometer,” “AVHRR,” “Advanced Microwave Scanning Radiometer,” and “AMSR.” *Id.*; Graff Decl. ¶ 27.

After NOAA directed those custodians to run the agreed-upon searches, it made a production on May 27, 2016 of 102 pages of material in its entirety and 90 partially redacted pages. *See* Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2. NOAA withheld in their entirety 8,013 pages of records, and informed Plaintiff that because it sought records from nine separate custodians, a significant amount of duplicative material existed in the responsive records. *See* Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12. The parties then

discussed the details of potential challenges to NOAA's production, and NOAA agreed to provide Plaintiff a draft *Vaughn* index in an attempt to narrow the issues in dispute. *See* Fifth & Sixth Joint Status Report, ECF Nos. 13 & 14. Upon further review of the withheld information, on September 16, 2016, NOAA released to Plaintiff an additional 44 pages of material (7 of those pages were partially redacted to exclude Mr. Karl's cell phone number), Graff Decl. ¶ 30, and contemporaneous with this filing on December 15, 2016, NOAA released an additional 62 records, Graff Decl. ¶ 31.

STANDARD OF REVIEW

A court reviews an agency's response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B). "FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). In deciding at the summary judgment stage whether an agency has fully discharged its obligations under FOIA, "the agency must show, viewing the facts in the light most favorable to the requester, that there is no genuine issue of material fact." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

ARGUMENT

I. NOAA's Search Was Reasonable, Adequate, and Satisfies Its Obligation Under the FOIA

A. The Standard for an Adequate Search

The touchstone for determining whether an agency should prevail on a motion for summary judgment in FOIA litigation is whether the agency demonstrates that its "search for documents was adequate." *Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009). An agency's search is adequate if "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. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The adequacy of a FOIA

search is thus gauged “not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.” *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (quoting *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)). In short, “[t]he adequacy of the search . . . is judged by a standard of reasonableness.” *Steinberg*, 23 F.3d at 551; *see also DiBacco v. U.S. Army*, 795 F.3d 178, 194–95 (D.C. Cir. 2015) (“A search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.” (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986))).

“In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith.” *Id.* (quoting *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). Such affidavits are sufficient if they “set[] forth the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials (if such records exist) were searched.” *Chambers v. U.S. Dep’t of Interior*, 568 F.3d 998, 1003 (D.C. Cir. 2009) (quoting *McCready v. Nicholson*, 465 F.3d 1, 7 (D.C. Cir. 2006)). This standard does not require that “the affidavits of the responding agency set forth with meticulous documentation the details of an epic search for the requested records.” *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). “Rather, in the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice” *Id.* Moreover, “[s]uch agency affidavits attesting to a reasonable search ‘are afforded a presumption of good faith,’ and ‘can be rebutted only with evidence that the agency’s search was not made in good faith.’” *Riccardi v. US Dep’t of Justice*, 32 F. Supp. 3d 59, 63 (D.D.C. 2014) (quoting *Def. of Wildlife v. U.S. Dep’t of Interior*, 314 F. Supp.2d 1, 8 (D.D.C. 2004)).

Finally, courts in this circuit recognize the “well-worn rule . . . that the adequacy of a FOIA search is not to be judged by its results.” *Rosenberg v. United States Dep’t of Immigration & Customs Enf’t*, 13 F. Supp. 3d 92, 104 (D.D.C. 2014). “The question is not ‘whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was *adequate*.’” *Steinberg*, 23 F.3d at 551 (quoting *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)) (emphases in original). Thus, courts have rejected challenges to the adequacy of a search, even when a “slim yield may be intuitively unlikely” and a “reasonable observer would find th[e] result[s] unexpected.” *Ancient Coin Collectors Guild*, 641 F.3d at 514. Moreover, “mere speculation that as yet uncovered documents might exist[] does not undermine the determination that the agency conducted an adequate search for the requested records.” *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004); *see also Sheffield v. Holder*, 951 F. Supp. 2d 98, 101 (D.D.C. 2013) (noting that a requester “cannot rest . . . on mere conjecture or ‘purely speculative claims about the existence and discoverability of other documents’” (quoting *Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 107 (D.D.C. 2005))).

B. NOAA Conducted an Adequate Search

As set forth in Mark Graff’s Declaration, NOAA’s search for records responsive to Plaintiff’s FOIA request was more than adequate. *See Perry*, 684 F.2d at 127. Judicial Watch and NOAA reached an agreement as to how the search would be carried out. The agency would search the records of the nine Hiatus Paper authors for any record referring to that study and containing the term “NMAT,” “night marine air temperatures,” “ISTI,” “ICOADS,” “sea ice,” “satellite,” “advanced very high resolution radiometer,” “AVHRR,” “advanced microwave scanning radiometer,” and “AMSR.” Graff Decl. ¶ 27; Second Joint Status Report at 2, ECF No.

10. The timeframe for the search would be October 1, 2014 to June 4, 2015. *Id.* NOAA determined that the records requested resided within one office, NCEI, because all of the agreed-upon custodians work or had worked there during the time frame in which responsive records were created. *Id.* ¶ 33. NOAA then directed those custodians to search their email, electronic, and paper files for records referring to the Karl Study and containing the agreed-upon search terms. *Id.* ¶ 35. Those scientists searched their electronic files (including email) and non-electronic files, collected any potentially responsive material, and forwarded that material for responsiveness and exemption review. *Id.* ¶¶ 36-38.² There were no common areas at NCEI for NOAA to search. *Id.* ¶ 37. Thus, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched. *Id.* ¶ 44.

On this record, NOAA's search should be upheld under FOIA. NOAA has provided "a reasonably detailed [declaration], setting forth the search terms and the type of search performed," and averred that all files likely to contain responsive, non-duplicative materials were searched. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F.2d at 68). NOAA has "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*, 920 F.2d at 68.

II. NOAA Properly Withheld Information Under Exemption 5

FOIA does not require disclosure of "matters that are . . . inter-agency or intra-agency memorandums or letters [which] would not be available by law to a party other than an agency in

² One custodian had retired from NCEI by the time the search was conducted and so that former employee's archived email was searched by another custodian. *See* Graff Decl. ¶ 36 n.1. No additional records responsive to this request from that author are known to have existed following his retirement. *See id.*

litigation with the agency.” 5 U.S.C. § 552(b)(5). “Exemption 5 . . . exempt[s] those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 thus protects the attorney-client privilege, the attorney work product privilege, and the deliberative process privilege. *Id.*; see also *Rockwell Int’l Corp. v. Dep’t of Justice*, 235 F.3d 598, 601 (D.C. Cir. 2001).

The deliberative process privilege “allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). According to the D.C. Circuit,

There are essentially three policy bases for this privilege. First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that officials should be judged by what they decided, not for matters they considered before making up their minds.

Russell v. Dep’t of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (quoting *Jordan v. Dep’t of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978)).

The privilege is necessary because “those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process.” *Sears*, 421 U.S. at 150-51. “[E]fficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to ‘operate in a fishbowl.’” *EPA v. Mink*, 410 U.S. 73, 87 (1973), *abrogated on other grounds*, Pub. L. No. 93-502, 88 Stat. 1561 (1974). There are “[t]wo requirements [that] are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative.” *In re Sealed Case*, 121 F.3d at 737.

The agency is best situated “to know what confidentiality is needed ‘to prevent injury to the quality of agency decisions.’” *Chem. Mfrs. Ass’n v. Consumer Prod. Safety Comm’n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *Sears*, 421 U.S. at 151). NOAA’s justification for asserting Exemption 5 is “sufficient if it appears ‘logical’ or ‘plausible.’” *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007).

Here, NOAA properly withheld information under Exemption 5 that is protected by the deliberative process privilege because the information withheld reflects deliberations in preparation for decisions of how to analyze and present data and theory, as well as decisions about how to respond to peer review comments and deliberations on developing public communications and congressional presentations. *See* Graff Decl. ¶¶ 50-63. Disclosure of such information, which is predecisional and deliberative, and contains selected factual material intertwined with opinion, would inhibit candid internal discussions and the expression of recommendations and judgments. *Id.* ¶ 64. Disclosure of the details of these confidential discussions and drafts could reasonably be expected to chill the open and frank exchange of comments and opinions that NOAA officials engage in, as well as inhibit candid internal discussions and recommendations regarding preferred courses of action for agency personnel. *Id.*

The documents withheld in full or in part under the deliberative process privilege fall generally into three categories: (1) drafts of the Hiatus Paper; (2) internal deliberations, including email exchanges; and (3) peer review materials, both formal and informal. As explained below and in the attached *Vaughn*, each redacted or withheld document contains both predecisional and deliberative information. Accordingly, NOAA properly asserted Exemption 5 based on the deliberative process privilege.

1. Drafts of the Hiatus Paper

NOAA withheld pursuant to Exemption 5 inter- or intra-agency, predecisional, and deliberative draft versions of the Hiatus Paper (including drafts of its accompanying figures and “supplementary materials”) that were produced while NOAA scientists were developing the Paper. Graff Decl. ¶ 51.³ “[D]raft documents by their very nature, are typically predecisional and deliberative, because they reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.” *In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 31 (D.D.C. 2008) (non-FOIA case) (citation omitted). Accordingly, “drafts are commonly found exempt under the deliberative process exemption.” *People for the Am. Way Found. v. Nat’l Park Serv.*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007). Among other reasons for this, disclosure of “decisions to insert or delete material or to change a draft’s focus or emphasis . . . would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work.” *Dudman Commc’ns Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987). Indeed, drafts are ordinarily exempt regardless of whether or to what extent segments of the draft made their way into the final product: “If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process: for some reason, the agency decided not to rely on that fact or argument after having been invited to do so.” *Exxon Corp. v. Dep’t of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983) (quoting *Lead Industries Ass’n v. OSHA.*, 610 F.2d 70, 86 (2d Cir. 1979)); see *ViroPharma Inc. v. HHS*, 839 F. Supp. 2d 184, 193 (D.D.C. 2012) (“The choice of what factual

³ The fact that some draft versions were shared for peer review purposes outside of the federal government does not affect those drafts’ status as inter- or intra-agency. See *infra* at Section II.3.

material . . . to include or remove during the drafting process is itself often part of the deliberative process, and thus is properly exempt under Exemption 5.”); *cf. Marzen v. HHS*, 825 F.2d 1148, 1155 (7th Cir. 1987) (noting that privilege “protects not only the opinions, comments and recommendations in the draft, but also the process itself”).

These drafts are predecisional inasmuch as they were generated to assist the agency in preparing the final version of the Hiatus Paper. *See Quarles v. Dep’t of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (explaining that materials are predecisional when “prepared in order to assist an agency decisionmaker in arriving at . . . decisions”). And they are deliberative in that they reflect the development of the final paper; these non-final, predecisional drafts contain opinions and recommendations of the 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 peer reviewers’ comments on earlier drafts of the paper. *See* Graff Decl. ¶ 51; *Vaughn* part 2 Category A. Withholding this material under Exemption 5 was proper, and the release of such drafts would inhibit agency scientists from expressing their views and deter NOAA scientists from participating candidly in the development of scientific products in the future. *See* Graff Decl. ¶ 51.⁴

2. Communications Among NOAA Personnel

Also integral to the drafting of the Hiatus Paper, the authors frequently communicated and exchanged ideas with one another via email during the Paper’s development. Here, NOAA

⁴ Equally appropriate, NOAA’s *Vaughn* also shows that the agency withheld draft documents that aided in or related to the development of the Paper, such as “[d]raft graphs of land and ocean temperature data created by NOAA scientists to be used in the paper,” *Vaughn* part 2 at bates pages 1170-73, “[d]raft graphs and charts of SST data to be used in [the] development of the paper,” *Vaughn* part 2 at bates pages 2071-76, and a “[d]raft powerpoint by [an] author presenting information on global temperature and presenting data analysis done by NOAA scientists for the paper,” *Vaughn* part 2 at bates pages 1876-86.

withheld inter- or intra-agency, predecisional, and deliberative communications. *See* Graff Decl. ¶ 50. In pursuing a research objective, scientists may begin with only a rough idea, and then develop, test, and revise that idea as data is collected and interpreted. Declaration of Richard W. Spinrad (“Spinrad Decl.”) ¶ 14 (attached herein as Exhibit B). Possible interpretations are generated and tested in part through candid debates and exchanges among peers. *Id.* ¶ 15. Indeed, the exchange and debate among peers is the mechanism that allows NOAA to ensure its scientific products are robustly developed and accurately tested. *Id.* ¶ 16. And there is a general and well-established presumption that such discussions are not intended to be, and will not be, shared with a wider audience, as confidentiality is essential to ensuring participants feel free to propose new ideas or explanations without fear of misinterpretation or being taken out of context. *Id.* ¶ 20. It is critical that this type of information be protected so as not to chill candid exchanges and debates, as well as to avoid the risk of confusing the public with preliminary or incomplete information. *See id.* ¶¶ 23-25.

NOAA’s *Vaughn* index reinforces that these types of predecisional and deliberative communications occurred here, were integral to the development of the Hiatus Paper, and were appropriately withheld or redacted. *See Abteu v. U.S. Dep’t of Homeland Sec.*, 808 F.3d 895, 898 (D.C. Cir. 2015) (“[O]fficials should be judged by what they decided, not for matters they considered before making up their minds” (citation and internal quotation mark omitted)). For example, NOAA is redacting or withholding communications between scientists in which authors asked for clarification on data analysis conducted for developing the Paper, *Vaughn* part 1 at bates pages 22-23, shared opinions on the results of a draft data analysis for developing the Paper, *Vaughn* part 1 at bates page 15, offered opinions as to the best approach to take in the Paper, *Vaughn* part 1 at bates pages 300, 335, 362-63, and provided opinions on statistical error

uncertainty ranges for development of the Paper, *Vaughn* part 1 at bates page 245. Moreover, NOAA withheld a document that presented questions and draft graphs to spur discussion among the NOAA scientists. This document was created and circulated for the purpose of author discussions during the development of the Hiatus Paper, and shows NOAA scientists considering what constitutes the best data analysis and presentation for the Paper. *See Vaughn* part 2 Category E; Graff Decl. ¶ 52.⁵

In addition to withholding communications concerning the development of the Hiatus Paper, NOAA also withheld communications and information reflecting the development of a plan by its officials for communications and press release in preparation for publication of the paper, *e.g. Vaughn* part 1 at bates page 289-90, *Vaughn* part 2 at bates page 7446-50, as well as the agency's development of a presentation to Congress, *e.g., Vaughn* part 1 at bates pages 143, 324 (explaining that redacted email reflected "NOAA scientist discussing climate change research and developing the agency's presentation for Congress"). This withheld information, which reflects NOAA's development of how to brief Congress and the public, is predecisional and deliberative and falls squarely within Exemption 5. *E.g., Judicial Watch, Inc. v. U.S. Dep't of the Treasury*, 796 F. Supp. 2d 13, 31 (D.D.C. 2011) (noting email discussing response to press inquiry protected under deliberative process privilege).

All of this material is precisely the sort of information that the deliberative process privilege is designed to protect. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854,

⁵ Similarly, NOAA withheld information reflecting discussions among scientists concerning potential scientific inquiries. *See, e.g., Vaughn* part 1 at bates page 75 (discussing future climate research and asking for opinion on this research and on possible role of NOAA scientists in this research). Again, such material is predecisional and deliberative, and therefore is exempt from disclosure. *E.g., Sears*, 421 U.S. at 151 n.18 (explaining that protection extends to records that are part of decisionmaking process even where process does not produce actual decision by agency).

866 (D.C. Cir. 1980) (document is “predecisional” if it is “generated before the adoption of an agency policy” and “deliberative” if it “reflects the give-and-take of the consultative process”); *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 9 (2001) (explaining that deliberative process privilege’s “object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government”) (citation omitted); *Russell*, 682 F.2d at 1048 (“[T]he exemption protects not only communications which are themselves deliberative in nature, but all communications which, if revealed, would expose to public view the deliberative process of an agency.”). Moreover, any factual material in the withheld documents reflect the authors’ selection and presentation of factual material, Graff Decl. ¶ 65, and as such it too is covered by the deliberative process privilege. *See, e.g., Ancient Coin Collectors Guild*, 641 F.3d at 513 (explaining that factual material can be withheld where it reflects “an exercise of discretion and judgment calls” and that the “legitimacy of [the] withholding” turns on “whether the selection or organization of facts is part of an agency’s deliberative process”).

Because all of the redacted and withheld information is inter- or intra-agency, predecisional, and deliberative in nature, NOAA properly applied Exemption 5.

3. Peer Review Material

NOAA also withheld inter- or intra-agency material reflecting the different peer review processes its analyses and drafts underwent prior to publication of the Hiatus Paper. *Science* follows a formal peer review process in which subject matter experts evaluate the rigor and merit of the paper, and provide feedback on an array of issues. Graff Decl. ¶ 15. Those anonymous, impartial reviewers share their reviews with the authors, *Science*’s board, and potentially other reviewers (for cross-comment). *Id.* ¶ 17.

Here, *Science* sent the manuscript to five anonymous peer reviewers, and the scientists received two rounds of comments. Upon receiving these reviewers' comments, the NOAA scientists deliberated internally as to how to respond in writing to every comment received. NOAA properly withheld peer reviewer comments, the agency's internal draft responses to these peer reviewer comments, draft cover letters NOAA's scientists wrote to accompany their response, as well as the agency's final responses to peer reviewer comments. See Graff Decl. ¶¶ 53-54; *Vaughn* part 2 Category B, C, D.

The D.C. Circuit has specifically held that comments provided by peer reviewers during the peer review process for publication of scientific articles in scientific journals are covered by Exemption 5 because they are both "pre-decisional because it preceded the agency's decision whether and in what form to publish" the paper and were part of the agency's deliberative process "because the agency secured review commentary in order to make that decision." See *Formaldehyde Inst. v. U.S. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1123-25 (D.C. Cir. 1989). As that Court recognized, agency scientists "must regularly rely on the comments of expert scientists to help them evaluate the readiness of agency work for publication [and i]n that sense they must rely on the opinions and recommendations of temporary consultants." *Id.* at 1125.

The scientists' draft responses to the peer reviewer comments are also covered by Exemption 5 since these materials, including personal opinions and recommendations, draft language, data, and data interpretation for consideration, as well as comments on previous drafts of the responses, reflect predecisional and deliberative discussions. See *Vaughn* part 2 Category C; Graff Decl. ¶ 54. Similarly, the final responses to peer review comments that NOAA submitted to *Science* during the peer review process reflect the agency's response to constructive

criticism and advice, and were part of the process to assist in the authors' deliberation as to whether and in what form to publish the paper. *See Vaughn* part 2 Category D; Graff Decl. ¶ 55. These final responses, then, fit comfortably within Exemption 5. *See Petroleum Info. Corp.*, 976 F.2d at 1434 (agency documents that were "prepared in order to assist an agency decisionmaker in arriving at his decision" are "predecisional" (citation omitted)); *Coastal States Gas Corp.*, 617 F.2d at 866. Finally, the draft cover letters to *Science* accompanying the scientists' responses to the peer review comments contain edits or otherwise do not include the final wording of the letter, reflecting that the scientists' final approach had not been finalized at that point. *Vaughn* part 2 Category B; Graff Decl. ¶ 53. Withholding such draft material was appropriate.

