

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

OCEAN CONSERVANCY  
1300 19th Street, NW, Eighth Floor  
Washington, DC 20036

Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE  
U.S. Department of Commerce  
Room 14555  
1315 East-West Highway  
Silver Spring, Montgomery County, MD 20910

NATIONAL OCEANIC AND ATMOSPHERIC  
ADMINISTRATION  
U.S. Department of Commerce  
Room 5128  
1401 Constitution Avenue, NW  
Washington, DC 20230

Defendants.

No. \_\_\_\_\_

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

**INTRODUCTION**

1. Plaintiff Ocean Conservancy brings this case to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by the National Marine Fisheries Service and National Oceanic and Atmospheric Administration (collectively, Defendants). The violations arise out of Defendants' continuing failure to respond to Ocean Conservancy's FOIA request.

2. In June 2017, Defendants issued a Temporary Rule reopening the Gulf of Mexico private angler red snapper fishing season and extending the fishing season from 3 to 42 days. 82 Fed. Reg. 27,777 (June 19, 2017). Defendants admitted that the action would cause the private recreational fishing sector to substantially exceed the annual catch limit set for that sector and delay rebuilding for the overfished population of red snapper, *id.* at 27,779, in violation of a

number of statutes.

3. Ocean Conservancy filed a FOIA request with the National Marine Fisheries Service (Fisheries Service), an agency of the National Oceanic and Atmospheric Administration (NOAA), on June 19, 2017, seeking pertinent records to enable Ocean Conservancy to analyze the basis for and impact of the Temporary Rule and disseminate the information to the public. The records sought in the FOIA request are essential to Ocean Conservancy's advocacy and public education missions to support protecting the red snapper population. Defendants failed to provide Ocean Conservancy a determination on its FOIA request within the time required under FOIA and have not to date provided Ocean Conservancy a determination on its request.

4. Although Defendants have provided Ocean Conservancy a small, partial release of responsive records, Defendants continue to unlawfully withhold the information sought by Ocean Conservancy. Defendants have provided Ocean Conservancy no information on additional responsive records in their possession. By failing to provide the requested records, Defendants are actively impeding Ocean Conservancy's access to government information and blocking its ability to carry out its organizational missions.

5. Having constructively exhausted its administrative remedies with Defendants, Ocean Conservancy now turns to this Court to enforce FOIA's guarantee of public access to agency records and to remedy Defendants' withholding of that access. Accordingly, Ocean Conservancy asks this Court to declare that Defendants have violated FOIA by failing to make a determination on Ocean Conservancy's FOIA request and by withholding the requested records, to order Defendants to immediately provide Ocean Conservancy with a legally compliant response to its outstanding record request, to order Defendants to promptly provide Ocean Conservancy 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, on information and belief, the requested agency records are situated in this District. Venue also properly vests in this District pursuant to 28 U.S.C. § 1391(b) and (e)(i) because: (1) the principal office of each Defendant is located in this District and (2) a substantial part of the events and omissions which gave rise to this action occurred 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 OCEAN CONSERVANCY is a nonprofit, science-based conservation organization dedicated to healthy oceans and the wildlife and communities that depend on them. Since 1972, Ocean Conservancy has sought to improve the health of our nation's marine wildlife and fish. To that end, and as part of its organizational goals, Ocean Conservancy seeks to prevent degradation of marine habitats and end overfishing (i.e., catching more fish than the remaining population can replace). Ocean Conservancy has over 125,000 members and supporters worldwide, including over 14,000 in the five Gulf of Mexico states. The organization publishes numerous reports, articles, newsletters, and other analyses on ocean and fishery sustainability topics each year. The organization is routinely called upon to brief and educate federal and state policymakers, and Ocean Conservancy staff are frequently quoted in the media

and invited to present and speak at various conferences and events. Ocean Conservancy's headquarters are located in Washington, DC. It also has offices in Alaska, California, Washington, Oregon, Florida, and Texas.

10. In the 1990s, Ocean Conservancy became involved in the conservation and management of the red snapper fishery. For the past three decades, Ocean Conservancy has worked to promote a healthy red snapper fishery for the benefit of the Gulf of Mexico's ecosystem and coastal communities. Ocean Conservancy staff have regularly attended meetings of the Gulf of Mexico Fishery Management Council and have been involved in public awareness events concerning fisheries for decades.

11. In 2005, Ocean Conservancy successfully challenged the Fisheries Service's rebuilding plan for red snapper. *Coastal Conservation Ass'n v. Gutierrez*, 512 F. Supp. 2d 896 (S.D. Tex. 2007). In 2015, Ocean Conservancy filed *amicus curiae* briefs in support of the federal government in two lawsuits challenging the Fisheries Service's red snapper management.

12. Defendant NATIONAL MARINE FISHERIES SERVICE is an agency of the U.S. Department of Commerce that has been delegated the responsibility to manage the Gulf of Mexico red snapper fishery under the authority of the Magnuson-Stevens Fishery Conservation and Management Act. 16 U.S.C. §§ 1801 *et seq.* The Fisheries Service has authority to issue regulations governing the red snapper fishery seasons and other management measures. The principal office of the Fisheries Service is located in Silver Spring, Montgomery County, Maryland. The Fisheries Service is in possession and control of the records that Ocean Conservancy seeks, and therefore it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

13. Defendant NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION is an agency of the U.S. Department of Commerce with supervisory responsibility for the

Fisheries Service. The principal office of NOAA is located in Silver Spring, Montgomery County, Maryland. NOAA administers and oversees FOIA requests made to the Fisheries Service. NOAA's FOIA office is located in Silver Spring, Montgomery County, Maryland. NOAA is in possession and control of the records that Ocean Conservancy seeks, and therefore is subject to FOIA pursuant to 5 U.S.C. § 552(f).

### STATUTORY BACKGROUND

14. 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).

15. 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 business days from the date of its receipt and to immediately notify the requester of its determination and the reasons therefore. *Id.* § 552(a)(6)(A)(i). This provision 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).

16. 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).

17. 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).

18. 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).

19. 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).

20. 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**

21. On June 19, 2017, Defendants issued a Temporary Rule reopening the Gulf of Mexico private angler red snapper fishing season and extending that fishing season from 3 to 42 days. 82 Fed. Reg. 27,777 (June 19, 2017).

22. The same day, June 19, 2017, Ocean Conservancy submitted a FOIA request to the Fisheries Service seeking records related to the reopening of the private angler red snapper

fishing season. The request sought all documents relating to the reopening of the red snapper season within the date range of January 20, 2017, through June 19, 2017.

23. Ocean Conservancy's FOIA request furthers the organization's objectives to end overfishing and inform its members and the public about conservation and management of the red snapper fishery to benefit the Gulf of Mexico's ecosystem and coastal communities.

24. On June 20, 2017, Ocean Conservancy received a form email from Defendants acknowledging receipt of the request and assigning the request a tracking number, DOC-NOAA-2017-001394. The acknowledgement did not indicate the scope of the documents Defendants would produce, nor did it indicate any planned withholdings or exemptions.

25. The due date for Defendants to issue a determination on Ocean Conservancy's FOIA request was July 18, 2017, under 5 U.S.C. § 552(a)(6)(A)(i).

26. On July 6, 2017, NOAA notified Ocean Conservancy that the agency had granted Ocean Conservancy's fee waiver request. *See id.* 552(a)(4)(A)(i); 15 C.F.R. § 4.11(l).

27. On July 11, 2017, Ocean Conservancy clarified the scope of its request on a phone call with the Fisheries Service's Southeast Region FOIA Coordinator.

28. On July 17, 2017—the day before FOIA required the Fisheries Service to respond to Ocean Conservancy's request—the Fisheries Service requested to extend the due date from July 18, 2017, to August 11, 2017—more than the ten working days allowed for unusual circumstances under 5 U.S.C. § 552(a)(6)(B)(i) and 15 C.F.R. § 4.6(b), (d). Ocean Conservancy agreed to the request.

29. On July 17, 2017, Ocean Conservancy and another organization filed a federal lawsuit challenging Defendants' unilateral decision to extend the private angler red snapper fishing season in the Gulf of Mexico. *Ocean Conservancy v. Ross*, No. 1:17-cv-01408-ABJ

(D.D.C. filed July 17, 2017).

30. On July 25, 2017, NOAA's FOIA Officer emailed Ocean Conservancy requesting additional information in order to make a determination on Ocean Conservancy's eligibility for a waiver of fees. Although NOAA already had granted Ocean Conservancy's fee waiver request, NOAA's FOIA Officer asserted Ocean Conservancy might use the requested records in its lawsuit, which, according to the FOIA Officer, may constitute a "commercial interest" in the records that Ocean Conservancy had not previously disclosed. The FOIA Officer requested additional information on Ocean Conservancy's purported commercial interests in the records.

31. Ocean Conservancy responded via email on July 26, 2017, reiterating that it is a nonprofit organization that has no commercial interest in the requested records.

32. Defendants did not acknowledge or respond to Ocean Conservancy's July 26, 2017 email.

33. On August 2, 2017, Ocean Conservancy sent NOAA an email to inquire about the agency's determination whether Ocean Conservancy has a "commercial interest" in the requested records.

34. On August 3, 2017, Ocean Conservancy received an email from NOAA alleging that Ocean Conservancy had substantively failed to answer the underlying question regarding its commercial interest.

35. Ocean Conservancy emailed NOAA that same day—August 3, 2017—recounting and further explaining the ways in which it would use the records.

36. NOAA did not provide any response.

37. Ocean Conservancy sent NOAA an email on August 28, 2017, to inquire as to the status of the request. NOAA responded that same day via email granting a full fee waiver for the



second time.

38. On August 31, 2017, NOAA telephoned Ocean Conservancy asking to further postpone the agency's response to Ocean Conservancy's FOIA request. Ocean Conservancy declined NOAA's request during that call.

39. On September 12, 2017, Ocean Conservancy received an email from the Fisheries Service stating the Fisheries Service's Southeast Regional Office would be closed due to Hurricane Irma. The email did not provide a timetable for responding to Ocean Conservancy's FOIA request.

40. On September 12, 2017, Ocean Conservancy sent NOAA an email narrowing the date range of its FOIA request to March 13, 2017, through June 19, 2017, to lessen the burden of its request on the agency. NOAA did not acknowledge that email or enter it into the agency's FOIA correspondence log.

41. On September 18, 2017, Ocean Conservancy received an email from the Fisheries Service stating that the Southeast Regional Office reopened on September 15, 2017. The Fisheries Service also stated that the server housing the agency's FOIA application and responsive records was not yet operating, but was anticipated to be running by the end of the day on September 18, 2017. The Fisheries Service stated that it had on September 5, 2017, provided the NOAA Office of General Counsel, Southeast Region with an interim records response for that office's legal review and clearance. The email did not provide any further timetable for responding to Ocean Conservancy's FOIA request, any statement on the scope of records that the agency had sent to the General Counsel or that the agency would produce, or any statement on the agency's planned withholdings or exemptions.

42. On October 12, 2017, having not received any interim records response, Ocean

Conservancy sent an email to NOAA requesting an update on the status of its FOIA request.

43. On October 17, 2017, Ocean Conservancy received an email from the Fisheries Service stating that “a records response has been provided to [the Fisheries Service] and NOAA FOIA for release approval.”

44. On November 14, 2017, Ocean Conservancy sent NOAA an email requesting that Defendants commit to providing the requested documents by a date certain.

45. Later that day, November 14, 2017, NOAA informed Ocean Conservancy it would provide a partial, interim release of 38 documents “shortly.”

46. On November 28, 2017, Ocean Conservancy received an “interim response” from Defendants transmitting 38 documents. The majority of the 38 documents consist of correspondence discussing how to set up an email account to accept public comments on the Temporary Rule. The response did not indicate how many or the scope of any other records Defendants were processing or would produce. Nor did the response provide any information on what documents Defendants planned to withhold or the reasons for any withholding.

47. On December 15, 2017, NOAA informed Ocean Conservancy that additional records were undergoing legal review and clearance and a response to the request would be provided “shortly.” This correspondence did not convey the number or scope of the records under review, or any statement on the agency’s planned withholdings or exemptions.

48. On January 5, 2018, Ocean Conservancy sent NOAA an email requesting an update on the status of its FOIA request.

49. Ocean Conservancy has received no further correspondence from the Fisheries Service or NOAA to date.

50. Ocean Conservancy has not received all the responsive records or the reasonably

segregable portion of non-exempt responsive records to date.

51. The due date for Defendants' FOIA determination remains August 11, 2017.

52. While Defendants acknowledged receipt of the FOIA request and granted the fee waiver twice, Defendants have failed to substantively respond to Ocean Conservancy's FOIA request. None of Defendants' responses indicated the scope of the documents they would produce. Nor did any response include information on planned withholdings or exemptions. Defendants thus never provided Ocean Conservancy with the determination required by FOIA and the governing regulations—more than seven months after acknowledging receipt of the request, more than six months after initially granting the fee waiver, more than six months after the statutory due date for issuing a determination, and more than five months after the agreed-upon extended due date for issuing a determination.

#### **CLAIMS FOR RELIEF**

##### **Count I – Failure to Make a Determination on a FOIA Request, 5 U.S.C. § 552(a)(6), (7)**

53. The allegations made in all preceding paragraphs are realleged and incorporated by this reference.

54. 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.

55. Defendants were required to provide a determination within 20 working days on Ocean Conservancy's FOIA request, dated June 19, 2017. *Id.* § 552(a)(6).

56. Defendants were required to provide “an estimated date on which the agency [would] complete action on the request.” *Id.* § 552(a)(7)(B); *accord id.* § 552(a)(6)(B)(i).

57. Ocean Conservancy agreed to extend Defendants' deadline to respond to Ocean Conservancy's FOIA request from July 18, 2017, to August 11, 2017. Even so, Defendants have

not issued a determination on Ocean Conservancy's FOIA request, more than six months after the statutory deadline and more than five months after the agreed-upon extended deadline.

58. Ocean Conservancy has constructively and fully exhausted all administrative remedies required by FOIA. *Id.* § 552(a)(6)(A), (C).

59. Defendants violated FOIA by failing to make the required determination within 20 working days in response to Ocean Conservancy's June 19, 2017 FOIA request. *Id.* § 552(a)(6).

60. Defendants violated FOIA by failing to provide an estimated date by which they would complete action on Ocean Conservancy's June 19, 2017 FOIA request. *Id.* § 552(a)(6)(B)(i), (7)(B).

**Count II – Failure to Respond to a FOIA Request, 5 U.S.C. § 552(a)(3), (b)**

61. The allegations made in all preceding paragraphs are realleged and incorporated by this reference.

62. FOIA requires Defendants 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).

63. Defendants have provided Ocean Conservancy only a subset of the requested records. Defendants have not claimed that any of the records they have not yet provided are exempt from disclosure. Therefore, the interim response does not constitute the reasonably segregable portion of the requested records not subject to a FOIA exemption.

64. Defendants have acknowledged they are in possession of additional responsive records they have not provided to Ocean Conservancy to date.

65. Defendants have not provided Ocean Conservancy all the requested records. Defendants have not provided Ocean Conservancy the reasonably segregable portion of the requested records not subject to a FOIA exemption.

66. Defendants have violated FOIA by failing to promptly provide the responsive records or the reasonably segregable portion of lawfully exempt responsive records to Ocean Conservancy. *Id.*

### **REQUEST FOR RELIEF**

WHEREFORE, Ocean Conservancy prays that this Court:

1. Declare that Defendants failed to make a timely determination on Ocean Conservancy's records request in violation of FOIA, 5 U.S.C. § 552(a)(6), (7);
2. Declare that Defendants failed to promptly provide records in response to Ocean Conservancy's information request in violation of 5 U.S.C. § 552(a)(3), (b);
3. Order Defendants to provide a determination on Ocean Conservancy's FOIA request, as required by FOIA;
4. Order Defendants to conduct searches that are reasonably calculated to locate all records responsive to Ocean Conservancy's FOIA request, as required by FOIA;
5. Order Defendants to provide Ocean Conservancy all responsive records or the reasonably segregable portions of lawfully exempt records, as required by FOIA, within 20 days of this Court's order;
6. Maintain jurisdiction over this action until Defendants are in compliance with FOIA and every order of this Court;
7. Award Ocean Conservancy 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 23rd day of January, 2018.

/s/ Khushi Desai

Khushi Desai (MD Bar 17444)

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*Attorneys for Plaintiff Ocean Conservancy*

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

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.	)	
	)	

**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



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, 21<sup>st</sup> Floor  
San Francisco, CA 94104  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE  
COUNCIL, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR and  
U.S. DEPARTMENT OF COMMERCE,

Defendants.

18 Civ. 00650 (JGK)

ANSWER

Defendants the U.S. Department of the Interior and the U.S. Department of Commerce (“Defendants”), by their attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, answer the complaint (the “complaint”) filed January 24, 2018, by Natural Resources Defense Council, Inc. (“Plaintiff”), upon information and belief as follows:

#### **INTRODUCTION**

1. Paragraph 1 of the complaint contains Plaintiff’s characterization of this action, to which no response is required. To the extent a response is required, deny the allegations in paragraph 1.

2. The first sentence of paragraph 2 consists of Plaintiff’s characterization of alleged background information and argument, to which no response is required. To the extent a

response is required, admit that President Donald Trump (“the President”) signed (1) Executive Order 13,792, titled “Review of Designations Under the Antiquities Act” and dated April 26, 2017, and (2) Executive Order 13,795, titled “Implementing an America-First Offshore Energy Strategy” and dated April 28, 2017, and respectfully refer the Court to those documents for a true and complete statement of their contents, and otherwise deny the allegations in the first sentence of paragraph 2. With respect to the second sentence of paragraph 2 of the complaint, admit that on December 4, 2017, the President issued a “Presidential Proclamation Modifying the Grand Staircase-Escalante National Monument” and a “Presidential Proclamation Modifying the Bears Ears National Monument,” and respectfully refer the Court to those documents for a true and complete statement of their contents. Defendants further aver that the second sentence of paragraph 2 otherwise consists of Plaintiff’s characterization of alleged background information and argument, to which no response is required. To the extent a response is required, deny the allegations in the second sentence of paragraph 2.

3. With respect to the first two sentences of paragraph 3, admit that Defendants received Freedom of Information Act (“FOIA”) requests from Plaintiff in September and October 2017, and respectfully refer the Court to the referenced documents for a true and complete statement of their contents. Aver that the third sentence of paragraph 3 consists of argument by Plaintiff, to which no response is required.

4. Paragraph 4 of the complaint contains conclusions of law, to which no response is required. To the extent a response is required, deny the allegations in paragraph 4 on the basis that the phrase “respond substantively” is vague and ambiguous.



5. Paragraph 5 of the complaint contains Plaintiff's request for relief, to which no response is required. To the extent a response is required, deny that Plaintiff is entitled to the requested relief or any relief.

#### **JURISDICTION AND VENUE**

6. Paragraph 6 of the complaint consists of legal conclusions, to which no response is required.

7. Paragraph 7 of the complaint consists of legal conclusions, to which no response is required, except deny knowledge or information sufficient to form a belief as to the location of Plaintiff's residence and principal place of business.

#### **THE PARTIES**

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the complaint.

9. Paragraph 9 of the complaint consists of legal conclusions, to which no response is required, except admit that the U.S. Department of the Interior is a federal agency; that the Office of the Secretary of the Interior is a component of the U.S. Department of the Interior; and that Plaintiff submitted a FOIA request stating that it seeks records within the U.S. Department of the Interior's possession, custody, or control, but deny knowledge or information sufficient to form a belief as to the scope of the "documents NRDC seeks" and whether such records are in the U.S. Department of the Interior's possession or control.

10. Paragraph 10 of the complaint consists of legal conclusions, to which no response is required, except admit that the U.S. Department of Commerce is a federal agency; that the Office of the Secretary of Commerce is a component of the U.S. Department of Commerce; and that Plaintiff submitted a FOIA request stating that it seeks records within the U.S. Department

of Commerce's possession, custody, or control, but deny knowledge or information sufficient to form a belief as to the scope of the "documents NRDC seeks" and whether such records are in the U.S. Department of Commerce's possession or control.

#### **STATUTORY AND REGULATORY FRAMEWORK**

11. Paragraph 11 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 11, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

12. Paragraph 12 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 12, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

13. Paragraph 13 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 13, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

14. Paragraph 14 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 14, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

15. Paragraph 15 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 15, and

respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

16. Paragraph 16 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 16, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

17. Paragraph 17 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 17, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

#### **FACTS**

18. Admit that the President signed Executive Order 13,792, dated April 26, 2017, and respectfully refer the Court to that document for a true and complete statement of its contents.

19. Admit that the President signed Executive Order 13,795, dated April 28, 2017, and respectfully refer the Court to that document for a true and complete statement of its contents.

20. Defendant the U.S. Department of the Interior admits that the U.S. Department of the Interior accepted public comments and met with a variety of stakeholders related to Executive Order 13,792. Defendant the U.S. Department of Commerce admits that the National Oceanic and Atmospheric Administration (“NOAA”) and the U.S. Department of Commerce accepted public comments and met with a variety of stakeholders related to Executive Order 13,795. Defendants otherwise deny the allegations of paragraph 20.

21. Defendant the U.S. Department of the Interior admits that the U.S. Department of the Interior received approximately 2.8 million public comments related to Executive Order 13,792, and respectfully refers the Court to those documents for a true and correct statement of their contents. Defendant the U.S. Department of the Interior further admits that a report prepared by Secretary of the Interior Ryan Zinke (“Secretary Zinke”) stated that the “[c]omments received were overwhelmingly in favor of maintaining existing monuments and demonstrated a well-orchestrated national campaign organized by multiple organizations.” Defendant the U.S. Department of Commerce admits that the U.S. Department of Commerce received approximately 182,000 comments related to Executive Order 13,795, and respectfully refers the Court to those documents for a true and correct statement of their contents. Defendants otherwise deny the allegations in paragraph 21 of the complaint.

22. Defendant the U.S. Department of the Interior (a) admits that the U.S. Department of the Interior received comments from NRDC in response to the U.S. Department of the Interior’s request for public comments, and respectfully refers the Court to those documents for a true and complete statement of their contents; (b) denies knowledge or information sufficient to form a belief as to whether tens of thousands of NRDC’s individual members submitted comments related to Executive Order 13,792; and (c) otherwise denies the allegations in paragraph 22 of the complaint. Defendant the U.S. Department of Commerce (a) admits that the U.S. Department of Commerce received comments from NRDC in response to NOAA’s request for public comments, including comments “on behalf [of NRDC]” which NRDC purports are comments from “online members and activists,” *see* <https://www.regulations.gov/document?D=NOAA-NOS-2017-0066-67295>; <https://www.regulations.gov/document?D=NOAA-NOS-2017-0066-99250>, and respectfully

refers the Court to those documents for a true and complete statement of their contents; and  
(b) otherwise denies the allegations in paragraph 22 of the complaint.

23. Defendant the U.S. Department of the Interior admits that on August 24, 2017, Secretary Zinke sent a draft report to the President related to Executive Order 13,792; that on September 17, 2017, The Washington Post published a purported copy of a memorandum from Secretary Zinke to President Trump concerning a review of national monuments; and that on December 5, 2017, Secretary Zinke released a final report outlining recommendations to the President regarding certain national monument designations under the Antiquities Act, and respectfully refers the Court to those documents for a true and complete statement of their contents. Defendant the U.S. Department of the Interior otherwise denies the allegations in paragraph 23. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23.

24. Defendant the U.S. Department of Commerce admits that Executive Order 13,795 directs the Secretary of Commerce to report by October 25, 2017, the results of its review to the Assistant to the President for Economic Policy, as well as to the Director of the Office of Management and Budget and the Chairman of the Council on Environmental Quality, but denies that any report was to be submitted to the President, and otherwise denies the allegations in paragraph 24 of the complaint. Defendant the U.S. Department of Commerce further avers that its report has not yet been completed. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24.

25. Deny the allegations in the first sentence of paragraph 25, except admit that on December 4, 2017, the President issued a “Presidential Proclamation Modifying the Grand

Staircase-Escalante National Monument” and a “Presidential Proclamation Modifying the Bears Ears National Monument,” and respectfully refer the Court to those documents for a true and complete statement of their contents. Deny the second sentence of paragraph 25 on the ground that it is vague and ambiguous.

26. This paragraph consists of argument by Plaintiff, to which no response is required.

27. Admit that Defendants’ review of national monuments has generated public interest, and aver that paragraph 27 of the complaint otherwise contains Plaintiff’s characterization of alleged background information and argument, to which no response is required. To the extent a response is required, deny knowledge or information sufficient to form a belief as to the interests of NRDC and its members or the desires of “the public,” and otherwise deny the allegations of paragraph 27.

28. Admit that NRDC submitted FOIA requests to Defendants, and otherwise deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28.