The fact that the peer review comments were sent by *Science*, and the responses to those peer reviewer comments were sent back to *Science*, does not affect their status as "intra-agency" materials that may be protected by Exemption 5. "Recognizing that the purpose of the exemption was to promote the quality of agency policy decisions and that often these policy decisions were best made by incorporating the advice of outside experts, [the D.C. Circuit] developed a 'consultant corollary' whereby communications with temporary consultants would be considered 'intra-agency' for the purposes of Exemption 5." *Judicial Watch v. U.S. Dep't of Transp.*, 950 F. Supp. 2d 213, 216 (D.D.C. 2013) (citing cases). "When communications between an agency and a non-agency aid the agency's decision-making process and the non-agency did not have an outside interest in obtaining a benefit that is at the expense of competitors, the communication must be considered an intra-agency communication for the purposes of FOIA Exemption 5." *Judicial Watch*, 950 F. Supp. 2d at 218-19 (citing *Nat'l Inst. of Military Justice v. U.S. Dep't of Defense*, 512 F.3d 677 680-85 (D.C. Cir. 2008) ("*NIMJ*"); *Lardner v. U.S. Dep't of Justice*, No. 03-0180, 2005 WL 758267, at *1 (D.D.C. Mar. 31, 2015);

see also, e.g., Hooker v. HHS, 887 F. Supp. 2d 40, 55 (D.D.C. 2012) (upholding agency’s withholding of predecisional and deliberative letter from former employee where he “played the same role in the agency’s process of deliberation after his departure that he would have played had he remained”), *aff’d*, No. 13-5280, 2014 WL 3014213 (D.C. Cir. May 13, 2014); *see also Elec. Privacy Info. Ctr. v. DHS*, 892 F. Supp. 2d 28, 46 (D.D.C. 2012) (“In order to be excluded from the exemption, the contractors must assume a position that is ‘necessarily adverse’ to the government.”).⁶

Moreover, maintaining the confidentiality of these communications is important, as disclosure would discourage the sharing of candid thoughts of the reviewers and scientists. Graff Decl. ¶ 55, 64; *see also* Spinrad Decl. ¶¶ 20-21 (explaining importance of confidentiality in developing scientific products). Here, as in *Formaldehyde*, it is “indisputable” that both “reviewers’ comments are expected to be confidential” and “disclosure of reviewers’ comments would seriously harm the deliberative process.” 889 F.2d at 1124 (internal citations and quotations omitted).

Outside of *Science*’s formal peer review process, NOAA scientists welcomed the informal peer review from a limited number of consultants in evaluating the underlying datasets

⁶ *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), holding that Exemption 5 did not protect documents submitted by American Indian Tribes to the Interior Department addressing tribal interests that were then the subject of state and federal water allocation proceedings, does not prevent the application of the consultant corollary here. Rather, the D.C. Circuit “has allowed any communication that aids the agency’s deliberative process to be protected as ‘intra-agency,’” and “*Klamath* only modifies this by requiring that we not protect communications with interested parties seeking a government benefit that is adverse to others seeking that benefit.” *Judicial Watch*, 950 F. Supp. 2d at 218 (footnote omitted).

Also, to fall within the consultant corollary, there is no requirement that an individual must possess a contractual relationship with the agency in question. *See, e.g., NIMJ*, 512 F.3d at 679-87 (deliberative process privilege exempted from disclosure comments received by Department of Defense, in the course of issuing regulations, from non-governmental lawyers who were former high ranking governmental officials or academics or both).

and developing the Hiatus Paper. Graff Decl. ¶ 56; *see also Formaldehyde Inst.*, 889 F.2d at 1125. In the field of climate science, only a small number of scientists have the relevant, specialized expertise, *see* Spinrad ¶ 17, and it is common for scientists to seek input from colleagues both inside and outside the federal government, *id.* ¶ 19. Sometimes experts that are located outside of the federal government have an expertise that can aid the agency. *See id.* ¶ 17. The consultants here, each of whom is highly regarded in his specialized field, Graff Decl. ¶ 58, share the common goal with NOAA of advancing scientific inquiry and developing accurate information on climate science, *see id.* ¶ 56; *see also Formaldehyde*, 889 F.2d at 1122, quoting *Ryan v. Dep't of Defense*, 617 F.2d 781, 789-90 (D.C. Cir. 1980) (“In the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.”).

As the *Vaughn* and Mark Graff’s declaration make clear, withholding this informal peer review was also appropriate, as their input was used by NOAA to ensure that only the highest quality scientific product would be released. Tom Karl, for example, asked a scientist affiliated with the National Center for Atmospheric Research to comment on a draft while the paper was in development, and that scientist provided insights and feedback in response. Graff Decl. ¶ 59; *Vaughn* part 1 bates 66-67 (explaining redacted information contained feedback and review of a data analysis for the paper and raises issue for further discussion). Other climate science experts responded to the authors upon learning from *Science* of the pending publication, as commonly occurs after an author submits a high-profile scientific paper for publication. *See* Graff Decl. ¶ 60. Two other experts provided feedback on the Paper, discussed implications of the Hiatus

Paper's conclusion, or provided and discussed data analyses, Graff Decl. ¶¶ 62-63, *Vaughn* part 1 at bates 292-93, which helped provide important feedback about the agency's product and informed the agency's continuous, ongoing work of updating agency datasets and trend analyses, Graff Decl. ¶¶ 62-63; *see Vaughn* part 1 at bates 295-96 (noting that expert's work may be incorporated into a future NOAA analysis). With respect to these types of communications, a general and well-established presumption exists that these communications will not be shared with a wider audience, which is essential to scientific exchanges and the testing and refinement of ideas that help ensure that the agency's scientific products are well developed and robust. *See Spinrad* Decl. ¶ 20. Disclosing this material could inhibit candid discussions and exchanges and chill the open and frank exchanges upon which NOAA scientists rely. *See Graff* Decl. ¶ 64.

In sum, NOAA's *Vaughn* and declarations make plain that the agency appropriately applied Exemption 5 to redact and withhold information protected by the deliberative process privilege.

III. NOAA Properly Withheld Information Under Exemption 6

Exemption 6 protects the privacy of individuals from unwarranted invasion. Exemption 6 allows the withholding of information about individuals in "personnel and medical files and similar files" when the disclosure of such information would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 6 requires the agency to balance the individual's right to privacy against the public's interest in disclosure. *See U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991). When weighing the public interest involved in disclosure, the court considers: (1) whether disclosure would serve the "core purpose" for which Congress enacted the FOIA. *i.e.*, to show "what the government is up to," and (2) the public interest in general, not particular interests of

the person or group seeking the information. *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 750, 775 (1989).

Here, Exemption 6 has been applied to protect information in which individuals have a recognized privacy interest, specifically, the phone numbers of NOAA scientists. *See, e.g., Vaughn* part 1 at bates 23. Because this information can be identified as applying to a specific individual, the information withheld under Exemption 6 constitutes “similar files” within the meaning of statute; courts have routinely held that phone numbers meet this threshold test. *See, e.g., Judicial Watch, Inc. v. U.S. Dep't of State*, 875 F. Supp. 2d 37, 47 (D.D.C. 2012); *Smith v. Dep't of Labor*, 798 F. Supp. 2d 274, 283 (D.D.C. 2011); *Lowy v. IRS*, No. C 10-767, 2011 WL 1211479, at *16 (N.D. Cal. Mar. 30, 2011).

This threshold test having been met, the next step is to compare the privacy interest at stake with the benefit disclosure would provide toward the public’s understanding of how government operates. *Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994). Here, there is a substantial privacy interest at stake in preventing the burden of unsolicited phone calls and harassment. *See Moore v. Bush*, 601 F. Supp. 2d 6, 14 (D.D.C. 2009); *United Am. Fin., Inc. v. Potter*, 667 F. Supp. 2d 49, 65-66 (D.D.C. 2009); *cf. Shurtleff v. EPA*, 991 F. Supp. 2d 1, 18 (D.D.C. 2013) (protecting email address). By contrast, an individual’s phone number sheds no light on the operations and activities of the agency. NOAA balances the individual’s strong privacy interests against the fact that release of this information would fail to shed any light on the conduct of governmental business, and reasonably concluded that, with regard to the information withheld pursuant to Exemption 6, the individual privacy interests outweighed any public interest in disclosure. Graff Decl. ¶ 66. *See FLRA*, 510 U.S. at 497 (“We must weigh the privacy interest . . . in nondisclosure . . . against the only relevant public interest in the FOIA

balancing analysis – the extent to which disclosure of the information sought would she[d] light on an agency’s performance of its statutory duties’ or otherwise let citizens know what their government is up to.”). Accordingly, Exemption 6 was properly applied.

IV. NOAA Has Produced All Reasonably Segregable Information

The FOIA requires that, if a record contains information that is exempt from disclosure, any “reasonably segregable” information must be disclosed after deletion of the exempt information, 5 U.S.C. § 552(b), unless the non-exempt portions are “inextricably intertwined with exempt portions.” *Mead Data Ctr. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Kurdyukov v. U.S. Coast Guard*, 578 F. Supp. 2d 114, 128 (D.D.C. 2008). This provision does not, however, require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat’l Sec. Archive Fund v. CIA*, 402 F. Supp. 2d 211, 221 (D.D.C. 2005) (concluding that no reasonably segregable information existed because “the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words”). Consistent with this obligation, NOAA has reviewed each of the documents redacted or withheld and has concluded that there is no additional non-exempt information that may reasonably be segregated and released. *See* Graff Decl. ¶ 67. Accordingly, no further non-exempt material is subject to release.

CONCLUSION

NOAA has conducted an adequate search for documents responsive to Plaintiff’s request, and properly withheld information exempt from disclosure under Exemptions 5 and 6. Furthermore, all reasonably segregable information has been released to Plaintiff. For these reasons, the Department of Commerce respectfully requests that summary judgment be entered in its favor.

Dated: December 15, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

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Counsel for Defendant

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

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

**STATEMENT OF MATERIAL FACTS IN SUPPORT OF UNITED STATES
DEPARTMENT OF COMMERCE’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Civil Rule 7(h)(1), the following is a statement of material facts as to which the movant, the United States Department of Commerce (“the Department”), contends there is no genuine issue:

1. Between September 2013 and November 2014, the Intergovernmental Panel on Climate Change released a report in stages that concluded that the upward global surface temperature trend from 1998-2012 was lower than that from 1951-2012. Declaration of Mark Graff (“Graff Decl.”) ¶ 9.
2. The apparent observed slowing of the global surface temperatures was dubbed the “hiatus.” Graff Decl. ¶ 9.
3. The National Centers for Environmental Information (“NCEI”) at NOAA produces and maintains datasets for global ocean areas and global land areas. Graff Decl. ¶ 6.
4. NCEI scientists continually work to improve the datasets to provide the public the most up-to-date and accurate information. Graff Decl. ¶ 5.

5. NCEI scientists regularly interpret and analyze datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. Graff Decl. ¶ 7.
6. On June 4, 2015, a study authored by NOAA scientists was published in *Science* entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Hiatus Paper” or “the Paper”). Graff Decl. ¶ 23.
7. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data. Graff Decl. ¶ 10.
8. Around late October 2014, Tom Karl, then the Director of NCEI, circulated a draft paper to a group of NOAA scientists that developed an idea for properly accounting for the alleged “hiatus” based on the additional two years of global temperature data and the improvements to NOAA’s sea surface temperature dataset. Graff Decl. ¶ 11.
9. Karl sought feedback on the draft paper, and a team of scientists at NOAA formed to develop a manuscript. *See* Graff Decl. ¶¶ 11-13.
10. Many drafts and revisions were exchanged among these scientists, along with emails discussing various aspects of the paper or its content, including suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on implications of other researchers’ work, and so on. Graff Decl. ¶ 13.
11. Such collaboration via discussions and drafts is standard practice at NCEI. Graff Decl. ¶ 13.
12. In December 2014, the authors submitted the draft paper to the journal *Science*. Graff Decl. ¶ 14.

13. Once there, the draft paper went through the journal's peer review process, in which five anonymous peer reviewers weighed in on the manuscript. Graff Decl. ¶ 20.
14. When the authors received feedback, they discussed internally how to respond in writing to the comments they received, and also revised the manuscript to address the questions and concerns raised. *See* Graff Decl. ¶ 21.
15. After a second round of peer review, NOAA received word that the article would be published, and *Science* published the Paper on its website on June 4, 2015. Graff Decl. ¶ 23.
16. Plaintiffs' FOIA request, dated October 30, 2015, sought in relevant part:
 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.Graff Decl. ¶ 24; *see also* ECF No. 8-1.
17. Upon review of the request, NOAA officials determined that it did not reasonably describe the records requested. Graff Decl. ¶ 25.
18. Through counsel, NOAA conferred with Plaintiff to negotiate a clear description of the material sought. Graff Decl. ¶ 25.

19. During the course of those discussions, NOAA indicated to Plaintiff that it understood the request to reflect an interest in the Hiatus Paper and accordingly suggested modifying the request to call for a search for all documents and communications referring to the Hiatus Paper from its nine authors. Graff Decl. ¶ 26.
20. Plaintiff confirmed its interest in that study, but indicated that it sought only records referring to the topics listed in its initial FOIA request. Graff Decl. ¶ 26.
21. The parties ultimately “reached an agreement regarding the scope of the request and relevant search parameters.” Second Joint Status Report, ECF No. 10 at 2.
22. For Plaintiff’s FOIA request, NOAA agreed to search the records of the nine authors of the Hiatus Paper for records referring to that paper and that contain one of the following search terms: “NMAT,” “Night Marine Air Temperatures,” “ISTI,” “ICOADS,” “sea ice,” “satellite,” “Advanced Very High Resolution Radiometer,” “AVHRR,” “Advanced Microwave Scanning Radiometer,” and “AMSR.” Second Joint Status Report, ECF No. 10 at 2; Graff Decl. ¶ 27.
23. NOAA determined that the records requested resided within one office, NCEI, because all of the agreed-upon custodians work or had worked there during the time frame in which responsive records were created. Graff Decl. ¶ 33.
24. NOAA then directed those custodians to search their email, electronic, and paper files for records referring to the Karl Study and containing the agreed-upon search terms. Graff Decl. ¶ 35.
25. Those scientists searched their electronic files (including email) and non-electronic files, collected any potentially responsive material, and forwarded that material for responsiveness and exemption review. Graff Decl. ¶¶ 36-38.

26. One custodian had retired from NCEI by the time the search was conducted and so that former employee's archived email was searched by another custodian. No additional records responsive to this request from that author are known to have existed following his retirement. *See* Graff Decl. ¶ 36 n.1.
27. There were no common areas at NCEI for NOAA to search. Graff Decl. ¶ 37.
28. Thus, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched. Graff Decl. ¶ 44.
29. On May 27, 2016, NOAA produced 102 pages of material in its entirety and 90 partially redacted pages. Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2. NOAA withheld in their entirety 8,013 pages of records. Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2
30. NOAA informed Plaintiff at that time that because it sought records from nine separate custodians, a significant amount of duplicative material existed in the responsive records. *See* Graff Decl. ¶ 29
31. Upon further review of the withheld information, NOAA made two supplemental productions. *See* Graff Decl. ¶¶ 30-31.
32. On September 16, 2016, NOAA released to Plaintiff an additional 44 pages of material (7 of those pages were partially redacted to exclude Mr. Karl's phone number), Graff Decl. ¶ 30.
33. Contemporaneously with this filing (on December 15), NOAA is releasing an additional 62 records. Graff Decl. ¶ 31.
34. NOAA withheld information pursuant to FOIA Exemption 5 and the deliberative process privilege. *See Vaughn Index.*

35. NOAA withheld information pursuant to FOIA Exemption 6. *See Vaughn* Index.

Dated: December 15, 2016

Respectfully submitted,

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ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

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Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, I filed the attached electronically with the Clerk of the United States District Court for the District of Columbia through the CM/ECF system, which caused the following counsel of record to be served by electronic means:

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Attorney for Plaintiff

/s/ Kevin M. Snell

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Friday, May 25, 2018 2:13 PM
To: Stacey Nathanson - NOAA Federal
Subject: JW Declaration
Attachments: Dkt. 16 - Motion for Summary Judgment.pdf; Dkt. 16 - 1 Graff Declaration.pdf

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

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

Exhibit A

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.)	
_____)	

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. Additionally, this declaration includes the search terms, locations and parameters agreed upon with the plaintiffs and utilized by those who conducted the search. 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 the Department of Commerce in the above-captioned lawsuit.

3. This declaration provides background information on the development of a paper entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* ("Hiatus Paper" or "the Paper"), which was published in June 2015 in the journal *Science* and is the focus of the FOIA request at issue in this case. It also explains NOAA's search for records responsive to Plaintiff's FOIA request and the FOIA exemptions applied in processing the responsive records. A *Vaughn* index (Exhibit 1) provides a detailed description of information withheld by NOAA and challenged by Plaintiff, as well as NOAA's basis for those withholdings.

I. BACKGROUND

4. The National Centers for Environmental Information (NCEI), located within the NOAA's National Environmental Satellite, Data, and Information Service (NESDIS), develops use-inspired datasets, products and reports that describe average weather conditions (and changes therein) over the United States and the globe. NCEI acts as the "Nation's Scorekeeper" regarding the trends and anomalies of weather and climate, focusing on essential climatic elements such as temperature and rainfall, as well as extreme events such as hurricanes and droughts.

5. NCEI produces and maintains datasets for global ocean areas and global land areas. Changes in surface temperature over long periods are studied using several datasets that are continuously maintained and updated. There are separate datasets for the ocean and the land, which are then merged to create a global dataset.

6. Scientists throughout the government, including at agencies other than NOAA and researchers outside of the government, use NOAA's temperature datasets for a variety of purposes, including for climatic research and climate assessments. NCEI scientists are continually working on improving these datasets to provide scientists and the public with the most up-to-date and accurate information.

7. NCEI scientists periodically interpret and analyze global datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. NCEI scientists use the most recent information from these datasets to propose new scientific theories and also re-evaluate earlier conclusions reached within the scientific community in light of new or updated data.

8. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data, work which is consistent with the mission of NOAA. Nine NOAA scientists contributed to this paper: Thomas Karl (the lead author), Dr. Anthony Arguez, Dr. Boyin Huang, Mr. Jay Lawrimore, Mr. James McMahon, Dr. Matthew Menne, Dr. Thomas Peterson, Dr. Russell Vose, and Dr. Huai-min Zhang. Thomas Karl is the former Director of NCEI. Jay Lawrimore, Dr. Russell Vose, and Dr. Huai-min Zhang are supervisory scientists at NCEI. Dr. Anthony Arguez and Dr. Matthew Menne are climate scientists at NCEI. Since the publication

of the paper, Dr. Thomas Karl and Dr. Thomas Peterson have retired, and Mr. James McMahon no longer works at NCEI.

9. The Intergovernmental Panel on Climate Change (IPCC) released a report in stages between September 2013 and November 2014 that concluded that the upward global surface temperature trend from 1998-2012 was lower than the upward global surface temperature trend from 1951-2012. This apparent observed slowing was dubbed the “hiatus.”

10. There were significant developments related to the alleged “hiatus” in the two years immediately following the release of the IPCC report. In particular, both 2013 and 2014 were among the top-five warmest years on record for the globe. In addition, NOAA scientists made significant improvements to its sea surface temperature dataset, one of the largest being a correction that accounted for the difference in data collected from buoys and ships. (Until the mid-1970s, ships were used to measure sea surface temperatures; since then, buoys have increasingly been used.) Scientists developed a method to correct for the difference between these two observing systems, and incorporated those corrections into its dataset and subsequently the paper that is the subject of this request.

11. On or about October 31, 2014, Director Karl shared with a group of NOAA scientists a draft of a paper that he had worked on himself, inspired by some of the papers exchanged previously by the NCEI scientists. The draft developed an idea for properly accounting for the “hiatus,” based on the additional two years of global temperature data and the improvements to NOAA’s sea surface temperature dataset. Director Karl asked the scientists to provide feedback to his draft.

12. The scientists who received the draft responded with feedback in various forms, including exchanging drafts of the paper with edits done via track changes and sending emails providing feedback.

13. Until the paper was submitted to *Science*, many drafts and revisions were exchanged along with emails and one-on-one discussions about various aspects of the paper, including: suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on implications of other researchers' work, and so on. Such collaboration via drafts and discussions in emails and orally is standard practice at NCEI.