**NRDC’s first FOIA request to the Interior Department<sup>1</sup>**

**# OS-2017-01247**

29. Admit the allegations in paragraph 29 of the complaint.

30. Defendant the U.S. Department of the Interior states that the document that appears to be the basis for the allegations in paragraph 30 is a purported copy of a U.S. Department of the Interior document obtained from a non-governmental source (*see, e.g.*, <https://www.washingtonpost.com/national/health-science/shrink-at-least-4-national-monuments->

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<sup>1</sup> For ease of reference, Defendants refer to Plaintiff’s headings and titles, but to the extent those headings and titles are construed to contain factual allegations, those allegations are denied.

and-modify-a-half-dozen-others-zinke-tells-trump/2017/09/17/a0df45cc-9b48-11e7-82e4-f1076f6d6152\_story.html?utm\_term=.75df9ed3e7f3), not a document available on a U.S.

Department of the Interior website or otherwise released to the public by the U.S. Department of the Interior, and on this basis, the allegations in paragraph 30 are denied. Defendant the U.S. Department of the Interior refers the Court to the publicly released December 5, 2017, report, for a true and correct statement of that document's contents.

31. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior dated September 22, 2017, seeking the information specified in Exhibit A of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31.

32. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit A of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 32.

33. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit A of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 33.

34. Defendant the U.S. Department of the Interior admits the allegations in the first sentence of paragraph 34. The second sentence of paragraph 34 consists of conclusions of law, to which no response is required. To the extent a response is required, denies the allegations in the second sentence of paragraph 34. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34.

35. Paragraph 35 of the complaint contains legal conclusions, to which no response is required, except Defendant the U.S. Department of the Interior admits that NRDC submitted its FOIA request via the U.S. Department of the Interior's online FOIA portal. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35.

36. Defendant the U.S. Department of the Interior admits that the allegations of paragraph 36 of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36.

37. Paragraph 37 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 37. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 37.

38. The allegation in the first sentence of paragraph 38 that October 24, 2017, was "the day after FOIA's statutory deadline had run" is a conclusion of law to which no response is required, except to the extent a response is required, Defendant the U.S. Department of the Interior denies this allegation. Defendant the U.S. Department of the Interior otherwise admits



the allegations in paragraph 38. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38.

39. Defendant the U.S. Department of the Interior admits the allegations in paragraph 39. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39.

40. Defendant the U.S. Department of the Interior admits the allegations in paragraph 40. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40.

41. Defendant the U.S. Department of the Interior admits the allegations in paragraph 41, as of the date of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41.

42. Paragraph 42 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 42. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 42.

43. Defendant the U.S. Department of the Interior admits that, to date, the U.S. Department of the Interior has not produced responsive records or claimed that responsive records are exempt specifically in response to Plaintiff's FOIA request, and otherwise denies the allegations in paragraph 43 on the basis that the phrase "substantively responded" is vague and ambiguous.

**NRDC's second FOIA request to the Interior Department**

**# OS-2018-00232**

44. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior dated October 29, 2017, seeking the information specified in Exhibit B of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 44.

45. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit B of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 45.

46. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit B of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 46.

47. Defendant the U.S. Department of the Interior admits the allegations in the first sentence of paragraph 47. The second sentence of paragraph 47 consists of conclusions of law, to which no response is required. To the extent a response is required, denies the allegations in the second sentence of paragraph 47. Defendant the U.S. Department of Commerce denies

knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 47.

48. Paragraph 48 of the complaint contains legal conclusions, to which no response is required, except Defendant the U.S. Department of the Interior admits that NRDC submitted its FOIA request via the U.S. Department of the Interior's online FOIA portal. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48.

49. Defendant the U.S. Department of the Interior admits that the allegations of paragraph 49 of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 49.

50. Paragraph 50 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 50. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 50.

51. Defendant the U.S. Department of the Interior admits the allegations in paragraph 51. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 51.

52. Defendant the U.S. Department of the Interior admits the allegations in paragraph 52. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 52.

53. Defendant the U.S. Department of the Interior admits the allegations in paragraph 53. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 53.

54. Defendant the U.S. Department of the Interior admits the allegations in paragraph 54, as of the date of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 54.

55. Paragraph 55 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 55. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 55.

56. Defendant the U.S. Department of the Interior admits that, to date, the U.S. Department of the Interior has not produced responsive records or claimed that responsive records are exempt specifically in response to Plaintiff's FOIA request, and otherwise denies the allegations in paragraph 56 on the basis that the phrase "substantively responded" is vague and ambiguous.

**NRDC's FOIA request to the Commerce Department**

**# DOC-IOS-2018-000178**

57. Defendant the U.S. Department of Commerce admits that Plaintiff submitted a FOIA request to the U.S. Department of Commerce dated October 29, 2017, seeking the information specified in Exhibit C of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57.

58. Defendant the U.S. Department of Commerce admits that Plaintiff submitted a FOIA request to the U.S. Department of Commerce seeking the information specified in Exhibit

C of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 58.

59. Defendant the U.S. Department of Commerce admits that Plaintiff submitted a FOIA request to the U.S. Department of Commerce seeking the information specified in Exhibit C of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59.

60. Defendant the U.S. Department of Commerce admits the allegations in the first clause of paragraph 60. To the extent the second clause of paragraph 60 consists of conclusions of law, no response is required. To the extent a response is required, denies the allegations in the second clause of paragraph 60. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 60.

61. Paragraph 61 of the complaint contains legal conclusions, to which no response is required, except the U.S. Department of Commerce admits that NRDC submitted a FOIA request to the U.S. Department of Commerce via a federal government online portal for FOIA requests. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 61.

62. Defendant the U.S. Department of Commerce admits the allegations in paragraph 62. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 62.

63. Defendant the U.S. Department of Commerce admits the allegations in paragraph 63. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 63.

64. Paragraph 64 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, Defendant the U.S. Department of Commerce denies the allegations in paragraph 64, and Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 64.

65. With respect to the first sentence of paragraph 65, Defendant the U.S. Department of Commerce admits that the U.S. Department of Commerce sent Plaintiff an email on November 14, 2017, granting a fee waiver for request DOC-IOS-2018-000178, and respectfully refers the Court to that e-mail for a true and complete statement of its contents, but avers that there is no “Exhibit K” to the complaint. The second sentence of paragraph 65 contains legal conclusions to which no response is required. To the extent a response is required, denies the second sentence of paragraph 65 on the basis that the phrase “respond substantively” is vague and ambiguous. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 65.

66. Defendant the U.S. Department of Commerce admits that, to date, the U.S. Department of Commerce has not produced responsive records or claimed that responsive records are exempt in response to Plaintiff’s FOIA request, and otherwise denies the allegations in paragraph 66 on the basis that the phrase “substantively responded” is vague and ambiguous. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66.

67. Paragraph 67 of the complaint consists of legal conclusions and describes Plaintiff's prayer for relief, to which no response is required. To the extent a response is required, deny the allegations in paragraph 67 and deny that Plaintiff is entitled to the relief requested or any relief.

68. Paragraph 68 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 68.

**CLAIM FOR RELIEF**

**COUNT ONE**  
**5 U.S.C. § 552(a) (FOIA)**  
*All Defendants*

69. Defendants repeat and restate their responses to paragraphs 1 through 68 of the complaint with the same force and effect as if set forth fully herein.

70. Paragraph 70 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 70.

71. Paragraph 71 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 71.

72. Paragraph 72 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 72 and respectfully refer the Court to the cited provision of law.

73. Paragraph 73 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 73.

## REQUEST FOR RELIEF

74. The seven lettered paragraphs in the section of the complaint titled “Request for Relief” constitute a prayer for relief, to which no response is required. To the extent a response is required, deny that Plaintiff is entitled to the requested relief or any relief.

## DEFENSES

### FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

### SECOND DEFENSE

Plaintiff is not entitled to compel the production of records protected from disclosure by any applicable FOIA exemptions or exclusions. *See* 5 U.S.C. § 552(b).

### THIRD DEFENSE

At all times alleged in the complaint, Defendants acted in good faith, with justification, and pursuant to authority, and exceptional circumstances exist that necessitate additional time for Defendants to process Plaintiff’s FOIA requests.

### FOURTH DEFENSE

The Court lacks subject matter jurisdiction over Plaintiffs’ requests for relief to the extent those requests exceed the relief authorized under FOIA. *See* 5 U.S.C. § 552.

### FIFTH DEFENSE

Plaintiff is not entitled to declaratory relief. *See* 5 U.S.C. § 552(a)(4)(B).

### SIXTH DEFENSE

Defendants may have additional affirmative defenses that are not known to Defendants at this time, but that may be ascertained during litigation. Defendants specifically preserve these



and other affirmative defenses as they are ascertained during litigation, including those required by Fed. R. Civ. P. 8 and 12.

WHEREFORE, Defendants, having fully answered the allegations in the complaint and stated their defenses, respectfully request this Court to dismiss the complaint with prejudice, enter judgment in favor of Defendants, award costs for defense of this action, and grant such other relief as may be just and equitable.

Dated: New York, New York  
March 23, 2018

GEOFFREY S. BERMAN  
United States Attorney for the  
Southern District of New York  
*Attorney for Defendants*

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

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.	)	
	)	

**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



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  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE  
COUNCIL, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR and  
U.S. DEPARTMENT OF COMMERCE,

Defendants.

18 Civ. 00650 (JGK)

ANSWER

Defendants the U.S. Department of the Interior and the U.S. Department of Commerce (“Defendants”), by their attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, answer the complaint (the “complaint”) filed January 24, 2018, by Natural Resources Defense Council, Inc. (“Plaintiff”), upon information and belief as follows:

#### **INTRODUCTION**

1. Paragraph 1 of the complaint contains Plaintiff’s characterization of this action, to which no response is required. To the extent a response is required, deny the allegations in paragraph 1.

2. The first sentence of paragraph 2 consists of Plaintiff’s characterization of alleged background information and argument, to which no response is required. To the extent a

response is required, admit that President Donald Trump (“the President”) signed (1) Executive Order 13,792, titled “Review of Designations Under the Antiquities Act” and dated April 26, 2017, and (2) Executive Order 13,795, titled “Implementing an America-First Offshore Energy Strategy” and dated April 28, 2017, and respectfully refer the Court to those documents for a true and complete statement of their contents, and otherwise deny the allegations in the first sentence of paragraph 2. With respect to the second sentence of paragraph 2 of the complaint, admit that on December 4, 2017, the President issued a “Presidential Proclamation Modifying the Grand Staircase-Escalante National Monument” and a “Presidential Proclamation Modifying the Bears Ears National Monument,” and respectfully refer the Court to those documents for a true and complete statement of their contents. Defendants further aver that the second sentence of paragraph 2 otherwise consists of Plaintiff’s characterization of alleged background information and argument, to which no response is required. To the extent a response is required, deny the allegations in the second sentence of paragraph 2.

3. With respect to the first two sentences of paragraph 3, admit that Defendants received Freedom of Information Act (“FOIA”) requests from Plaintiff in September and October 2017, and respectfully refer the Court to the referenced documents for a true and complete statement of their contents. Aver that the third sentence of paragraph 3 consists of argument by Plaintiff, to which no response is required.

4. Paragraph 4 of the complaint contains conclusions of law, to which no response is required. To the extent a response is required, deny the allegations in paragraph 4 on the basis that the phrase “respond substantively” is vague and ambiguous.

5. Paragraph 5 of the complaint contains Plaintiff's request for relief, to which no response is required. To the extent a response is required, deny that Plaintiff is entitled to the requested relief or any relief.

#### **JURISDICTION AND VENUE**

6. Paragraph 6 of the complaint consists of legal conclusions, to which no response is required.

7. Paragraph 7 of the complaint consists of legal conclusions, to which no response is required, except deny knowledge or information sufficient to form a belief as to the location of Plaintiff's residence and principal place of business.

#### **THE PARTIES**

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the complaint.

9. Paragraph 9 of the complaint consists of legal conclusions, to which no response is required, except admit that the U.S. Department of the Interior is a federal agency; that the Office of the Secretary of the Interior is a component of the U.S. Department of the Interior; and that Plaintiff submitted a FOIA request stating that it seeks records within the U.S. Department of the Interior's possession, custody, or control, but deny knowledge or information sufficient to form a belief as to the scope of the "documents NRDC seeks" and whether such records are in the U.S. Department of the Interior's possession or control.

10. Paragraph 10 of the complaint consists of legal conclusions, to which no response is required, except admit that the U.S. Department of Commerce is a federal agency; that the Office of the Secretary of Commerce is a component of the U.S. Department of Commerce; and that Plaintiff submitted a FOIA request stating that it seeks records within the U.S. Department

of Commerce's possession, custody, or control, but deny knowledge or information sufficient to form a belief as to the scope of the "documents NRDC seeks" and whether such records are in the U.S. Department of Commerce's possession or control.

#### **STATUTORY AND REGULATORY FRAMEWORK**

11. Paragraph 11 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 11, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

12. Paragraph 12 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 12, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

13. Paragraph 13 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 13, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

14. Paragraph 14 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 14, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

15. Paragraph 15 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 15, and

respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

16. Paragraph 16 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 16, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

17. Paragraph 17 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 17, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

#### **FACTS**

18. Admit that the President signed Executive Order 13,792, dated April 26, 2017, and respectfully refer the Court to that document for a true and complete statement of its contents.

19. Admit that the President signed Executive Order 13,795, dated April 28, 2017, and respectfully refer the Court to that document for a true and complete statement of its contents.

20. Defendant the U.S. Department of the Interior admits that the U.S. Department of the Interior accepted public comments and met with a variety of stakeholders related to Executive Order 13,792. Defendant the U.S. Department of Commerce admits that the National Oceanic and Atmospheric Administration (“NOAA”) and the U.S. Department of Commerce accepted public comments and met with a variety of stakeholders related to Executive Order 13,795. Defendants otherwise deny the allegations of paragraph 20.

21. Defendant the U.S. Department of the Interior admits that the U.S. Department of the Interior received approximately 2.8 million public comments related to Executive Order 13,792, and respectfully refers the Court to those documents for a true and correct statement of their contents. Defendant the U.S. Department of the Interior further admits that a report prepared by Secretary of the Interior Ryan Zinke (“Secretary Zinke”) stated that the “[c]omments received were overwhelmingly in favor of maintaining existing monuments and demonstrated a well-orchestrated national campaign organized by multiple organizations.” Defendant the U.S. Department of Commerce admits that the U.S. Department of Commerce received approximately 182,000 comments related to Executive Order 13,795, and respectfully refers the Court to those documents for a true and correct statement of their contents. Defendants otherwise deny the allegations in paragraph 21 of the complaint.

22. Defendant the U.S. Department of the Interior (a) admits that the U.S. Department of the Interior received comments from NRDC in response to the U.S. Department of the Interior’s request for public comments, and respectfully refers the Court to those documents for a true and complete statement of their contents; (b) denies knowledge or information sufficient to form a belief as to whether tens of thousands of NRDC’s individual members submitted comments related to Executive Order 13,792; and (c) otherwise denies the allegations in paragraph 22 of the complaint. Defendant the U.S. Department of Commerce (a) admits that the U.S. Department of Commerce received comments from NRDC in response to NOAA’s request for public comments, including comments “on behalf [of NRDC]” which NRDC purports are comments from “online members and activists,” *see* <https://www.regulations.gov/document?D=NOAA-NOS-2017-0066-67295>; <https://www.regulations.gov/document?D=NOAA-NOS-2017-0066-99250>, and respectfully

refers the Court to those documents for a true and complete statement of their contents; and  
(b) otherwise denies the allegations in paragraph 22 of the complaint.

23. Defendant the U.S. Department of the Interior admits that on August 24, 2017, Secretary Zinke sent a draft report to the President related to Executive Order 13,792; that on September 17, 2017, The Washington Post published a purported copy of a memorandum from Secretary Zinke to President Trump concerning a review of national monuments; and that on December 5, 2017, Secretary Zinke released a final report outlining recommendations to the President regarding certain national monument designations under the Antiquities Act, and respectfully refers the Court to those documents for a true and complete statement of their contents. Defendant the U.S. Department of the Interior otherwise denies the allegations in paragraph 23. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23.

24. Defendant the U.S. Department of Commerce admits that Executive Order 13,795 directs the Secretary of Commerce to report by October 25, 2017, the results of its review to the Assistant to the President for Economic Policy, as well as to the Director of the Office of Management and Budget and the Chairman of the Council on Environmental Quality, but denies that any report was to be submitted to the President, and otherwise denies the allegations in paragraph 24 of the complaint. Defendant the U.S. Department of Commerce further avers that its report has not yet been completed. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24.

25. Deny the allegations in the first sentence of paragraph 25, except admit that on December 4, 2017, the President issued a “Presidential Proclamation Modifying the Grand



Staircase-Escalante National Monument” and a “Presidential Proclamation Modifying the Bears Ears National Monument,” and respectfully refer the Court to those documents for a true and complete statement of their contents. Deny the second sentence of paragraph 25 on the ground that it is vague and ambiguous.

26. This paragraph consists of argument by Plaintiff, to which no response is required.

27. Admit that Defendants’ review of national monuments has generated public interest, and aver that paragraph 27 of the complaint otherwise contains Plaintiff’s characterization of alleged background information and argument, to which no response is required. To the extent a response is required, deny knowledge or information sufficient to form a belief as to the interests of NRDC and its members or the desires of “the public,” and otherwise deny the allegations of paragraph 27.

28. Admit that NRDC submitted FOIA requests to Defendants, and otherwise deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28.

**NRDC’s first FOIA request to the Interior Department<sup>1</sup>**

**# OS-2017-01247**

29. Admit the allegations in paragraph 29 of the complaint.

30. Defendant the U.S. Department of the Interior states that the document that appears to be the basis for the allegations in paragraph 30 is a purported copy of a U.S. Department of the Interior document obtained from a non-governmental source (*see, e.g.*, <https://www.washingtonpost.com/national/health-science/shrink-at-least-4-national-monuments->

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<sup>1</sup> For ease of reference, Defendants refer to Plaintiff’s headings and titles, but to the extent those headings and titles are construed to contain factual allegations, those allegations are denied.

and-modify-a-half-dozen-others-zinke-tells-trump/2017/09/17/a0df45cc-9b48-11e7-82e4-f1076f6d6152\_story.html?utm\_term=.75df9ed3e7f3), not a document available on a U.S.

Department of the Interior website or otherwise released to the public by the U.S. Department of the Interior, and on this basis, the allegations in paragraph 30 are denied. Defendant the U.S. Department of the Interior refers the Court to the publicly released December 5, 2017, report, for a true and correct statement of that document's contents.

31. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior dated September 22, 2017, seeking the information specified in Exhibit A of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31.

32. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit A of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 32.

33. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit A of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 33.

34. Defendant the U.S. Department of the Interior admits the allegations in the first sentence of paragraph 34. The second sentence of paragraph 34 consists of conclusions of law, to which no response is required. To the extent a response is required, denies the allegations in the second sentence of paragraph 34. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34.

35. Paragraph 35 of the complaint contains legal conclusions, to which no response is required, except Defendant the U.S. Department of the Interior admits that NRDC submitted its FOIA request via the U.S. Department of the Interior's online FOIA portal. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35.

36. Defendant the U.S. Department of the Interior admits that the allegations of paragraph 36 of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36.

37. Paragraph 37 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 37. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 37.

38. The allegation in the first sentence of paragraph 38 that October 24, 2017, was "the day after FOIA's statutory deadline had run" is a conclusion of law to which no response is required, except to the extent a response is required, Defendant the U.S. Department of the Interior denies this allegation. Defendant the U.S. Department of the Interior otherwise admits

the allegations in paragraph 38. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38.

39. Defendant the U.S. Department of the Interior admits the allegations in paragraph 39. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39.

40. Defendant the U.S. Department of the Interior admits the allegations in paragraph 40. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40.

41. Defendant the U.S. Department of the Interior admits the allegations in paragraph 41, as of the date of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41.

42. Paragraph 42 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 42. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 42.

43. Defendant the U.S. Department of the Interior admits that, to date, the U.S. Department of the Interior has not produced responsive records or claimed that responsive records are exempt specifically in response to Plaintiff's FOIA request, and otherwise denies the allegations in paragraph 43 on the basis that the phrase "substantively responded" is vague and ambiguous.

**NRDC's second FOIA request to the Interior Department**

**# OS-2018-00232**

44. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior dated October 29, 2017, seeking the information specified in Exhibit B of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 44.

45. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit B of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 45.

46. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit B of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 46.

47. Defendant the U.S. Department of the Interior admits the allegations in the first sentence of paragraph 47. The second sentence of paragraph 47 consists of conclusions of law, to which no response is required. To the extent a response is required, denies the allegations in the second sentence of paragraph 47. Defendant the U.S. Department of Commerce denies

knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 47.

48. Paragraph 48 of the complaint contains legal conclusions, to which no response is required, except Defendant the U.S. Department of the Interior admits that NRDC submitted its FOIA request via the U.S. Department of the Interior's online FOIA portal. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48.

49. Defendant the U.S. Department of the Interior admits that the allegations of paragraph 49 of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 49.

50. Paragraph 50 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 50. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 50.

51. Defendant the U.S. Department of the Interior admits the allegations in paragraph 51. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 51.

52. Defendant the U.S. Department of the Interior admits the allegations in paragraph 52. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 52.

53. Defendant the U.S. Department of the Interior admits the allegations in paragraph 53. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 53.

54. Defendant the U.S. Department of the Interior admits the allegations in paragraph 54, as of the date of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 54.

55. Paragraph 55 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 55. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 55.

56. Defendant the U.S. Department of the Interior admits that, to date, the U.S. Department of the Interior has not produced responsive records or claimed that responsive records are exempt specifically in response to Plaintiff's FOIA request, and otherwise denies the allegations in paragraph 56 on the basis that the phrase "substantively responded" is vague and ambiguous.

**NRDC's FOIA request to the Commerce Department**

**# DOC-IOS-2018-000178**

57. Defendant the U.S. Department of Commerce admits that Plaintiff submitted a FOIA request to the U.S. Department of Commerce dated October 29, 2017, seeking the information specified in Exhibit C of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57.

58. Defendant the U.S. Department of Commerce admits that Plaintiff submitted a FOIA request to the U.S. Department of Commerce seeking the information specified in Exhibit

C of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 58.

59. Defendant the U.S. Department of Commerce admits that Plaintiff submitted a FOIA request to the U.S. Department of Commerce seeking the information specified in Exhibit C of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59.

60. Defendant the U.S. Department of Commerce admits the allegations in the first clause of paragraph 60. To the extent the second clause of paragraph 60 consists of conclusions of law, no response is required. To the extent a response is required, denies the allegations in the second clause of paragraph 60. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 60.

61. Paragraph 61 of the complaint contains legal conclusions, to which no response is required, except the U.S. Department of Commerce admits that NRDC submitted a FOIA request to the U.S. Department of Commerce via a federal government online portal for FOIA requests. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 61.

62. Defendant the U.S. Department of Commerce admits the allegations in paragraph 62. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 62.



63. Defendant the U.S. Department of Commerce admits the allegations in paragraph 63. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 63.

64. Paragraph 64 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, Defendant the U.S. Department of Commerce denies the allegations in paragraph 64, and Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 64.

65. With respect to the first sentence of paragraph 65, Defendant the U.S. Department of Commerce admits that the U.S. Department of Commerce sent Plaintiff an email on November 14, 2017, granting a fee waiver for request DOC-IOS-2018-000178, and respectfully refers the Court to that e-mail for a true and complete statement of its contents, but avers that there is no “Exhibit K” to the complaint. The second sentence of paragraph 65 contains legal conclusions to which no response is required. To the extent a response is required, denies the second sentence of paragraph 65 on the basis that the phrase “respond substantively” is vague and ambiguous. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 65.

66. Defendant the U.S. Department of Commerce admits that, to date, the U.S. Department of Commerce has not produced responsive records or claimed that responsive records are exempt in response to Plaintiff’s FOIA request, and otherwise denies the allegations in paragraph 66 on the basis that the phrase “substantively responded” is vague and ambiguous. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66.

67. Paragraph 67 of the complaint consists of legal conclusions and describes Plaintiff's prayer for relief, to which no response is required. To the extent a response is required, deny the allegations in paragraph 67 and deny that Plaintiff is entitled to the relief requested or any relief.

68. Paragraph 68 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 68.

**CLAIM FOR RELIEF**

**COUNT ONE**  
**5 U.S.C. § 552(a) (FOIA)**  
*All Defendants*

69. Defendants repeat and restate their responses to paragraphs 1 through 68 of the complaint with the same force and effect as if set forth fully herein.

70. Paragraph 70 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 70.

71. Paragraph 71 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 71.

72. Paragraph 72 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 72 and respectfully refer the Court to the cited provision of law.

73. Paragraph 73 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 73.

## REQUEST FOR RELIEF

74. The seven lettered paragraphs in the section of the complaint titled “Request for Relief” constitute a prayer for relief, to which no response is required. To the extent a response is required, deny that Plaintiff is entitled to the requested relief or any relief.

## DEFENSES

### FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

### SECOND DEFENSE

Plaintiff is not entitled to compel the production of records protected from disclosure by any applicable FOIA exemptions or exclusions. *See* 5 U.S.C. § 552(b).

### THIRD DEFENSE

At all times alleged in the complaint, Defendants acted in good faith, with justification, and pursuant to authority, and exceptional circumstances exist that necessitate additional time for Defendants to process Plaintiff’s FOIA requests.

### FOURTH DEFENSE

The Court lacks subject matter jurisdiction over Plaintiffs’ requests for relief to the extent those requests exceed the relief authorized under FOIA. *See* 5 U.S.C. § 552.

### FIFTH DEFENSE

Plaintiff is not entitled to declaratory relief. *See* 5 U.S.C. § 552(a)(4)(B).

### SIXTH DEFENSE

Defendants may have additional affirmative defenses that are not known to Defendants at this time, but that may be ascertained during litigation. Defendants specifically preserve these

and other affirmative defenses as they are ascertained during litigation, including those required by Fed. R. Civ. P. 8 and 12.

WHEREFORE, Defendants, having fully answered the allegations in the complaint and stated their defenses, respectfully request this Court to dismiss the complaint with prejudice, enter judgment in favor of Defendants, award costs for defense of this action, and grant such other relief as may be just and equitable.

Dated: New York, New York  
March 23, 2018

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United States Attorney for the  
Southern District of New York  
*Attorney for Defendants*

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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, 21<sup>st</sup> Floor  
San Francisco, CA 94104  
Tel: (415) 875-6158  
kdesormeau@nrdc.org

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE  
COUNCIL, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR and  
U.S. DEPARTMENT OF COMMERCE,

Defendants.

18 Civ. 00650 (JGK)

ANSWER

Defendants the U.S. Department of the Interior and the U.S. Department of Commerce (“Defendants”), by their attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, answer the complaint (the “complaint”) filed January 24, 2018, by Natural Resources Defense Council, Inc. (“Plaintiff”), upon information and belief as follows:

#### **INTRODUCTION**

1. Paragraph 1 of the complaint contains Plaintiff’s characterization of this action, to which no response is required. To the extent a response is required, deny the allegations in paragraph 1.

2. The first sentence of paragraph 2 consists of Plaintiff’s characterization of alleged background information and argument, to which no response is required. To the extent a

response is required, admit that President Donald Trump (“the President”) signed (1) Executive Order 13,792, titled “Review of Designations Under the Antiquities Act” and dated April 26, 2017, and (2) Executive Order 13,795, titled “Implementing an America-First Offshore Energy Strategy” and dated April 28, 2017, and respectfully refer the Court to those documents for a true and complete statement of their contents, and otherwise deny the allegations in the first sentence of paragraph 2. With respect to the second sentence of paragraph 2 of the complaint, admit that on December 4, 2017, the President issued a “Presidential Proclamation Modifying the Grand Staircase-Escalante National Monument” and a “Presidential Proclamation Modifying the Bears Ears National Monument,” and respectfully refer the Court to those documents for a true and complete statement of their contents. Defendants further aver that the second sentence of paragraph 2 otherwise consists of Plaintiff’s characterization of alleged background information and argument, to which no response is required. To the extent a response is required, deny the allegations in the second sentence of paragraph 2.

3. With respect to the first two sentences of paragraph 3, admit that Defendants received Freedom of Information Act (“FOIA”) requests from Plaintiff in September and October 2017, and respectfully refer the Court to the referenced documents for a true and complete statement of their contents. Aver that the third sentence of paragraph 3 consists of argument by Plaintiff, to which no response is required.

4. Paragraph 4 of the complaint contains conclusions of law, to which no response is required. To the extent a response is required, deny the allegations in paragraph 4 on the basis that the phrase “respond substantively” is vague and ambiguous.

5. Paragraph 5 of the complaint contains Plaintiff's request for relief, to which no response is required. To the extent a response is required, deny that Plaintiff is entitled to the requested relief or any relief.

#### **JURISDICTION AND VENUE**

6. Paragraph 6 of the complaint consists of legal conclusions, to which no response is required.

7. Paragraph 7 of the complaint consists of legal conclusions, to which no response is required, except deny knowledge or information sufficient to form a belief as to the location of Plaintiff's residence and principal place of business.

#### **THE PARTIES**

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the complaint.

9. Paragraph 9 of the complaint consists of legal conclusions, to which no response is required, except admit that the U.S. Department of the Interior is a federal agency; that the Office of the Secretary of the Interior is a component of the U.S. Department of the Interior; and that Plaintiff submitted a FOIA request stating that it seeks records within the U.S. Department of the Interior's possession, custody, or control, but deny knowledge or information sufficient to form a belief as to the scope of the "documents NRDC seeks" and whether such records are in the U.S. Department of the Interior's possession or control.

10. Paragraph 10 of the complaint consists of legal conclusions, to which no response is required, except admit that the U.S. Department of Commerce is a federal agency; that the Office of the Secretary of Commerce is a component of the U.S. Department of Commerce; and that Plaintiff submitted a FOIA request stating that it seeks records within the U.S. Department

of Commerce's possession, custody, or control, but deny knowledge or information sufficient to form a belief as to the scope of the "documents NRDC seeks" and whether such records are in the U.S. Department of Commerce's possession or control.

#### **STATUTORY AND REGULATORY FRAMEWORK**

11. Paragraph 11 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 11, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

12. Paragraph 12 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 12, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

13. Paragraph 13 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 13, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

14. Paragraph 14 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 14, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

15. Paragraph 15 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 15, and



respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

16. Paragraph 16 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 16, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

17. Paragraph 17 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 17, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

#### **FACTS**

18. Admit that the President signed Executive Order 13,792, dated April 26, 2017, and respectfully refer the Court to that document for a true and complete statement of its contents.

19. Admit that the President signed Executive Order 13,795, dated April 28, 2017, and respectfully refer the Court to that document for a true and complete statement of its contents.

20. Defendant the U.S. Department of the Interior admits that the U.S. Department of the Interior accepted public comments and met with a variety of stakeholders related to Executive Order 13,792. Defendant the U.S. Department of Commerce admits that the National Oceanic and Atmospheric Administration (“NOAA”) and the U.S. Department of Commerce accepted public comments and met with a variety of stakeholders related to Executive Order 13,795. Defendants otherwise deny the allegations of paragraph 20.

21. Defendant the U.S. Department of the Interior admits that the U.S. Department of the Interior received approximately 2.8 million public comments related to Executive Order 13,792, and respectfully refers the Court to those documents for a true and correct statement of their contents. Defendant the U.S. Department of the Interior further admits that a report prepared by Secretary of the Interior Ryan Zinke (“Secretary Zinke”) stated that the “[c]omments received were overwhelmingly in favor of maintaining existing monuments and demonstrated a well-orchestrated national campaign organized by multiple organizations.” Defendant the U.S. Department of Commerce admits that the U.S. Department of Commerce received approximately 182,000 comments related to Executive Order 13,795, and respectfully refers the Court to those documents for a true and correct statement of their contents. Defendants otherwise deny the allegations in paragraph 21 of the complaint.

22. Defendant the U.S. Department of the Interior (a) admits that the U.S. Department of the Interior received comments from NRDC in response to the U.S. Department of the Interior’s request for public comments, and respectfully refers the Court to those documents for a true and complete statement of their contents; (b) denies knowledge or information sufficient to form a belief as to whether tens of thousands of NRDC’s individual members submitted comments related to Executive Order 13,792; and (c) otherwise denies the allegations in paragraph 22 of the complaint. Defendant the U.S. Department of Commerce (a) admits that the U.S. Department of Commerce received comments from NRDC in response to NOAA’s request for public comments, including comments “on behalf [of NRDC]” which NRDC purports are comments from “online members and activists,” *see* <https://www.regulations.gov/document?D=NOAA-NOS-2017-0066-67295>; <https://www.regulations.gov/document?D=NOAA-NOS-2017-0066-99250>, and respectfully

refers the Court to those documents for a true and complete statement of their contents; and  
(b) otherwise denies the allegations in paragraph 22 of the complaint.

23. Defendant the U.S. Department of the Interior admits that on August 24, 2017, Secretary Zinke sent a draft report to the President related to Executive Order 13,792; that on September 17, 2017, The Washington Post published a purported copy of a memorandum from Secretary Zinke to President Trump concerning a review of national monuments; and that on December 5, 2017, Secretary Zinke released a final report outlining recommendations to the President regarding certain national monument designations under the Antiquities Act, and respectfully refers the Court to those documents for a true and complete statement of their contents. Defendant the U.S. Department of the Interior otherwise denies the allegations in paragraph 23. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23.

24. Defendant the U.S. Department of Commerce admits that Executive Order 13,795 directs the Secretary of Commerce to report by October 25, 2017, the results of its review to the Assistant to the President for Economic Policy, as well as to the Director of the Office of Management and Budget and the Chairman of the Council on Environmental Quality, but denies that any report was to be submitted to the President, and otherwise denies the allegations in paragraph 24 of the complaint. Defendant the U.S. Department of Commerce further avers that its report has not yet been completed. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24.

25. Deny the allegations in the first sentence of paragraph 25, except admit that on December 4, 2017, the President issued a “Presidential Proclamation Modifying the Grand

Staircase-Escalante National Monument” and a “Presidential Proclamation Modifying the Bears Ears National Monument,” and respectfully refer the Court to those documents for a true and complete statement of their contents. Deny the second sentence of paragraph 25 on the ground that it is vague and ambiguous.

26. This paragraph consists of argument by Plaintiff, to which no response is required.

27. Admit that Defendants’ review of national monuments has generated public interest, and aver that paragraph 27 of the complaint otherwise contains Plaintiff’s characterization of alleged background information and argument, to which no response is required. To the extent a response is required, deny knowledge or information sufficient to form a belief as to the interests of NRDC and its members or the desires of “the public,” and otherwise deny the allegations of paragraph 27.

28. Admit that NRDC submitted FOIA requests to Defendants, and otherwise deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28.

**NRDC’s first FOIA request to the Interior Department<sup>1</sup>**

**# OS-2017-01247**

29. Admit the allegations in paragraph 29 of the complaint.

30. Defendant the U.S. Department of the Interior states that the document that appears to be the basis for the allegations in paragraph 30 is a purported copy of a U.S. Department of the Interior document obtained from a non-governmental source (*see, e.g.*, <https://www.washingtonpost.com/national/health-science/shrink-at-least-4-national-monuments->

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<sup>1</sup> For ease of reference, Defendants refer to Plaintiff’s headings and titles, but to the extent those headings and titles are construed to contain factual allegations, those allegations are denied.

and-modify-a-half-dozen-others-zinke-tells-trump/2017/09/17/a0df45cc-9b48-11e7-82e4-f1076f6d6152\_story.html?utm\_term=.75df9ed3e7f3), not a document available on a U.S.

Department of the Interior website or otherwise released to the public by the U.S. Department of the Interior, and on this basis, the allegations in paragraph 30 are denied. Defendant the U.S. Department of the Interior refers the Court to the publicly released December 5, 2017, report, for a true and correct statement of that document's contents.

31. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior dated September 22, 2017, seeking the information specified in Exhibit A of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31.

32. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit A of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 32.

33. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit A of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 33.

34. Defendant the U.S. Department of the Interior admits the allegations in the first sentence of paragraph 34. The second sentence of paragraph 34 consists of conclusions of law, to which no response is required. To the extent a response is required, denies the allegations in the second sentence of paragraph 34. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34.

35. Paragraph 35 of the complaint contains legal conclusions, to which no response is required, except Defendant the U.S. Department of the Interior admits that NRDC submitted its FOIA request via the U.S. Department of the Interior's online FOIA portal. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35.

36. Defendant the U.S. Department of the Interior admits that the allegations of paragraph 36 of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36.

37. Paragraph 37 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 37. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 37.

38. The allegation in the first sentence of paragraph 38 that October 24, 2017, was "the day after FOIA's statutory deadline had run" is a conclusion of law to which no response is required, except to the extent a response is required, Defendant the U.S. Department of the Interior denies this allegation. Defendant the U.S. Department of the Interior otherwise admits

the allegations in paragraph 38. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38.

39. Defendant the U.S. Department of the Interior admits the allegations in paragraph 39. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39.

40. Defendant the U.S. Department of the Interior admits the allegations in paragraph 40. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40.

41. Defendant the U.S. Department of the Interior admits the allegations in paragraph 41, as of the date of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41.

42. Paragraph 42 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 42. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 42.

43. Defendant the U.S. Department of the Interior admits that, to date, the U.S. Department of the Interior has not produced responsive records or claimed that responsive records are exempt specifically in response to Plaintiff's FOIA request, and otherwise denies the allegations in paragraph 43 on the basis that the phrase "substantively responded" is vague and ambiguous.

**NRDC's second FOIA request to the Interior Department**

**# OS-2018-00232**

44. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior dated October 29, 2017, seeking the information specified in Exhibit B of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 44.

45. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit B of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 45.

46. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit B of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 46.

47. Defendant the U.S. Department of the Interior admits the allegations in the first sentence of paragraph 47. The second sentence of paragraph 47 consists of conclusions of law, to which no response is required. To the extent a response is required, denies the allegations in the second sentence of paragraph 47. Defendant the U.S. Department of Commerce denies



knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 47.

48. Paragraph 48 of the complaint contains legal conclusions, to which no response is required, except Defendant the U.S. Department of the Interior admits that NRDC submitted its FOIA request via the U.S. Department of the Interior's online FOIA portal. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48.

49. Defendant the U.S. Department of the Interior admits that the allegations of paragraph 49 of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 49.

50. Paragraph 50 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 50. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 50.

51. Defendant the U.S. Department of the Interior admits the allegations in paragraph 51. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 51.

52. Defendant the U.S. Department of the Interior admits the allegations in paragraph 52. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 52.

53. Defendant the U.S. Department of the Interior admits the allegations in paragraph 53. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 53.

54. Defendant the U.S. Department of the Interior admits the allegations in paragraph 54, as of the date of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 54.

55. Paragraph 55 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 55. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 55.

56. Defendant the U.S. Department of the Interior admits that, to date, the U.S. Department of the Interior has not produced responsive records or claimed that responsive records are exempt specifically in response to Plaintiff's FOIA request, and otherwise denies the allegations in paragraph 56 on the basis that the phrase "substantively responded" is vague and ambiguous.

**NRDC's FOIA request to the Commerce Department**

**# DOC-IOS-2018-000178**

57. Defendant the U.S. Department of Commerce admits that Plaintiff submitted a FOIA request to the U.S. Department of Commerce dated October 29, 2017, seeking the information specified in Exhibit C of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57.

58. Defendant the U.S. Department of Commerce admits that Plaintiff submitted a FOIA request to the U.S. Department of Commerce seeking the information specified in Exhibit

C of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 58.

59. Defendant the U.S. Department of Commerce admits that Plaintiff submitted a FOIA request to the U.S. Department of Commerce seeking the information specified in Exhibit C of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59.

60. Defendant the U.S. Department of Commerce admits the allegations in the first clause of paragraph 60. To the extent the second clause of paragraph 60 consists of conclusions of law, no response is required. To the extent a response is required, denies the allegations in the second clause of paragraph 60. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 60.

61. Paragraph 61 of the complaint contains legal conclusions, to which no response is required, except the U.S. Department of Commerce admits that NRDC submitted a FOIA request to the U.S. Department of Commerce via a federal government online portal for FOIA requests. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 61.

62. Defendant the U.S. Department of Commerce admits the allegations in paragraph 62. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 62.

63. Defendant the U.S. Department of Commerce admits the allegations in paragraph 63. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 63.

64. Paragraph 64 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, Defendant the U.S. Department of Commerce denies the allegations in paragraph 64, and Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 64.

65. With respect to the first sentence of paragraph 65, Defendant the U.S. Department of Commerce admits that the U.S. Department of Commerce sent Plaintiff an email on November 14, 2017, granting a fee waiver for request DOC-IOS-2018-000178, and respectfully refers the Court to that e-mail for a true and complete statement of its contents, but avers that there is no “Exhibit K” to the complaint. The second sentence of paragraph 65 contains legal conclusions to which no response is required. To the extent a response is required, denies the second sentence of paragraph 65 on the basis that the phrase “respond substantively” is vague and ambiguous. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 65.

66. Defendant the U.S. Department of Commerce admits that, to date, the U.S. Department of Commerce has not produced responsive records or claimed that responsive records are exempt in response to Plaintiff’s FOIA request, and otherwise denies the allegations in paragraph 66 on the basis that the phrase “substantively responded” is vague and ambiguous. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66.

67. Paragraph 67 of the complaint consists of legal conclusions and describes Plaintiff's prayer for relief, to which no response is required. To the extent a response is required, deny the allegations in paragraph 67 and deny that Plaintiff is entitled to the relief requested or any relief.

68. Paragraph 68 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 68.

**CLAIM FOR RELIEF**

**COUNT ONE**  
**5 U.S.C. § 552(a) (FOIA)**  
*All Defendants*

69. Defendants repeat and restate their responses to paragraphs 1 through 68 of the complaint with the same force and effect as if set forth fully herein.

70. Paragraph 70 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 70.

71. Paragraph 71 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 71.

72. Paragraph 72 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 72 and respectfully refer the Court to the cited provision of law.

73. Paragraph 73 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 73.

## **REQUEST FOR RELIEF**

74. The seven lettered paragraphs in the section of the complaint titled “Request for Relief” constitute a prayer for relief, to which no response is required. To the extent a response is required, deny that Plaintiff is entitled to the requested relief or any relief.

## **DEFENSES**

### FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

### SECOND DEFENSE

Plaintiff is not entitled to compel the production of records protected from disclosure by any applicable FOIA exemptions or exclusions. *See* 5 U.S.C. § 552(b).

### THIRD DEFENSE

At all times alleged in the complaint, Defendants acted in good faith, with justification, and pursuant to authority, and exceptional circumstances exist that necessitate additional time for Defendants to process Plaintiff’s FOIA requests.

### FOURTH DEFENSE

The Court lacks subject matter jurisdiction over Plaintiffs’ requests for relief to the extent those requests exceed the relief authorized under FOIA. *See* 5 U.S.C. § 552.

### FIFTH DEFENSE

Plaintiff is not entitled to declaratory relief. *See* 5 U.S.C. § 552(a)(4)(B).

### SIXTH DEFENSE

Defendants may have additional affirmative defenses that are not known to Defendants at this time, but that may be ascertained during litigation. Defendants specifically preserve these

and other affirmative defenses as they are ascertained during litigation, including those required by Fed. R. Civ. P. 8 and 12.

WHEREFORE, Defendants, having fully answered the allegations in the complaint and stated their defenses, respectfully request this Court to dismiss the complaint with prejudice, enter judgment in favor of Defendants, award costs for defense of this action, and grant such other relief as may be just and equitable.

Dated: New York, New York  
March 23, 2018

GEOFFREY S. BERMAN  
United States Attorney for the  
Southern District of New York  
*Attorney for Defendants*

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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



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  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE  
COUNCIL, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR and  
U.S. DEPARTMENT OF COMMERCE,

Defendants.

18 Civ. 00650 (JGK)

ANSWER

Defendants the U.S. Department of the Interior and the U.S. Department of Commerce (“Defendants”), by their attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, answer the complaint (the “complaint”) filed January 24, 2018, by Natural Resources Defense Council, Inc. (“Plaintiff”), upon information and belief as follows:

#### **INTRODUCTION**

1. Paragraph 1 of the complaint contains Plaintiff’s characterization of this action, to which no response is required. To the extent a response is required, deny the allegations in paragraph 1.

2. The first sentence of paragraph 2 consists of Plaintiff’s characterization of alleged background information and argument, to which no response is required. To the extent a



response is required, admit that President Donald Trump (“the President”) signed (1) Executive Order 13,792, titled “Review of Designations Under the Antiquities Act” and dated April 26, 2017, and (2) Executive Order 13,795, titled “Implementing an America-First Offshore Energy Strategy” and dated April 28, 2017, and respectfully refer the Court to those documents for a true and complete statement of their contents, and otherwise deny the allegations in the first sentence of paragraph 2. With respect to the second sentence of paragraph 2 of the complaint, admit that on December 4, 2017, the President issued a “Presidential Proclamation Modifying the Grand Staircase-Escalante National Monument” and a “Presidential Proclamation Modifying the Bears Ears National Monument,” and respectfully refer the Court to those documents for a true and complete statement of their contents. Defendants further aver that the second sentence of paragraph 2 otherwise consists of Plaintiff’s characterization of alleged background information and argument, to which no response is required. To the extent a response is required, deny the allegations in the second sentence of paragraph 2.

3. With respect to the first two sentences of paragraph 3, admit that Defendants received Freedom of Information Act (“FOIA”) requests from Plaintiff in September and October 2017, and respectfully refer the Court to the referenced documents for a true and complete statement of their contents. Aver that the third sentence of paragraph 3 consists of argument by Plaintiff, to which no response is required.

4. Paragraph 4 of the complaint contains conclusions of law, to which no response is required. To the extent a response is required, deny the allegations in paragraph 4 on the basis that the phrase “respond substantively” is vague and ambiguous.

5. Paragraph 5 of the complaint contains Plaintiff's request for relief, to which no response is required. To the extent a response is required, deny that Plaintiff is entitled to the requested relief or any relief.

#### **JURISDICTION AND VENUE**

6. Paragraph 6 of the complaint consists of legal conclusions, to which no response is required.

7. Paragraph 7 of the complaint consists of legal conclusions, to which no response is required, except deny knowledge or information sufficient to form a belief as to the location of Plaintiff's residence and principal place of business.

#### **THE PARTIES**

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the complaint.

9. Paragraph 9 of the complaint consists of legal conclusions, to which no response is required, except admit that the U.S. Department of the Interior is a federal agency; that the Office of the Secretary of the Interior is a component of the U.S. Department of the Interior; and that Plaintiff submitted a FOIA request stating that it seeks records within the U.S. Department of the Interior's possession, custody, or control, but deny knowledge or information sufficient to form a belief as to the scope of the "documents NRDC seeks" and whether such records are in the U.S. Department of the Interior's possession or control.

10. Paragraph 10 of the complaint consists of legal conclusions, to which no response is required, except admit that the U.S. Department of Commerce is a federal agency; that the Office of the Secretary of Commerce is a component of the U.S. Department of Commerce; and that Plaintiff submitted a FOIA request stating that it seeks records within the U.S. Department

of Commerce's possession, custody, or control, but deny knowledge or information sufficient to form a belief as to the scope of the "documents NRDC seeks" and whether such records are in the U.S. Department of Commerce's possession or control.

#### **STATUTORY AND REGULATORY FRAMEWORK**

11. Paragraph 11 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 11, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

12. Paragraph 12 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 12, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

13. Paragraph 13 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 13, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

14. Paragraph 14 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 14, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

15. Paragraph 15 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 15, and

respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

16. Paragraph 16 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 16, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

17. Paragraph 17 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 17, and respectfully refer the Court to the cited provisions of law for a true and complete statement of their contents.

#### **FACTS**

18. Admit that the President signed Executive Order 13,792, dated April 26, 2017, and respectfully refer the Court to that document for a true and complete statement of its contents.

19. Admit that the President signed Executive Order 13,795, dated April 28, 2017, and respectfully refer the Court to that document for a true and complete statement of its contents.

20. Defendant the U.S. Department of the Interior admits that the U.S. Department of the Interior accepted public comments and met with a variety of stakeholders related to Executive Order 13,792. Defendant the U.S. Department of Commerce admits that the National Oceanic and Atmospheric Administration (“NOAA”) and the U.S. Department of Commerce accepted public comments and met with a variety of stakeholders related to Executive Order 13,795. Defendants otherwise deny the allegations of paragraph 20.

21. Defendant the U.S. Department of the Interior admits that the U.S. Department of the Interior received approximately 2.8 million public comments related to Executive Order 13,792, and respectfully refers the Court to those documents for a true and correct statement of their contents. Defendant the U.S. Department of the Interior further admits that a report prepared by Secretary of the Interior Ryan Zinke (“Secretary Zinke”) stated that the “[c]omments received were overwhelmingly in favor of maintaining existing monuments and demonstrated a well-orchestrated national campaign organized by multiple organizations.” Defendant the U.S. Department of Commerce admits that the U.S. Department of Commerce received approximately 182,000 comments related to Executive Order 13,795, and respectfully refers the Court to those documents for a true and correct statement of their contents. Defendants otherwise deny the allegations in paragraph 21 of the complaint.