14. On or about December 23, 2014, a NOAA author submitted the draft paper to *Science* via an online portal.

15. *Science* follows a formal peer review process that is described on their public website. See <http://www.sciencemag.org/authors/peer-review-science-publications>. Peer reviewers are subject matter experts in the topic of the submitted paper who are able to use their expertise to evaluate the scientific rigor and merit of the paper.

16. Peer reviewers provide feedback on an array of issues, including making an overall recommendation as to whether the paper should be published, in view of *Science*'s mission and also providing more detailed critique on a range of issues. These issues include the technical rigor of the data and methods used and whether the conclusions of the report are novel or similar to work already published. See <http://www.sciencemag.org/sites/default/files/REinstr13.pdf>.

17. According to *Science*, their peer review process is anonymous. The identities of reviewers are never revealed to authors, and reviewers are instructed not to identify themselves to any entity, including the press. Reviews are shared only with the author, potentially other reviewers (for cross-comment), and the Board of the journal. See <http://www.sciencemag.org/authors/peer-review-science-publications>.

18. Reviewers are expressly instructed to treat the submitted manuscript as privileged and confidential:

The submitted manuscript is a privileged communication and must be treated as a confidential document. Please destroy all copies of the manuscript after review. Please do not share the manuscript with any colleagues without the explicit permission of the editor. Reviewers should not make personal or professional use of the data or interpretations before publication without the authors' specific permission (unless you are writing an editorial or commentary to accompany the article).

<http://www.sciencemag.org/authors/peer-review-science-publications>.

19. This is reinforced in the journal's Instructions to Peer Reviewers of reports, which states:

Confidentiality: We expect reviewers to protect the confidentiality of the manuscript and ensure that it is not disseminated or exploited. Please destroy your copy of the manuscript when you are done. Only discuss the paper with a colleague with permission from the editor. We do not disclose the identity of our reviewers.

<http://www.sciencemag.org/sites/default/files/REinstr13.pdf>.

20. The authors received via email the first round of reviews from *Science* on or about February 26, 2015. In this case, *Science* sent the manuscript to five peer reviewers. These reviewers provided their comments anonymously to NOAA through *Science*, as is standard in the peer review process for *Science*.

21. After determining the best response to all of the peer reviewer comments, the authors submitted the revised manuscript and a response to reviewer comments to *Science* via the online submission portal on or about March 27, 2015. See Categories C and D of part 2 of the *Vaughn* Index.

22. On or about April 22, 2015, the authors received the second round of reviews from *Science* via email. The authors developed responses to this second round of comments, made revisions accordingly, and submitted the revised manuscript and response to reviewer comments to *Science* via the online portal on or about May 5, 2015. *See id.*

23. After submitting the revised manuscript, the authors received notice that it would be published, received galley proofs, and approved them. On June 4, 2015, the paper was published online on the *Science* website. This was followed up by publication in the printed volume of *Science* on June 26, 2015 (Volume 348, Issue 6242, at 1469).

II. ADMINISTRATIVE PROCESSING OF PLAINTIFF'S REQUEST

24. Plaintiff's FOIA request was addressed to NOAA, which is located within the Department of Commerce ("the Department"). The request sought, in relevant part:

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.

25. When NOAA officials first reviewed the request, they determined that it did not reasonably describe the records sought. NOAA and the Department, through counsel, conferred with Plaintiff's counsel to negotiate a clear description of the materials sought.

26. During the course of those discussions, NOAA indicated to Plaintiff that it understood Plaintiff's request to reflect an interest in the Hiatus Paper. Defendant suggested Plaintiff modify the FOIA request to call for a search for all documents and communications referring to the Hiatus Paper from October 1, 2014 through June 4, 2015. Defendant offered to search the files of the nine authors of the Study. Plaintiff confirmed its interest in the Hiatus Paper, but indicated that it sought only records referring to the topics listed in its initial FOIA request.

27. The parties ultimately "reached an agreement regarding the scope of the request and the relevant search parameters," which was memorialized in the Second Joint Status Report, submitted to this Court on March 1, 2016. Regarding the documents at issue in this litigation, the parties agreed that:

"Defendant will search the records of the nine authors of the June 4, 2015 study entitled Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus published in Science ("Karl Study") for records referring to the Karl Study and that contain the following search terms:

(1) "NMAT" and "Night Marine Air Temperatures";

(2) "ISTU", "ICOADS", and "sea ice";

(3) "satellite", "Advanced Very High Resolution Radiometer", "AVHRR", "Advanced Microwave Scanning Radiometer", and "AMSR".

For items 1, 2, and 3 of Plaintiff's FOIA request, the timeframe for the searches will be October 1, 2014 to June 4, 2015."

See Second Joint Status Report, ECF No. 10.

28. In the Third Joint Status Report, submitted to this Court on March 22, 2016, the parties agreed that NOAA, through the Department, would produce responsive, non-exempt records, as described above, to Plaintiff by May 27, 2016. *See* ECF No. 11.

29. On May 27, 2016, the Department released 102 pages of material in its entirety and 90 partially redacted pages. Defendant withheld in their entirety 8,013 pages of records. *See* May 27 Cover Letter (Exhibit 2); *see also* Fourth Joint Status Report, ECF No. 12. In that letter, NOAA informed Plaintiff that "[b]ecause the request sought records of multiple custodians, there is a significant amount of duplicative material in the responsive records." Exhibit 2.

30. NOAA made a supplemental release of records on September 16, 2016, providing Plaintiff with an additional 44 pages of released material after further review the records identified and described in the letter accompanying the May 27, 2016, production, 7 of which were partially redacted because they included Tom Karl's personal telephone number.

31. After the September release, NOAA continued to evaluate the responsiveness and exemption status of the records that had been identified. Contemporaneously with this filing (on December 15), NOAA is releasing another 62 records providing Plaintiff with additional records that were previously withheld.

32. Because of the further segregation and responsiveness review NOAA conducted that led to the release of additional material to the Plaintiff, the page counts in the May 27 cover letter (and also the Fourth Joint Status Report) originally provided to Plaintiff are no longer accurate. A complete listing of all records withheld in full or in part pursuant to an exemption is reflected in the attached *Vaughn* Index.

II. THE SEARCH PROCESS

33. After NOAA and Plaintiffs, through counsel, reached an agreement as to the terms of the search for this FOIA request, it was determined that the records requested resided within one office: NCEI. NCEI's headquarters is located in Asheville, North Carolina. This determination was based on the fact that all of the agreed-upon custodians work or had worked within NCEI during the time in which responsive records were created.

34. The nine authors of the Hiatus Paper were Thomas R. Karl, Anthony Arguez, Boyin Huang, Jay H. Lawrimore, James R. McMahon, Matthew J. Menne, Thomas C. Peterson, Russell S. Vose, and Huai-Min Zhang.

35. NOAA instructed eight of the nine authors (record custodians) that were still within NCEI to conduct a search in accordance with the parameters agreed to by the parties and memorialized in the Second Joint Status Report. NOAA specified that custodians must search their email, electronic, and paper records.

36. Each records custodian still at NCEI¹ searched his own records in accordance with these instructions. As such, all search terms and parameters of the search as agreed upon by the Plaintiff were utilized by NOAA in the search of the files where responsive records were likely to be filed.

37. There were no common areas to be searched at NCEI because the authors all kept their own files separate.

38. After the custodians collected their records, they were forwarded for responsiveness and exemption review.

39. The search conducted was reasonably calculated to uncover all relevant, non-duplicative documents.

40. The Department compiled two sets of bates-numbered files, which included, in addition to the partially redacted and fully withheld email records, placeholder pages, which are discussed further in Paragraph 49. One bates-numbered file reflects the email records, and the other bates-numbered file reflects documents, as contained on parts 1 and 2 of the *Vaughn*.

41. Each record was evaluated separately for responsiveness, and each email was deemed to be one record.

42. In the case of an email with attachment(s), responsiveness determinations were made independently for that email and any attachment(s) to that email.

43. For email records that were joined with other emails in a chain, NOAA deemed responsive any email that related to the Paper and contained an agreed-upon search term as well

¹ One custodian (Thomas Peterson) had retired by the time of the search. His archived email inbox and outbox were searched by another author who was still with NOAA at the time. No additional, non-duplicative records created by Mr. Peterson that are responsive to this request are known to have existed following the retirement of Mr. Peterson.

as other, surrounding emails that were related to or provided important context for the email that contained the search term. If an email appeared to directly relate to the subject matter of the request in an email containing the search term, a case-by-case determination was made in good faith and in the effort to maximize transparency as to whether that record was responsive even though not technically within the search terms outlined in the Second Joint Status Report.

44. The search was reasonably calculated to uncover all relevant documents and there are no known locations where additional, non-duplicative, responsive material is likely to be found. Accordingly, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched.

III. The Vaughn Index

45. I have read the *Vaughn* index attached as Exhibit 1 and reviewed the documents referenced in that index. Based on my review of the documents and on information provided me in the course of my official duties, I have determined that the material redacted from the referenced documents falls within the enumerated FOIA exemptions identified in the index.

46. The *Vaughn* index is divided into two parts. The first part covers responsive emails that were withheld or redacted. It identifies each record by Bates stamp numbers (which correspond to the numbering on records provided to Plaintiff), the originator, the recipient(s), the date of the record, the title of the email, the exemption invoked, and the basis for withholding.

47. Due to how the email records are stored in and were printed from the user's email accounts, some email records are duplicative but certain copies truncate the metadata for that record email (e.g., the sender, recipient, subject line, who was cc'd on the records). Sometimes

NOAA was able to reconstruct the information by looking to duplicate instances that were printed differently, or by going to the original files. We have generally inferred that the subject line that prints at the top of the printed email chain carried through for individual email records connected to that string of emails.

48. The second part of the *Vaughn* index covers non-email documents that were withheld in their entirety, except for a relatively small number of documents that were released to Plaintiffs upon further review. These documents consist almost exclusively of five categories of records. Records that fell into one of the five categories are labeled in the *Vaughn* index by a letter that corresponds to a category. The few exceptions that do not fall into one of the five categories have a more detailed description.

49. The *Vaughn* index reflects occasional “gaps” in the Bates stamp numbering. For example, *Vaughn* part one reflects an entry for bates page 1, and the next entry is for bates page 4. Such “gaps” exist for three reasons. First, not all pages had redacted information. Only pages with redacted information are accounted for on the *Vaughn*. Second, NOAA, in an effort to be transparent during production, included pages that served as “placeholders” for records in email chains that were removed because those records were either non-responsive or were fully withheld under Exemption 5. For example, if one page with responsive records was produced with redactions, followed by four fully withheld pages of records, the four fully withheld pages were represented in the production by a placeholder page that indicated four pages of material had been withheld as either not responsive or as exempt under Exemption 5. That placeholder page was bates stamped during the initial production, but NOAA has not listed it in the *Vaughn*

index. And third, NOAA removed bates-marked documents that were non-responsive that had been inadvertently bates stamped during the initial production. The withheld records, if responsive, are represented elsewhere in the *Vaughn* index.

50. As reflected in the first part of the *Vaughn* index, NOAA withheld or redacted emails under Exemption 5 because they are protected by the deliberative process privilege. *See, generally, Vaughn* part 1. These records are inter-agency or intra-agency communications. The bulk of this information reflects the predecisional and deliberative exchange of ideas and recommendations among scientists within and outside NOAA as NOAA scientists developed and edited the Hiatus Paper or discussed the underlying analysis of the datasets for purposes of developing the paper. The information also includes communications among NOAA personnel carrying out related agency deliberations such as development of public communications and presentations to Congress. The communications are, unless otherwise indicated, among NOAA personnel and reflect agency deliberations or input to agency determinations. These deliberations were in preparation for agency decisions, including how to analyze and present the data and interpretation. A relatively small number of the deliberative communications reflect input from non-federal scientists who were contacted either by one of the authors or by the journal *Science* to provide feedback and input on the Paper. These non-federal scientists provided NOAA's scientists input for the agency's ongoing processes of developing the Hiatus Paper, as well as providing input for the agency's potential updating of underlying datasets and analysis based on those datasets. Additionally, one scientist provided input to inform the agency's development of a communications plan for the paper.

51. In addition to the emails redacted or withheld, NOAA withheld drafts of the Hiatus Paper. *See Vaughn* part two Category A. These documents are inter-agency or intra-agency drafts. This category includes the drafts of the “supplementary materials” that accompanied the Hiatus Paper and were made available for download by *Science* upon publication of the Paper. Category A in the *Vaughn* Index sometimes lists the draft paper text, figures and supplementary materials as one entry and sometimes separately. These were pre-decisional drafts that contained the 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 expert reviewers’ comments on earlier drafts of the paper. Disclosure of deliberative draft documents that were not ultimately finalized or adopted by NOAA risks confusing the public concerning NOAA’s position and also risks data or statements being taken out of context. Disclosure of these deliberative draft materials would also seriously undermine the quality and integrity of NOAA’s decisionmaking process, by deterring NOAA staff or experts outside the agency who are collaborating in development of the agency’s work from expressing their candid views on the development of data analysis and presentation.

52. NOAA also withheld documents that contain questions for discussion and draft graphs that were circulated by an author and created for author discussions during the development of the Hiatus Paper. *See Vaughn* part two Category E. These records are inter-agency or intra-agency documents. These documents are deliberative and pre-decisional, as they

reflect NOAA scientists' deliberations as to what constitutes the best data analysis and presentation for the Hiatus Paper.

53. NOAA also withheld drafts of a cover letter from Tom Karl to *Science* magazine in response to peer review comments. *See Vaughn* part two Category B. These records are inter-agency or intra-agency drafts. These drafts are predecisional and deliberative in that they include discussions and exchanges among authors in determining what to include, and how to present, their formal letter to accompany their peer review responses. The draft cover letters to *Science* contain edits or otherwise do not include the final wording of the letter, reflecting that the scientists' approach had not been finalized at that point.

54. NOAA also withheld draft responses to peer reviewers enlisted by *Science* as part of that journal's peer review process. *See Vaughn* Index part two Category C. These records are inter-agency or intra-agency drafts. These drafts reflect pre-decisional discussions and proposed responses to peer review comments. The drafts contain opinions and recommendations of one or more NOAA authors; draft language, data, and data interpretation for consideration by other authors; comments on previous drafts of the responses to peer reviewers; and/or responses to other authors' comments on earlier drafts of the responses to peer reviewers. These drafts helped the NOAA authors determine how best to respond to comments provided during the peer review process initiated by the submission of the Hiatus Paper to *Science* for potential publication. These documents are internal, pre-decisional drafts that reflect the view of NOAA authors as to how to present their response to peer review feedback.

55. NOAA also withheld the final responses to peer reviewers enlisted by *Science* as part of that journal's peer review process. See *Vaughn* Index Part 2 Category D. These records are inter-agency or intra-agency documents. These documents are predecisional and deliberative because they are responses to constructive criticism and advice submitted by scientific experts as part of the confidential peer review process for papers submitted to scientific journals. The responses were submitted as part of a process to assist in the authors' deliberations regarding whether and in what form to publish the paper. Confidentiality is important to the peer review process, and disclosure of the responses to peer reviews would discourage the sharing of candid thoughts of both the reviewers and of the scientists.

56. In addition to this formal peer review, NOAA's authors also welcomed the assistance of informal peer review from a limited group of scientific experts in evaluating the underlying datasets and developing the Hiatus Paper. It is common for NOAA scientists to seek input from other qualified experts to get a second opinion on a working hypothesis or to provide expertise that an author's affiliated organization may lack. Sometimes those scientists are employed outside the federal government, but they share the common goal with NOAA of advancing scientific inquiry and developing accurate information on climate science.

57. This collegial relationship and shared goals lays the groundwork for an author to reach out for the kind of honest, confidential feedback necessary to formulate a sustainable, justified scientific conclusion.

58. Each of these scientists who offered their assistance is highly regarded in their specialized fields. Their prior work represents a portion of the prior published literature on the

alleged hiatus. Some of those works were consulted by the team in developing the “hiatus” paper and were cited as references in it.

59. One of the outside scientists who contributed (and is listed in the “Acknowledgements” section of the Hiatus Paper) is Dr. Gerald (Jerry) A. Meehl, an affiliate with the National Center for Atmospheric Research (NCAR), which is a National Science Foundation Federally Funded Research and Development Center. *See* <https://www2.ucar.edu/about-us/quick-facts>. In November 2014, Director Karl emailed Dr. Meehl and invited him to comment on drafts of the paper, and he provided insights and feedback in response. *See* Bates 66 (11/27/14) (released).

60. If a paper is expected to get an unusual amount of attention, a journal may seek pre-publication reactions from experts in the field outside of that journal’s formal peer review process. On occasion, those experts who are contacted by the journal will then directly communicate with the author(s) of the article and share their thoughts on the article.

61. These communications provide important feedback to the authors on the Hiatus Paper and often provide information, relied upon by NOAA, about the external expert’s own related recent or ongoing work. These communications provide input to the continuous, ongoing work to update and improve datasets and trend analyses, as described in Paragraphs 5 through 7.

62. One outside scientist who provided input (and is cited in the references for the Hiatus Paper) is Dr. Kevin E. Trenberth, who (like Dr. Meehl) is also affiliated with the NCAR. Dr. Trenberth was contacted for his expertise by a journalist prior to publication of the Hiatus Paper and asked to provide comment on the paper. Dr. Trenberth then contacted Director Karl

by email to provide feedback and discuss implications of the conclusion in light of other literature. *See* Bates 379 (6/1/15). As discussed in paragraph 61, above, this type of input provides important feedback and also helps inform the continuous, ongoing work to update and improve datasets and trend analyses. In part, this information was also provided to inform NOAA in its deliberations as it formulated its public communications messaging for the Hiatus Paper. *See* Bates 381-382 (6/1/15).

63. Last, Dr. Kevin Cowtan, who is affiliated with the University of York in the United Kingdom, is an outside scientist who contacted Dr. Boyin and Director Karl, after being contacted by a writer at *Science* who was seeking comment on the paper before publication, during the embargo period. *See* Bates 292-293 (6/2/15). Those emails indicate that all participants understood and respected that there was an embargo on publicly disseminating or discussing the work until it was officially released on June 4. *See, e.g.*, Bates 295 (6/2/15). Director Karl indicated in an email that he would like to continue to review and incorporate Dr. Cowtan's work in NOAA's ongoing work. *See* Bates 295-296 (6/2/15). As discussed in paragraph 61, above, this type of input provides important feedback and also helps inform the continuous, ongoing work to update and improve our datasets and trend analyses.

64. Disclosure of any of this information that is pre-decisional and deliberative would inhibit candid internal discussions and expressions of ideas, recommendations, criticism, and judgments regarding the development of scientific theories and presentations of information to the public and to Congress. Disclosure of the details of these confidential discussions, drafts, and responses, could reasonably be expected to chill the open and frank exchange of comments

and opinions that occurs between NOAA scientists and a limited group of qualified outside experts at such times. It would also inhibit candid internal discussions and the expression of recommendations and judgments regarding preferred courses of action for agency personnel.

65. To the extent the redacted or withheld information contains some factual material, the authors' selection and presentation of that factual material reflects the agency's deliberative process and is therefore protected from disclosure. Singling out a particular data point in the course of a deliberative discussion reflects a preliminary judgment or argument rather than an assertion of scientific fact. There is a risk of misconstruing or taking out of context an instance where one piece of information has been singled out for purposes of an informal discussion.

66. With regard to information withheld pursuant to exemption (b)(6), NOAA has determined that the individual privacy interests outweighed the public interest in disclosure.