22. Defendant the U.S. Department of the Interior (a) admits that the U.S. Department of the Interior received comments from NRDC in response to the U.S. Department of the Interior’s request for public comments, and respectfully refers the Court to those documents for a true and complete statement of their contents; (b) denies knowledge or information sufficient to form a belief as to whether tens of thousands of NRDC’s individual members submitted comments related to Executive Order 13,792; and (c) otherwise denies the allegations in paragraph 22 of the complaint. Defendant the U.S. Department of Commerce (a) admits that the U.S. Department of Commerce received comments from NRDC in response to NOAA’s request for public comments, including comments “on behalf [of NRDC]” which NRDC purports are comments from “online members and activists,” *see* <https://www.regulations.gov/document?D=NOAA-NOS-2017-0066-67295>; <https://www.regulations.gov/document?D=NOAA-NOS-2017-0066-99250>, and respectfully

refers the Court to those documents for a true and complete statement of their contents; and  
(b) otherwise denies the allegations in paragraph 22 of the complaint.

23. Defendant the U.S. Department of the Interior admits that on August 24, 2017, Secretary Zinke sent a draft report to the President related to Executive Order 13,792; that on September 17, 2017, The Washington Post published a purported copy of a memorandum from Secretary Zinke to President Trump concerning a review of national monuments; and that on December 5, 2017, Secretary Zinke released a final report outlining recommendations to the President regarding certain national monument designations under the Antiquities Act, and respectfully refers the Court to those documents for a true and complete statement of their contents. Defendant the U.S. Department of the Interior otherwise denies the allegations in paragraph 23. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23.

24. Defendant the U.S. Department of Commerce admits that Executive Order 13,795 directs the Secretary of Commerce to report by October 25, 2017, the results of its review to the Assistant to the President for Economic Policy, as well as to the Director of the Office of Management and Budget and the Chairman of the Council on Environmental Quality, but denies that any report was to be submitted to the President, and otherwise denies the allegations in paragraph 24 of the complaint. Defendant the U.S. Department of Commerce further avers that its report has not yet been completed. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24.

25. Deny the allegations in the first sentence of paragraph 25, except admit that on December 4, 2017, the President issued a “Presidential Proclamation Modifying the Grand

Staircase-Escalante National Monument” and a “Presidential Proclamation Modifying the Bears Ears National Monument,” and respectfully refer the Court to those documents for a true and complete statement of their contents. Deny the second sentence of paragraph 25 on the ground that it is vague and ambiguous.

26. This paragraph consists of argument by Plaintiff, to which no response is required.

27. Admit that Defendants’ review of national monuments has generated public interest, and aver that paragraph 27 of the complaint otherwise contains Plaintiff’s characterization of alleged background information and argument, to which no response is required. To the extent a response is required, deny knowledge or information sufficient to form a belief as to the interests of NRDC and its members or the desires of “the public,” and otherwise deny the allegations of paragraph 27.

28. Admit that NRDC submitted FOIA requests to Defendants, and otherwise deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28.

**NRDC’s first FOIA request to the Interior Department<sup>1</sup>**

**# OS-2017-01247**

29. Admit the allegations in paragraph 29 of the complaint.

30. Defendant the U.S. Department of the Interior states that the document that appears to be the basis for the allegations in paragraph 30 is a purported copy of a U.S. Department of the Interior document obtained from a non-governmental source (*see, e.g.*, <https://www.washingtonpost.com/national/health-science/shrink-at-least-4-national-monuments->

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<sup>1</sup> For ease of reference, Defendants refer to Plaintiff’s headings and titles, but to the extent those headings and titles are construed to contain factual allegations, those allegations are denied.

and-modify-a-half-dozen-others-zinke-tells-trump/2017/09/17/a0df45cc-9b48-11e7-82e4-f1076f6d6152\_story.html?utm\_term=.75df9ed3e7f3), not a document available on a U.S.

Department of the Interior website or otherwise released to the public by the U.S. Department of the Interior, and on this basis, the allegations in paragraph 30 are denied. Defendant the U.S. Department of the Interior refers the Court to the publicly released December 5, 2017, report, for a true and correct statement of that document's contents.

31. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior dated September 22, 2017, seeking the information specified in Exhibit A of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31.

32. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit A of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 32.

33. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit A of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 33.



34. Defendant the U.S. Department of the Interior admits the allegations in the first sentence of paragraph 34. The second sentence of paragraph 34 consists of conclusions of law, to which no response is required. To the extent a response is required, denies the allegations in the second sentence of paragraph 34. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34.

35. Paragraph 35 of the complaint contains legal conclusions, to which no response is required, except Defendant the U.S. Department of the Interior admits that NRDC submitted its FOIA request via the U.S. Department of the Interior's online FOIA portal. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35.

36. Defendant the U.S. Department of the Interior admits that the allegations of paragraph 36 of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36.

37. Paragraph 37 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 37. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 37.

38. The allegation in the first sentence of paragraph 38 that October 24, 2017, was "the day after FOIA's statutory deadline had run" is a conclusion of law to which no response is required, except to the extent a response is required, Defendant the U.S. Department of the Interior denies this allegation. Defendant the U.S. Department of the Interior otherwise admits

the allegations in paragraph 38. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38.

39. Defendant the U.S. Department of the Interior admits the allegations in paragraph 39. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39.

40. Defendant the U.S. Department of the Interior admits the allegations in paragraph 40. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40.

41. Defendant the U.S. Department of the Interior admits the allegations in paragraph 41, as of the date of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41.

42. Paragraph 42 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 42. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 42.

43. Defendant the U.S. Department of the Interior admits that, to date, the U.S. Department of the Interior has not produced responsive records or claimed that responsive records are exempt specifically in response to Plaintiff's FOIA request, and otherwise denies the allegations in paragraph 43 on the basis that the phrase "substantively responded" is vague and ambiguous.

**NRDC's second FOIA request to the Interior Department**

**# OS-2018-00232**

44. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior dated October 29, 2017, seeking the information specified in Exhibit B of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 44.

45. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit B of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 45.

46. Defendant the U.S. Department of the Interior admits that Plaintiff submitted a FOIA request to the U.S. Department of the Interior seeking the information specified in Exhibit B of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 46.

47. Defendant the U.S. Department of the Interior admits the allegations in the first sentence of paragraph 47. The second sentence of paragraph 47 consists of conclusions of law, to which no response is required. To the extent a response is required, denies the allegations in the second sentence of paragraph 47. Defendant the U.S. Department of Commerce denies

knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 47.

48. Paragraph 48 of the complaint contains legal conclusions, to which no response is required, except Defendant the U.S. Department of the Interior admits that NRDC submitted its FOIA request via the U.S. Department of the Interior's online FOIA portal. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48.

49. Defendant the U.S. Department of the Interior admits that the allegations of paragraph 49 of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 49.

50. Paragraph 50 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 50. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 50.

51. Defendant the U.S. Department of the Interior admits the allegations in paragraph 51. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 51.

52. Defendant the U.S. Department of the Interior admits the allegations in paragraph 52. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 52.

53. Defendant the U.S. Department of the Interior admits the allegations in paragraph 53. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 53.

54. Defendant the U.S. Department of the Interior admits the allegations in paragraph 54, as of the date of the complaint. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 54.

55. Paragraph 55 consists of conclusions of law, to which no response is required. To the extent a response is required, Defendant the U.S. Department of the Interior denies the allegations in paragraph 55. Defendant the U.S. Department of Commerce denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 55.

56. Defendant the U.S. Department of the Interior admits that, to date, the U.S. Department of the Interior has not produced responsive records or claimed that responsive records are exempt specifically in response to Plaintiff's FOIA request, and otherwise denies the allegations in paragraph 56 on the basis that the phrase "substantively responded" is vague and ambiguous.

**NRDC's FOIA request to the Commerce Department**

**# DOC-IOS-2018-000178**

57. Defendant the U.S. Department of Commerce admits that Plaintiff submitted a FOIA request to the U.S. Department of Commerce dated October 29, 2017, seeking the information specified in Exhibit C of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57.

58. Defendant the U.S. Department of Commerce admits that Plaintiff submitted a FOIA request to the U.S. Department of Commerce seeking the information specified in Exhibit

C of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 58.

59. Defendant the U.S. Department of Commerce admits that Plaintiff submitted a FOIA request to the U.S. Department of Commerce seeking the information specified in Exhibit C of the complaint, and respectfully refers the Court to that document for a true and correct statement of its contents. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59.

60. Defendant the U.S. Department of Commerce admits the allegations in the first clause of paragraph 60. To the extent the second clause of paragraph 60 consists of conclusions of law, no response is required. To the extent a response is required, denies the allegations in the second clause of paragraph 60. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 60.

61. Paragraph 61 of the complaint contains legal conclusions, to which no response is required, except the U.S. Department of Commerce admits that NRDC submitted a FOIA request to the U.S. Department of Commerce via a federal government online portal for FOIA requests. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 61.

62. Defendant the U.S. Department of Commerce admits the allegations in paragraph 62. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 62.

63. Defendant the U.S. Department of Commerce admits the allegations in paragraph 63. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 63.

64. Paragraph 64 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, Defendant the U.S. Department of Commerce denies the allegations in paragraph 64, and Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 64.

65. With respect to the first sentence of paragraph 65, Defendant the U.S. Department of Commerce admits that the U.S. Department of Commerce sent Plaintiff an email on November 14, 2017, granting a fee waiver for request DOC-IOS-2018-000178, and respectfully refers the Court to that e-mail for a true and complete statement of its contents, but avers that there is no “Exhibit K” to the complaint. The second sentence of paragraph 65 contains legal conclusions to which no response is required. To the extent a response is required, denies the second sentence of paragraph 65 on the basis that the phrase “respond substantively” is vague and ambiguous. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 65.

66. Defendant the U.S. Department of Commerce admits that, to date, the U.S. Department of Commerce has not produced responsive records or claimed that responsive records are exempt in response to Plaintiff’s FOIA request, and otherwise denies the allegations in paragraph 66 on the basis that the phrase “substantively responded” is vague and ambiguous. Defendant the U.S. Department of the Interior denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66.

67. Paragraph 67 of the complaint consists of legal conclusions and describes Plaintiff's prayer for relief, to which no response is required. To the extent a response is required, deny the allegations in paragraph 67 and deny that Plaintiff is entitled to the relief requested or any relief.

68. Paragraph 68 of the complaint consists of legal conclusions, to which no response is required. To the extent a response is required, deny the allegations in paragraph 68.

**CLAIM FOR RELIEF**

**COUNT ONE**  
**5 U.S.C. § 552(a) (FOIA)**  
*All Defendants*

69. Defendants repeat and restate their responses to paragraphs 1 through 68 of the complaint with the same force and effect as if set forth fully herein.

70. Paragraph 70 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 70.

71. Paragraph 71 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 71.

72. Paragraph 72 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 72 and respectfully refer the Court to the cited provision of law.

73. Paragraph 73 of the complaint consists of legal conclusions to which no response is required. To the extent a response is required, deny the allegations in paragraph 73.



## **REQUEST FOR RELIEF**

74. The seven lettered paragraphs in the section of the complaint titled “Request for Relief” constitute a prayer for relief, to which no response is required. To the extent a response is required, deny that Plaintiff is entitled to the requested relief or any relief.

### **DEFENSES**

#### **FIRST DEFENSE**

The complaint fails to state a claim upon which relief can be granted.

#### **SECOND DEFENSE**

Plaintiff is not entitled to compel the production of records protected from disclosure by any applicable FOIA exemptions or exclusions. *See* 5 U.S.C. § 552(b).

#### **THIRD DEFENSE**

At all times alleged in the complaint, Defendants acted in good faith, with justification, and pursuant to authority, and exceptional circumstances exist that necessitate additional time for Defendants to process Plaintiff’s FOIA requests.

#### **FOURTH DEFENSE**

The Court lacks subject matter jurisdiction over Plaintiffs’ requests for relief to the extent those requests exceed the relief authorized under FOIA. *See* 5 U.S.C. § 552.

#### **FIFTH DEFENSE**

Plaintiff is not entitled to declaratory relief. *See* 5 U.S.C. § 552(a)(4)(B).

#### **SIXTH DEFENSE**

Defendants may have additional affirmative defenses that are not known to Defendants at this time, but that may be ascertained during litigation. Defendants specifically preserve these

and other affirmative defenses as they are ascertained during litigation, including those required by Fed. R. Civ. P. 8 and 12.

WHEREFORE, Defendants, having fully answered the allegations in the complaint and stated their defenses, respectfully request this Court to dismiss the complaint with prejudice, enter judgment in favor of Defendants, award costs for defense of this action, and grant such other relief as may be just and equitable.

Dated: New York, New York  
March 23, 2018

GEOFFREY S. BERMAN  
United States Attorney for the  
Southern District of New York  
*Attorney for Defendants*

By: s/ Talia Kraemer  
TALIA KRAEMER  
Assistant United States Attorney  
86 Chambers St., 3rd Floor  
New York, New York 10007  
Tel.: (212) 637-2822  
Fax: (212) 637-2702  
taliam.kraemer@usdoj.gov



**Judicial  
Watch**<sup>®</sup>  
*Because no one  
is above the law!*

February 6, 2017

**VIA CERTIFIED MAIL**

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

**Re: Freedom of Information Act Request**

Dear Freedom of Information Officer:

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

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

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

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

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

## NOAA FOIA Request

February 6, 2017

Page 2 of 3

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

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

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

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

Thank you for your cooperation.

**NOAA FOIA Request**  
**February 6, 2017**  
**Page 3 of 3**

Very respectfully,

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

William F. Marshall  
Judicial Watch, Inc.

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

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

---

**COMPLAINT**

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

**JURISDICTION AND VENUE**

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

**PARTIES**

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

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

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

### **STATEMENT OF FACTS**

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

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

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

The request was submitted by certified mail.

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

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

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

### **COUNT I**

#### **Violation of FOIA, 5 U.S.C. § 552**

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

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

11. To trigger FOIA's administrative exhaustion requirement, Defendant was required to determine whether to comply with Plaintiff's request by March 31, 2017 at the latest. At a minimum, Defendant was required to: (i) gather and review the requested documents; (ii) determine and communicate to Plaintiff the scope of any responsive records Defendant intended to produce or withhold and the reasons for any withholdings; (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination; and (iv) make the records available promptly thereafter. *See, e.g., Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188-89 (D.C. Cir. 2013).

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

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request; (2) order Defendant to produce, by a date certain, any and all non-exempt records to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.



Dated: June 29, 2017

Respectfully submitted,

*s/ Chris Fedeli*

Chris Fedeli

D.C. Bar No. 472919

**JUDICIAL WATCH, INC.**

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

*Counsel for Plaintiff*

<b>Tracking Number</b>	<b>Type</b>	<b>Requester</b>	<b>Requester Organization</b>	<b>Submitted</b>
DOC-NOAA-2018-001037	Request	Jane Davenport	Defenders of Wildlife	03/27/2018
DOC-NOAA-2018-001022	Request	Michael L. Johnson		03/27/2018
DOC-NOAA-2018-001009	Request	Michael L. Johnson		03/26/2018
DOC-NOAA-2018-001005	Request	Anne Philbrick		03/25/2018
DOC-NOAA-2018-001001	Request	Jeff Berebitsky		03/23/2018
DOC-NOAA-2018-000991	Request	David Becker	Law Office of David H Becker	03/21/2018
DOC-NOAA-2018-000986	Request	Raymond Clarke		03/21/2018

Custom Report - 03/28/2018 10:02:23

Received	Assigned To	Case File Assigned To	Perfected?	Due	Closed Date
03/27/2018	NOAA	NOAA	No	TBD	TBD
03/27/2018	NOAA	NOAA	No	TBD	TBD
03/26/2018	OGC	OGC	Yes	04/23/2018	TBD
03/26/2018	Kelvin James	Kelvin James	Yes	04/23/2018	TBD
03/23/2018	AGO	AGO	Yes	04/23/2018	TBD
03/21/2018	Ana Liza Malabanan	Ana Liza Malabanan	Yes	04/23/2018	TBD
03/21/2018	Kehaupuaokal Kamaka	Kehaupuaokal Kamaka	Yes	04/23/2018	TBD

<b>Status</b>	<b>Dispositions</b>
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Submitted

Submitted

Assignment Determination

Assignment Determination

Assignment Determination

Assignment Determination

Assignment Determination

**Detail**

See attached request.

I request a copy of Exhibit 31 from UNITED STATES DEPARTMENT OF COMMERCE NATIONAL OCEANIC AND

I request a copy of Exhibit 10 from UNITED STATES DEPARTMENT OF COMMERCE NATIONAL OCEANIC AND

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

Interested in obtaining the contract and certificates of insurance that would have been in place between NOAA and

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

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



RE MATTER OF: Lobster's Inc. Lawrence M. Yacubian, Respondents. Exhibit 31 contains information and

RE MATTER OF: Lobster's Inc. Lawrence M. Yacubian, Respondents. Exhibit 10 has the basic and nine a  
nham, Kyung Yang Ho 6 NBI, Dae Jin Ho No 52, Dae Sung Ho, Korean ships, Soviet processors, Marine  
988. Please let me know if you need any clarification.

(IDFG) to the National Marine Fisheries Service (NMFS), or correspondence from  
the result of recent changes in MSC fishery standards on compartmentalization, it requires all fishing gear

l data relevant to the "USCG Research & Development Center and Eight Coast Guard District BOA  
ttachments as follows: Exhibit 10 – Statement by Linda Galvin dated 14 January 1999 with a supplemer  
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



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

rams in streams in Idaho that are habitat for Snake River Basin DPS steelhead during the period from J:  
us. In a previous request – we sought and obtained information on the free school portion of our fishing :

Thank you for your assistance.

ail dated 11 December 1998 titled "Vessels in Closed Areas during Past Week." Exhi

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











**From:** postmaster@DOCGOV.onmicrosoft.com  
**Sent:** Wednesday, March 28, 2018 10:46 AM  
**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](mailto:cholmes@doc.gov) couldn't be delivered.

**cholmes** wasn't found at [doc.gov](https://doc.gov).

<b>Mark.Graff</b> <b>Action Required</b> Unknown To address	<b>Office 365</b>	<b>cholmes</b> Recipient
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### 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.](#)

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## 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: 3/28/2018 2:45:20 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: CY1PR09MB0843.namprd09.prod.outlook.com

### Message Hops

HOP	TIME (UTC)	FROM	TO	WITH	RELAY TIME
1	3/28/2018 2:45:20 PM		10.200.46.138	HTTP	*
2	3/28/2018 2:46:03 PM		mail-qt0-x230.google.com	SMTP	43 sec
3	3/28/2018 2:46:03 PM	mail-qt0-x230.google.com	CY1GCC01FT008.mail.protection.outlook.com	Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_GCM_SHA384)	*
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Authentication-Results: spf=pass (sender IP is 2607:f8b0:400d:c0d::230) smtp.mailfrom=noaa.gov; doc.gov; dkim=pass (signature was verified) header.d=noaa.gov; doc.gov; dmarc=bestguesspass action=none header.from=noaa.gov;  
Received-SPF: Pass (protection.outlook.com: domain of noaa.gov designates 2607:f8b0:400d:c0d::230 as permitted sender) receiver=protection.outlook.com; client-ip=2607:f8b0:400d:c0d::230; helo=mail-qt0-x230.google.com;  
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From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>Date: Wed, 28 Mar 2018 10:45:20 -0400  
Message-ID: <CAFW6A9XWfiv15qC5=cykZuN274Ntp5KH0h-sF7hj1h9Lzocw@mail.gmail.com>Subject: Weekly FOIA Incoming and High Visibilit  
y 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="089e0822920cdf0d705687a1023"  
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Arrival-Date: Wed, 28 Mar 2018 14:46:03 +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



**Judicial  
Watch**<sup>®</sup>  
*Because no one  
is above the law!*

February 6, 2017

**VIA CERTIFIED MAIL**

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

**Re: Freedom of Information Act Request**

Dear Freedom of Information Officer:

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

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

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

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

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

## NOAA FOIA Request

February 6, 2017

Page 2 of 3

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

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

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

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

Thank you for your cooperation.

**NOAA FOIA Request**  
**February 6, 2017**  
**Page 3 of 3**

Very respectfully,

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

William F. Marshall  
Judicial Watch, Inc.

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

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

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**COMPLAINT**

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

**JURISDICTION AND VENUE**

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

**PARTIES**

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

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

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

### **STATEMENT OF FACTS**

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

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

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

The request was submitted by certified mail.

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

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

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

### **COUNT I**

#### **Violation of FOIA, 5 U.S.C. § 552**

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



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

11. To trigger FOIA's administrative exhaustion requirement, Defendant was required to determine whether to comply with Plaintiff's request by March 31, 2017 at the latest. At a minimum, Defendant was required to: (i) gather and review the requested documents; (ii) determine and communicate to Plaintiff the scope of any responsive records Defendant intended to produce or withhold and the reasons for any withholdings; (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination; and (iv) make the records available promptly thereafter. *See, e.g., Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188-89 (D.C. Cir. 2013).

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

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request; (2) order Defendant to produce, by a date certain, any and all non-exempt records to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated: June 29, 2017

Respectfully submitted,

*s/ Chris Fedeli*

Chris Fedeli

D.C. Bar No. 472919

**JUDICIAL WATCH, INC.**

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

*Counsel for Plaintiff*

<b>Tracking Number</b>	<b>Type</b>	<b>Requester</b>	<b>Requester Organization</b>	<b>Submitted</b>
DOC-NOAA-2018-001037	Request	Jane Davenport	Defenders of Wildlife	03/27/2018
DOC-NOAA-2018-001022	Request	Michael L. Johnson		03/27/2018
DOC-NOAA-2018-001009	Request	Michael L. Johnson		03/26/2018
DOC-NOAA-2018-001005	Request	Anne Philbrick		03/25/2018
DOC-NOAA-2018-001001	Request	Jeff Berebitsky		03/23/2018
DOC-NOAA-2018-000991	Request	David Becker	Law Office of David H Becker	03/21/2018
DOC-NOAA-2018-000986	Request	Raymond Clarke		03/21/2018

**Custom Report - 03/28/2018 10:02:23**

<b>Received</b>	<b>Assigned To</b>	<b>Case File Assigned To</b>	<b>Perfected?</b>	<b>Due</b>	<b>Closed Date</b>
03/27/2018	NOAA	NOAA	No	TBD	TBD
03/27/2018	NOAA	NOAA	No	TBD	TBD
03/26/2018	OGC	OGC	Yes	04/23/2018	TBD
03/26/2018	Kelvin James	Kelvin James	Yes	04/23/2018	TBD
03/23/2018	AGO	AGO	Yes	04/23/2018	TBD
03/21/2018	Ana Liza Malabanan	Ana Liza Malabanan	Yes	04/23/2018	TBD
03/21/2018	Kehaupuaokal Kamaka	Kehaupuaokal Kamaka	Yes	04/23/2018	TBD

<b>Status</b>	<b>Dispositions</b>
---------------	---------------------

Submitted

Submitted

Assignment Determination

Assignment Determination

Assignment Determination

Assignment Determination

Assignment Determination

**Detail**

See attached request.

I request a copy of Exhibit 31 from UNITED STATES DEPARTMENT OF COMMERCE NATIONAL OCEANIC AND

I request a copy of Exhibit 10 from UNITED STATES DEPARTMENT OF COMMERCE NATIONAL OCEANIC AND

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

Interested in obtaining the contract and certificates of insurance that would have been in place between NOAA and

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

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

U.S. ENVIRONMENTAL PROTECTION AGENCY  
ATMOSPHERIC ADMINISTRATION DOCKET NUMBER NE980310FM/V (F/V Independence) IN THE  
ATMOSPHERIC ADMINISTRATION DOCKET NUMBER NE980310FM/V (F/V Independence) IN THE  
records within the 200 mile zone between 1980 and 1991. Specifically Anne Hartmann, Anne Hartmann Burrill  
Marine Vacuum Services, Inc. See attached invoices. I am interested in the years between 1984 and 1991.  
In 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

RE MATTER OF: Lobster's Inc. Lawrence M. Yacubian, Respondents. Exhibit 31 contains information and

RE MATTER OF: Lobster's Inc. Lawrence M. Yacubian, Respondents. Exhibit 10 has the basic and nine a  
nham, Kyung Yang Ho 6 NBI, Dae Jin Ho No 52, Dae Sung Ho, Korean ships, Soviet processors, Marin  
988. Please let me know if you need any clarification.

'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



l data relevant to the "USCG Research & Development Center and Eight Coast Guard District BOA  
ttachments as follows: Exhibit 10 – Statement by Linda Galvin dated 14 January 1999 with a supplemer  
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

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

rams in streams in Idaho that are habitat for Snake River Basin DPS steelhead during the period from J:  
us. In a previous request – we sought and obtained information on the free school portion of our fishing :

Thank you for your assistance.

ail dated 11 December 1998 titled "Vessels in Closed Areas during Past Week." Exhi

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













# The Protect - Democracy Project

October 2, 2017

Via Online Portal  
(<https://foiaonline.regulations.gov>)  
Immediate Office of the Secretary  
Department of Commerce  
Bobbie Parsons, FOIA Officer  
Office of Privacy and Open Government  
14th Street and Constitution Avenue, NW  
Washington, DC. 20230

Via Online Portal  
(<https://foiaonline.regulations.gov>)  
Economic Development Administration  
Department of Commerce  
Stephen Kong, FOIA Officer  
Room 72023  
1401 Constitution Avenue, NW  
Washington, DC 20230

Via Online Portal  
(<https://foiaonline.regulations.gov>)  
Census Bureau  
Department of Commerce  
Jennifer Goode, Acting FOIA Officer  
Room 8H207  
4600 Silver Hill Road  
Washington, DC 20233-3700

Via Online Portal  
(<https://foiaonline.regulations.gov>)  
National Oceanic and Atmospheric  
Administration  
Mark Graff, FOIA Officer  
Room 9719 - NOAA FOIA Office (SOU 10000)  
1315 East-West Highway  
Silver Spring, MD 20910

Re: Freedom of Information Act

To Whom It May Concern:

The Protect Democracy Project submits this FOIA request for records pertaining to contacts involving the White House and the Department of the Treasury. For decades, Administrations of both parties have had in place policies limiting contacts between the White House and executive branch agencies on enforcement, regulatory, procurement, benefit, grant, and contract decisions involving specific parties.<sup>1</sup> To better understand whether there have been contacts from the White House regarding these types of agency actions by the Department of Commerce involving specific parties, The Protect Democracy Project is seeking the following types of records.

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<sup>1</sup> Memo from United to Protect Democracy, *White House Communications With the DOJ and FBI*, Mar. 8, 2017, <https://unitedtoprotectdemocracy.org/agencycontacts/>.

## Requested Records

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, The Protect Democracy Project hereby requests that your office produce within 20 business days the following records (see below for clarity on the types of records sought):

1. Any and all records created or transmitted by or between White House staff, including but not limited to their email addresses ending in “who.eop.gov,” including but not limited to Jared Kushner, Stephen (Steve) Bannon, Reince Priebus, John F. Kelly, Justin Clark, George Sifakis, Andrew Giuliani, Bill Stepien, Stephen Munisteri, Jennifer Korn, Sarah Makin, Ivanka Trump, Rolf Lundberg, Peter Navarro, Andrew Quinn, Andrew Bremberg, Gary Cohn, Jeremy Katz, and Ashley Hickey Marquis and Commerce employees regarding:
  - a. any and all processes or protocols or procedural requirements for initiating, continuing, or terminating compliance matters, investigations and/or enforcement actions of either a civil, administrative, or criminal nature involving any specific party;
  - b. initiating, continuing, or terminating any specific compliance matter, investigation and/or enforcement action of either a civil, administrative, or criminal nature involving any party;
  - c. any and all processes or protocols or procedural requirements for initiating, awarding, rejecting, or terminating an acquisition, procurement contract, grant, award, or subaward, for any specific party.
  - d. initiating, awarding, rejecting, or terminating an acquisition, procurement contract, grant, award, or subaward, for any party;
  - e. any and all processes or protocols or procedural requirements for considering a regulatory approval, regulatory waiver, or administrative or benefits adjudication for any specific party;
  - f. any regulatory approval, regulatory waiver, or administrative or benefits adjudication for a specific party.
2. In addition to the records requested above, we also request records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched, and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

The timeframe for this request is November 9, 2016 through the date that searches are conducted for records responsive to this FOIA request.

## FEE WAIVER

FOIA provides that any fees associated with a request are waived if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The core mission of The Protect Democracy Project, a 501(c)(3) organization, is to inform public understanding on operations and activities of the government. This request is submitted in consort with the organization’s mission to gather and disseminate information that is likely to contribute significantly to the public understanding of executive branch operations and activities. The Protect Democracy Project has no commercial interests.

In addition to satisfying the requirements for a waiver of fees associated with the search and processing of records, The Protect Democracy Project is entitled to a waiver of all fees except “reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). Federal law mandates that fees be limited to document duplication costs for any requester that qualifies as a representative of the news media. *Id.* The Protect Democracy Project operates in the tradition of 501(c)(3) good government organizations that qualify under FOIA as “news media organizations.” Like those organizations, the purpose of The Protect Democracy Project is to “gather information of potential interest to a segment of the public, use its editorial skills to turn the raw materials into distinct work, and distribute that work to an audience.” *Nat’s Sec. Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). As the District Court for the District of Columbia “easily” determined in recent litigation in a separate FOIA request, The Protect Democracy Project is “primarily engaged in disseminating information.” *Protect Democracy Project, Inc. v. U.S. Dep’t of Def.*, No. 17-CV-00842 (CRC), 2017 WL 2992076, at \*5 (D.D.C. July 13, 2017). Indeed, The Protect Democracy Project has routinely demonstrated the ability to disseminate information about its FOIA requests to a wide audience,<sup>2</sup> including on the topic of this request.<sup>3</sup> The Protect Democracy Project will disseminate information and

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<sup>2</sup> See, e.g., Lisa Rein, *Watchdog group, citing “integrity of civil service,” sues Trump to find out if feds are being bullied*, Wash. Post (Apr. 27, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/04/27/watchdog-group-citing-integrity-of-civil-service-sues-trump-to-find-out-if-feds-are-being-bullied/>; Ben Berwick, *Going to Court for Civil Servants*, Take Care (April 28, 2017), <https://takecareblog.com/blog/going-to-court-for-civil-servants>; Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strike*, N.Y. Times (May 8, 2017), <https://nyti.ms/2pX82OV>; Justin Florence, *What’s the Legal Basis for the Syria Strikes? The Administration Must Acknowledge Limits on its Power to Start a War*, Lawfare (May 8, 2017), <https://www.lawfareblog.com/whats-legal-basis-syria-strikes-administration-must-acknowledge-limits-its-power-start-war>.

<sup>3</sup> See Allison Murphy, *Ten Questions for a New FBI Director*, Take Care (June 6, 2017), <https://takecareblog.com/blog/ten-questions-for-a-new-fbi-director> (analyzing and linking to the Department of Justice contacts policy, which was disclosed in response to a Protect Democracy FOIA request); Edward-Isaac Dove, *Liberal Groups: Delay FBI Director Vote Until Trump Promises to Keep Special Counsel*, Politico, (July 25, 2017), <http://www.politico.com/story/2017/07/25/delay-fbi-director-confirmation-christopher-wray-democrats-240938> (reporting on Protect Democracy’s letter urging adoption of a robust contacts policy to prevent interference with independence agencies, which attached Protect Democracy’s disclosure of FOIA-responsive documents from White House compliance staff on the status of that policy).

analysis about this request – and any information obtained in response – through its website (protectdemocracy.org); its Twitter feed (<https://twitter.com/protctdemocracy>), which has more than 10,000 followers; its email list of approximately 20,000 people; and sharing information with other members of the press.

### RESPONSIVE RECORDS

We ask that all types of records and all record systems be searched to discover records responsive to our request. We seek records in all media and formats. This includes, but is not limited to: agendas, manifests, calendars, schedules, notes, and any prepared documentation for meetings, calls, teleconferences, or other discussions responsive to our request; voicemails; e-mails; e-mail attachments; talking points; faxes; training documents and guides; tables of contents and contents of binders; documents pertaining to instruction and coordination of couriers; and any other materials. However, you need not produce press clippings and news articles that are unaccompanied by any commentary (e.g., an email forwarding a news article with no additional commentary in the email thread).

We ask that you search for records from all components of the Department of Commerce, including but not limited to the Office of the Secretary, Office of General Counsel, International Trade Administration Office of Enforcement and Compliance, Census Bureau, National Oceanic and Atmospheric Administration, and Economic Development Administration. We also ask that you search all systems of record, including electronic and paper, in use at your agency, as well as files or emails in the personal custody of your employees, such as personal email accounts, as required by FOIA and to the extent that they are reasonably likely to contain responsive records. The Protect Democracy Project would prefer records in electronic format, saved as PDF documents, and transmitted via email or CD-rom.

If you make a determination that any responsive record, or any segment within a record, is exempt from disclosure, we ask that you provide an index of those records at the time you transmit all other responsive records. In the index, please include a description of the record and the reason for exclusion with respect to each individual exempt record or exempt portion of a record, as provided by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). When you deem a portion of a record exempt, we ask that the remainder of the record to be provided, as required by 5 U.S.C. § 552(b).

Given the 20-day statutory deadline, we hope to be as helpful as possible in clarifying or answering questions about our request. Please contact me at [allison.murphy@protectdemocracy.org](mailto:allison.murphy@protectdemocracy.org) or (202) 417-2341 if you require any additional information. We appreciate your cooperation, and look forward to hearing from you very soon.

Sincerely,

A handwritten signature in blue ink that reads "Allison Murphy". The signature is written in a cursive, flowing style.

Allison F. Murphy  
Counsel  
The Protect Democracy Project



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

*Via FOIAonline*

March 29, 2018

Margaret Townsend  
Center for Biological Diversity  
P.O. Box 11374  
Portland, OR 97211

Re: FOIA Request DOC-NOAA-2017-001975

Dear Ms. Townsend:

This letter is in response to your Freedom of Information Act (FOIA) request, which was received by our office on September 15, 2017. Your request tracking number is DOC-NOAA-2017-001975. You requested:

All records mentioning, including, and/or referencing the decision to terminate, or otherwise not renew, the Federal Advisory Committee Act charter for the “Advisory Committee for the Sustained National Climate Assessment” (hereafter “Committee”) including, but not limited to:

- a. Who participated in this decision-making process, both within and outside the agency and the U.S. Department of Commerce;
- b. What factors were considered in making this decision; and
- c. How the Committee’s unfinished work will now be completed, including:
  - i. NOAA’s formal request for the Committee to prepare, by the Spring of 2018, a set of “Recommendations on a Sustained National Climate Assessment,” as detailed in Attachment A (Advisory Committee for the Sustained National 1 Climate Assessment); and
  - ii. The Committee’s other work in support of the preparation of the final Fourth National Climate Assessment, pursuant to 15 U.S.C. § 2936, in light of its charge “to advise on the engagement of stakeholders, and on sustained assessment activities and the quadrennial National Climate Assessment report” – particularly in

light of the central role the Committee's predecessor advisory committee, the "National Climate Assessment & Development Advisory Committee," played in preparing the Third National Climate Assessment in 2014.

This is our first interim release. We have reviewed approximately 5,000 of the 14,000 records retrieved by our search terms as potentially responsive, and found 1,754 of those records responsive to your request. 1,291 of these documents are being released to you in their entirety. Another 463 records are being released to you with partial redactions under the following exemptions:

- 61 records under 5 U.S.C.552(b)(5), concerning communications within or between agencies and are protected by legal privileges, include but are not, limited to: Attorney-Work Product Privilege (AWP), Attorney-Client Privilege (ACP) and Deliberative Process Privilege (DPP).
- 32 records under 5 U.S.C.552(b)(5), concerning communications within or between agencies and are protected by legal privileges, include but are not, limited to: Attorney-Work Product Privilege (AWP), Attorney-Client Privilege (ACP) and Deliberative Process Privilege (DPP).and 5 U.S.C.552(b)(6), that, if disclosed, would invade another individual's personal privacy.
- 370 records under 5 U.S.C.552(b)(6), that, if disclosed, would invade another individual's personal privacy.

Although we are aware that this case is already in litigation, we must inform you that 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  
14<sup>th</sup> and Constitution Avenue, N.W.  
Washington, D.C. 20230

An appeal may also be sent by e-mail to [FOIAAppeals@doc.gov](mailto: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

Email: [ogis@nara.gov](mailto: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 Special Assistant United States Attorney Sherri Morgan at [Sherri.Morgan@usdoj.gov](mailto:Sherri.Morgan@usdoj.gov) or 202-252-2538.

Sincerely,

**GRAFF.MARK.HYRUM.15**  
**14447892**

Mark H. Graff  
NOAA FOIA Officer  
National Oceanic and Atmospheric Administration

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ou=OTHER, cn=GRAFF.MARK.HYRUM.1514447892  
Date: 2018.03.29 14:40:33 -04'00'





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

*Via FOIAonline*

March 29, 2018

Margaret Townsend  
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- a. Who participated in this decision-making process, both within and outside the agency and the U.S. Department of Commerce;
- b. What factors were considered in making this decision; and
- c. How the Committee’s unfinished work will now be completed, including:
  - i. NOAA’s formal request for the Committee to prepare, by the Spring of 2018, a set of “Recommendations on a Sustained National Climate Assessment,” as detailed in Attachment A (Advisory Committee for the Sustained National 1 Climate Assessment); and
  - ii. The Committee’s other work in support of the preparation of the final Fourth National Climate Assessment, pursuant to 15 U.S.C. § 2936, in light of its charge “to advise on the engagement of stakeholders, and on sustained assessment activities and the quadrennial National Climate Assessment report” – particularly in

light of the central role the Committee's predecessor advisory committee, the "National Climate Assessment & Development Advisory Committee," played in preparing the Third National Climate Assessment in 2014.

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Assistant General Counsel for Litigation, Employment, and Oversight  
U.S. Department of Commerce  
Office of General Counsel  
Room 5875  
14<sup>th</sup> and Constitution Avenue, N.W.  
Washington, D.C. 20230

An appeal may also be sent by e-mail to [FOIAAppeals@doc.gov](mailto:FOIAAppeals@doc.gov), or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

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- a copy of the original request,

- our response to your request,
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College Park, MD 20740-6001

Email: [ogis@nara.gov](mailto: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 Special Assistant United States Attorney Sherri Morgan at [Sherri.Morgan@usdoj.gov](mailto:Sherri.Morgan@usdoj.gov) or 202-252-2538.

Sincerely,

**GRAFF.MARK.HYRUM.15**  
**14447892**

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: 2018.03.29 14:40:33 -04'00'



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

December 14, 2017

MEMORANDUM FOR:      Vernon E. Curry, CEN                      Victor Powers, ITA  
                                 Stephen Kong, EDA                      Stacy Cheney, NTIA  
                                 Grace Agyekum, BIS                      Dondi Staunton, BEA  
                                 Catherine Fletcher, NIST                      Pam Moulder, ESA  
                                 Josephine Arnold, MBDA                      Bobbie Parsons, IOS  
                                 Wayne Strickland, NTIS  
                                 **Mark Graff, NOAA**  
                                 Jamie Boston, PTO

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

SUBJECT:                      Fee Estimate for FOIA Request – DOC-OS-2018-000347  
                                 Leslie Lynch

The Department has received a Freedom of Information Act (FOIA) request. The short description of the FOIA request seeks,

“a list of outstanding, uncashed, stale dated checks and/or unreconciled payments issued by the United States Department of Commerce [NIST, NTIA, NOAA, MBDA, ESA, ITA, EDA, PTO, ESA, BEA, CEN, BIS, IOS] with regard to accounts payable, property tax and vendor over-payments, refunds or credits. We only need checks made out to corporations/businesses (not individuals) for amounts over \$100, dated 1/1/2010 to current date. Please include check number and amount, payee name, and issue date.”

The FOIA requester is in the “**Other**” category. Per the statutory guidelines of 15 C.F.R.§4.11:

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

Type	Grade	Hourly Rate
Administrative	E-9/GS-8 and below	\$28
Professional	Contractor/O-1 to O-6/W-1 to W-5/GS-9 to GS-15	\$56
Executive	O-7 and above and Senior Executive Service	\$128

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

at the outset, there is a reasonable likelihood that there may be responsive documents, and the search is conducted with due diligence.

**Please fill in the applicable information and return this sheet by C.O.B. December 19, 2017 to: Sulma Khalid, FOIA Analyst, Office of Privacy and Open Government, Room 52010FB, Washington, D.C. 20230, Telephone – 202-482-7432, e-mail – [skhalid@doc.gov](mailto:skhalid@doc.gov).**

**For documents responsive under the Freedom of Information Act:**

**Computer Search (Complete if necessary.)**

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

Total estimated hours of time for electronic search. \_\_\_\_\_

Total estimated dollar amount for electronic search. \_\_\_\_\_

Total estimated hours for review. \_\_\_\_\_

Total estimated dollar amount for review. \_\_\_\_\_

**Manual Search (Complete if necessary.)**

Total estimated number of pages of documents. \_\_\_\_\_

Total estimated dollar amount for duplication. \_\_\_\_\_

Total estimated hours for search. \_\_\_\_\_

Total estimated dollar amount for search. \_\_\_\_\_

Total estimated hours for review. \_\_\_\_\_

Total estimated dollar amount for review. \_\_\_\_\_

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

**No records. NOAA does not have records responsive to this FOIA request.**

GRAFF.MARK.HY  
RUM.1514447892

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cn=GRAFF.MARK.HYRUM.1514447892  
Date: 2018.04.04 10:46:45 -04'00'

Signature (Senior Official)

NOAA

Bureau

4/4/18

Date

## Ryan Mulvey

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**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 / (c) 202.603.7698  
[Ryan.Mulvey@causeofaction.org](mailto:Ryan.Mulvey@causeofaction.org)

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



**Confidentiality:** *The information contained in, and attached to, this communication may be confidential, and is intended only for the use of the recipient named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please re-send this communication to the sender and delete the original message and any copy of it from your computer system. Thank you.*

# CAUSE *of* ACTION

## INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability<sup>SM</sup>

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”).<sup>1</sup> 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.”<sup>2</sup> CoA Institute also requested a public interest fee waiver, categorization as a requester of the news media, and expedited processing.<sup>3</sup>

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.”<sup>4</sup> 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*].”<sup>5</sup> 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.”<sup>6</sup> CoA Institute filed an administrative appeal on April 4, 2018.<sup>7</sup>

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.<sup>8</sup> 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

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

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 2–5.

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

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

<sup>6</sup> *Id.* at 2.

<sup>7</sup> Letter from CoA Inst. to Dep’t of Commerce (Apr. 4, 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).<sup>9</sup>

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.”<sup>10</sup> 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.”<sup>11</sup> 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.

---

<sup>9</sup> *Id.* at 2.

<sup>10</sup> March 28, 2018 FOIA Request, *supra* note 1, at 2.

<sup>11</sup> *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.<sup>9</sup>
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,<sup>10</sup> 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](mailto: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**

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**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](mailto: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](mailto:mark.graff@noaa.gov)>  
**Cc:** "[foia@noaa.gov](mailto:foia@noaa.gov)" <[foia@noaa.gov](mailto: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) 202.603.7698

[Ryan.Mulvey@causeofaction.org](mailto: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 & Accountability<sup>SM</sup>

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”).<sup>1</sup> 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.”<sup>2</sup> CoA Institute also requested a public interest fee waiver, categorization as a requester of the news media, and expedited processing.<sup>3</sup>

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.”<sup>4</sup> 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*].”<sup>5</sup> 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.”<sup>6</sup> CoA Institute filed an administrative appeal on April 4, 2018.<sup>7</sup>

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.<sup>8</sup> 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

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

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 2–5.

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

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

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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).<sup>9</sup>

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.”<sup>10</sup> 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.”<sup>11</sup> 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.

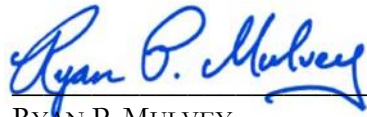
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<sup>9</sup> *Id.* at 2.

<sup>10</sup> March 28, 2018 FOIA Request, *supra* note 1, at 2.

<sup>11</sup> *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.<sup>9</sup>
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,<sup>10</sup> 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.
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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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Office of Government Information Services  
National Archives and Records Administration  
Room 2510  
8601 Adelphi Road  
College Park, MD 20740-6001

Email: [ogis@nara.gov](mailto: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 —



# CAUSE *of* ACTION

## INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability<sup>SM</sup>

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:

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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.”<sup>4</sup> 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*].”<sup>5</sup> 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.”<sup>6</sup> CoA Institute filed an administrative appeal on April 4, 2018.<sup>7</sup>

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#### **Conclusion**

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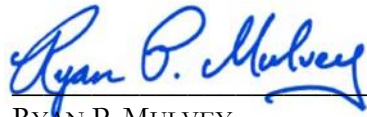
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<sup>9</sup> *Id.* at 2.

<sup>10</sup> March 28, 2018 FOIA Request, *supra* note 1, at 2.

<sup>11</sup> *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.<sup>9</sup>
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,<sup>10</sup> 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](mailto: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](mailto: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 —





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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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

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<sup>1</sup> 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](http://usa.oceana.org/sites/default/files/reports/wasted_cash_report_final.pdf).

<sup>2</sup> 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](http://usa.oceana.org/sites/default/files/reports/Bycatch_Report_FINAL.pdf).

<sup>3</sup> 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.<sup>4</sup>

### **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

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<sup>4</sup> 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.<sup>5</sup> 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

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<sup>5</sup> 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).

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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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

### **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.

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<sup>1</sup> 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](http://usa.oceana.org/sites/default/files/reports/wasted_cash_report_final.pdf).

<sup>2</sup> 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](http://usa.oceana.org/sites/default/files/reports/Bycatch_Report_FINAL.pdf).

<sup>3</sup> Oceana, *Dusky Sharks*, <http://usa.oceana.org/our-work/promote-responsible-fishing/bycatch/dusky-sharks> (last visited April 17, 2017).

<sup>4</sup> *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.<sup>5</sup> 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)).

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<sup>5</sup> 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).

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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/ Brettny 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.<sup>1</sup> Likewise, in March of 2014, Oceana published a report entitled, “Wasted Catch:

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Unsolved Problems in U.S. Fisheries,” which reported on comprehensive national bycatch estimates nation-wide.<sup>2</sup> 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.<sup>3</sup>

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;<sup>4</sup> and engaging in the more general public discourse over these fisheries and associated marine life in various public and scientific symposia.<sup>5</sup>

### **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

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<sup>2</sup> 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](http://usa.oceana.org/sites/default/files/reports/Bycatch_Report_FINAL.pdf).

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<sup>4</sup> 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.

<sup>5</sup> 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).

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## 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).

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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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**CIVIL COVER SHEET**

JS-44 (Rev. 7/16 DC)

<b>I. (a) PLAINTIFFS</b> Oceana, Inc.  (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>88888</u> (EXCEPT IN U.S. PLAINTIFF CASES)	<b>DEFENDANTS</b> The National Oceanic and Atmospheric Administration; the National Marine Fisheries Service  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) See Attachment.	ATTORNEYS (IF KNOWN)

<b>II. BASIS OF JURISDICTION</b> (PLACE AN X IN ONE BOX ONLY)	<b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) <b>FOR DIVERSITY CASES ONLY!</b>																								
<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)	<table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;"></th> <th style="text-align: center; border-bottom: 1px solid black;">PTF</th> <th style="text-align: center; border-bottom: 1px solid black;">DFT</th> <th style="text-align: left;"></th> <th style="text-align: center; border-bottom: 1px solid black;">PTF</th> <th style="text-align: center; border-bottom: 1px solid black;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
	PTF	DFT		PTF	DFT																				
Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4																				
Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5																				
Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6																				

**IV. CASE ASSIGNMENT AND NATURE OF SUIT**

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

<input type="radio"/> <b>A. Antitrust</b>  <input type="checkbox"/> 410 Antitrust	<input type="radio"/> <b>B. Personal Injury/Malpractice</b> <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"/> <b>C. Administrative Agency Review</b>  <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"/> <b>D. Temporary Restraining Order/Preliminary Injunction</b>  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"/> <b>E. General Civil (Other)</b> <span style="margin-left: 100px;">OR</span> <span style="margin-left: 100px;"><input type="radio"/> <b>F. Pro Se General Civil</b></span>			
<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"/> 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	<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"/> <b>G. Habeas Corpus/ 2255</b>  <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"/> <b>H. Employment Discrimination</b>  <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"/> <b>I. FOIA/Privacy Act</b>  <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"/> <b>J. Student Loan</b>  <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> <b>K. Labor/ERISA (non-employment)</b>  <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"/> <b>L. Other Civil Rights (non-employment)</b>  <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"/> <b>M. Contract</b>  <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"/> <b>N. Three-Judge Court</b>  <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.

<b>VII. REQUESTED IN COMPLAINT</b>	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"/>
<b>VIII. RELATED CASE(S) IF ANY</b>	(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  
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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.



## **Bogomolny, Michael (Federal)**

---

**From:** Bogomolny, Michael (Federal)  
**Sent:** Wednesday, June 6, 2018 10:41 AM  
**To:** Nathanson, Stacey (Federal)  
**Cc:** Graff, Mark (Federal)  
**Subject:** RE: ERF v. NMFS  
**Attachments:** 13 ADR Cert.pdf; 14 request for settlement conference.pdf; 17 briefing schedule.pdf; 22 order re settlement conference.pdf; 00 docket.pdf; 11 consent to magistrate.pdf

Some docket entries you may find helpful.