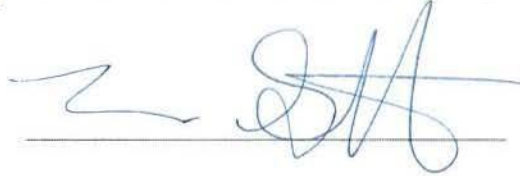
67. I am further satisfied that NOAA has reasonably concluded that there was no additional non-exempt, responsive information that could be reasonably segregated and released to the plaintiff.

IV. CONCLUSION

In summary, the Department conducted thorough searches of all components that were reasonably likely to maintain responsive records and withheld only reasonably segregable information under exemption (b)(5) and (b)(6). Additionally, the search was reasonably calculated to uncover all relevant documents, and there are no known locations where additional, non-duplicative, responsive material is likely to be found.

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 4th day of December, 2016, Silver Spring, Maryland.

A handwritten signature in blue ink, consisting of a stylized 'M' followed by a large, looped 'G' and 'A', written over a horizontal line.

Mark H. Graff

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

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant U.S. Department of Commerce hereby moves for summary judgment on all of Plaintiff's claims. This motion is supported by a statement of material facts as to which there is no genuine issue, a memorandum of points and authorities, the Declarations of Mark Graff and Dr. Richard Spinrad, and a *Vaughn* index. A proposed order is attached.

Dated: December 15, 2016

Respectfully submitted,

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

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

In this Freedom of Information Act (“FOIA”), Plaintiff Judicial Watch requested from the National Oceanographic and Atmospheric Administration (“NOAA”), a component of the Department of Commerce, records relating to different temperature metrics and datasets.¹ The parties conferred and reached an agreement regarding the scope of the request and relevant search parameters. Using those agreed-upon parameters, NOAA conducted a search and ultimately produced responsive, non-exempt material.

Plaintiff now challenges the adequacy of NOAA’s search and all of its redactions and withholdings. But as discussed more fully herein, NOAA conducted a search that was reasonably calculated to locate all non-duplicative records in its possession responsive to Plaintiff’s request. Moreover, all of the challenged information and records that NOAA withheld were properly exempt from production. The Court should therefore grant summary judgment in favor of the Department of Commerce.

FACTUAL BACKGROUND

I. The Hiatus Paper

The FOIA request at issue centers around a June 4, 2015 study authored by NOAA scientists and published in the journal *Science* entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Hiatus Paper” or “the Paper”). Between September 2013 and November 2014, the Intergovernmental Panel on Climate Change (“IPCC”) released a report in stages that concluded that the upward global surface temperature trend from 1998-2012

¹ The FOIA request also sought communications between NOAA and the House of Representatives Committee on Science, Space, and Technology. The agency made a separate production of these records, which Plaintiff’s counsel indicated in writing that Plaintiff did not intend to challenge. Therefore, this motion for summary judgment and accompanying documents do not address the agency’s response to that aspect of the request.

was lower than that from 1951-2012. Declaration of Mark Graff (“Graff Decl.”) Decl. ¶ 9 (attached herein as Exhibit A). The apparent observed slowing of the global surface temperatures was dubbed the “hiatus.” *Id.* The Hiatus Paper, drafted after that report by a team of NOAA scientists, sought to properly account for the alleged “hiatus.”

NOAA’s National Centers for Environmental Information (“NCEI”) produces and maintains datasets for global ocean areas and global land areas. *Id.* ¶ 6. Scientists throughout the government, including scientists at agencies other than NOAA, and outside of the government, use the sea surface temperature and land surface temperature datasets for a variety of purposes, including for climatic research and climate assessments. *Id.* NCEI scientists continually work to improve the datasets to provide the public the most up-to-date and accurate information. *Id.* There were two significant developments related to the “hiatus” after the IPCC’s report. In particular, 2013 and 2014 were two of the five warmest years on record for the globe. *Id.* ¶ 10. Also, NOAA scientists made significant improvements to its sea surface temperature dataset, one of largest being a correction that accounted for the difference in data collected from ships and buoys. *Id.* Buoys have been increasingly used since the 1970s to measure sea surface temperatures, and scientists developed a method to correct for the difference between these two observing systems and incorporated those corrections into the dataset. *Id.*

NCEI scientists regularly interpret and analyze datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. *Id.* ¶ 7. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data. *Id.* ¶ 8.

Around late October 2014, Tom Karl, then the Director of NCEI, circulated a draft paper to a group of NOAA scientists that developed an idea for properly accounting for the alleged “hiatus” based on the additional two years of global temperature data and the improvements to

NOAA's sea surface temperature dataset. *Id.* ¶ 11. Karl sought feedback on the draft paper, and a team of scientists at NOAA worked to develop a manuscript. *See id.* ¶¶ 11-13. Many drafts and revisions were exchanged among these scientists, along with emails discussing various aspects of the paper or its content, including suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on the implications of other researchers' work, and so on. *Id.* ¶ 13. Such collaboration via discussions and drafts is standard practice at NCEI. *Id.* ¶ 13.

In December 2014, the authors submitted the draft paper to the journal *Science*. *Id.* ¶ 14. Once there, the draft paper went through the journal's peer review process, in which five anonymous peer reviewers weighed in on the manuscript. *Id.* ¶ 20. When the authors received feedback, they discussed internally how to respond in writing to the comments they received, and also revised the manuscript to address the questions and concerns raised. *See id.* ¶ 21. After a second round of peer review, NOAA received word that the article would be published, and *Science* published the Paper on its website on June 4, 2015. *Id.* ¶ 23.

II. The FOIA Request and NOAA's Response

Plaintiff's FOIA request, dated October 30, 2015, sought in relevant part:

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.

Graff Decl. ¶ 24; *see also* Answer, ECF No. 8-1.

Upon review of the request, NOAA officials determined that it did not reasonably describe the records requested. Graff Decl. ¶ 25. Through counsel, NOAA conferred with Plaintiff to negotiate a clear description of the material sought. *Id.* During the course of those discussions, NOAA indicated to Plaintiff that it understood the request to reflect an interest in the Hiatus Paper and accordingly suggested modifying the request to call for a search for all documents and communications referring to the Hiatus Paper from its nine authors. *Id.* ¶ 26. Plaintiff confirmed its interest in that study, but indicated that it sought only records referring to the topics listed in its initial FOIA request. *Id.*

The parties ultimately “reached an agreement regarding the scope of the request and relevant search parameters.” Second Joint Status Report, ECF No. 10 at 2. For Plaintiff’s FOIA request, NOAA agreed to search the records of the nine authors of the Hiatus Paper for records referring to that paper and that contain one of the following search terms: “NMAT,” “Night Marine Air Temperatures,” “ISTI,” “ICOADS,” “sea ice,” “satellite,” “Advanced Very High Resolution Radiometer,” “AVHRR,” “Advanced Microwave Scanning Radiometer,” and “AMSR.” *Id.*; Graff Decl. ¶ 27.

After NOAA directed those custodians to run the agreed-upon searches, it made a production on May 27, 2016 of 102 pages of material in its entirety and 90 partially redacted pages. *See* Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2. NOAA withheld in their entirety 8,013 pages of records, and informed Plaintiff that because it sought records from nine separate custodians, a significant amount of duplicative material existed in the responsive records. *See* Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12. The parties then

discussed the details of potential challenges to NOAA's production, and NOAA agreed to provide Plaintiff a draft *Vaughn* index in an attempt to narrow the issues in dispute. *See* Fifth & Sixth Joint Status Report, ECF Nos. 13 & 14. Upon further review of the withheld information, on September 16, 2016, NOAA released to Plaintiff an additional 44 pages of material (7 of those pages were partially redacted to exclude Mr. Karl's cell phone number), Graff Decl. ¶ 30, and contemporaneous with this filing on December 15, 2016, NOAA released an additional 62 records, Graff Decl. ¶ 31.

STANDARD OF REVIEW

A court reviews an agency's response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B). "FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). In deciding at the summary judgment stage whether an agency has fully discharged its obligations under FOIA, "the agency must show, viewing the facts in the light most favorable to the requester, that there is no genuine issue of material fact." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

ARGUMENT

I. NOAA's Search Was Reasonable, Adequate, and Satisfies Its Obligation Under the FOIA

A. The Standard for an Adequate Search

The touchstone for determining whether an agency should prevail on a motion for summary judgment in FOIA litigation is whether the agency demonstrates that its "search for documents was adequate." *Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009). An agency's search is adequate if "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. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The adequacy of a FOIA

search is thus gauged “not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.” *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (quoting *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)). In short, “[t]he adequacy of the search . . . is judged by a standard of reasonableness.” *Steinberg*, 23 F.3d at 551; *see also DiBacco v. U.S. Army*, 795 F.3d 178, 194–95 (D.C. Cir. 2015) (“A search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.” (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986))).

“In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith.” *Id.* (quoting *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). Such affidavits are sufficient if they “set[] forth the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials (if such records exist) were searched.” *Chambers v. U.S. Dep’t of Interior*, 568 F.3d 998, 1003 (D.C. Cir. 2009) (quoting *McCready v. Nicholson*, 465 F.3d 1, 7 (D.C. Cir. 2006)). This standard does not require that “the affidavits of the responding agency set forth with meticulous documentation the details of an epic search for the requested records.” *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). “Rather, in the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice” *Id.* Moreover, “[s]uch agency affidavits attesting to a reasonable search ‘are afforded a presumption of good faith,’ and ‘can be rebutted only with evidence that the agency’s search was not made in good faith.’” *Riccardi v. US Dep’t of Justice*, 32 F. Supp. 3d 59, 63 (D.D.C. 2014) (quoting *Def. of Wildlife v. U.S. Dep’t of Interior*, 314 F. Supp.2d 1, 8 (D.D.C. 2004)).

Finally, courts in this circuit recognize the “well-worn rule . . . that the adequacy of a FOIA search is not to be judged by its results.” *Rosenberg v. United States Dep’t of Immigration & Customs Enf’t*, 13 F. Supp. 3d 92, 104 (D.D.C. 2014). “The question is not ‘whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was *adequate*.’” *Steinberg*, 23 F.3d at 551 (quoting *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)) (emphases in original). Thus, courts have rejected challenges to the adequacy of a search, even when a “slim yield may be intuitively unlikely” and a “reasonable observer would find th[e] result[s] unexpected.” *Ancient Coin Collectors Guild*, 641 F.3d at 514. Moreover, “mere speculation that as yet uncovered documents might exist[] does not undermine the determination that the agency conducted an adequate search for the requested records.” *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004); *see also Sheffield v. Holder*, 951 F. Supp. 2d 98, 101 (D.D.C. 2013) (noting that a requester “cannot rest . . . on mere conjecture or ‘purely speculative claims about the existence and discoverability of other documents’” (quoting *Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 107 (D.D.C. 2005))).

B. NOAA Conducted an Adequate Search

As set forth in Mark Graff’s Declaration, NOAA’s search for records responsive to Plaintiff’s FOIA request was more than adequate. *See Perry*, 684 F.2d at 127. Judicial Watch and NOAA reached an agreement as to how the search would be carried out. The agency would search the records of the nine Hiatus Paper authors for any record referring to that study and containing the term “NMAT,” “night marine air temperatures,” “ISTI,” “ICOADS,” “sea ice,” “satellite,” “advanced very high resolution radiometer,” “AVHRR,” “advanced microwave scanning radiometer,” and “AMSR.” Graff Decl. ¶ 27; Second Joint Status Report at 2, ECF No.

10. The timeframe for the search would be October 1, 2014 to June 4, 2015. *Id.* NOAA determined that the records requested resided within one office, NCEI, because all of the agreed-upon custodians work or had worked there during the time frame in which responsive records were created. *Id.* ¶ 33. NOAA then directed those custodians to search their email, electronic, and paper files for records referring to the Karl Study and containing the agreed-upon search terms. *Id.* ¶ 35. Those scientists searched their electronic files (including email) and non-electronic files, collected any potentially responsive material, and forwarded that material for responsiveness and exemption review. *Id.* ¶¶ 36-38.² There were no common areas at NCEI for NOAA to search. *Id.* ¶ 37. Thus, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched. *Id.* ¶ 44.

On this record, NOAA's search should be upheld under FOIA. NOAA has provided "a reasonably detailed [declaration], setting forth the search terms and the type of search performed," and averred that all files likely to contain responsive, non-duplicative materials were searched. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F.2d at 68). NOAA has "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*, 920 F.2d at 68.

II. NOAA Properly Withheld Information Under Exemption 5

FOIA does not require disclosure of "matters that are . . . inter-agency or intra-agency memorandums or letters [which] would not be available by law to a party other than an agency in

² One custodian had retired from NCEI by the time the search was conducted and so that former employee's archived email was searched by another custodian. *See* Graff Decl. ¶ 36 n.1. No additional records responsive to this request from that author are known to have existed following his retirement. *See id.*

litigation with the agency.” 5 U.S.C. § 552(b)(5). “Exemption 5 . . . exempt[s] those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 thus protects the attorney-client privilege, the attorney work product privilege, and the deliberative process privilege. *Id.*; see also *Rockwell Int’l Corp. v. Dep’t of Justice*, 235 F.3d 598, 601 (D.C. Cir. 2001).

The deliberative process privilege “allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). According to the D.C. Circuit,

There are essentially three policy bases for this privilege. First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that officials should be judged by what they decided, not for matters they considered before making up their minds.

Russell v. Dep’t of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (quoting *Jordan v. Dep’t of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978)).

The privilege is necessary because “those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process.” *Sears*, 421 U.S. at 150-51. “[E]fficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to ‘operate in a fishbowl.’” *EPA v. Mink*, 410 U.S. 73, 87 (1973), *abrogated on other grounds*, Pub. L. No. 93-502, 88 Stat. 1561 (1974). There are “[t]wo requirements [that] are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative.” *In re Sealed Case*, 121 F.3d at 737.

The agency is best situated “to know what confidentiality is needed ‘to prevent injury to the quality of agency decisions.’” *Chem. Mfrs. Ass’n v. Consumer Prod. Safety Comm’n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *Sears*, 421 U.S. at 151). NOAA’s justification for asserting Exemption 5 is “sufficient if it appears ‘logical’ or ‘plausible.’” *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007).

Here, NOAA properly withheld information under Exemption 5 that is protected by the deliberative process privilege because the information withheld reflects deliberations in preparation for decisions of how to analyze and present data and theory, as well as decisions about how to respond to peer review comments and deliberations on developing public communications and congressional presentations. *See* Graff Decl. ¶¶ 50-63. Disclosure of such information, which is predecisional and deliberative, and contains selected factual material intertwined with opinion, would inhibit candid internal discussions and the expression of recommendations and judgments. *Id.* ¶ 64. Disclosure of the details of these confidential discussions and drafts could reasonably be expected to chill the open and frank exchange of comments and opinions that NOAA officials engage in, as well as inhibit candid internal discussions and recommendations regarding preferred courses of action for agency personnel. *Id.*

The documents withheld in full or in part under the deliberative process privilege fall generally into three categories: (1) drafts of the Hiatus Paper; (2) internal deliberations, including email exchanges; and (3) peer review materials, both formal and informal. As explained below and in the attached *Vaughn*, each redacted or withheld document contains both predecisional and deliberative information. Accordingly, NOAA properly asserted Exemption 5 based on the deliberative process privilege.

1. Drafts of the Hiatus Paper

NOAA withheld pursuant to Exemption 5 inter- or intra-agency, predecisional, and deliberative draft versions of the Hiatus Paper (including drafts of its accompanying figures and “supplementary materials”) that were produced while NOAA scientists were developing the Paper. Graff Decl. ¶ 51.³ “[D]raft documents by their very nature, are typically predecisional and deliberative, because they reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.” *In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 31 (D.D.C. 2008) (non-FOIA case) (citation omitted). Accordingly, “drafts are commonly found exempt under the deliberative process exemption.” *People for the Am. Way Found. v. Nat’l Park Serv.*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007). Among other reasons for this, disclosure of “decisions to insert or delete material or to change a draft’s focus or emphasis . . . would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work.” *Dudman Commc’ns Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987). Indeed, drafts are ordinarily exempt regardless of whether or to what extent segments of the draft made their way into the final product: “If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process: for some reason, the agency decided not to rely on that fact or argument after having been invited to do so.” *Exxon Corp. v. Dep’t of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983) (quoting *Lead Industries Ass’n v. OSHA.*, 610 F.2d 70, 86 (2d Cir. 1979)); see *ViroPharma Inc. v. HHS*, 839 F. Supp. 2d 184, 193 (D.D.C. 2012) (“The choice of what factual

³ The fact that some draft versions were shared for peer review purposes outside of the federal government does not affect those drafts’ status as inter- or intra-agency. See *infra* at Section II.3.

material . . . to include or remove during the drafting process is itself often part of the deliberative process, and thus is properly exempt under Exemption 5.”); *cf. Marzen v. HHS*, 825 F.2d 1148, 1155 (7th Cir. 1987) (noting that privilege “protects not only the opinions, comments and recommendations in the draft, but also the process itself”).

These drafts are predecisional inasmuch as they were generated to assist the agency in preparing the final version of the Hiatus Paper. *See Quarles v. Dep’t of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (explaining that materials are predecisional when “prepared in order to assist an agency decisionmaker in arriving at . . . decisions”). And they are deliberative in that they reflect the development of the final paper; these non-final, predecisional drafts contain opinions and recommendations of the 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 peer reviewers’ comments on earlier drafts of the paper. *See* Graff Decl. ¶ 51; *Vaughn* part 2 Category A. Withholding this material under Exemption 5 was proper, and the release of such drafts would inhibit agency scientists from expressing their views and deter NOAA scientists from participating candidly in the development of scientific products in the future. *See* Graff Decl. ¶ 51.⁴

2. Communications Among NOAA Personnel

Also integral to the drafting of the Hiatus Paper, the authors frequently communicated and exchanged ideas with one another via email during the Paper’s development. Here, NOAA

⁴ Equally appropriate, NOAA’s *Vaughn* also shows that the agency withheld draft documents that aided in or related to the development of the Paper, such as “[d]raft graphs of land and ocean temperature data created by NOAA scientists to be used in the paper,” *Vaughn* part 2 at bates pages 1170-73, “[d]raft graphs and charts of SST data to be used in [the] development of the paper,” *Vaughn* part 2 at bates pages 2071-76, and a “[d]raft powerpoint by [an] author presenting information on global temperature and presenting data analysis done by NOAA scientists for the paper,” *Vaughn* part 2 at bates pages 1876-86.

withheld inter- or intra-agency, predecisional, and deliberative communications. *See* Graff Decl. ¶ 50. In pursuing a research objective, scientists may begin with only a rough idea, and then develop, test, and revise that idea as data is collected and interpreted. Declaration of Richard W. Spinrad (“Spinrad Decl.”) ¶ 14 (attached herein as Exhibit B). Possible interpretations are generated and tested in part through candid debates and exchanges among peers. *Id.* ¶ 15. Indeed, the exchange and debate among peers is the mechanism that allows NOAA to ensure its scientific products are robustly developed and accurately tested. *Id.* ¶ 16. And there is a general and well-established presumption that such discussions are not intended to be, and will not be, shared with a wider audience, as confidentiality is essential to ensuring participants feel free to propose new ideas or explanations without fear of misinterpretation or being taken out of context. *Id.* ¶ 20. It is critical that this type of information be protected so as not to chill candid exchanges and debates, as well as to avoid the risk of confusing the public with preliminary or incomplete information. *See id.* ¶¶ 23-25.

NOAA’s *Vaughn* index reinforces that these types of predecisional and deliberative communications occurred here, were integral to the development of the Hiatus Paper, and were appropriately withheld or redacted. *See Abteu v. U.S. Dep’t of Homeland Sec.*, 808 F.3d 895, 898 (D.C. Cir. 2015) (“[O]fficials should be judged by what they decided, not for matters they considered before making up their minds” (citation and internal quotation mark omitted)). For example, NOAA is redacting or withholding communications between scientists in which authors asked for clarification on data analysis conducted for developing the Paper, *Vaughn* part 1 at bates pages 22-23, shared opinions on the results of a draft data analysis for developing the Paper, *Vaughn* part 1 at bates page 15, offered opinions as to the best approach to take in the Paper, *Vaughn* part 1 at bates pages 300, 335, 362-63, and provided opinions on statistical error

uncertainty ranges for development of the Paper, *Vaughn* part 1 at bates page 245. Moreover, NOAA withheld a document that presented questions and draft graphs to spur discussion among the NOAA scientists. This document was created and circulated for the purpose of author discussions during the development of the Hiatus Paper, and shows NOAA scientists considering what constitutes the best data analysis and presentation for the Paper. *See Vaughn* part 2 Category E; Graff Decl. ¶ 52.⁵

In addition to withholding communications concerning the development of the Hiatus Paper, NOAA also withheld communications and information reflecting the development of a plan by its officials for communications and press release in preparation for publication of the paper, *e.g. Vaughn* part 1 at bates page 289-90, *Vaughn* part 2 at bates page 7446-50, as well as the agency's development of a presentation to Congress, *e.g., Vaughn* part 1 at bates pages 143, 324 (explaining that redacted email reflected "NOAA scientist discussing climate change research and developing the agency's presentation for Congress"). This withheld information, which reflects NOAA's development of how to brief Congress and the public, is predecisional and deliberative and falls squarely within Exemption 5. *E.g., Judicial Watch, Inc. v. U.S. Dep't of the Treasury*, 796 F. Supp. 2d 13, 31 (D.D.C. 2011) (noting email discussing response to press inquiry protected under deliberative process privilege).

All of this material is precisely the sort of information that the deliberative process privilege is designed to protect. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854,

⁵ Similarly, NOAA withheld information reflecting discussions among scientists concerning potential scientific inquiries. *See, e.g., Vaughn* part 1 at bates page 75 (discussing future climate research and asking for opinion on this research and on possible role of NOAA scientists in this research). Again, such material is predecisional and deliberative, and therefore is exempt from disclosure. *E.g., Sears*, 421 U.S. at 151 n.18 (explaining that protection extends to records that are part of decisionmaking process even where process does not produce actual decision by agency).

866 (D.C. Cir. 1980) (document is “predecisional” if it is “generated before the adoption of an agency policy” and “deliberative” if it “reflects the give-and-take of the consultative process”); *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 9 (2001) (explaining that deliberative process privilege’s “object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government”) (citation omitted); *Russell*, 682 F.2d at 1048 (“[T]he exemption protects not only communications which are themselves deliberative in nature, but all communications which, if revealed, would expose to public view the deliberative process of an agency.”). Moreover, any factual material in the withheld documents reflect the authors’ selection and presentation of factual material, Graff Decl. ¶ 65, and as such it too is covered by the deliberative process privilege. *See, e.g., Ancient Coin Collectors Guild*, 641 F.3d at 513 (explaining that factual material can be withheld where it reflects “an exercise of discretion and judgment calls” and that the “legitimacy of [the] withholding” turns on “whether the selection or organization of facts is part of an agency’s deliberative process”).

Because all of the redacted and withheld information is inter- or intra-agency, predecisional, and deliberative in nature, NOAA properly applied Exemption 5.

3. Peer Review Material

NOAA also withheld inter- or intra-agency material reflecting the different peer review processes its analyses and drafts underwent prior to publication of the Hiatus Paper. *Science* follows a formal peer review process in which subject matter experts evaluate the rigor and merit of the paper, and provide feedback on an array of issues. Graff Decl. ¶ 15. Those anonymous, impartial reviewers share their reviews with the authors, *Science*’s board, and potentially other reviewers (for cross-comment). *Id.* ¶ 17.

Here, *Science* sent the manuscript to five anonymous peer reviewers, and the scientists received two rounds of comments. Upon receiving these reviewers' comments, the NOAA scientists deliberated internally as to how to respond in writing to every comment received. NOAA properly withheld peer reviewer comments, the agency's internal draft responses to these peer reviewer comments, draft cover letters NOAA's scientists wrote to accompany their response, as well as the agency's final responses to peer reviewer comments. *See* Graff Decl. ¶¶ 53-54; *Vaughn* part 2 Category B, C, D.

The D.C. Circuit has specifically held that comments provided by peer reviewers during the peer review process for publication of scientific articles in scientific journals are covered by Exemption 5 because they are both "pre-decisional because it preceded the agency's decision whether and in what form to publish" the paper and were part of the agency's deliberative process "because the agency secured review commentary in order to make that decision." *See Formaldehyde Inst. v. U.S. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1123-25 (D.C. Cir. 1989). As that Court recognized, agency scientists "must regularly rely on the comments of expert scientists to help them evaluate the readiness of agency work for publication [and i]n that sense they must rely on the opinions and recommendations of temporary consultants." *Id.* at 1125.

The scientists' draft responses to the peer reviewer comments are also covered by Exemption 5 since these materials, including personal opinions and recommendations, draft language, data, and data interpretation for consideration, as well as comments on previous drafts of the responses, reflect predecisional and deliberative discussions. *See Vaughn* part 2 Category C; Graff Decl. ¶ 54. Similarly, the final responses to peer review comments that NOAA submitted to *Science* during the peer review process reflect the agency's response to constructive

criticism and advice, and were part of the process to assist in the authors' deliberation as to whether and in what form to publish the paper. *See Vaughn* part 2 Category D; Graff Decl. ¶ 55. These final responses, then, fit comfortably within Exemption 5. *See Petroleum Info. Corp.*, 976 F.2d at 1434 (agency documents that were "prepared in order to assist an agency decisionmaker in arriving at his decision" are "predecisional" (citation omitted)); *Coastal States Gas Corp.*, 617 F.2d at 866. Finally, the draft cover letters to *Science* accompanying the scientists' responses to the peer review comments contain edits or otherwise do not include the final wording of the letter, reflecting that the scientists' final approach had not been finalized at that point. *Vaughn* part 2 Category B; Graff Decl. ¶ 53. Withholding such draft material was appropriate.

The fact that the peer review comments were sent by *Science*, and the responses to those peer reviewer comments were sent back to *Science*, does not affect their status as "intra-agency" materials that may be protected by Exemption 5. "Recognizing that the purpose of the exemption was to promote the quality of agency policy decisions and that often these policy decisions were best made by incorporating the advice of outside experts, [the D.C. Circuit] developed a 'consultant corollary' whereby communications with temporary consultants would be considered 'intra-agency' for the purposes of Exemption 5." *Judicial Watch v. U.S. Dep't of Transp.*, 950 F. Supp. 2d 213, 216 (D.D.C. 2013) (citing cases). "When communications between an agency and a non-agency aid the agency's decision-making process and the non-agency did not have an outside interest in obtaining a benefit that is at the expense of competitors, the communication must be considered an intra-agency communication for the purposes of FOIA Exemption 5." *Judicial Watch*, 950 F. Supp. 2d at 218-19 (citing *Nat'l Inst. of Military Justice v. U.S. Dep't of Defense*, 512 F.3d 677 680-85 (D.C. Cir. 2008) ("*NIMJ*"); *Lardner v. U.S. Dep't of Justice*, No. 03-0180, 2005 WL 758267, at *1 (D.D.C. Mar. 31, 2015);

see also, e.g., Hooker v. HHS, 887 F. Supp. 2d 40, 55 (D.D.C. 2012) (upholding agency’s withholding of predecisional and deliberative letter from former employee where he “played the same role in the agency’s process of deliberation after his departure that he would have played had he remained”), *aff’d*, No. 13-5280, 2014 WL 3014213 (D.C. Cir. May 13, 2014); *see also Elec. Privacy Info. Ctr. v. DHS*, 892 F. Supp. 2d 28, 46 (D.D.C. 2012) (“In order to be excluded from the exemption, the contractors must assume a position that is ‘necessarily adverse’ to the government.”).⁶

Moreover, maintaining the confidentiality of these communications is important, as disclosure would discourage the sharing of candid thoughts of the reviewers and scientists. Graff Decl. ¶ 55, 64; *see also* Spinrad Decl. ¶¶ 20-21 (explaining importance of confidentiality in developing scientific products). Here, as in *Formaldehyde*, it is “indisputable” that both “reviewers’ comments are expected to be confidential” and “disclosure of reviewers’ comments would seriously harm the deliberative process.” 889 F.2d at 1124 (internal citations and quotations omitted).

Outside of *Science*’s formal peer review process, NOAA scientists welcomed the informal peer review from a limited number of consultants in evaluating the underlying datasets

⁶ *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), holding that Exemption 5 did not protect documents submitted by American Indian Tribes to the Interior Department addressing tribal interests that were then the subject of state and federal water allocation proceedings, does not prevent the application of the consultant corollary here. Rather, the D.C. Circuit “has allowed any communication that aids the agency’s deliberative process to be protected as ‘intra-agency,’” and “*Klamath* only modifies this by requiring that we not protect communications with interested parties seeking a government benefit that is adverse to others seeking that benefit.” *Judicial Watch*, 950 F. Supp. 2d at 218 (footnote omitted).

Also, to fall within the consultant corollary, there is no requirement that an individual must possess a contractual relationship with the agency in question. *See, e.g., NIMJ*, 512 F.3d at 679-87 (deliberative process privilege exempted from disclosure comments received by Department of Defense, in the course of issuing regulations, from non-governmental lawyers who were former high ranking governmental officials or academics or both).

and developing the Hiatus Paper. Graff Decl. ¶ 56; *see also Formaldehyde Inst.*, 889 F.2d at 1125. In the field of climate science, only a small number of scientists have the relevant, specialized expertise, *see* Spinrad ¶ 17, and it is common for scientists to seek input from colleagues both inside and outside the federal government, *id.* ¶ 19. Sometimes experts that are located outside of the federal government have an expertise that can aid the agency. *See id.* ¶ 17. The consultants here, each of whom is highly regarded in his specialized field, Graff Decl. ¶ 58, share the common goal with NOAA of advancing scientific inquiry and developing accurate information on climate science, *see id.* ¶ 56; *see also Formaldehyde*, 889 F.2d at 1122, quoting *Ryan v. Dep't of Defense*, 617 F.2d 781, 789-90 (D.C. Cir. 1980) (“In the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.”).

As the *Vaughn* and Mark Graff’s declaration make clear, withholding this informal peer review was also appropriate, as their input was used by NOAA to ensure that only the highest quality scientific product would be released. Tom Karl, for example, asked a scientist affiliated with the National Center for Atmospheric Research to comment on a draft while the paper was in development, and that scientist provided insights and feedback in response. Graff Decl. ¶ 59; *Vaughn* part 1 bates 66-67 (explaining redacted information contained feedback and review of a data analysis for the paper and raises issue for further discussion). Other climate science experts responded to the authors upon learning from *Science* of the pending publication, as commonly occurs after an author submits a high-profile scientific paper for publication. *See* Graff Decl. ¶ 60. Two other experts provided feedback on the Paper, discussed implications of the Hiatus

Paper’s conclusion, or provided and discussed data analyses, Graff Decl. ¶¶ 62-63, *Vaughn* part 1 at bates 292-93, which helped provide important feedback about the agency’s product and informed the agency’s continuous, ongoing work of updating agency datasets and trend analyses, Graff Decl. ¶¶ 62-63; *see Vaughn* part 1 at bates 295-96 (noting that expert’s work may be incorporated into a future NOAA analysis). With respect to these types of communications, a general and well-established presumption exists that these communications will not be shared with a wider audience, which is essential to scientific exchanges and the testing and refinement of ideas that help ensure that the agency’s scientific products are well developed and robust. *See Spinrad* Decl. ¶ 20. Disclosing this material could inhibit candid discussions and exchanges and chill the open and frank exchanges upon which NOAA scientists rely. *See Graff* Decl. ¶ 64.

In sum, NOAA’s *Vaughn* and declarations make plain that the agency appropriately applied Exemption 5 to redact and withhold information protected by the deliberative process privilege.

III. NOAA Properly Withheld Information Under Exemption 6

Exemption 6 protects the privacy of individuals from unwarranted invasion. Exemption 6 allows the withholding of information about individuals in “personnel and medical files and similar files” when the disclosure of such information would constitute a “clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Exemption 6 requires the agency to balance the individual’s right to privacy against the public’s interest in disclosure. *See U.S. Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991). When weighing the public interest involved in disclosure, the court considers: (1) whether disclosure would serve the “core purpose” for which Congress enacted the FOIA. *i.e.*, to show “what the government is up to,” and (2) the public interest in general, not particular interests of

the person or group seeking the information. *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 750, 775 (1989).

Here, Exemption 6 has been applied to protect information in which individuals have a recognized privacy interest, specifically, the phone numbers of NOAA scientists. *See, e.g., Vaughn* part 1 at bates 23. Because this information can be identified as applying to a specific individual, the information withheld under Exemption 6 constitutes “similar files” within the meaning of statute; courts have routinely held that phone numbers meet this threshold test. *See, e.g., Judicial Watch, Inc. v. U.S. Dep't of State*, 875 F. Supp. 2d 37, 47 (D.D.C. 2012); *Smith v. Dep't of Labor*, 798 F. Supp. 2d 274, 283 (D.D.C. 2011); *Lowy v. IRS*, No. C 10-767, 2011 WL 1211479, at *16 (N.D. Cal. Mar. 30, 2011).

This threshold test having been met, the next step is to compare the privacy interest at stake with the benefit disclosure would provide toward the public’s understanding of how government operates. *Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994). Here, there is a substantial privacy interest at stake in preventing the burden of unsolicited phone calls and harassment. *See Moore v. Bush*, 601 F. Supp. 2d 6, 14 (D.D.C. 2009); *United Am. Fin., Inc. v. Potter*, 667 F. Supp. 2d 49, 65-66 (D.D.C. 2009); *cf. Shurtleff v. EPA*, 991 F. Supp. 2d 1, 18 (D.D.C. 2013) (protecting email address). By contrast, an individual’s phone number sheds no light on the operations and activities of the agency. NOAA balances the individual’s strong privacy interests against the fact that release of this information would fail to shed any light on the conduct of governmental business, and reasonably concluded that, with regard to the information withheld pursuant to Exemption 6, the individual privacy interests outweighed any public interest in disclosure. Graff Decl. ¶ 66. *See FLRA*, 510 U.S. at 497 (“We must weigh the privacy interest . . . in nondisclosure . . . against the only relevant public interest in the FOIA

balancing analysis – the extent to which disclosure of the information sought would she[d] light on an agency’s performance of its statutory duties’ or otherwise let citizens know what their government is up to.”). Accordingly, Exemption 6 was properly applied.

IV. NOAA Has Produced All Reasonably Segregable Information

The FOIA requires that, if a record contains information that is exempt from disclosure, any “reasonably segregable” information must be disclosed after deletion of the exempt information, 5 U.S.C. § 552(b), unless the non-exempt portions are “inextricably intertwined with exempt portions.” *Mead Data Ctr. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Kurdyukov v. U.S. Coast Guard*, 578 F. Supp. 2d 114, 128 (D.D.C. 2008). This provision does not, however, require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat’l Sec. Archive Fund v. CIA*, 402 F. Supp. 2d 211, 221 (D.D.C. 2005) (concluding that no reasonably segregable information existed because “the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words”). Consistent with this obligation, NOAA has reviewed each of the documents redacted or withheld and has concluded that there is no additional non-exempt information that may reasonably be segregated and released. *See* Graff Decl. ¶ 67. Accordingly, no further non-exempt material is subject to release.

CONCLUSION

NOAA has conducted an adequate search for documents responsive to Plaintiff’s request, and properly withheld information exempt from disclosure under Exemptions 5 and 6. Furthermore, all reasonably segregable information has been released to Plaintiff. For these reasons, the Department of Commerce respectfully requests that summary judgment be entered in its favor.

Dated: December 15, 2016

Respectfully submitted,

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

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

**STATEMENT OF MATERIAL FACTS IN SUPPORT OF UNITED STATES
DEPARTMENT OF COMMERCE’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Civil Rule 7(h)(1), the following is a statement of material facts as to which the movant, the United States Department of Commerce (“the Department”), contends there is no genuine issue:

1. Between September 2013 and November 2014, the Intergovernmental Panel on Climate Change released a report in stages that concluded that the upward global surface temperature trend from 1998-2012 was lower than that from 1951-2012. Declaration of Mark Graff (“Graff Decl.”) ¶ 9.
2. The apparent observed slowing of the global surface temperatures was dubbed the “hiatus.” Graff Decl. ¶ 9.
3. The National Centers for Environmental Information (“NCEI”) at NOAA produces and maintains datasets for global ocean areas and global land areas. Graff Decl. ¶ 6.
4. NCEI scientists continually work to improve the datasets to provide the public the most up-to-date and accurate information. Graff Decl. ¶ 5.

5. NCEI scientists regularly interpret and analyze datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. Graff Decl. ¶ 7.
6. On June 4, 2015, a study authored by NOAA scientists was published in *Science* entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Hiatus Paper” or “the Paper”). Graff Decl. ¶ 23.
7. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data. Graff Decl. ¶ 10.
8. Around late October 2014, Tom Karl, then the Director of NCEI, circulated a draft paper to a group of NOAA scientists that developed an idea for properly accounting for the alleged “hiatus” based on the additional two years of global temperature data and the improvements to NOAA’s sea surface temperature dataset. Graff Decl. ¶ 11.
9. Karl sought feedback on the draft paper, and a team of scientists at NOAA formed to develop a manuscript. *See* Graff Decl. ¶¶ 11-13.
10. Many drafts and revisions were exchanged among these scientists, along with emails discussing various aspects of the paper or its content, including suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on implications of other researchers’ work, and so on. Graff Decl. ¶ 13.
11. Such collaboration via discussions and drafts is standard practice at NCEI. Graff Decl. ¶ 13.
12. In December 2014, the authors submitted the draft paper to the journal *Science*. Graff Decl. ¶ 14.

13. Once there, the draft paper went through the journal's peer review process, in which five anonymous peer reviewers weighed in on the manuscript. Graff Decl. ¶ 20.
14. When the authors received feedback, they discussed internally how to respond in writing to the comments they received, and also revised the manuscript to address the questions and concerns raised. *See* Graff Decl. ¶ 21.
15. After a second round of peer review, NOAA received word that the article would be published, and *Science* published the Paper on its website on June 4, 2015. Graff Decl. ¶ 23.
16. Plaintiffs' FOIA request, dated October 30, 2015, sought in relevant part:
 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.Graff Decl. ¶ 24; *see also* ECF No. 8-1.
17. Upon review of the request, NOAA officials determined that it did not reasonably describe the records requested. Graff Decl. ¶ 25.
18. Through counsel, NOAA conferred with Plaintiff to negotiate a clear description of the material sought. Graff Decl. ¶ 25.

19. During the course of those discussions, NOAA indicated to Plaintiff that it understood the request to reflect an interest in the Hiatus Paper and accordingly suggested modifying the request to call for a search for all documents and communications referring to the Hiatus Paper from its nine authors. Graff Decl. ¶ 26.
20. Plaintiff confirmed its interest in that study, but indicated that it sought only records referring to the topics listed in its initial FOIA request. Graff Decl. ¶ 26.
21. The parties ultimately “reached an agreement regarding the scope of the request and relevant search parameters.” Second Joint Status Report, ECF No. 10 at 2.
22. For Plaintiff’s FOIA request, NOAA agreed to search the records of the nine authors of the Hiatus Paper for records referring to that paper and that contain one of the following search terms: “NMAT,” “Night Marine Air Temperatures,” “ISTI,” “ICOADS,” “sea ice,” “satellite,” “Advanced Very High Resolution Radiometer,” “AVHRR,” “Advanced Microwave Scanning Radiometer,” and “AMSR.” Second Joint Status Report, ECF No. 10 at 2; Graff Decl. ¶ 27.
23. NOAA determined that the records requested resided within one office, NCEI, because all of the agreed-upon custodians work or had worked there during the time frame in which responsive records were created. Graff Decl. ¶ 33.
24. NOAA then directed those custodians to search their email, electronic, and paper files for records referring to the Karl Study and containing the agreed-upon search terms. Graff Decl. ¶ 35.
25. Those scientists searched their electronic files (including email) and non-electronic files, collected any potentially responsive material, and forwarded that material for responsiveness and exemption review. Graff Decl. ¶¶ 36-38.