-bogo

---

**From:** Bogomolny, Michael (Federal)  
**Sent:** Wednesday, June 06, 2018 10:33 AM  
**To:** Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>  
**Cc:** Graff, Mark (Federal) (Mark.Graff@noaa.gov) <Mark.Graff@noaa.gov>  
**Subject:** ERF v. NMFS

The Court has ordered the parties to a settlement conference before a Magistrate Judge. There is an initial call with Judge Ryu this Thursday, June 7, at 10:00 a.m. Pacific, and the settlement conference date has been set for June 29, 2018, starting at 10:00 a.m. Pacific. Someone with knowledge of the case and appropriately positioned to make settlement decisions/recommendations (even if they don't personally have settlement authority) needs to attend the June 29 conference in person, in San Francisco. The parties requested an early settlement conference before a Magistrate Judge back on April 25.

There is also a hearing schedule for July 19, 2018, on the pending motions for summary judgement. None of this changes the current deadlines -

- June 8 is the deadline for Plaintiff's Reply in Support of its Motion for Summary Judgment and Opposition to Defendant's Cross-Motion for Summary Judgment
- June 15 is our deadline for Defendant's Reply In Support of its Cross-Motion for Summary Judgment

In sum:

- June 7, 10am – telephone call with Judge Ryu at 10am Pacific (precall for settlement conference)
- June 8 – ERF to file reply and opp
- June 15 – NMFS (the named party) to file reply
- June 29 – settlement conference starts at 10am in San Francisco – someone must attend in person
- July 19 – hearing on MSJs if settlement not yet achieved (2pm, San Francisco)

Let's discuss if NOAA wants to send me or prefers to send an OLE attorney in the West Coast Region.

-bogo

# US District Court Civil Docket

U.S. District - California Northern  
(San Francisco)

**3:18cv888**

## Ecological Rights Foundation v. National Marine Fisheries Service

This case was retrieved from the court on Monday, June 04, 2018

**Date Filed: 02/10/2018**

**Assigned To: Magistrate Judge Jacqueline Scott Corley**

**Referred To: Magistrate Judge Donna M. Ryu (Settlement)**

**Nature of suit: FOIA (895)**

**Cause: Freedom of Information Act**

**Lead Docket: None**

**Other Docket: None**

**Jurisdiction: U.S. Government Defendant**

**Class Code: OPEN**

**Closed:**

**Statute: [05:552](#)**

**Jury Demand: None**

**Demand Amount: \$0**

**NOS Description: Foia**

### Litigants

Ecological Rights Foundation  
a non-profit corporation  
Plaintiff

National Marine Fisheries Service  
Defendant

### Attorneys

[Patricia Linn](#)  
LEAD ATTORNEY; ATTORNEY TO BE NOTICED  
[Law Office Of Patricia Linn](#)  
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ATTORNEY TO BE NOTICED  
[Environmental Advocates](#)  
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[Fredric Evenson](#)  
ATTORNEY TO BE NOTICED  
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[Jennifer S Wang](#)  
LEAD ATTORNEY; ATTORNEY TO BE NOTICED  
United States Attorney's Office  
450 Golden Gate Avenue, 9th Floor  
San Francisco, CA 94102-3495  
USA  
415-436-6967  
Fax: 415-436-6748  
Email: [Jennifer.S.Wang@usdoj.gov](mailto:Jennifer.S.Wang@usdoj.gov)

Date	#	Proceeding Text	Source
05/31/2018		Set/Reset Deadlines as to 12 MOTION for Summary Judgment, 25 MOTION for Summary Judgment Defendant's Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment. Motion Hearing reset for 7/19/2018 at 2:00 PM in San Francisco, Courtroom F, 15th Floor before Magistrate Judge Jacqueline Scott Corley. (ahm, COURT STAFF) (Filed on 5/31/2018) (Entered: 05/31/2018)	
05/31/2018	28	CLERK'S NOTICE REGARDING TIME OF MOTION HEARING. To all parties and counsel of record: Please take notice that the hearing on the pending motions for summary judgment (Dkt. Nos. 12 & 25 ) currently scheduled for July 19, 2018 at 9:00 a.m. shall commence at 2:00 p.m., before Magistrate Judge Jacqueline Scott Corley, in Courtroom F, 15th Floor, Federal Building, 450 Golden Gate Avenue in San Francisco. (This is a text only docket entry, there is no document associated with this notice.) (ahm, COURT STAFF) (Filed on 5/31/2018) (Entered: 05/31/2018)	
05/25/2018	27	Declaration of Jennifer S Wang in Support of 25 MOTION for Summary Judgment Defendant's Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment filed by National Marine Fisheries Service. (Attachments: # 1 Exhibit 1)(Related document(s) 25 ) (Wang, Jennifer) (Filed on 5/25/2018) (Entered: 05/25/2018)	
05/25/2018	26	Declaration of Mark H. Graff in Support of 25 MOTION for Summary Judgment Defendant's Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment filed by National Marine Fisheries Service. (Attachments: # 1 Exhibit 1-5)(Related document(s) 25 ) (Wang, Jennifer) (Filed on 5/25/2018) (Entered: 05/25/2018)	
05/25/2018	25	MOTION for Summary Judgment Defendant's Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment filed by National Marine Fisheries Service. Motion Hearing set for 7/19/2018 09:00 AM in San Francisco, Courtroom F, 15th Floor before Magistrate Judge Jacqueline Scott Corley. Responses due by 6/8/2018. Replies due by 6/15/2018. (Attachments: # 1 Proposed Order)(Wang, Jennifer) (Filed on 5/25/2018) (Entered: 05/25/2018)	
05/22/2018	24	ORDER SETTING SETTLEMENT CONFERENCE: Settlement Conference set for 6/29/2018 10:00 AM before Magistrate Judge Donna M. Ryu. Signed by Magistrate Judge Donna M. Ryu on 5/22/18. (ig, COURT STAFF) (Filed on 5/22/2018) (Entered: 05/22/2018)	
05/22/2018	23	CLERK'S NOTICE: Notice is hereby given to all parties that Magistrate Judge Donna M. Ryu will convene a pre-settlement conference call to discuss timing and preparation for an in-person settlement conference. Judge Ryu anticipates that the phone call will last approximately 20-30 minutes. The conference call shall take place on 6/7/2018 10:00 AM. Lead Counsel for all parties shall participate. Counsel will receive the call-in information via e-mail from Judge Ryu's courtroom deputy. (This is a text-only entry generated by the court. There is no document associated with this entry.) (ig, COURT STAFF) (Filed on 5/22/2018) (Entered: 05/22/2018)	
05/18/2018	22	ORDER RE SETTLEMENT CONFERENCE. Signed by Magistrate Judge Jacqueline Scott Corley on 5/18/2018. (ahm, COURT STAFF) (Filed on 5/18/2018) (Entered: 05/18/2018)	
05/17/2018		CASE REFERRED to Magistrate Judge Donna M. Ryu for Settlement (ahm, COURT STAFF) (Filed on 5/17/2018) (Entered: 05/17/2018)	
05/17/2018	21	Minute Entry for proceedings held before Magistrate Judge Jacqueline Scott Corley: Initial Case Management Conference held on 5/17/2018. Case is referred to a random magistrate judge for a settlement conference to occur after June 15, 2018 and at the convenience of the magistrate judge. (Not Reported)(Time: 3 mins)Attorney for Plaintiff: Patricia Linn. Attorney for Defendant: Jennifer Wang. (This is a text-only entry generated by the court. There is no document associated with this entry.) (ahm, COURT STAFF) (Date Filed: 5/17/2018) (Entered: 05/17/2018)	
05/10/2018	20	JOINT CASE MANAGEMENT STATEMENT filed by National Marine Fisheries Service. (Wang, Jennifer) (Filed on 5/10/2018) (Entered: 05/10/2018)	
05/07/2018		Electronic filing error re: 19 Statement filed by Ecological Rights Foundation. Incorrect event used. [err101] Corrected by Clerk's Office. No further action is necessary . (slhS, COURT STAFF) (Filed on 5/7/2018) (Entered: 05/07/2018)	
05/04/2018	19	Certificate of Interested Entities or Persons by Ecological Rights Foundation. (Linn, Patricia) (Filed on 5/4/2018) Modified on 5/7/2018 (slhS, COURT STAFF). (Entered: 05/04/2018)	
05/04/2018	18	ADR Remark: ADR Phone Conference held on 5/4/2018 by Howard Herman. (cmf, COURT STAFF) (Filed on 5/4/2018) (This is a text-only entry generated by the court. There is no document associated with this entry.) (Entered: 05/04/2018)	
04/30/2018		Set/Reset Deadlines as to 12 MOTION for Summary Judgment . Responses due by 5/25/2018. Replies due by 6/8/2018. (ahm, COURT STAFF) (Filed on 4/30/2018) (Entered: 04/30/2018)	

04/30/2018	17	ORDER by Magistrate Judge Jacqueline Scott Corley granting 16 Stipulation Summary Judgment Briefing Schedule. (ahm, COURT STAFF) (Filed on 4/30/2018) (Entered: 04/30/2018)
04/27/2018	16	STIPULATION WITH PROPOSED ORDER re 12 MOTION for Summary Judgment Stipulation and Proposed Order Regarding Summary Judgment Briefing Schedule filed by National Marine Fisheries Service. (Wang, Jennifer) (Filed on 4/27/2018) (Entered: 04/27/2018)
04/26/2018	15	ADR Clerk's Notice Setting ADR Phone Conference on May 4, 2018 at 10:30 AM Pacific time. Please note that you must be logged into an ECF account of counsel of record in order to view this document. (cmf, COURT STAFF) (Filed on 4/26/2018) (Entered: 04/26/2018)
04/26/2018	14	NOTICE of need for ADR Phone Conference (ADR L.R. 3-5 d) (Wang, Jennifer) (Filed on 4/26/2018) (Entered: 04/26/2018)
04/23/2018	13	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Linn, Patricia) (Filed on 4/23/2018) (Entered: 04/23/2018)
04/20/2018	12	MOTION for Summary Judgment filed by Ecological Rights Foundation. Motion Hearing set for 5/31/2018 09:00 AM in San Francisco, Courtroom F, 15th Floor before Magistrate Judge Jacqueline Scott Corley. Responses due by 5/4/2018. Replies due by 5/11/2018. (Attachments: # 1 Declaration of Patricia Linn, # 2 Ex. A, # 3 Ex. B, # 4 Ex. C, # 5 Ex. D, # 6 Ex. E, # 7 Ex. F, # 8 Ex. G, # 9 Ex. H, # 10 Ex. I, # 11 Ex. J, # 12 Ex. K, # 13 Ex. L, # 14 Ex. 1, # 15 Ex. 2, # 16 Ex. 3, # 17 Ex. 4, # 18 Ex. 5, # 19 Ex. 6, # 20 Ex. 7, # 21 Ex. 8, # 22 Ex. 9, # 23 Proposed Order, # 24 Declaration of Christopher Hudak)(Linn, Patricia) (Filed on 4/20/2018) (Entered: 04/20/2018)
04/03/2018	11	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by National Marine Fisheries Service.. (Wang, Jennifer) (Filed on 4/3/2018) (Entered: 04/03/2018)
03/20/2018	10	CLERK'S NOTICE Re: Consent or Declination: Defendant shall file a consent or declination to proceed before a magistrate judge by 4/3/2018. Note that any party is free to withhold consent to proceed before a magistrate judge without adverse substantive consequences. The forms are available at: <a href="http://cand.uscourts.gov/civilforms">http://cand.uscourts.gov/civilforms</a> . (ahm, COURT STAFF) (Filed on 3/20/2018) (Entered: 03/20/2018)
03/19/2018	9	Defendants' ANSWER to Complaint by National Marine Fisheries Service. (Wang, Jennifer) (Filed on 3/19/2018) (Entered: 03/19/2018)
02/26/2018	8	CERTIFICATE OF SERVICE by Ecological Rights Foundation (Linn, Patricia) (Filed on 2/26/2018) (Entered: 02/26/2018)
02/23/2018	7	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Ecological Rights Foundation.. (Linn, Patricia) (Filed on 2/23/2018) (Entered: 02/23/2018)
02/12/2018	6	Summons Issued as to National Marine Fisheries Service, U.S. Attorney and U.S. Attorney General. (slhS, COURT STAFF) (Filed on 2/12/2018) (Entered: 02/12/2018)
02/12/2018	5	Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 5/10/2018. Initial Case Management Conference set for 5/17/2018 01:30 PM in San Francisco, Courtroom F, 15th Floor. (slhS, COURT STAFF) (Filed on 2/12/2018) (Entered: 02/12/2018)
02/12/2018	4	Proposed Summons. (Linn, Patricia) (Filed on 2/12/2018) (Entered: 02/12/2018)
02/12/2018	3	Case assigned to Magistrate Judge Jacqueline Scott Corley. Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit E-Filing A New Civil Case at <a href="http://cand.uscourts.gov/ecf/caseopening">http://cand.uscourts.gov/ecf/caseopening</a> . Standing orders can be downloaded from the court's web page at <a href="http://www.cand.uscourts.gov/judges">www.cand.uscourts.gov/judges</a> . Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. Consent/Declination due by 2/26/2018. (as, COURT STAFF) (Filed on 2/12/2018) (Entered: 02/12/2018)
02/10/2018	2	Proposed Summons. (Linn, Patricia) (Filed on 2/10/2018) (Entered: 02/10/2018)
02/10/2018	1	COMPLAINT against National Marine Fisheries Service ( Filing fee \$ 400, receipt number 0971-12102318.). Filed by Ecological Rights Foundation. (Attachments: # 1 Civil Cover Sheet)(Linn, Patricia) (Filed on 2/10/2018) (Entered: 02/10/2018)

---

[Order documents](#) from our nationwide document retrieval service.

- OR - Call **1.866.540.8818**.

1 ALEX G. TSE (CABN 152348)  
Acting United States Attorney  
2 SARA WINSLOW (DCBN 457643)  
Chief, Civil Division  
3 JENNIFER S WANG (CABN 233155)  
Assistant United States Attorney

4 450 Golden Gate Avenue, Box 36055  
5 San Francisco, California 94102-3495  
6 Telephone: (415) 436-6967  
7 FAX: (415) 436-6748  
jennifer.s.wang@usdoj.gov

8 Attorneys for Defendant  
NATIONAL MARINE FISHERIES SERVICE

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12 ECOLOGICAL RIGHTS FOUNDATION, ) CASE NO. 18-cv-888 JSC  
13 Plaintiff, )  
14 v. ) **FEDERAL DEFENDANT’S CONSENT TO**  
15 NATIONAL MARINE FISHERIES SERVICE, ) **ASSIGNMENT TO MAGISTRATE JUDGE**  
16 Defendant. )  
17 )  
18 )  
19 )

20 In accordance with the provisions of 28 U.S.C. Section 636(c), the undersigned party hereby  
21 consents to have a United States Magistrate Judge conduct any and all further proceedings in the case,  
22 including trial, and order the entry of a final judgment, and voluntarily waives the right to proceed  
23 before a United States District Judge.

24 Respectfully submitted,  
25 ALEX G. TSE  
26 Acting United States Attorney

27 Dated: April 3, 2018

/s/ Jennifer S Wang  
28 JENNIFER S WANG  
Assistant United States Attorney

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Ecological Rights Foundation

Plaintiff(s)

v.

National Marine Fisheries Service

Defendant(s)

Case No. C 3:18-cv-00888

ADR CERTIFICATION BY PARTIES  
AND COUNSEL

Pursuant to Civil L.R. 16-8(b) and ADR L.R. 3-5 (b), each of the undersigned certifies that he or she has:

- (1) Read the handbook entitled “Dispute Resolution Procedures in the Northern District of California” (available at [cand.uscourts.gov/adr](http://cand.uscourts.gov/adr)).
- (2) Discussed the available dispute resolution options provided by the Court and private entities; and
- (3) Considered whether this case might benefit from any of the available dispute resolution options.

Date: April 23, 2018

Signed: Ecological Rights Foundation

Party

Date: April 23, 2018

Signed: Patricia Linn

Attorney

*Important! E-file this form in ECF using event name: “ADR Certification (ADR LR 3-5 b) of Discussion of ADR Options.”*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Ecological Rights Foundation , <p style="text-align: center;">Plaintiff(s)</p> v. National Marine Fisheries Service , <p style="text-align: center;">Defendant(s)</p>	Case No. C 3:18cv888 JSC  NOTICE OF NEED FOR ADR PHONE CONFERENCE
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Counsel report that they have met and conferred regarding ADR and that they:

- have not yet reached an agreement to an ADR process OR  
 request an Early Settlement Conference with a Magistrate Judge

Date of Case Management Conference May 17, 2018

The following counsel will participate in the ADR phone conference:

Attorney Name & Party Representing	Phone & Email Address
Jennifer S Wang, AUSA for defendant	(415) 436-6967 jennifer.s.wang@usdoj.gov
Patricia Linn, for plaintiff	(415) 388-2303 patricialinn19@gmail.com
Christopher Sproul, for plaintiff	(415) 533-3376 csroul@enviroadvocates.com

*Civil Local Rule 16-8 and ADR Local Rule 3-5 require that lead trial counsel participate in a telephone conference with a member of the ADR Legal Staff before the Case Management Conference. The ADR Unit ([adr@cand.uscourts.gov](mailto:adr@cand.uscourts.gov)) will notify you of the date and time of your phone conference.*

Date: 4/25/18

Signed: /s/ Patricia Linn; /s/ Christopher Sproul

Date: 4/25/18

Attorney for Plaintiff

Signed: /s/ Jennifer S Wang

Attorney for Defendant

Print Form

**Important!** E-file this form in ECF using event name: "Notice of Need for ADR Phone Conference (ADR LR 3-5)."

1 ALEX G. TSE (CABN 152348)  
Acting United States Attorney  
2 SARA WINSLOW (DCBN 457643)  
Chief, Civil Division  
3 JENNIFER S WANG (CABN 233155)  
Assistant United States Attorney

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6 FAX: (415) 436-6748  
jennifer.s.wang@usdoj.gov  
7

8 Attorneys for Defendant  
NATIONAL MARINE FISHERIES SERVICE

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12 ECOLOGICAL RIGHTS FOUNDATION, ) CASE NO. 18-cv-888 JSC  
13 )

14 Plaintiff, )

15 v. )

16 NATIONAL MARINE FISHERIES SERVICE, )

17 Defendant. )

**STIPULATION AND ~~PROPOSED~~ ORDER  
REGARDING SUMMARY JUDGMENT  
BRIEFING SCHEDULE**

18 Plaintiff Ecological Rights Foundation and defendant National Marine Fisheries Service, through  
19 their counsel of record hereby stipulate as follows:  
20

- 21 1. On April 20, 2018, plaintiff filed a motion for summary judgment. The defendant's  
22 opposition to summary judgment is currently due on May 4, 2018, and plaintiff's reply is due  
23 on May 11, 2018.
- 24 2. An initial case management conference is currently set for May 17, 2018, and a joint case  
25 management statement is due by May 10, 2018. Pursuant to Federal Rule of Civil Procedure  
26 26(f), the parties met and conferred regarding, among other matters, case management dates  
27 in this case on April 23, 2018, including a briefing schedule for dispositive motions.
- 28 3. Defendant has informed plaintiff that it intends to file a cross-motion for summary judgment.



1 4. The parties agree, subject to the approval of the Court, that it is in the interest of justice and  
2 efficiency to revise the current summary judgment briefing schedule as follows:

3 May 25, 2018: Deadline for Defendant’s Opposition and Cross-Motion for Summary  
4 Judgment

5 June 8, 2018: Deadline for Plaintiff’s Reply in Support of Motion for Summary  
6 Judgment and Opposition to Defendant’s Cross-Motion for Summary  
7 Judgment

8 June 15, 2018: Deadline for Defendant’s Reply In Support of Cross-Motion for Summary  
9 Judgment

10 IT IS SO STIPULATED.

11  
12 DATED: April 27, 2018

Respectfully submitted,  
ALEX G. TSE  
Acting United States Attorney

13  
14 /s/ Jennifer S Wang  
JENNIFER S WANG  
Assistant United States Attorney

15  
16 DATED: April 27, 2018

/s/ Patricia Linn  
PATRICIA LINN  
CHRISTOPHER SPROUL  
Attorneys for Plaintiff Ecological Rights  
Foundation

17  
18  
19  
20  
21 ~~PROPOSED~~ ORDER

22 Pursuant to the parties’ stipulation and good cause having been shown, the Court adopts the  
23 parties’ proposed schedule as follows:

24 May 25, 2018: Deadline for Defendant’s Opposition and Cross-Motion for Summary  
25 Judgment

26 June 8, 2018: Deadline for Plaintiff’s Reply in Support of Motion for Summary  
27 Judgment and Opposition to Defendant’s Cross-Motion for Summary  
28 Judgment

1 June 15, 2018: Deadline for Defendant's Reply In Support of Cross-Motion for Summary  
2 Judgment  
3

4 IT IS SO ORDERED.

5 DATED: April 30, 2018  
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JACQUELINE SCOTT CORLEY  
United States Magistrate Judge

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ECOLOGICAL RIGHTS FOUNDATION,  
Plaintiff,  
v.  
NATIONAL MARINE FISHERIES  
SERVICE,  
Defendant.

Case No. [18-cv-00888-JSC](#)

**ORDER RE SETTLEMENT  
CONFERENCE**

The Court held a case management conference on May 17, 2018. As discussed at the conference, this case is referred to a magistrate judge for a settlement conference to occur as soon after June 15, 2018 as possible.

The parties shall inform the Court of the settlement conference date once it has been set. The Court shall set a hearing for the pending motion for summary judgment after it learns the settlement conference date. The parties shall also advise the Court after the settlement conference if the case resolved.

**IT IS SO ORDERED.**

Dated: May 18, 2018

  
\_\_\_\_\_  
JACQUELINE SCOTT CORLEY  
United States Magistrate Judge

United States District Court  
Northern District of California

## **Bogomolny, Michael (Federal)**

---

**From:** Bogomolny, Michael (Federal)  
**Sent:** Monday, June 11, 2018 3:48 PM  
**To:** Nathanson, Stacey (Federal); Graff, Mark (Federal)  
**Subject:** Fwd: ERF Opp to Cross MSJ  
**Attachments:** Pl Opp Brief.pdf; ATT00001.htm; Linn Decl. ISO Opp MSJ w Exhibits 1-5.pdf; ATT00002.htm

Sent from my iPhone

Begin forwarded message:

**From:** "Wang, Jennifer (USACAN)" <[Jennifer.S.Wang@usdoj.gov](mailto:Jennifer.S.Wang@usdoj.gov)>  
**To:** "Bogomolny, Michael (Federal)" <[MBogomolny@doc.gov](mailto:MBogomolny@doc.gov)>  
**Subject:** ERF Opp to Cross MSJ

Bogo – I've attached plaintiff's opposition brief to the cross-MSJ. Our reply is due on Friday. I'm still reviewing plaintiff's brief, but will send you my thoughts later this afternoon.

Thanks  
Jennifer

Jennifer Wang | Assistant United States Attorney  
U.S. Attorney's Office | Northern District of California  
450 Golden Gate Avenue, Box 36055 | San Francisco, CA 94102-3495  
Tel: 415-436-6967 | Fax: 415-436-6748 | [jennifer.s.wang@usdoj.gov](mailto:jennifer.s.wang@usdoj.gov)





1 Christopher Sproul (Bar No. 126398)  
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Facsimile: (415) 358-5695  
4 Email: csproul@enviroadvocates.com

5 Patricia Linn (Bar No. 253015)  
Law Office of Patricia Linn  
6 115 Oakdale Avenue  
Mill Valley, CA 94941  
7 Telephone: (415) 388-2303  
8 Email: patricialinn19@gmail.com

9 Fredric Evenson (State Bar No. 198059)  
Law Offices of Fredric Evenson  
10 109 Quarry Lane  
Santa Cruz, CA 95060  
11 Telephone: (831) 454-8216  
Facsimile: (415) 358-5695  
12 Email: ecorights@earthlink.net

13 Attorneys for Plaintiff  
ECOLOGICAL RIGHTS FOUNDATION

14  
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

**REPLY 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 Reply Declaration in Support of Plaintiff’s Motion for Summary Judgment.

4 2. On May 8, 2018, I sent an email to Defendant National Marine Fisheries Service ("NMFS")'s  
5 counsel, Jennifer Wang, requesting further details about NMFS's search for records responsive to  
6 EcoRights' FOIA request. I informed Ms. Wang that documents NMFS had released in response to the  
7 FOIA request indicate the presence of NOAA Office of Law Enforcement ("OLE") documents that were  
8 not located in the search. I attached seven documents to this email. Attached hereto as Exhibit 1 is a true  
9 and correct copy of my May 8, 2018 email to Ms. Wang.

10  
11 3. Attached hereto as Exhibit 2 is a true and correct copy of an attachment to my May 8, 2018 email  
12 to Ms. Wang. This attachment is a document that NMFS released in response to EcoRights' FOIA  
13 request. NMFS numbered this document 0.7.1707.5075. This document is an email chain dated October  
14 21, 2015 from Larry Thompson, a NMFS Fishery Biologist, to a number of NMFS staff, including OLE  
15 agent Don Tanner. I added the yellow highlighting to the document to direct Ms. Wang's attention to the  
16 pertinent parts of the email chain. The emails concern the stranding of nine Chinook salmon in a pool  
17 below the Narrows 2 powerhouse and an attempt to rescue the fish. In the email Mr. Thompson  
18 expresses concern that the fish may be ESA-listed spring-run Chinook. This document indicates Mr.  
19 Thompson contacted Agent Tanner about the "potential unauthorized take of ESA-listed species" and  
20 intended to "continue to keep in touch with him" about the stranding and attempted rescue.

21  
22 4. Attached hereto as Exhibit 3 is a true and correct copy of an attachment to my May 8, 2018 email  
23 to Ms. Wang. This attachment is a document that NMFS released in response to EcoRights' FOIA  
24 request. NMFS numbered this document 0.7.1707.5102. This document is an email chain dated October  
25 21, 2015. I added the yellow highlighting to the document to direct Ms. Wang's attention to the pertinent  
26 part of the email chain. The email at the top of the chain is from Larry Thompson to Anna Ewing, who I  
27  
28



1 believe was, at the time, with the California Department of Fish and Wildlife ("CDFW"). The email  
2 concerns the stranding of Chinook salmon in a pool below the Narrows 2 powerhouse, the same  
3 stranding event discussed in the Exhibit 2 email chain. Mr. Thompson states "I just spoke with Don  
4 Tanner (NOAA Law Enforcement) and he asked me if CDFW has been contacted about this event. This  
5 is why I am forwarding this email to you."

6 5. Attached hereto as Exhibit 4 is a true and correct copy of an attachment to my May 8, 2018 email  
7 to Ms. Wang. This attachment is a document that NMFS released in response to EcoRights' FOIA  
8 request. NMFS numbered this document 0.7.1707.5300. This document is a chain of emails between  
9 October 22, 2015 and October 27, 2015 from Larry Thompson, NMFS Fishery Biologist, to a number of  
10 NMFS staff including OLE agent Don Tanner. I added the yellow highlighting to the document to direct  
11 Ms. Wang's attention to the pertinent part of the email chain. This document pertains to the same fish  
12 stranding event and attempted rescue discussed in Exhibits 2 and 3. Mr. Thompson states, "CDFW  
13 discovered 6 adult Chinook salmon carcasses along the edge of the same pool, which they recovered for  
14 later analysis."  
15

16  
17 6. The emails in Exhibits 2, 3, and 4 indicate that Mr. Thompson spoke to Agent Tanner about the  
18 fish stranding event that occurred in October 2015 and continued to follow up with him about the  
19 attempted rescue of stranded fish. The emails indicate Agent Tanner told Mr. Thompson to contact the  
20 CDFW about the stranding, and after the stranding CDFW collected salmon carcass remains. These  
21 emails indicate some OLE record keeping of this event and sharing of information between CDFW and  
22 the OLE. However, OLE did not release any records of its own about the October 2015 stranding event  
23 and fish mortality, although Mr. Thompson indicated he contacted Agent Tanner numerous times and  
24 received direction from him about how to proceed.  
25

26 7. One of the attachments to my May 8, 2018 email to Ms. Wang. was Exhibit B from EcoRights'  
27 motion for summary judgment. *See* Dkt. 12-3. This document was released by NMFS in response to  
28

1 EcoRights' FOIA request. This document is an email chain from Larry Thompson to OLE agent Don  
2 Tanner. I added the yellow highlighting in this document to direct Ms. Wang's attention to the pertinent  
3 parts of the email chain. Although, Agent Tanner's name is redacted in the version of this email chain  
4 that was submitted as Exhibit B, and that was attached to my May 8, 2018 email, NMFS has now  
5 released this document in full, which reveals that Agent Tanner was the person whose name was  
6 redacted in these emails. *See* Dkt. 26-1 at 11-12. The email chain contains a February 13, 2014 email  
7 from Mr. Thompson to Agent Tanner pertaining to "Chinook salmon stranding events downstream of  
8 Englebright Dam that you and I discussed in November 2013." Mr. Thompson indicates he has written a  
9 letter to FERC about the fish stranding events which includes a request for a response from FERC about  
10 salmon carcass remains that have been collected and other evidence. The email chain also contains  
11 Agent Tanner's reply to Mr. Thompson in which he indicates he is keeping track of Mr. Thompson's  
12 reports.  
13

14 8. Attached hereto as Exhibit 5 is a true and correct copy of an attachment to my May 8, 2018 email  
15 to Ms. Wang. This attachment is a portion of one of the documents that NMFS released in response to  
16 EcoRights' FOIA request. NMFS numbered this document 0.7.1707.5394. I added the yellow  
17 highlighting to direct Ms. Wang's attention to the pertinent parts of the document which is a February  
18 2014 letter from NMFS to FERC about fish stranding events that had occurred in the vicinity of the  
19 Narrows 2 powerhouse. The letter states that "NOAA Law Enforcement has advised our staff to request  
20 that FERC's compliance staff determine if any salmon carcass remains have been collected and retained  
21 by an entity. We ask that you provide this information to NMFS, following your interviews, data  
22 gathering, and document reviews associated with your inquiry."  
23

24 9. Taken together, the emails in Exhibit B and the letter in Exhibit 5 indicate, at the very least, the  
25 presence of OLE record keeping of the 2013 fish strandings and potential collection of physical  
26 evidence. However, OLE's search did not locate any records that demonstrate Agent Tanner, or anyone  
27

1 else at OLE, is keeping track of these fish strandings as Agent Tanner indicated in his February 2014  
2 email that he is doing.

3 10. EcoRights is a public advocacy group that intends to continue its advocacy work on behalf of  
4 ESA-listed anadromous fish that are within NMFS's jurisdiction. EcoRights has sent NMFS several  
5 FOIA requests in the past concerning ESA-listed anadromous fish, and thus will almost certainly send  
6 additional FOIA requests to NMFS in the future.

7 11. In this case, only NMFS has access to the material facts related to the adequacy of its search.  
8 Without discovery, EcoRights is limited to the description of the search in the Graff declaration.  
9

10 12. I declare under penalty of perjury under the laws of the United States that the foregoing is true  
11 and correct, and that this Declaration was executed on June 8, 2018 in Mill Valley, California.  
12

13 /s/ Patricia Linn  
14 Patricia Linn  
15 Counsel for Plaintiff  
16 Ecological Rights Foundation  
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Linn Reply Declaration

# EXHIBIT 1



Patricia Linn &lt;patricialinn19@gmail.com&gt;

---

**ERF v. NMFS**

---

Patricia Linn <patricialinn19@gmail.com>  
To: "Wang, Jennifer (USACAN)" <Jennifer.S.Wang@usdoj.gov>  
Cc: Chris Sproul <csproul@enviroadvocates.com>

Tue, May 8, 2018 at 6:53 PM

Jennifer,

Thank you for providing the list of NMFS search terms and parameters. However, further details are still needed to assess whether the searches were adequate. **First, it appears all searches were conducted electronically, using key words to search network drives. Were other record systems searched** for handwritten notes, audio recordings, physical evidence of dead salmon or steelhead, types of information which may not be in the computer systems that were searched? EcoRights has requested records back to January 1, 2000. Were paper records searched? EcoRights would like to know which records systems were searched and who searched which records systems. Such information describing the search would be required in affidavits to the court.

**Second, EcoRights suggests the following additional search terms** relevant to take of Yuba River fish species: Yuba County Water Agency, YCWA, FERC, poach, and impinge.

**Third, documents that NMFS released indicate the presence of other OLE documents that were not located in the search (see attached):**

1) an email from Larry Thompson from the NMFS Hydro staff discussing contacting OLE agent, Don Tanner, in November 2013 about fish strandings, a letter from NMFS to FERC in February 2014 which states the OLE advised NMFS staff to ask the FERC Compliance division if any entity has collected and retained salmon carcass remains as a result of the strandings and to provide that information to NMFS, and a February 2014 email from Don Tanner to Larry Thompson indicating Mr. Tanner is keeping track of the stranding reports. Taken together these 3 documents indicate, at the very least, the presence of OLE record keeping of the 2013 fish strandings and potential collection of evidence;

2) an email from Larry Thompson indicating that he and Don Tanner went on a site visit of the Yuba River in September 2014 to investigate poaching and observe hazards causing fish strandings near Narrows 2. If Mr. Tanner went on a site visit it stands to reason there is some record of his observations, either handwritten notes, photographs, and/or a followup memo or report;

3) a series of emails on October 21, 2015 that Don Tanner was copied on, about a fish stranding in October 2015 indicating Larry Thompson spoke to Mr. Tanner about the event and continued to follow up with him about the attempted rescue of stranded fish. The emails indicate Mr. Tanner told Mr. Thompson to contact CDFW about the stranding, and after the stranding CDFW collected salmon carcass remains. These emails indicate some OLE record keeping of this event and sharing of information between CDFW and the OLE.

Despite these indications that OLE has been keeping track of strandings caused by Narrows 1 and 2, advising NMFS staff about how to proceed in the wake of the strandings, seeking evidence of dead fish, investigating poaching on the Yuba River, and going on a site visit to the Yuba, the OLE asserts it does not have a single record of its own about these incidents of unauthorized take.

Given these concerns is NMFS amenable to doing another search? Please let me know how you would like to proceed. I am available tomorrow until noon and most of the day on Thursday and Friday.


Patti

Law Office of Patricia Linn  
115 Oakdale Avenue  
Mill Valley, CA 94941  
(415) 388-2303

[Quoted text hidden]

---

**7 attachments**

 **0.7.1707.5075-I'll continue to stay in touch with Don.pdf**  
111K

 **0.7.1707.5102-Thompson email re. contacting enforcement.pdf**  
94K

 **0.7.1707.5300-LT email chain re. six dead fish.pdf**  
109K

 **filed Ex. H.pdf**  
534K

 **0.7.1707.5394-NMFS letter re. 2013 strandings.pdf**  
280K

 **filed Ex. A.pdf**  
106K

 **filed Ex. B.pdf**  
119K

Linn Reply Declaration

# EXHIBIT 2

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**From:** Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>  
**Sent:** Wednesday, October 21, 2015 12:58 PM  
**To:** Howard Brown - NOAA Federal  
**Cc:** Gary Sprague - NOAA Federal; Tom Holley; Jeff McLain - NOAA Federal; Jonathan Ambrose - NOAA Federal; Edmondson, Steve; John Wooster; Don Tanner - NOAA Federal; John Aedo  
**Subject:** Re: Potential fish rescue on the Yuba

Hi HOward,

I'll continue to keep in touch with Don, and follow up to see what CDFW plans and carries out.

Without having to contact the Corps or YCWA, the area in question can be viewed from a lookout above Englebright Dam. I am contemplating a visit tomorrow, with camera and binoculars in hand...

LT

On Wed, Oct 21, 2015 at 11:19 AM, Howard Brown - NOAA Federal <[howard.brown@noaa.gov](mailto:howard.brown@noaa.gov)> wrote:  
Thanks Gary. I appreciate the follow up and agree that it is CDFW's hands from here out.  
Howard

Sent from my iPhone

On Oct 21, 2015, at 11:17 AM, Gary Sprague - NOAA Federal <[gary.sprague@noaa.gov](mailto:gary.sprague@noaa.gov)> wrote:

Hello Tom,  
I do not have the flow details. Geoff said that the bypass operated longer than planned, because of equipment difficulties at Narrows I.

At this point we are leaving the decision on any action(s) up to CDFW. They have indicated they will have people on site today.  
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](mailto:gary.sprague@noaa.gov)  
<http://www.westcoast.fisheries.noaa.gov/>

On Wed, Oct 21, 2015 at 10:59 AM, Tom Holley <[thomas.holley@noaa.gov](mailto:thomas.holley@noaa.gov)> wrote:  
Gary,



I would also request from Geoff flow records from all the Narrows facilities over the past two months. From my current understanding none of the facilities, including the full bypass, have been used since September 9. If that is the case then the fish were attracted to the Narrows 2 bypass pool by nothing other than seepage from Englebright- a situation that none of the potential remedies will stop from happening again, regardless of how these fish are rescued.

Thanks,

Tom

On Wed, Oct 21, 2015 at 10:27 AM, Gary Sprague - NOAA Federal <[gary.sprague@noaa.gov](mailto:gary.sprague@noaa.gov)> wrote:

No, this is an adjacent pool. This pool is where water is discharged, that result in rock be washed up and creating the pool project we recently consulted on.

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](mailto:gary.sprague@noaa.gov)  
<http://www.westcoast.fisheries.noaa.gov/>

On Wed, Oct 21, 2015 at 10:04 AM, Howard Brown - NOAA Federal <[howard.brown@noaa.gov](mailto:howard.brown@noaa.gov)> wrote:

Thanks for the heads up on this Gary and Jeff for the guidance on fish rescues. I will offer to follow up with Collin Purdy on that. Gary, is this the same pool where we just completed the consultation to fill it in? I am wondering if this might be a good opportunity to move the fish out and fill in the pool.

Howard

Sent from my iPhone

On Oct 21, 2015, at 9:51 AM, Jeff McLain - NOAA Federal <[jeff.mclain@noaa.gov](mailto:jeff.mclain@noaa.gov)> wrote:

Hi all - I am in Portland and on e-mail. I would pursue your FERC-related notifications as you suggest. Regarding the potential rescue, I would start by notifying your DFW contacts as they technically have the lead on fish rescues. They have the staff and expertise. They will need to go through a bit of an internal process, including the development of a rescue plan. If they agree to pursue a rescue, we need to approve if there are listed species present. Easy enough to use

the 4(d) rule if they are threatened. I am attaching the fish rescue agreement. I am learning to like the two-agency approach to these. I know they take more coordination, but fish rescues are so controversial. It is nice to get us fish agencies on the same page...Let me know if you have any questions.

**Jeffrey McLain**

*Division Manager*  
NOAA Fisheries West Coast Region  
U.S. Department of Commerce  
Office: [916 930-5647](tel:9169305647)  
Mobile: [916 600-5410](tel:9166005410)  
[Jeff.McLain@noaa.gov](mailto:Jeff.McLain@noaa.gov)

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[www.westcoast.fisheries.noaa.gov](http://www.westcoast.fisheries.noaa.gov)

On Wed, Oct 21, 2015 at 9:19 AM, Larry Thompson - NOAA Federal  
<[larry.thompson@noaa.gov](mailto:larry.thompson@noaa.gov)> wrote:

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](mailto: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](mailto: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](mailto:larry.thompson@noaa.gov)

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<5.19.14 CA Interagency Fish Rescue Agreement FINAL.pdf>

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Tom Holley | Hydrologist  
NOAA Fisheries West Coast Region  
U.S. Department of Commerce  
Office: [\(916\) 930-5592](tel:916-930-5592)  
[thomas.holley@noaa.gov](mailto:thomas.holley@noaa.gov)

--

**Larry Thompson**

*Fishery Biologist*

*NOAA Fisheries West Coast Region*

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Linn Reply Declaration

# EXHIBIT 3

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**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  
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650 Capitol Mall, Suite 5-100  
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[gary.sprague@noaa.gov](mailto:gary.sprague@noaa.gov)  
<http://www.westcoast.fisheries.noaa.gov/>



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**Larry Thompson**  
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**Larry Thompson**

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# EXHIBIT 4

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**From:** Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>  
**Sent:** Tuesday, October 27, 2015 12:05 PM  
**To:** Maria Rea - NOAA Federal; Jeff McLain - NOAA Federal; Steve Edmondson - NOAA Federal; Thomas Holley - NOAA Federal; John Wooster - NOAA Federal; Don Tanner - NOAA Federal; Jonathan Ambrose - NOAA Federal; William Foster - NOAA Federal; Howard Brown - NOAA Federal; Gary Sprague - NOAA Federal  
**Subject:** Fwd: Status Update on Full Bypass Shutdown at Narrows 2 PH on Lower Yuba River

To all:

I received a phone call this morning from CDFW, and the conversation included an update on yesterday's fish rescue (see background below). While more formal notification may be coming from CDFW, I wanted you to know:

CDFW biologists discovered only 2 live adult Chinook salmon stranded in the isolated pool downstream of Englebright. They seined/netted these fish, and rescued them by placing them in the Yuba River downstream.

CDFW discovered 6 adult Chinook salmon carcasses along the edge of the same pool, which they recovered for later analysis.

I plan to await CDFW's written notification before reporting anything to FERC or Corps' personnel.

Regards,

Larry

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

**From:** Purdy, Colin@Wildlife <[Colin.Purdy@wildlife.ca.gov](mailto:Colin.Purdy@wildlife.ca.gov)>  
**Date:** Mon, Oct 26, 2015 at 8:15 AM  
**Subject:** RE: Status Update on Full Bypass Shutdown at Narrows 2 PH on Lower Yuba River  
**To:** Geoff Rabone <[grabone@ycwa.com](mailto:grabone@ycwa.com)>, "Rea, Maria@NOAA" <[Maria.Rea@noaa.gov](mailto:Maria.Rea@noaa.gov)>, Jeff McClain <[jeff.mclain@noaa.gov](mailto:jeff.mclain@noaa.gov)>, "steve.edmondson@noaa.gov" <[steve.edmondson@noaa.gov](mailto:steve.edmondson@noaa.gov)>, "Larry.Thompson@noaa.gov" <[Larry.Thompson@noaa.gov](mailto:Larry.Thompson@noaa.gov)>, "Debbie.Giglio@fws.gov" <[Debbie.Giglio@fws.gov](mailto:Debbie.Giglio@fws.gov)>, "Thaler, Parker@Waterboards" <[parker.thaler@waterboards.ca.gov](mailto:parker.thaler@waterboards.ca.gov)>, "Lynch, MaryLisa@Wildlife" <[MaryLisa.Lynch@wildlife.ca.gov](mailto:MaryLisa.Lynch@wildlife.ca.gov)>, "Ewing, Anna@Wildlife" <[Anna.Ewing@wildlife.ca.gov](mailto:Anna.Ewing@wildlife.ca.gov)>, "Hoobler, Sean@Wildlife" <[Sean.Hoobler@wildlife.ca.gov](mailto:Sean.Hoobler@wildlife.ca.gov)>, "Tierney, Marilyn -FS" <[mtierney@fs.fed.us](mailto:mtierney@fs.fed.us)>, "Gary.Sprague@noaa.gov" <[Gary.Sprague@noaa.gov](mailto:Gary.Sprague@noaa.gov)>  
**Cc:** "Aikens, Curt@YCWA" <[caikens@ycwa.com](mailto:caikens@ycwa.com)>, "Lynch, Jim" <[Jim.Lynch@hdrinc.com](mailto:Jim.Lynch@hdrinc.com)>, "Passovoy, Joel" <[Joel.Passovoy@hdrinc.com](mailto:Joel.Passovoy@hdrinc.com)>, Maury Miller <[mmiller@ycwa.com](mailto:mmiller@ycwa.com)>, Marcel Bos <[mbos@ycwa.com](mailto:mbos@ycwa.com)>

Good morning Geoff,

After evaluating the situation we've decided to proceed with a fish rescue. The main drivers in this are the small number of adults returning to the Yuba this year and limited ability of the stranded fish to successfully

spawn. Additionally, as it looks like the pool became isolated around the 6<sup>th</sup> of October, there is the potential that these are spring-run Chinook salmon.

If possible we would like to move forward with the rescue today. I'm hoping you can help provide access to the dam. I know there is a gate we'll need to get through. I'll try calling you shortly.

Thanks,

Colin Purdy, M.S.

Supervisor - Low Elevation Fisheries

CA Department of Fish and Wildlife - North Central Region

1701 Nimbus Rd., Rancho Cordova, CA I Phone [\(916\) 704-2154](tel:9167042154) I Fax [\(916\) 358-2912](tel:9163582912)

<https://www.wildlife.ca.gov/>

---

**From:** Purdy, Colin@Wildlife

**Sent:** Thursday, October 22, 2015 12:14 PM

**To:** 'Geoff Rabone'; Rea, Maria@NOAA; Jeff McClain; [steve.edmondson@noaa.gov](mailto:steve.edmondson@noaa.gov); [Larry.Thompson@noaa.gov](mailto:Larry.Thompson@noaa.gov); [Debbie.Giglio@fws.gov](mailto:Debbie.Giglio@fws.gov); Thaler, Parker@Waterboards; Lynch, MaryLisa@Wildlife; Ewing, Anna@Wildlife; Hoobler, Sean@Wildlife; Tierney, Marilyn -FS; [Gary.Sprague@noaa.gov](mailto:Gary.Sprague@noaa.gov)

**Cc:** Aikens, Curt@YCWA; Lynch, Jim; Passovoy, Joel; Maury Miller; Marcel Bos

**Subject:** RE: Status Update on Full Bypass Shutdown at Narrows 2 PH on Lower Yuba River

Geoff,

Thanks for sending this information around and I appreciate the coordination. As I mentioned on the phone yesterday, we are still evaluating next steps. Just to clarify, based on the initial site visit, it did not appear there was an imminent threat of fish perishing. There still may be a need for intervention and we will let you know as this develops.

Thanks,

Colin Purdy, M.S.

Supervisor - Low Elevation Fisheries

CA Department of Fish and Wildlife - North Central Region

1701 Nimbus Rd., Rancho Cordova, CA 95670 I Phone [\(916\) 704-2154](tel:9167042154) I Fax [\(916\) 358-2912](tel:9163582912)

<https://www.wildlife.ca.gov/>

---

**From:** Geoff Rabone [<mailto:grabone@ycwa.com>]

**Sent:** Thursday, October 22, 2015 8:37 AM

**To:** Rea, Maria@NOAA; Jeff McClain; [steve.edmondson@noaa.gov](mailto:steve.edmondson@noaa.gov); [Larry.Thompson@noaa.gov](mailto:Larry.Thompson@noaa.gov); [Debbie.Giglio@fws.gov](mailto:Debbie.Giglio@fws.gov); Purdy, Colin@Wildlife; Thaler, Parker@Waterboards; Lynch, MaryLisa@Wildlife; Ewing, Anna@Wildlife; Hoobler, Sean@Wildlife; Tierney, Marilyn -FS; [Gary.Sprague@noaa.gov](mailto:Gary.Sprague@noaa.gov)

**Cc:** Aikens, Curt@YCWA; Lynch, Jim; Passovoy, Joel; Maury Miller; Marcel Bos; Geoff Rabone

**Subject:** Status Update on Full Bypass Shutdown at Narrows 2 PH on Lower Yuba River

Hello,

I appreciate everyone's interest and assistance in evaluating and advising YCWA about a small group of Chinook salmon that are currently residing in a pool directly below the Full Bypass at our Narrows 2 Powerhouse. HDR Engineering helped YCWA prepare this memo to bring everyone up to speed and provide the currently available information.

As background, PG&E's Narrows (1) Powerhouse (PH) and YCWA's Narrows 2 PH typically undergo outages in the fall when flows are generally low. This year, both outages were extended, and Narrows 2 is currently offline while new parts are being obtained. Because Narrows 2 was not operating, and while Narrows 1 was still in outage, all flow in the lower Yuba River was being provided through the Narrows 2 Full Bypass. Now Narrows 1 is back online, after extended repairs and testing. As Narrows 1 was put back into service and testing was performed, the Narrows 1 PH took on more flow. Flow through the Narrows 2 Full Bypass was used to supplement flows through the Narrows 1 PH during testing. Once testing was successfully completed, flow was transferred over to Narrows 1 completely. That brings you up to the point in time that the attached status report begins. I am out in the field today, but am happy to provide more explanation or receive any advice you care to offer, when I return.

--

**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](mailto:larry.thompson@noaa.gov)



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Linn Reply Declaration

# EXHIBIT 5



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE

West Coast Region

9

5

Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street NE, Washington, D.C. 20426.

RE: NMFS Response to the Information Request of the Commission's Division of Hydropower Administration and the Response of the Yuba County Water Agency, Regarding Salmon Stranding Incidents Downstream of the Narrows 2 Development, Yuba River Development Project, P-2246-061.

Dear Secretary Bose,

NOAA's National Marine Fisheries Service (NMFS) has reviewed the request (November 25, 2013) of the Federal Energy Regulatory Commission regarding salmon stranding in the lower Yuba River, downstream of Englebright Dam and near the Narrows 2 Development facilities operated under a FERC license for the Yuba River Project (P-2246).

Our comments and suggestions are enclosed.

If you have questions about NMFS' response, please contact Mr. Larry Thompson, at 916-930-3613.