26. One custodian had retired from NCEI by the time the search was conducted and so that former employee's archived email was searched by another custodian. No additional records responsive to this request from that author are known to have existed following his retirement. *See* Graff Decl. ¶ 36 n.1.
27. There were no common areas at NCEI for NOAA to search. Graff Decl. ¶ 37.
28. Thus, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched. Graff Decl. ¶ 44.
29. On May 27, 2016, NOAA produced 102 pages of material in its entirety and 90 partially redacted pages. Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2. NOAA withheld in their entirety 8,013 pages of records. Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2
30. NOAA informed Plaintiff at that time that because it sought records from nine separate custodians, a significant amount of duplicative material existed in the responsive records. *See* Graff Decl. ¶ 29
31. Upon further review of the withheld information, NOAA made two supplemental productions. *See* Graff Decl. ¶¶ 30-31.
32. On September 16, 2016, NOAA released to Plaintiff an additional 44 pages of material (7 of those pages were partially redacted to exclude Mr. Karl's phone number), Graff Decl. ¶ 30.
33. Contemporaneously with this filing (on December 15), NOAA is releasing an additional 62 records. Graff Decl. ¶ 31.
34. NOAA withheld information pursuant to FOIA Exemption 5 and the deliberative process privilege. *See Vaughn Index.*

35. NOAA withheld information pursuant to FOIA Exemption 6. *See Vaughn* Index.

Dated: December 15, 2016

Respectfully submitted,

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Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, I filed the attached electronically with the Clerk of the United States District Court for the District of Columbia through the CM/ECF system, which caused the following counsel of record to be served by electronic means:

Lauren Burke
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Attorney for Plaintiff

/s/ Kevin M. Snell

Ellen Sebastian - NOAA Federal

From: Ellen Sebastian - NOAA Federal
Sent: Wednesday, May 30, 2018 8:41 AM
To: Stacey Nathanson - NOAA Federal; Daniel Pollak - NOAA Federal
Cc: Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Shawn Puyear - NOAA Federal; Daniel Bess - NOAA Federal; Graff, Mark; Lola Stith - NOAA Affiliate
Subject: Clearwell Indices? Appeal 2017-1431
Attachments: Appeal for DOC-NOAA-2017-001431 (no attachments).pdf

(b) (5)

Please let me know if you have questions.

--

Ellen Sebastian
FOIA & Records Coordinator Alaska Region
Temporary Detail w/ Office of Protected Resources/PR4
(301) 427-8489

Nourish and sustain your sense of joy.



May 4, 2018

VIA FOIAONLINE.REGULATIONS.GOV

National Oceanic and Atmospheric Administration

Re: FREEDOM OF INFORMATION ACT APPEAL: DOC-NOAA-2017-001431 (Final Pesticides BEs and BOs)

Dear FOIA Appeals Officer:

On behalf of the Center for Biological Diversity (“Center”), I appeal the National Oceanic and Atmospheric Administration’s (“NOAA”) final determination and all interim responses on the Center’s referenced request for records pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), assigned FOIA Request No. DOC-NOAA-2017-001431 (“FOIA request”). NOAA failed to conduct an adequate search and improperly applied redactions pursuant to FOIA Exemption 5. For the reasons set forth below, NOAA’s withholding of responsive records violates FOIA.

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 search for and disclose all responsive records immediately, in accordance with FOIA’s disclosure mandate and federal policies.

FACTUAL BACKGROUND ABOUT THE CENTER’S FOIA REQUEST

On June 27, 2017 the Center sent the National Marine Fisheries Service (“NMFS”) in care of the National Oceanic and Atmospheric Administration (“NOAA”) a request pursuant to FOIA through the U.S. Department of Commerce (“DOC”) via electronic mail and FOIAOnline. Attachment A (The Center’s June 27, 2017 FOIA Request). In that request the Center sought:

- (1) All records mentioning, including, and/or referencing the draft and/or final biological evaluation of chlorpyrifos under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”);
- (2) All records mentioning, including, and/or referencing the draft and/or final biological evaluation of malathion under the ESA;
- (3) All records mentioning, including, and/or referencing the draft and/or final biological evaluation of diazinon under ESA;
- (4) All records mentioning, including, and/or referencing the draft and/or final biological opinion of chlorpyrifos under the ESA;
- (5) All records mentioning, including, and/or referencing the draft and/or final biological opinion of malathion under the ESA;
- and (6) All records mentioning, including, and/or referencing the draft and/or final biological opinion of diazinon under ESA. Please note that this request does not apply to documents found online or under the docket EPA-HQ-OPP-2016-

0167. The Center is willing to receive records on a rolling basis, and requests that NMFS prioritize responsive records from April 1, 2017 to the date of the search.

Id. That same day, DOC sent the Center automated electronic mail through FOIAOnline acknowledging the Center's FOIA request and assigning it tracking number DOC-OS-2017-001431. Attachment B (DOC's June 27, 2017 Acknowledgment Email).

That same day, the Center submitted a separate FOIA request to DOC through FOIAOnline. Attachment C (The Center's June 27, 2017 DOC FOIA Request).

On June 28, 2017 DOC sent the Center automated electronic mail through FOIAOnline stating that "FOIA request DOC-OS-2017-001431 has had its Tracking Number changed to DOC-NOAA-2017-001431." Attachment D (DOC's June 28, 2017 Tracking Number Change Email).

On July 6, 2017 NOAA sent the Center a letter acknowledging its FOIA request. Attachment E (NOAA's July 6, 2017 Acknowledgment Letter).

On July 7, 2017 NOAA's Office of Protected Resources sent the Center electronic mail seeking to clarify the scope of its FOIA request. Attachment F (NOAA's July 7, 2017 Clarification Email).

On July 12, 2017 the Center and NOAA participated in a telephone call to clarify the scope of the Center's FOIA request. That same day, NOAA sent the Center electronic email memorializing the substance of their telephone call. Attachment G (NOAA's July 12, 2017 Memorialization Email Chain). In that email chain, NOAA stated:

We will only include in your request documents regarding the FWS biological opinion when we have relied on information found in those documents.

We will exclude from your request the following:

- 1 - routine internal reporting of pending matters
- 2 - personnel matters
- 3 - printed materials unless those printed materials have handwritten notes

You have also tentatively agreed that when the last email in an unbroken email chain contains all of the earlier emails, we may exclude all but that last email. In the case that the first email in such a chain had an attachment, we would treat that attachment as included in your request.

Id. That same day, the Center sent NOAA electronic mail stating that NOAA's email "summary accurately represents our agreement and understanding." *Id.*

On July 18, 2017 NOAA sent the Center electronic mail stating:

Since sending this list, I have learned that at least one of our biologists works almost exclusively on EPA and consultation, with only a small portion of her work involving pesticides. I suggest amending the list above to suggest removing “EPA” from the search terms, either altogether or specifically for this biologist and any others who may have a similar work profile.

Attachment H (NOAA’s July 18, 2017 Email Chain). That same day, the Center sent NOAA electronic mail agreeing to the change NOAA outlined. *Id.*

On July 25, 2017 NOAA sent the Center electronic mail granting its fee waiver request pursuant to its FOIA request. Attachment I (NOAA’s July 25, 2017 Fee Waiver Email).

On August 10, 2017 the Center sent NOAA a Notice of Deadline Violation and Offer to Assist Letter. Attachment J (The Center’s August 10, 2017 Notice of Deadline Violation and Offer to Assist Letter).

On August 11, 2017 NOAA sent the Center electronic mail acknowledging receipt of its Notice of Deadline Violation and Offer to Assist Letter. Attachment K (NOAA’s August 11, 2017 Acknowledgment Email).

On August 16, 2017 NOAA sent the Center electronic mail stating:

We have asked that responsive records be provided by this Friday, August 18, although because of vacation schedules it is possible we may not have all of them by that date

Until we know how many records are involved, it is difficult to predict exactly when we can provide an interim response or a final response. Once the documents are received, some time is needed to load them into our document review software. This can be a week or more, depending on the number of records identified. The amount of time needed for review will also depend on the number of documents found.

In addition, because other agencies also received similar requests from you, we are scheduling an interagency call by the end of the month to determine how to manage records in which other agencies have equities.

Based on the above, we should be able by September 15 to provide estimates for interim releases, if any, and estimate for a final response.

Attachment L (NOAA’S August 16, 2017 Status Update Email).

On November 20, 2017 the Center sent its Second Notice of Deadline Violation and Offer to Assist. Attachment M (The Center’s November 20, 2017 Second Notice of Deadline Violation and Offer to Assist).

On November 22, 2017 NOAA sent the Center electronic mail with a status update stating “We should be able to send our first interim response within the next two weeks. At that time we should be able to estimate the time for our final response.” Attachment N (NOAA’s November 22, 2017 Status Update Email Chain). That same day, the Center sent NOAA electronic mail thanking the agency for the quick response and status update. *Id.*

On November 30, 2017 NOAA sent the Center its First Response Letter. Attachment O (NOAA’s November 30, 2017 First Response Letter).

On December 8, 2017 NOAA sent electronic mail stating:

This is to let you know that you either have received or will have received a small - 15 documents - first interim response.

Our 2nd and larger interim response is in process and should get to you in the next two weeks.

We anticipate providing a third interim response in January, and believe that we can provide NOAA’s final response by the end of February.

Attachment P (NOAA’s December 8, 2017 Status Update).

On January 11, 2018 NOAA sent the Center its Second Response Letter. Attachment Q (NOAA’s January 11, 2018 Second Response Letter).

On February 1, 2018 NOAA sent the Center its Third Response Letter. Attachment R (NOAA’s February 1, 2018 Third Response Letter).

On February 2, 2018 the Center sent NOAA electronic mail stating:

Thank you for providing the most recent interim release. I would like to note that I was not notified of this release in my inbox, but happened to come upon it while checking FOIAonline. I believe the file size was too large and did not transmit properly. To ensure we receive proper notification I suggest that large records be sent separately from the notification email.

I noticed the cover letter states this to be the 3rd interim response. Please note that we also never received notification of a 2nd interim response. The letter states the 2nd release was provided on January 11, 2018 but we did not receive any emails nor is there any recorded notification on FOIAonline. I do see the released records themselves, however, they are not dated January 11 and share the same release date as the 3rd response. If available, please provide the cover letter for the 2nd response.

Additionally, per our December 8, 2017 correspondence with Ms. Lawrence, please confirm whether we may all expect a final response by the end of February and if not please provide an updated estimated completion date.

Attachment S (The Center's February 2, 2018 Email). That same day, NOAA sent the Center electronic mail stating:

I must apologize for the recent third interim response as I attached the records to the correspondence. I sincerely apologize for not realizing it would be too large for your email. ...

I've attached the second interim response to your request dated January 11, 2018. We can not [sic] confirm at this time why FOIAonline did not provide you with the second interim response. We're looking into the permission issue as I provided the second interim response in FOIAonline instead of Ms. Hodge-Tonic.

... In light of this situation, we understand the agency should contact you via the email above to alert you of an agency response to ensure you have awareness and receipt, and we will not attach records to the response.

We are on track to complete this request by the end of February.

Attachment T (NOAA's February 2, 2018 Email).

On February 5, 2018 the Center sent NOAA electronic mail stating:

We had originally sent this request to the Department of Commerce and was assigned tracking number DOC-OS-2017-001431 but the request was later reassigned to NOAA. The requester is also interested in records generated at the DOC level and wanted to know if a search was also being conducted there or if it has solely taken place on the NOAA level.

Attachment U (The Center's February 5, 2018 Email).

On February 6, 2018 NOAA sent the Center electronic mail stating that the agency confirmed that the "DOC records responsive to this request will be provided under NOAA FOIA referenced as DOC-NOAA-2017-0001431 [sic]." Attachment V (NOAA's February 6, 2018 Email). In that email, NOAA stated that the Center is "correct in assuming DOC is processing under its own timeline. While we are networking and cooperating with DOC FOIA to provide you responsive records, NOAA will not close out DOC-NOAA-2017-0001431 [sic] until DOC documents are provided. NOAA is on track to provide our response to you by end of February." *Id.*

On February 8, 2018 NOAA sent the Center its Fourth Response Letter. Attachment W (NOAA's February 8, 2018 Fourth Response Letter). In that letter, NOAA stated that 731 records were "exempted from disclosure through Attorney Client-Privilege, Attorney Work

Product and/or Deliberate Process Privilege.” *Id.* The letter further stated that 13 records were released in part with portions exempt from disclosure by Exemption 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.” *Id.* That same day, NOAA sent the Center electronic mail stating, that NMFS was “on track to provide you a final response by end of February which should include Department of Commerce (DOC) records responsive to your request.” Attachment X (NOAA’s February 8, 2018 ECD Email).

On February 27, 2018 NOAA sent the Center its Fifth Response Letter. Attachment Y (NOAA’s February 27, 2018 Fifth Response Letter). In that letter, NOAA stated that it released 72 records in part and withheld 139 in full pursuant to Exemption 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 Attorney Client-Privilege, Attorney Work Product and/or Deliberate Process Privilege.” *Id.* Furthermore, NOAA stated that it released one record in part with portions exempt pursuant Exemption 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,” and Exemption 6, “which protects personnel and medical files and similar files about individuals when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.” *Id.*

On March 8, 2018 NOAA sent the Center automated electronic mail from FOIAOnline notifying the Center that it approved its fifth interim response for release. Attachment Z (NOAA’s March 8, 2018 Email).

On March 16, 2018 NOAA sent the Center electronic mail with a status update. Attachment AA (NOAA’s March 16, 2018 Status Update Email). In that email, NOAA stated that it had provided its fifth interim release and had informed the Center that “approximately 100 records were in need of consultation before their release to you. Those records are trickling back to our agency and you can expect another response shortly. In that response, we will also update you to the Department of Commerce’s search and collection of responsive records.” *Id.*

On March 19, 2018 NOAA sent the Center electronic mail asking the Center:

We have one responsive email that we would like you to consider excluding from your request. This is a May 3, 2017, email to NOAA attorneys Dan Pollak and me, from the Department of Justice attorney representing NMFS in the Northwest Coalition for Alternatives to Pesticides v. NMFS litigation. The email from the Department of Justice attorney attaches the April 13, 2017 letter from David Weinberg of Wiley Rein to Secretary Ross and the April 27, 2017 letter to Administrator Pruitt. I then forwarded the email from the Department of Justice attorney to Cathy Tortorici, my program client.

Please advise if you are willing to allow us to exclude this email chain. If you are not, we will refer this email to the Department of Justice for their review.

Attachment BB (NOAA's March 19, 2018 Email Chain to Exclude Email Chain). That same day, the Center sent NOAA electronic mail agreeing to exclude the email chain. *Id.*

On March 27, 2018 NOAA sent the Center its sixth and Final Response Letter. Attachment CC (NOAA's March 27, 2018 Final Response Letter). In that letter, NOAA stated, *inter alia*:

34 records are released in part and 8 are withheld in full 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 through Attorney Client-Privilege, Attorney Work Product and/or Deliberate Process Privilege.

2 records are released in part with portions exempt 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 and 5 U.S.C. § 552 (b)(6) which protects personnel and medical files and similar files about individuals when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.

Id. On March 29, 2018 NOAA sent the Center electronic mail notifying the Center of its final release. Attachment DD (NOAA's March 29, 2018 Final Release Notification). NOAA states that “[t]he National Marine Fisheries Service has completed search and review of responsive records in its possession.” *Id.* at 2. NOAA summarized that it had released 1,825 records, of which 186 records were redacted in full and 1,050 redacted in part based on the deliberative process privilege. *Id.* Based on these representations, the Center believes that this appeal is to NOAA's final determination on the Center's original FOIA request to NOAA.

In this appeal, the Center challenges the adequacy of NOAA's search, and its withholding of responsive records under Exemption 5 for all of NOAA's interim responses. The Center also challenges NOAA's withholding of the original electronic names of the records, which should not be subject to any exemption. The Center also appeals DOC's constructive denial of the Center's FOIA request, and its failure to show that there are no non-exempt, segregable portions of the withheld records for all of the interim responses. The Center does not challenge NOAA's withholding of information from responsive records pursuant to Exemption 6.

THE FREEDOM OF INFORMATION ACT

The purpose of FOIA is to “open agency action to the light of public scrutiny.” *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). 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 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. *Id.* 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.* These authorities remain in effect.

FOIA “mandates a policy of broad disclosure of government documents” and carries a strict disclosure mandate that requires federal agencies to expeditiously disclose requested records to requesters. *See* 5 U.S.C. § 552; *Church of Scientology v. Dep’t of the Army*, 611 F.2d 738, 741 (9th Cir. 1980). Consequently, 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).

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 in light of FOIA’s dominant objective of disclosure, not secrecy.” *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1996). Accordingly, because FOIA carries a presumption in favor of disclosure, and indeed, because “FOIA requesters face an information asymmetry given that the agency possesses the requested information and decides whether it should be withheld or disclosed,” *COMPTTEL v. U.S. Federal Comm’n Comm.*, 910 F. Supp. 2d 100, 111 (D.D.C. 2012) (internal citations omitted), agencies bear the burden of justifying the withholding of any records that are responsive to a FOIA request. 5 U.S.C. § 552(a)(4).

An agency must provide “a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *See King v. Dept. of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987) (agency must provide); *see also Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (holding an agency’s disclosure of “who wrote the [document], to whom it was addressed, its date, and a brief description” was “patently inadequate” to establish exemption under FOIA).

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

DISCUSSION

I. NOAA DID NOT CONDUCT AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS.

NOAA failed to demonstrate that it conducted an adequate search for records responsive to the Center’s FOIA request.

To achieve FOIA's core purpose of disclosure, an agency must perform an adequate search for responsive records. *Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979). Upon receiving a FOIA request, federal agencies are "required to perform more than a perfunctory search" to identify records that are responsive to the request. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). An agency must demonstrate "a 'good faith effort to conduct a search using methods which can be reasonably expected to produce the information requested.'" *DiBacco v. U.S. Army*, 795 F.3d 178, 188 (D.C. Cir. 2014) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)) (internal alterations omitted); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. U.S. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)) (to meet this burden, the agency must "demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents'").

In addition, "agency affidavits must explain in reasonable detail the scope and method of the search conducted by the agency" for the agency to "satisfy its burden of establishing the adequacy of its search." *Nat'l Sec. Counselors II*, 960 F. Supp. 2d 101, 152 (internal quotations omitted); *Ancient Coin Collectors Guild*, 641 F.3d at 514 (internal quotation omitted) (agency may meet its burden by submitting "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched"). 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 evidence suggests that NOAA failed to conduct an adequate search for records responsive to the Center's FOIA request. *Founding Church of Scientology*, 610 F.2d at 837. NOAA's Final Response Letter lacks any information about the scope and method of the search it conducted. Attachment CC; *Nat'l Sec. Counselors II*, 960 F. Supp. 2d at 152; *Ancient Coin Collectors Guild*, 641 F.3d at 514. Nowhere in NOAA's Final Response Letter did the agency provide search terms or a description of its search. Attachment CC. Instead, the agency merely stated, "Our search within the National Marine Fisheries Service, Office of Protected Resources Headquarters, has identified 129 responsive records." *Id.* As such, NOAA did not demonstrate that it made a "good faith effort to conduct a search" for the requested records, nor did the agency prove that it used methods that "can be reasonably expected to produce the information requested." *Oglesby* at 920 F.2d at 68. Therefore, the agency did not satisfy its burden to prove the adequacy of its search.

Accordingly, it appears that NOAA merely performed a perfunctory search for responsive records. *Ancient Coin Collectors Guild v.*, 641 F.3d at 514. Without a description of the search methods NOAA used, or the original electronic names of the documents, the agency has failed to make it apparent to the Center that it conducted an adequate search for records. *Oglesby* at 920 F.2d at 68; *Nat'l Sec. Counselors II*, 960 F. Supp. 2d at 152; *Ancient Coin Collectors Guild v.*, 641 F.3d at 514. To remedy this, NOAA must conduct an adequate search for responsive records, release responsive records immediately, and provide adequate detail about the search methods that it utilized. Additionally, because the Center believes there may be further evidence

of NOAA's inadequate search, the Center reserves its right to further challenge any subsequent searches once it receives additional records from NOAA and has an opportunity to review them.

The Center is simply unable to conclude that NOAA's search was reasonably calculated to locate all records that are responsive to the Center's FOIA request. Thus, based on available information, NOAA failed to conduct an adequate search for requested responsive records.

II. NOAA HAS NOT CARRIED ITS BURDEN TO PROVE THAT IT MAY LAWFULLY WITHHOLD RESPONSIVE RECORDS UNDER EXEMPTION 5.

In addition to conducting an inadequate search, NOAA failed to prove that it may lawfully withhold responsive records under FOIA Exemption 5's deliberative process privilege. 5 U.S.C. § 552(b)(5). An agency may only withhold information pursuant to one of FOIA's exemptions if "the agency reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption...; or ... disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). To satisfy its burden, an agency seeking to utilize a FOIA exemption to withhold information "must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (citations omitted). "Without a sufficiently specific affidavit or *Vaughn* Index, a court cannot decide, one way or the other, a deliberative process, attorney-client, or attorney work product privilege claim." *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 259-60 (D.D.C. 2004) (citation omitted). Indeed, an agency seeking to withhold information "must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA" and, thus, "[a]n agency cannot meet its statutory burden of justification by conclusory allegations." *Mead Data Cent.*, 566 F.2d at 258.

Here, NOAA withheld 186 records in full (completely blacked out) and withheld 1,050 records in part by broadly invoking Exemption 5's privileges. Attachment CC (summary). But, NOAA failed to provide "a relatively detailed justification specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of the withheld document to which they apply." *Mead Data Cent.*, 566 F.2d at 251. NOAA did not address how it applied Exemption 5 to the withheld records, or how it justified its use of Exemption 5. *Id.* Considering the scarcity of information in NOAA's Final Response Letter, there is no way to determine if the records would "routinely be disclosed" in civil litigation. Attachment CC; *See U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984). It is nearly impossible for the Center to ascertain what is missing from the records since most of the records are completely or nearly completely blacked out. Attachment CC. Due to NOAA's complete lack of justification, the Center is left to speculate as to how the redacted records qualify for the deliberate process privilege.

Nowhere in NOAA's communications did the agency state that it reasonably foresaw that disclosure would harm an interest protected by Exemption 5. Aside from failing to demonstrate or allege that NOAA reasonably foresaw that disclosure of the requested records would harm a protected interest, NOAA also failed to satisfy the elements necessary to show that withholding information is warranted pursuant to Exemption 5. Exemption 5 allows government agencies to

withhold “interagency 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.” 5 U.S.C. § 552(b)(5). To qualify for Exemption 5, (1) a record’s “source must be a Government agency,” and (2) “it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.” *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8, (2001). In other words, Exemption 5 covers “those documents, and only those documents, normally privileged in the civil discovery context[.]” *Loving v. Dep’t of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008) (quotation omitted).

First, NOAA provided no evidence that the records are inter-agency or intra-agency memoranda or letters that would not be available to a party other than one in litigation with the agency. Second, NOAA failed to show that the records are predecisional and deliberative such that they would qualify for the deliberative process privilege. Third, NOAA failed to show that the records qualify for the attorney-client privilege. Fourth, NOAA did not demonstrate that it withheld records properly under the attorney work-product privilege. Thus, NOAA did not meet its burden to prove that it may lawfully withhold records pursuant to Exemption 5.

A. NOAA Did Not Meet FOIA Exemption 5’s Threshold Requirement.

NOAA failed to show that it could meet the threshold requirement of FOIA Exemption 5 that the records must be inter- or intra-agency records. 5 U.S.C. § 552(b)(5).

The Supreme Court has held that the standard to determine whether records fall under the inter-agency or intra-agency threshold requirement is whether the records would “routinely be disclosed” in civil litigation. *See U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984). Furthermore, to satisfy Exemption 5’s threshold requirement that a record must be inter- or intra-agency, the agency must show that it has not shared the withheld records with third parties, including state agencies or tribes. *See People for Am. Way Found. v. U.S. Dep’t of Educ.*, 516 F. Supp. 2d 28, 36 (D.D.C. 2007) (citing 5 U.S.C. § 551(1)) (for the purpose of FOIA, “it is clear” that “an ‘agency’ must be a federal entity”).

Here, it is not apparent that the responsive records withheld by NOAA are, in fact, inter- or intra-agency records. In its Final Response Letter, NOAA did not address whether it shared the withheld records with non-federal entities. Attachment CC. However, given the nature of the Center’s FOIA request, it is reasonable to assume that the records were shared with third-parties, such as chemical companies or pesticide trade or advocacy organizations (e.g. Croplife America) and even state agencies. If NOAA withheld records under Exemption 5 but shared the records with third parties, then the agency directly offended the threshold requirement that Exemption 5 can only apply only to federal inter- and intra-agency communications. *See People for Am. Way Found.*, 516 F. Supp. 2d at 36. Moreover, considering the utter lack of information in NOAA’s Final Response Letter, the agency failed to show that the redacted or withheld records were inter- or intra-agency. Attachment CC.

Thus, NOAA has not met its burden to prove that it may lawfully withhold records pursuant to Exemptions 5.

B. NOAA Failed To Show That The Records Are Both Predecisional And Deliberative.

Even if NOAA had proved that it met Exemption 5's threshold requirement (which it did not), NOAA failed to show that the withheld records were predecisional and deliberative, thus warranting the deliberative process privilege.

The deliberative process privilege allows a federal agency to withhold responsive records only where the records contain material that is both "predecisional" and "deliberative." 5 U.S.C. § 552(b)(5). For a record to be "predecisional," it must reflect the give-and-take of a consultative process before the agency took final action. *Vaughn v. Rosen (II)*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). An agency must be able to point to a specific agency decision to which a withheld record pertains. *Senate of P.R. v. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987). Even draft documents are not universally exempt from disclosure. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982); *Nevada v. DOE*, 517 F.Supp.2d 1245, 1264-65 (D. Nev. 2007).

In addition to being "predecisional," records must be "deliberative" to qualify for the privilege. Portions of a record are "deliberative" only 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), <http://www.justice.gov/oip/doj-guide-freedom-information-act-0> (hereinafter *DOJ Guide*) (website last visited June 7, 2017). 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).

In evaluating withholdings based on Exemption 5's deliberative process privilege, the privilege "must be construed as narrowly as is consistent with efficient government operation." *Army Times Pub. Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1069 (D.C. Cir. 1993). To explain how information qualifies for the privilege, an agency necessarily must explain, at a minimum, what the records consist of (i.e., who generated them, who received them, and what they contain). Simply providing conclusory statements of privilege or policy justifications for withholding information is wholly inadequate for an agency to overcome FOIA's strong disclosure presumption and to withhold information from records under the narrowly construed deliberative process privilege. *Founding Church of Scientology*, 610 F.2d at 837; see also *COMPTEL*, 910 F.

Supp. at 111 (“conclusory assertions of privilege will not suffice to carry the Government’s burden of proof in defending FOIA cases”); *see also 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 justification whatsoever as to why it may withhold portions of the final pesticide biological evaluations and opinions under the deliberative process privilege. Attachment CC. As stated above, in its Final Response Letter NOAA failed to provide any explanation for the legal standard it invoked, let alone how the records qualified for the privilege. *Id.* NOAA only included the exemption’s language from the statute, which amounts to conclusory, boilerplate language. *Id.* The agency broadly redacted records of the final pesticide biological evaluations and opinions under Exemption 5, but as stated above, NOAA did not offer a “relatively detailed justification” for withholding and redacting records. *King*, 830 F.2d at 219; *Mead Data Cent.*, 566 F.2d at 251. Moreover, NOAA failed to explain what the records consist of (i.e., who generated them, who received them, and what they contain). As a result, NOAA failed to establish that it may withhold any portion of the records.

NOAA did not identify any particular decision to which the records are purportedly “predecisional.” *Senate of P.R.*, 823 F.2d at 585. It is unclear how the *final* pesticide biological evaluations and opinions could be categorized as predecisional. As such, NOAA cannot overcome FOIA’s strong disclosure mandate and lawfully withhold these records under the narrowly construed deliberative process privilege. *Founding Church of Scientology of Wash.*, 610 F.2d at 830; and *see also COMPTEL*, 910 F. Supp. 2d at 119; *see also Senate of P.R.*, 823 F.2d at 585.

Furthermore, NOAA did not demonstrate how the redacted portions of final pesticide biological evaluations and opinions qualify as “deliberative.” The Center requested all records of the final pesticide biological evaluations and opinions; however, as these are records of final evaluations and opinions, it is highly unlikely that they reflect advisory opinions, recommendations, or 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); *see also Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (internal citations omitted). NOAA failed to show that the withheld records were “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn*, 523 F.2d at 1143-44. Exemption 5 only protects “preliminary positions or ruminations about how to exercise *discretion* on some *policy* matter.” *Petroleum Info. Corp.*, 976 F.2d at 1435 (emphasis added). Here, NOAA is not exercising discretion in a policy matter. NOAA is not making a decision by which it is exercising its policy judgment in commenting on the statements of other agencies. Therefore, the deliberative process privilege does not apply.

Indeed, the substance of the withheld records is, presumably, primarily factual in nature and would include a significant amount of information that is not, by nature, deliberative. Under Exemption 5, NOAA may not withhold factual information as deliberative. *Julian*, 806 F.2d at 1419. The burden is on NOAA to demonstrate that the withheld records reveal an agency exercise of discretionary policy-making judgment which it has failed to do. *Coastal States Gas*

Corp., 617 F.2d at 861. Therefore, NOAA failed to show that the withheld records are “deliberative,” and as such it does not qualify for the deliberative process privilege.

Thus, NOAA failed to show that it can meet Exemption 5’s requirements. As a result, NOAA must promptly release any and all records improperly withheld under the deliberative process privilege, including portions of records.

C. NOAA Failed To Carry Its Burden To Show That It May Withhold Records Pursuant To Exemption 5’s Attorney-Client Privilege.

In addition to failing to prove that the records qualify for Exemption 5’s deliberative process privilege, NOAA also failed to prove that the attorney-client privilege applies. The attorney-client privilege protects confidential communications with counsel which must concern a legal matter for which the client sought professional, legal advice. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *see also Schlefer v. U.S.*, 702 F.2d 233, 25 (D.C. Cir 1983). The privilege protects an agency’s communication with its attorneys, as long as the communications occurred pursuant to obtaining legal advice and is limited to agents authorized to speak or act on behalf of the agency. *See Coastal States* at 617 F.2d at 862-64. This privilege “does not exempt a document simply because the communication involves the government’s counsel.” *See Judicial Watch v. Dep’t of Army*, 435 F.Supp. 2d 81 (D.D.C. 2006).

Here again, NOAA failed to provide a “relatively detailed justification, specifically identifying the reasons” for withholding the records. *King*, 830 F.2d at 219. In its Final Response Letter, NOAA provided a paltry explanation for its application of Exemption 5, and as such, the Center is left to speculate as to how the attorney-client privilege may apply to the records. Attachment CC. NOAA merely stated that “the records are exempted from disclosure through Attorney Client-Privilege, Attorney Work Product and/or Deliberate Process Privilege.” *Id.* Nowhere in its Final Response Letter did NOAA provide any meaningful explanation as to how the withheld records would reveal the agency’s communications seeking legal advice from agency counsel. *NLRB*, 421 U.S. at 154; *Schlefer*, 702 F.2d at 25. Furthermore, as the Center’s request sought final pesticide biological evaluations and opinions, it is unclear how the records would qualify as communications occurring pursuant to obtaining legal advice. *Coastal States* at 617 F.2d at 862-64. NOAA’s utter lack of justification in its Final Response Letter is entirely insufficient to warrant attorney-client privilege protection to records responsive to the Center’s FOIA request.

Thus, NOAA failed to prove that it properly applied the attorney-client privilege to the withheld records. As a result, NOAA must promptly release any and all improperly withheld information, including portions of records.

D. NOAA Has Failed To Show That It May Withhold Records Under The Attorney Work-Product Privilege.

Suffering the same flaws as the deliberative-process and attorney-client privileges, NOAA has failed to establish that it may withhold records under the attorney work-product privilege.













The attorney work-product privilege is intended to protect records that have been prepared by an attorney or others in anticipation of litigation, preserving the adversarial process by shielding materials which would disclose the attorney's theory of the case or litigation strategy. *See, e.g., Coastal States*, 617 F.2d at 864. Thus, "at the very least some articulable claim, likely to lead to litigation," must have arisen. *Id.* at 865.

Here, NOAA has not provided any information to substantiate its claims that this privilege applies whatsoever. Indeed, NOAA failed to show that "at the very least some articulable claim, likely to lead to litigation." *Coastal States*, 617 F.2d at 864 at 865.




Thus, NOAA failed to demonstrate that it properly withheld records under Exemption 5's attorney work-product privilege.

III. NOAA UNLAWFULLY WITHHELD THE ORIGINAL, ELECTRONIC NAMES OF THE RECORDS.

In addition to improperly invoking Exemption 5 to the released records, NOAA improperly changed the file names that were part of the records. The name of an electronic record is part of the record, and NOAA cannot withhold it without claiming an exemption. In its first interim release, NOAA included the name of the records as follows:

-  4-13-17 Wiley Rein LLP memo to The Honorable Ryan Zinke-DOI.pdf
-  4-13-17 Wiley Rein LLP memo to The Honorable Scott Pruitt-EPA.pdf
-  4-13-17 Wiley Rein LLP memo to The Honorable Wilbur Ross-DOC.pdf
-  4-19-17 CropLife America memo to EPA_ DOI_ DOC.pdf
-  6-20-17 Proposed Mtg Agenda_EPA-USFWS-USDA FESTF Mtg (wNotes).pdf
-  103-601Malathion_Data_Report_2016.pdf
-  Appendix C - Critical Habitat PBFs (6-30-17).pdf
-  Best Mgmt Practices to Prvent Aquatic Contamination.pdf
-  expertise slide.pdf
-  Proportion US range summary 6-8-15.pdf
-  Thistle et al 2017 Evalutation of Spray Drift from Backpack Sprayer and UTV.pdf
-  WSDA 2015 MONITORING REPORT- issued 5-30-17.pdf

Yet, in its second release, and all subsequent releases, NOAA changed the names of the records. For example, NOAA's second interim response released three records in full, but changed the names:

-  0.7.1596.5205.pdf
-  0.7.1596.6433.pdf
-  0.7.1596.12481.pdf

The Center is entitled to the original record, including the name of the record, not a modified record. Thus, NOAA's withholding of the original, electronic names of the records is unlawful.

IV. THE DEPARTMENT OF COMMERCE CONSTRUCTIVELY DENIED THE CENTER'S FOIA REQUEST.

In addition to NOAA's unlawfully withholding the original electronic names of the records, DOC has constructively denied the Center's FOIA request. A FOIA requester "shall be deemed to have exhausted his administrative remedies" whenever an agency fails to comply with a time limit of the Act. 5 U.S.C. § 552(a)(6)(C); *see also 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."). In other words, when an agency fails to respond to a FOIA request within the statutory timeframe, the request is treated as being constructively denied by the agency. At this time, DOC has violated statutory 20-workday deadline that FOIA mandates for agencies to make a determination on FOIA requests, effectively constructively denying the Center's request such that the Center is now deemed to have constructively exhausted its administrative remedies.

Here, the Center submitted two FOIA requests on June 27, 2017: one to DOC and one to NOAA. In the Center's original FOIA request to DOC, the agency assigned it tracking number DOC-OS-2017-00143. Then, without the Center's consent or approval, DOC consolidated that request with the Center's separate request to NOAA, and changed the tracking number to DOC-NOAA-2017-001431. In NOAA's Final Response Letter, the agency stated that "[t]he Department of Commerce continues to search, collect, and review responsive records. You can expect further or final response regarding those records under the FOIA reference number DOC-NOAA-2017-001431." Attachment CC. Now, while NOAA's response is "complete" the request is not final because DOC has still not provided any responsive records, effectively holding up the agency's response. The Center routinely submits requests to agencies and their sub-agencies without the departmental agency subsuming the separate requests into one matter.

Here, because DOC has treated the Center's two separate requests as one matter and because the agency has not provided any response to the Center's request, let alone one that complies with FOIA's 20-workday deadline, DOC has constructively denied the Center's request.

V. 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 the records under Exemption 5 was proper (which it did not), the agency did not carry its burden to prove that there are no reasonably segregable, non-exempt portions of the withheld records, such as purely factual and scientific information. This issue was not even mentioned in NOAA's Final Response Letter. Attachment CC.

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. Interior*, 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.

VI. CONCLUSION

As described above, NOAA violated FOIA by failing to conduct an adequate search for final pesticide biological evaluations and opinions, and by improperly redacting records pursuant to Exemptions 5. Accordingly, NOAA must conduct an adequate search for responsive records and produce all responsive records immediately. In so doing, NOAA must also provide an estimated date of completion of its release of the records. 5 U.S.C. § 552(a)(7)(B).

We expect your timely resolution of this matter. Do not hesitate to contact me with any questions regarding this appeal. Please contact me at 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 June 27, 2017 FOIA Request)
- Attachment B (DOC's June 27, 2017 Acknowledgment Email)
- Attachment C (The Center's June 27, 2017 DOC FOIA Request)
- Attachment D (DOC's June 28, 2017 Tracking Number Change Email)
- Attachment E (NOAA's July 6, 2017 Acknowledgment Letter)
- Attachment F (NOAA's July 7, 2017 Clarification Email)
- Attachment G (NOAA's July 12, 2017 Memorialization Email)
- Attachment H (NOAA's July 18, 2017 Email Chain)
- Attachment I (NOAA's July 25, 2017 Fee Waiver Email)
- Attachment J (The Center's August 10, 2017 Notice of Deadline Violation and Offer to Assist Letter)
- Attachment K (NOAA's August 11, 2017 Acknowledgment Email)
- Attachment L (NOAA'S August 16, 2017 Status Update Email)
- Attachment M (The Center's November 20, 2017 Second Notice of Deadline Violation and Offer to Assist)

Attachment N (NOAA's November 22, 2017 Status Update Email Chain)
Attachment O (NOAA's November 30, 2017 First Response Letter)
Attachment P (NOAA's December 8, 2017 Status Update)
Attachment Q (NOAA's January 11, 2018 Second Response Letter)
Attachment R (NOAA's February 1, 2018 Third Response Letter)
Attachment S (The Center's February 2, 2018 Email)
Attachment T (NOAA's February 2, 2018 Email)
Attachment U (The Center's February 5, 2018 Email)
Attachment V (NOAA's February 6, 2018 Email)
Attachment W (NOAA's February 8, 2018 Fourth Response Letter)
Attachment X (NOAA's February 8, 2018 ECD Email)
Attachment Y (NOAA's February 27, 2018 Fifth Response Letter)
Attachment Z (NOAA's March 8, 2018 Email)
Attachment AA (NOAA's March 16, 2018 Status Update Email)
Attachment BB (NOAA's March 19, 2018 Email Chain to Exclude Email Chain)
Attachment CC (NOAA's March 27, 2018 Final Response Letter)
Attachment DD (NOAA's March 29, 2018 Final Release Notification)

Jackie Rolleri - NOAA Federal

From: Jackie Rolleri - NOAA Federal
Sent: Thursday, May 31, 2018 11:12 AM
To: Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate
Cc: Monique Bortey - NOAA Affiliate
Subject: rough draft - NOS FOIA Handbook
Attachments: Draft process (5-28-18).docx

Hi Mark and Lola,

Attached is what we have so far of the draft NOS FOIA Handbook. As you'll see, it's still a work in progress but Monique and I are hoping to have the draft ready to share with NOS POCs by early next week for their feedback. We're planning to push back our POC training by a couple of weeks, which we can discuss when we meet later today, so that we'll be able to time it with the FOIA Online rollout and have additional time for others to review the handbook.

(b)(5)

Looking forward to talking more at 2pm.

Thanks,
Jackie

--

Jackie Rolleri, Attorney-Advisor
Oceans and Coasts Section
Office of the General Counsel
National Oceanic and Atmospheric Administration
1305 East-West Highway
SSMC4, Suite 6111
Silver Spring, MD 20910
301-713-7387 (office)
202-494-8963 (cell) (Telework Tues. and Fri)

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Daniel Pollak - NOAA GC

From: Daniel Pollak - NOAA GC
Sent: Friday, June 1, 2018 9:43 AM
To: Mark Graff - NOAA Federal
Subject: Fwd: FOIA Request 2018-001372
Attachments: 2018.05.14 FOIA Request to NMFS RE EPA Request for Reinitiation of Pesticides Consultation.pdf

Mark, Ellen forwarded this email to me and I don't understand it. I am the subject matter GC point of contact for FOIA 2018-001372. I hadn't heard of any scope discussions with the requester. Could you clarify for me? Are we talking about the same FOIA as the attached?

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

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Thu, May 31, 2018 at 11:18 AM
Subject: Re: FOIA Request 2018-001372
To: NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>
Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Cheyenne Johnson - NOAA Affiliate <cheyenne.johnson@noaa.gov>, Peaches Hodge-Tonic - NOAA Federal <peaches.hodge-tonic@noaa.gov>

Wait (b)(5)

[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) (C)

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On Thu, May 31, 2018 at 11:15 AM, NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov> wrote:

Mark (b)(5) [REDACTED].

~ Ellen

On Thu, May 31, 2018 at 11:10 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
Hello Ellen/Cheyenne--

(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 Thu, May 31, 2018 at 10:58 AM, NMFS HQ PR FOIA Requests - NOAA Service Account

<nmfs.hq.pr.foia@noaa.gov> wrote:

Mark and Lola, (b)(5)

Any help on this issue would be greatly appreciated!

Best~ Ellen and Cheyenne

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

From: **Brianne Szczepanek - NOAA Federal** <brianne.szczepanek@noaa.gov>

Date: Wed, May 23, 2018 at 1:32 PM

Subject: Re: FOIA Request 2018-001372

To: NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>, Nicole Skerritt - NOAA Federal <nicole.skerritt@noaa.gov>

Cc: Samuel Rauch - NOAA Federal <samuel.rauch@noaa.gov>, Donna Wieting - NOAA Federal <donna.wieting@noaa.gov>, Cathy Tortorici - NOAA Federal <cathy.tortorici@noaa.gov>, Daniel Pollak - NOAA Federal <daniel.pollak@noaa.gov>, Alesia Read - NOAA Federal <alesia.read@noaa.gov>, Emma Htun - NOAA Federal <emma.htun@noaa.gov>, Stuart Levenbach - NOAA Federal <Stuart.Levenbach@noaa.gov>, Ellen Sebastian - NOAA Federal <Ellen.Sebastian@noaa.gov>, Cheyenne Johnson - NOAA Affiliate <cheyenne.johnson@noaa.gov>, Peaches Hodge-Tonic - NOAA Federal <peaches.hodge-tonic@noaa.gov>

Looping in Nicole Skerritt, Front office's FOIA coordinator.

On Wed, May 23, 2018 at 12:55 PM, NMFS HQ PR FOIA Requests - NOAA Service Account

<nmfs.hq.pr.foia@noaa.gov> wrote:

For those going wishing to provide records before the long weekend, here's a brief summary of what's needed:

(b)(5)

Thank you all for your attention and cooperation moving this forward.

On Tue, May 22, 2018 at 5:11 PM, NMFS HQ PR FOIA Requests - NOAA Service Account
<nmfs.hq.pr.foia@noaa.gov> wrote:

Good Afternoon,

(b) (5)

Thanks, Peaches

--

NOAA / National Marine Fisheries Service
FREEDOM OF INFORMATION OFFICE (FOIA)
Office of Protected Resources
[Tawand Tonic, acting PR FOIA Coordinator](#)
Phone: 301 - 427 - 8482

--

NOAA / National Marine Fisheries Service
FREEDOM OF INFORMATION OFFICE (FOIA)
Office of Protected Resources
[Tawand Tonic, acting PR FOIA Coordinator](#)
Phone: 301 - 427 - 8482

--

Brianne Szczepanek
Chief of Staff
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
work: (301) 427-8021 cell: (301)452-0051
brianne.szczepanek@noaa.gov

--

Daniel Pollak, Attorney Advisor
NOAA Office of General Counsel
United States Department of Commerce
Silver Spring, MD
daniel.pollak@noaa.gov
(301) 628-1616

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May 14, 2018

VIA FOIAONLINE.REGULATIONS.GOV

National Oceanic and Atmospheric Administration

Re: Freedom of Information Act Request: EPA Request for Reinitiation of Pesticides Consultation

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 from the National Oceanic and Atmospheric Administration (“NOAA”), National Marine Fisheries Service (“NMFS”): the request, draft request, and records generated in connection to a request from the U.S. Environmental Protection Agency (“EPA”) to reinitiate informal consultations, consultations, or otherwise review the NMFS Biological Opinion on Environmental Protection Agency’s Registration of Pesticides containing Chlorpyrifos, Diazinon, and Malathion. *See generally*, NOAA Fisheries, *Biological Opinion for Pesticides: Chlorpyrifos, Diazinon, and Malathion*, <https://www.fisheries.NMFS.gov/resource/document/biological-opinion-pesticides-chlorpyrifos-diazinon-and-malathion> (last views May 14, 2018).

For this request, the term “records” refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related 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.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to 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, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

The Center is willing to receive records on a rolling basis.

Finally, FOIA's "frequently requested record" provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give "reading room" treatment to any FOIA-processed records that, "because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records." *See* 5 U.S.C. § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA's Rule of 3 requires all federal agencies to proactively "make available for public inspection in an electronic format" "copies of records, regardless of form or format ... that have been released to any person ... and ... that have been requested 3 or more times." 5 U.S.C. § 552(a)(2)(D)(ii)(II). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide 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."). "Readily accessible" means text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B). Pursuant to this requirement, we hereby request that you produce all records in an electronic format and in their native file formats. Additionally, please provide the records in a load-ready

format with a CSV file index or Excel spreadsheet. If you produce files in .PDF format, then please omit any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily accessible. Please do not provide the records in a single, or “batched,” .PDF file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

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). 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
foia@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please email me 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 1986 fee waiver amendments 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).

I. The Center Qualifies for a Fee Waiver.

Under FOIA, a party 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 U.S. Department of Commerce FOIA regulations that govern NMFS at 15 C.F.R. § 4.11(l) establish the same standard.

Thus, NMFS 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 concerns the operations and activities of NMFS. This request asks for the request, draft request, and records generated in connection to a request from EPA to reinstate informal consultations, consultations, or otherwise review the NMFS Biological Opinion on Environmental Protection Agency’s Registration of Pesticides containing Chlorpyrifos, Diazinon, and Malathion. *See generally*, NOAA Fisheries, *Biological Opinion for Pesticides: Chlorpyrifos, Diazinon, and Malathion*, <https://www.fisheries.noaa.gov/resource/document/biological-opinion-pesticides-chlorpyrifos-diazinon-and-malathion> (last views May 14, 2018).

This FOIA will provide the Center and the public with crucial insight into EPA’s request to reinstate consultations for the pesticides chlorpyrifos, diazinon, and malathion. It is clear that a federal agency’s request to another federal agency to reinstate consultations under a federal environmental law is a specific and identifiable activity of the government, in this case the executive branch agency, NMFS. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, the Center meets this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow the Center to convey to the public information about EPA's intent to review NMFS's biological opinion concerning toxic pesticides. Once the information is made available, the Center will analyze it and present it to its 1.6 million members and online activists and the general public in a manner that will meaningfully enhance the public's understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of NMFS operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of EPA Request for Reinitiation of Pesticides Consultation.

The requested records will contribute to public understanding of whether NMFS and EPA's actions are consistent with their own missions. As explained above, the records will contribute to public understanding of this topic.

Activities of NMFS generally, and specifically its actions concerning EPA's request to review NMFS' biological opinion on pesticides are areas of interest to a reasonably broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about this subject matter. See *W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.").

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

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern EPA's request for reinitiation of pesticides consultation that are not currently in the public domain. See *Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "clarify important facts" about agency policy, "the CLS request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[FOIA] legislative history suggests that information [has more potential to

contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations... .”¹

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of the rationale behind EPA’s request to NMFS for reinitiation of pesticides consultation. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about this topic.

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 EPA’s decision to reinitiate consultations regarding chlorpyrifos, diazinon, and malathion, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about EPA and NMFS’s work concerning these pesticides.

The records are also certain to shed light on EPA and NMFS’s compliance with their own missions. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

II. The Center has a Demonstrated Ability to Disseminate the Requested Information Broadly.

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 activities of numerous government agencies for over 25 years, 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: (1) that the information requested by the Center contributes significantly to the public’s understanding of the government’s operations or activities; (2) that the information enhances the public’s understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center’s track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public’s

¹ In this connection, it is immaterial 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. *See Judicial Watch*, 326 F.3d at 1315.

understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in more than 2,500 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*, *The Guardian*, and *Los Angeles Times*. Many media outlets have reported on the adverse effects of pesticides to human and environmental health utilizing information obtained by the Center from federal agencies, including NMFS. In 2017, more than 2.7 million people visited the Center's extensive website, and viewed pages a total of 5.7 million times. The Center sends out more than 277 email newsletters and action alerts per year to more than 1.6 million members and supporters. Three times a year, the Center sends printed newsletters to more than 63,000 members. More than 304,800 people have "liked" the Center on Facebook, and there are regular postings regarding environmental protection. The Center also regularly tweets to more than 57,900 to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of NMFS's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably-broad audience of persons 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 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.*

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 1.6 million 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 NMFS 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.

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret E. Townsend". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
foia@biologicaldiversity.org

McClure, Cathy (Federal)

From: McClure, Cathy (Federal)
Sent: Friday, June 1, 2018 2:05 PM
To: Graff, Mark (Federal)
Subject: RE: DOC-NOAA-2018-000947
Attachments: FoE Memo (FINAL).docx

Mr. Graff—FYI attached is a copy of the memo that has gone forward for Brian’s signature.

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Thursday, May 31, 2018 10:52 AM
To: Dixon, Samuel (Contractor) <Samuel.Dixon@noaa.gov>; McClure, Cathy (Federal) <Cathy.McClure@DOCGOV.onmicrosoft.com>
Cc: Otoshi, Clete (Federal) <Clete.Otoshi@noaa.gov>; Stith, Lola (Contractor) <Lola.M.Stith@noaa.gov>
Subject: Re: DOC-NOAA-2018-000947

Just as a follow-u (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 Wed, May 16, 2018 at 12:35 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 (O)

(b)(6) (C)

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On Wed, May 16, 2018 at 12:14 PM, Samuel Dixon <samuel.dixon@noaa.gov> wrote:

Hi Mark,

You can see the fee estimate in correspondence to requester.

Sam

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

On Wed, May 16, 2018 at 11:44 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Hi Clete,

(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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UNITED STATES DEPARTMENT OF COMMERCE
Office of the Assistant General Counsel for
Employment, Litigation, and Information
Washington, DC 20230

Memorandum

To: Brian D. DiGiacomo
Assistant General Counsel
for Employment, Litigation, and Information

Through: Michael Bogomolny
Chief, Information Law Division

From: Cathy McClure
Information Law Division

Date: May 30, 2018

Re: FOIA Appeal of Hallie Templeton
Request No. DOC-NOAA-2018-000947
Appeal No. DOC-OS-2018-001100

(b) (5)

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Recommendation

(b) (5)

Ellen Sebastian - NOAA Federal

From: Ellen Sebastian - NOAA Federal
Sent: Friday, June 1, 2018 3:34 PM
To: Deborah Ben-David - NOAA Federal; Stacey Nathanson - NOAA Federal; Graff, Mark; NMFS HQ PR FOIA Requests - NOAA Service Account
Subject: Fwd: FOIA Request DOC-NOAA-2018-001420
Attachments: FOIA Fee Waiver Disposition Reached for DOC-NOAA-2018-001420; 2018-001420 Acknowledgement Letter.docx

Helli All, we need to address this respons (b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

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

From: NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>
Date: Friday, June 1, 2018
Subject: Fwd: FOIA Request DOC-NOAA-2018-001420
To: Ellen Sebastian - NOAA Federal <Ellen.Sebastian@noaa.gov>

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

From: Wang, Vivian <vwang@nrdc.org>
Date: Fri, Jun 1, 2018 at 1:20 PM
Subject: FOIA Request DOC-NOAA-2018-001420
To: "nmfs.hq.pr.foia@noaa.gov" <nmfs.hq.pr.foia@noaa.gov>

Ms. Ellen Sebastian

Nmfs.hq.pr.foia@noaa.gov

Re: FOIA Request DOC-NOAA-2018-001420

Dear Ms. Sebastian,

I am writing in reference to the May 23, 2018, letter from NOAA's Office of Protected Resource regarding a

FOIA request made by my organization to the Bureau of Ocean Energy Management (BOEM), which BOEM referred to the National Marine Fisheries Service.

The FOIA request, filed in April, sought records relating to the Executive Order on “America-First Offshore Energy Strategy” and the agencies’ implementation of that order as it relates to seismic surveys or seismic survey applications.

I am emailing for two reasons.

First, NRDC submitted this request to both NOAA and BOEM, since both agencies have relevant records. NOAA has sent us records in response to the FOIA request we made directly to NOAA. Will this recent referral from BOEM identify records that are different from those NOAA/NMFS has already produced?

Second, the letter attached to NOAA’s May 23 email indicated that NRDC was classified as “other” in the fee waiver category and would be assessed fees. This determination is inconsistent with NOAA’s grant of NRDC’s fee waiver in the request that NRDC sent directly to NOAA in April. Please see the attached email for documentation of that fee waiver grant. Can you please explain why NOAA granted NRDC’s fee waiver request in one instance and denied it in the other instance, given that the supporting documentation for our fee waiver request was the same in both instances? To the extent that NOAA’s first determination (granting NRDC’s fee waiver) does not control, please treat this email as an administrative appeal of the adverse fee waiver decision of May 23.

If you could please let me know NMFS’s position on these two points, I would appreciate it. I’m happy to speak on the phone if that would be helpful.

Thank you for your assistance!

Sincerely,

Vivian Wang

NATURAL RESOURCES DEFENSE COUNCIL

40 W 20TH STREET

NEW YORK, NY 10011

T 212.727.4477

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From: foia@noaa.gov [mailto:foia@noaa.gov]
Sent: Wednesday, May 23, 2018 4:17 PM
To: Wang, Vivian <vwang@nrdc.org>
Subject: 2018-001420 Acknowledgement Letter

Good Afternoon,

Attached, please find the acknowledgement letter for your referred FOIA request.

Thank you.

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

From: "foia@noaa.gov" <foia@noaa.gov>
To: "Wang, Vivian" <vwang@nrdc.org>
Cc:
Bcc:
Date: Tue, 22 May 2018 17:48:21 +0000
Subject: FOIA Fee Waiver Disposition Reached for DOC-NOAA-2018-001420

Your request for Fee Waiver for the FOIA request DOC-NOAA-2018-001420 has been fully granted. Additional details for this request are as follows:

- Request Created on: 04/26/2018
- Fee Waiver Disposition Reason: N/A
- Request Long Description: REFERRAL FROM BOEM: FOIA Request for Records Concerning the Executive Order (Apr. 28, 2017) and Secretarial Order (May 1, 2017) on "America-First Offshore Energy Strategy" Please produce records¹ of the following types in the possession, custody, or control of the Department of the Interior, including in the Bureau of Ocean Energy Management (BOEM), that are, include, or reflect decisions, directions, or communications—internal or external to Interior—concerning President Trump's Executive Order titled "Implementing an America-First Offshore Energy Strategy"

(April 28, 2017) (“Executive Order”); and the Secretary of the Interior’s Order No. 3350 on “America-First Offshore Energy Strategy” (May 1, 2017) (“Secretarial Order”), as these orders pertain to seismic surveys or seismic survey applications. This includes but is not limited to records that are or reflect:
Interior’s evaluation of, implementation of, and/or plans to implement, the Executive Order and/or Secretarial Order, with regard to Atlantic Outer Continental Shelf (OCS) survey permit applications, see Memorandum from Walter D. Cruickshank, Acting Director, to Michael Celata, Regional Director, Gulf of Mexico Region (May 10, 2017) (Exh. A);
the effect of the Executive Order and/or Secretarial Order on Interior’s request for voluntary remand of two Interior Board of Land Appeals proceedings concerning previous denials of those permit applications; see Motion for Remand, TGS, et al., IBLA No. 2017-0135 (filed May 10, 2017) (Exh. B); Motion for Remand, Ion/GX Technology Corp., IBLA No. 2017-140 (filed May 10, 2017) (Exh. C); and
communications with seismic survey applicants or any other industry groups regarding the Executive Order and/or Secretarial Order.

--

Ellen Sebastian
FOIA & Records Coordinator Alaska Region
Temporary Detail w/ Office of Protected Resources/PR4
(301) 427-8489

Nourish and sustain your sense of joy.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

May 23, 2018

Miss Vivian Wang
National Resources Defense Council
40 West 20th Street
11th Floor
New York, NY 10011

Re: FOIA Request DOC-NOAA-2018-001420

Dear Miss Wang:

This letter is to acknowledge receipt of your Freedom of Information Act (FOIA) request. Your FOIA request was referred to our agency, National Marine Fisheries Service (NMFS), by Bureau of Ocean Energy Management (BOEM), via FOIA online on May 22, 2018. You requested:

“...Records Concerning the Executive Order (Apr. 28, 2017) and Secretarial Order (May 1, 2017) on “America-First Offshore Energy Strategy” Please produce records¹ of the following types in the possession, custody, or control of the Department of the Interior, including in the Bureau of Ocean Energy Management (BOEM), that are, include, or reflect decisions, directions, or communications—internal or external to Interior—concerning President Trump’s Executive Order titled “Implementing an America-First Offshore Energy Strategy” (April 28, 2017) (“Executive Order”); and the Secretary of the Interior’s Order No. 3350 on “America-First Offshore Energy Strategy” (May 1, 2017) (“Secretarial Order”), as these orders pertain to seismic surveys or seismic survey applications.”

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**” and you will be charged according to that fee structure. We have noted your willingness to pay \$25.00 for these responsive records.

If you have questions regarding your request, please contact Mrs. Ellen Sebastian at nmfs.hq.pr.foia@noaa.gov or call 301-427-8489.

Sincerely,
//s//
Cheyenne Johnson
FOIA Contractor
Office of Protected Resources