Sincerely,

Steve Edmondson  
Hydropower Program Supervisor  
West Coast Region

Enclosures

cc: Maria Rea, Don Tanner, Steve Edmondson, Howard Brown, NMFS Sacramento, CA

NOAA's National Marine Fisheries Service (NMFS) has reviewed the request (November 25, 2013) of the Federal Energy Regulatory Commission (Commission or FERC) regarding salmon stranding in the lower Yuba River, downstream of Englebright Dam and near the Narrows 2 Development facilities operated under a FERC license for the Yuba River Project (P-2246).

Background:

FERC's information request was prompted by an email from NMFS (Larry Thompson) to FERC staff (Ken Hogan) on November 1, 2013 (attached). Mr. Thompson's email was not a detailed report of the incident(s), but rather a notification to FERC that NMFS had become aware of salmon strandings -- events that had not been reported to our agency by FERC staff or by Yuba County Water Agency (YCWA), the Project licensee. Aside from notifying FERC, a second purpose of NMFS' notification was to gain a greater understanding about how Project operations played a role in the salmon strandings. Mr. Hogan responded directly to Mr. Thompson (by telephone on November 4, 2013), informing NMFS that he considered the issue to be one of existing license compliance and therefore had contacted Mr. John Aedo, Division of Hydropower Administration and Compliance.

NMFS' concern is that two Endangered Species Act (ESA)-listed species (spring-run Chinook salmon and Central Valley steelhead), as well as their ESA-designated critical habitats, are directly influenced by the Project facilities in question (the Narrows 2 Powerhouse, Narrows 2 Partial Bypass, and Full Flow Bypass) as well as by the Narrows Powerhouse of the Narrows Project (P-1403). Fall-run Chinook salmon are also found in this area, which is also identified as "essential fish habitat" (Magnuson-Stevens Fishery Management Act) for Chinook salmon. A third ESA-listed species, the North American green sturgeon, is not known to currently exist upstream of Daguerre Dam (~12 miles downstream), but could in the future inhabit the area where the strandings occurred. Therefore, understanding the environmental effects of the Project's facilities and operations in the area directly downstream of Englebright Dam appears relevant to both: 1) the suitability of existing license conditions for anadromous fish resources; and 2) the development of new conditions for the new FERC license sought by YCWA; the license expiration date is April 30, 2016, and an Integrated Licensing Process is currently underway.

Prior to the commissioning of the Full Flow Bypass into service in January, 2007, when the Narrows 2 Powerhouse was shut down the Narrows 2 Partial Bypass was capable of releasing a maximum of 650 cubic feet per second (cfs) of flow. Emergency shutdowns at the Narrows 2 Powerhouse caused by lightning or other acts of nature could reduce flows into the lower Yuba River until the Powerhouse could be brought back on-line. To improve the situation, the CALFED program financed approximately \$8.5 million of the Full Flow Bypass project's costs through California Resources Agency grants, while YCWA financed the local share of more than \$4 million. The Full Flow Bypass was envisioned to "ensure a continuous release of cold water flows into the lower Yuba River for protected fall-run Chinook salmon, spring run Chinook salmon and steelhead, in the event of emergency outages or during scheduled maintenance." (See attached CALFED Fact Sheet).





We provide the following comments regarding the Commission's request, and the YCWA response.

- 1) Until notified by NMFS, FERC's Division of Hydropower Administration and Compliance was unaware of salmon strandings downstream of the Englebright Dam, near and subject to the operations of the Project's Narrows 2 Powerhouse, Narrows 2 Partial Bypass, and Full Flow Bypass facilities. This is a shortcoming of the existing license in need of correction. YCWA's response states a willingness to discuss procedures for contacting NMFS when YCWA observes stranding or other potential harm to anadromous fishes. We strongly recommend FERC lead this discussion, to assure that the lead agency (FERC) is notified, as well as NMFS. In any case, both FERC and NMFS should be notified; protocols should be established to account for cases where agency personnel are not present to receive notification in real-time, or person-to-person.
- 2) The Project's Narrows 2 Powerhouse, Narrows 2 Partial Bypass, and Full Flow Bypass facilities appear to be operated for purposes that FERC did not envision in its Order Modifying and Approving Amendment of License (November 22, 2005), issued to amend the Project license to include the installation of the Full Flow Bypass. This can be observed by reviewing the descriptions of Project operations in YCWA's response (including footnote 6, page 3), which do not correlate well with the following text from the 2005 Order:

"Three types of shutdowns can take place at the Narrows 2 development. Short-term emergency shutdowns can be caused by momentary failure of the PG&E transmission line as a result of interference by birds, fire, lightning, storm, failure of transmission equipment, or by a momentary plant malfunction. Flows can be reduced from 3,400 cfs to 0-650 cfs for a period ranging from about a minute to more than an hour. Although corrective actions have been taken by both the licensee and PG&E to minimize shutdowns of this type, they still can occur. Long-term emergency shutdowns can result from catastrophic failure of the PG&E transmission system that links the plant to the transmission grid or from major component failure at the plant. Flows through the plant can be reduced from 3,400 cfs to 0-650 cfs, depending on whether the malfunction allows the bypass to be operated. Such shutdowns are rare (two in the last 30 years) but could last from days to months. Partial downstream flow can be restored through the PG&E Narrows 1 Powerhouse within about 30-60 minutes, and full downstream flow can be resumed in 1-2 days by allowing water to spill over the top of Englebright Dam. High spill rates between May and October, however, can increase downstream temperatures. Maintenance activity shutdowns are required for generator brush replacement, which in the past involved a 6-hour shutdown two or three times per year, and annual maintenance, which typically requires a shutdown of 2-3 weeks or longer (in some instances, months) if major maintenance is performed. In recent years, maintenance activities typically have been scheduled during a time when no impact would result on

downstream flows. During brush replacement, the licensee can open the 650-cfs bypass valve and can request that PG&E operate the Narrows 1 Project to maintain downstream flow when flow is 1,350 cfs or less. During the annual maintenance period, the bypass valve usually cannot be operated, so downstream flow is entirely dependent on Narrows 1 releases or Englebright Reservoir spill. In recent years, annual maintenance has been conducted when Narrows 1 can handle the entire flow or during the winter so that the river flow can be held relatively constant with cool-water spills over Englebright Dam.” (2005 FERC Order, p. 3). [Underline emphasis added].

Therefore, it appears FERC envisioned operations of the Full Bypass for “shutdowns” and described three types: 1) short-term emergency shutdowns; 2) long-term emergency shutdowns; and 3) maintenance activity shutdowns. These shutdown types do not include, for example, shutting down or bypassing flows at the Narrows 2 Powerhouse so that PG&E (licensee for the Narrows Project, P-1403) may generate electricity at the Narrows 1 Powerhouse that qualifies for California Renewable Portfolio Standard credit and revenue – or for other purposes. We suggest FERC request additional information regarding the uses of the Project, to understand how and when it is operated in its various configurations.

- 3) The 2005 FERC Order Modifying and Approving Amendment of License (November 22, 2005) was also issued to amend the Project license to implement more stringent ramping and flow fluctuation criteria for flows downstream of the Narrows 2 development. However, FERC cannot monitor (or have knowledge of) the full range of Project operations or the resulting flow fluctuations because instream flow compliance is determined at a flow gaging station well downstream of the Project’s Narrows 2 Powerhouse, Narrows 2 Partial Bypass, and Full Flow Bypass facilities (and those of the Narrows Project, P-1403). There appears to be no FERC monitoring, recording, or reporting of flows, of transitions between the Narrows 2 Development facilities, of flow ramping, or of other operational details with respect to these facilities. Under this practice, FERC’s Compliance staff cannot possibly understand in a meaningful way when or how these Project facilities are locally operated, and when and how they are affecting environmental conditions for anadromous fish resources downstream of the Narrows 2 Development and upstream of the gaging station.
- 4) YCWA’s Response (p. 3) suggests that additional information is available about the flows through the Project facilities in question (e.g., the penstock acoustic velocity meter, Narrows 2 Powerhouse generation records, licensee operator log that records which bypass is used and when, etc.). FERC should obtain this existing information, and make use of it to understand how the Project is operated in the vicinity below Englebright Dam, and to determine the adjustments needed to the existing license.
- 5) Due to the close coordination of Project operations with those of the Narrows Project (P-1403),

flow data through the Narrows 1 Powerhouse may be needed for the FERC assessments suggested above. YCWA's response suggests that Narrows 1 Powerhouse flow information is available from PG&E (licensee for P-1403). We suggest that consultation with PG&E may be needed to resolve the stranding issues, not only due to their licensed operations at the Narrows 1 Powerhouse, but because YCWA's response indicates (footnote 6, p. 3) that it is PG&E's decisions under a power purchase agreement with YCWA that often dictate how and when flows impounded in the U.S. Army Corps of Engineers' Englebright Reservoir (by its Englebright Dam) are directed through YCWA's Narrows 2 Powerhouse, Narrows 2 Partial Bypass, and Full Flow Bypass facilities, as well as through the Narrows 1 Powerhouse. There may be alternatives to obtaining flow information for Narrows 1 Powerhouse via monitoring by the Corps that may (or could) occur within their Englebright Dam outlet works (to which PG&E's Narrows Project works are appended) (see attached 1994 Agreement for Operation and Maintenance of Narrows #1 Hydroelectric Project Between the United States of America and Pacific Gas and Electric Company, required by Article 102, of the license for P-1403).

- 6) The information discussed in #'s 4 and 5 above would inform FERC's future decisions pertinent to "reopener" Article 411 of the Narrows Project because the License Order for P-1403 recognized that P-2246 and P-1403 operate jointly and both affect the fish resources of the lower Yuba River. For this reason, the FERC Order includes Article 411, which "reopens PG&E's license for the limited purpose of considering the role of Project 1403 in maintaining instream flows in the lower Yuba River whenever the license for Project 2246 expires, is reopened, or is amended regarding instream flows in the lower Yuba River." (FERC Order Issuing New License, February 11, 1993). We also suggest the information would be useful to other resource agencies and interested parties to understand lower Yuba hydro operations, inform the development of terms or conditions for the new license due in 2016, and inform future ESA consultation(s) between FERC and NMFS, including over how these coordinated operations may change in the future, under any new power purchase contract(s).
- 7) The existing license requires YCWA to take measures to prevent or minimize salmon stranding. We recommend FERC staff review YCWA's response to identify the preventive measures taken during the various Project operational procedures, and report these back to NMFS. We could not fully understand what ramping or transition measures occurred on the various dates in October, 2013, to prevent stranding, but we noted that complete flow transitions between facilities often occurred over very short time frames, such as 15 minutes or less. We strongly recommend FERC evaluate these operations with the intent of placing new conditions in the existing license. This is because sufficient information now exists to indicate that Project facilities and operations are causing adverse biological effects to salmon in the vicinity below Englebright Dam (but the details and frequency of the effects are sketchy).
- 8) To assist your understanding of the current and past salmon stranding incidents, and the related

Project operations that may have caused or contributed, we suggest FERC staff will need to review (at the least) several documents, including:

- a. YCWA's Interim Technical Memorandum (TM) 7-11, "Fish Behavior and Hydraulics Near the Narrows 2 Powerhouse" (dated November 2012);
- b. NMFS' "Comments on the Initial Study Report..." filed January 28, 2013, in the FERC docket for P-2246.
- c. The YCWA response of November 25, 2013.
- d. YCWA's Updated Study Report (dated December 2013)
- e. YCWA's Draft License Application (filed December 2, 2013)

Given our experience reviewing these documents (thus far), we suggest FERC press YCWA to gain clarity on the varied and complex terminology they use in these documents and reports. In our view, FERC will need to understand and differentiate between these terms (such as between "observation" and "incidental observation"; or between "planned shutdown" and "forced shutdown"; or between a shutdown and a "planned operational event"). Results of studies and observations will be found to be separated for "operational events" versus "planned outages" versus "unplanned outages." FERC staff will find information about the strandings and associated operations across hundreds of pages of these documents. We suggest that you will need to understand the terminology to understand why the information is presented in so many different tables in different locations, and in text discussions (but not tables) – this will be required in order for your staff to locate and interpret the meaning of the information in the context of understanding the Project's effects on anadromous fish resources.

- 9) Technical Memorandum (TM) 7-11. We recommend FERC staff begin your review with Figure 2.4-1, because it provides an aerial view of the vicinity downstream of Englebright Dam, and is helpful to understand places near the facilities where salmon could be stranded. These include the area along the steep rocky shoreline of the area labeled "Narrows 2 Pool." From Figure 2.4-1, it is clear this area is directly downstream of the facilities labeled Narrows 2 Powerhouse "Draft Tube Outlet" and the Narrows 2 "Partial Bypass." This shoreline is inundated to various degrees as the Partial Bypass is operated, and then dewatered when its flow is reduced or shut off – and therefore is a stranding hazard area. FERC's goal should be to understand what measures licensee is undertaking to prevent or minimize potential stranding in this area. A second area of concern is the depression labeled "Bypass Pool." This pool is "perched" above the Narrows 2 Pool, and is inundated and filled to various degrees as the facility labeled "Full Bypass" is operated. Naturally, pool conditions change (potentially rapidly) as flows through the Full Bypass are reduced or shut off. As is the case with the area downstream of the Partial Bypass, the Bypass Pool area is directly downstream of another Project facility, the Full Bypass, and clearly represents a stranding hazard area. FERC's goal should be to understand what measures licensee is undertaking to prevent or minimize potential stranding in this area.

We also suggest review of TM 7-11, Table 3.3-2. "Presence or absence of fish observed during snorkel surveys at Narrows 2 Powerhouse in 2012 by event and location." (p. 19-20). It contains entries indicating that Chinook salmon were observed in the "Bypass Pool" on July 18 and October 25, 2012; there may be text explaining this somewhere in TM 7-11, but it is unclear to NMFS how, or when, the salmon exited the Bypass Pool when flow conditions associated with Project operations changed. The Bypass Pool observations were primarily from snorkeling surveys, so information about salmon presence was not obtained when the Full Bypass was on or if an operational change occurred, due to safety concerns (p. 20). However, even an incomplete monitoring record indicates that on two occasions in 2012, salmon were present in a known stranding hazard area that is influenced by Project operations.

Please also see the text on (p. 19, footnote 6) stating, "YCWA does not maintain on record a distinction of whether the full or partial bypass was used, but rather the volume of water bypassed." This view has also been conveyed orally (by Mr. Geoff Rabone, YCWA, and James Lynch, HDR, consultant to YCWA) to NMFS (Larry Thompson) in discussions during ILP meetings. This information appears inconsistent with text in YCWA's response (p. ): "YCWA estimates flow through the Narrows 2 Powerhouse, Partial Bypass and Full Bypass based on: 1) recorded flow at the AVM; 2) records of Narrows 2 Powerhouse generation; and 3) YCWA operators' log that records which bypass is used and when." We suggest FERC obtain clarification on this very important point, as emphasized earlier in this letter.

Please note text on p. 24, that on October 12, 2012, "The full bypass was open during the snorkeling event so only the Narrows 2 Pool was surveyed. Instantaneous temperature and DO in the Narrows 2 Pool were 11.8°C and 11.3 mg/L, respectively. Discharge from the bypass valve was 329 cfs on the day of the survey. Two full snorkel passes in the Narrows 2 Pool did not observe any Chinook salmon." This suggests that Chinook may have moved upstream into the Full Bypass pool or flows, as it would be unusual for no Chinook to hold downstream of the Narrows 2 Powerhouse, unless no flows were released from that facility.

Note also text on p. 24, that on October 25, 2012, an operational change from the partial bypass to the full bypass valve occurred (but no snorkeling occurred in the Dam Pool and Bypass Pool due to safety concerns): "Before the operational change, approximately 25 Chinook salmon were observed in the Bypass Pool from the powerhouse deck overlooking the pool. As flow was transferred from the partial bypass to the full bypass, the water became too rough to visually observe what the Chinook salmon did in response to the flow change. Approximately an hour following the flow change from the partial bypass to the full bypass, a fresh Chinook carcass was observed approximately 5 feet on shore. Its location was above the high water line and, thus, the fish was not considered stranded." This text should be cross-compared with NMFS' filing of January 28, 2013, in the docket for P-2246 (discussed below).

10) NMFS' "Comments on the Initial Study Report..." (January 28, 2013). This information may be

the earliest written report of salmon stranding (during an event in the previous year, in October of 2012). Please see Enclosure A, especially the text regarding “Monitoring of Partial-Bypass Impacts” (beginning on p. 21). Note “Photo 1” of the Narrows 2 Partial Bypass in operation (October 25, 2012) at ~300 cubic feet per second (cfs) flow. Note “Photo 2” of a fresh salmon carcass recovered ~40 minutes after the Partial Bypass was shut off. Enclosure A (p. 22) describes how that carcass was recovered from a crevice previously inundated under the plume of the Partial Bypass discharge, which was thought to spray about 100 to 130 feet downstream as it operated at 300 cfs, an estimated one-half of its flow capacity. The text also refers to a NMFS video recording of the Partial Bypass operation as flow was reduced from 300 cfs to 0; FERC staff may view this video upon your request. Additional photos in NMFS’s possession (but not yet filed) include those showing the Full Bypass and Partial Bypass operating at the same time; these photos do not support YCWA’s contention (TM 7-11, p. 4), “YCWA does not operate either the full or partial bypasses when Narrows 2 Powerhouse is operating, and does not operate both bypasses at the same time.” As discussed above, FERC should consider that adverse biological effects (such as strandings) are probably more likely to take place during operational transitions between the Project facilities, when river conditions experienced by salmon are caused to change. FERC’s goal should be to understand what measures licensee is undertaking to prevent or minimize potential stranding during these facility transitions, not only during “typical” operations.

11) YCWA’s Updated Study Report (dated December 2013). As the report suggests, there are several studies that may be relevant for FERC staff review, including:

Study 7.13 “Fish Stranding Associated with Shutdowns of the Narrows 2 Powerhouse Partial Bypass”

Study 7.11 “Fish Behavior and Hydraulics Near Narrows 2 Powerhouse”

Study 7.11a “Radio Telemetry Study of Spring- and Fall-run Chinook Salmon Downstream of Narrows 2 Powerhouse”

Study 7.10 “Instream Flow Downstream of Englebright Dam”

Study 7.8 “ESA/CESA-Listed Salmonids Downstream of Englebright Dam”

To understand the results, you will need to obtain and review the corresponding technical memorandum for each study. As you perform your review, we believe you will gain a better appreciation of the difficulty of obtaining a cohesive view of the Project’s effects in the vicinity downstream of Englebright Dam and the Narrows 2 Development facilities.

We especially suggest you review the text referring to Study 7.11, and to Table 2.7-1. “Summary of planned and actual operational events from July through November 2013.” Again, the terminology used is confusing, and we hope you are able to understand Project effects when results are separated for “operational event” versus “planned outages” versus “unplanned outage.” Please note the entry for October 7, 2013, “Stranded fish were not observed, but fish were observed from the waters surface.” Please cross-compare this entry with the YCWA response text pertaining to the “incidental observations”(and the photos in Figures 4, 5, and 6)

of a salmon carcass recovered on October 7, 2013, about 15 feet downstream from the face of the Narrows 2 Powerhouse (along the rocky shoreline of the area labeled “Narrows 2 Pool” in TM 7-11, Figure 2.4-1). This discovery is now reported in response to FERC’s inquiry. The YCWA response states (p. 6) that staff removed the salmon carcass found on October 7, 2013, and cut off the tail to be sure it would not be counted during the study. In this way, YCWA apparently felt it could then report that no stranded salmon were observed during the study. Clearly, these actions reflect a less-than-genuine approach to investigation of the potential effects of the Project’s facilities and operations.

Note also the summary entries in Table 2.7-1 for October 11 and 13, 2013, which do not report live salmon stranding observations. Please cross-compare the entries with the accounts (and photos, Figure 8, Figure 9) of live stranded adult salmon downstream in the Bypass Pool, now reported in the YCWA response. We ask that your staff cross-review these documents to obtain a full account of the facts concerning the stranding events and their associated operational events.

- 12) The YCWA Draft License Application (filed December 2, 2013). Please review Table 3.3.3-35, “Summary of planned and actual operational events from July through November 2013” (p. E3.3.3-69). We note it contains no entry acknowledging or describing the October 7, 2013, discovery of the salmon carcass (beginning p. 5). The same table (3.3.3-35, p. E3.3.3-69) also contains no entry acknowledging or describing the October 11, 2013, stranding of live salmon now reported in the YCWA response (beginning p. 7). This document is several volumes, so we suggest you “scan” it for terms such as “stranding”, “carcass”, etc.
  
- 13) **The YCWA response (November 25, 2013) contains accounts of stranding events in October of 2013. As discussed above, additional salmon carcasses have been reported observed and recovered in 2012. NOAA Law Enforcement has advised our staff to request that FERC’s Compliance staff determine if any salmon carcass remains have been collected and retained by any entity. We ask that you provide this information to NMFS, following your interviews, data gathering, and document reviews associated with your inquiry.**

We also request that you obtain, and retain, all other information pertinent to the facts of this case, including written accounts, field notes, and transcripts of interviews with on-site personnel and managers, emails, photographs, videos, or other relevant information. As you know, “take” of ESA-listed salmon is not limited to mortality. We noted that the YCWA response (p. 7) contains accounts of live adult (30+ inch) salmon observed leaping out of a small area of the Bypass Pool (where they had been stranded) and on to dry land – and then flipping back into the pool. Such accounts are relevant in this inquiry.



14) YCWA proposes 2 measures to prevent future salmon stranding incidents: 1) Physical removal of the cobble bar downstream of the Full Bypass; and 2) Notification to NMFS and Cal Fish and Wildlife if dead or stranded fish are observed in the future. We note that neither measure proposed any change to the operations of the Project's facilities, either under the existing or a future license. We understand YCWA's aversion to a regulatory approach, but voluntary ramping and flow fluctuation control by the licensee does not appear to have been effective in avoiding harm to anadromous fishery resources. In addition, it may be several years before a new license is issued, and there is no certainty that FERC will require additional flow ramping and fluctuation control (terms and conditions) to remedy the situation. While removal of a cobble (not gravel) bar within a river channel that is ESA-designated critical habitat is not an action quickly realized, changes to Project operations could be in place soon, with the benefits realized by the time adult spring-run Chinook salmon inhabit the area in 2014.

The second measure, after-the-fact notification of harm or take of ESA-listed fishes is not a preventive measure; notification was discussed (in point #1 above) and NMFS recommends FERC's involvement and leadership. At present, there appears to be little appreciation that notification measures are in need of repair. Please review YCWA's response (p. 23) and note the email of YCWA's consultant (Mr. Jim Lynch) to the email request of the California Department of Fish and Wildlife (Mr. Sean Hoobler), who asks for an update on the status of adult Chinook salmon known to be stranded 3 days earlier. Mr. Lynch responds that the information will be contained in a technical memorandum available 2 months later (see Updated Study Report, suggesting the update will be available December 2012).

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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.  
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Case No. 3:18-cv-00888-JSC

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT, AND  
REPLY IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

Hearing date: July 19, 2018

Time: 2:00pm

Location: Courtroom F, 15th Floor

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. INTRODUCTION.....1

II. ARGUMENT.....1

    A. Declaratory Judgment is Warranted That NMFS Violated FOIA's Deadlines.....1

    B. NMFS Has Not Carried Its Burden to Demonstrate Its Searches Were Adequate.....3

        1. The Office of Law Enforcement Searches Were Not Adequate.....3

        2. NMFS Has Not Provided Information On Its Search Cut-off Dates.....6

    C. NMFS Has Conceded That Its Withholding of Records Under Exemptions 6 and 7(C) Was Not Justified Warranting Declaratory Judgment.....7

    D. Declaratory Judgment Is Warranted That NMFS's Lack of Adequate Explanation at The Administrative Level Violates FOIA.....9

    E. NMFS Has Not Shown that Attorney-Client and Deliberate Process Privileges Protect Redacted Information. ....11

    F. NMFS Has Failed to Segregate and Release All Non-Exempt Factual Material.....19

    G. NMFS Should Be Enjoined to Comply With FOIA's Mandates.....19

III. CONCLUSION.....20

**TABLE OF AUTHORITIES**

**Cases**

1

2

3 *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review,*  
830 F.3d 667 (D.C. Cir. 2016).....7

4 *Biodiversity Legal Found. v. Badgley,* 309 F.3d 1166 (9th Cir. 2002).....3

5

6 *Campbell v. United States Dep't of Justice,* 164 F.3d 20 (D.C. Cir. 1998).....5

7 *Center for National Security Studies v. United States Department of Justice,*  
215 F. Supp. 2d 94 (D.D.C. 2002).....5

8

9 *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854 (D.C.Cir.1980).....13, 15, 17

10 *Ecological Rights Found. v. Fed. Emergency Mgmt. Agency,* No. 16-05254,  
U.S. Dist. LEXIS 197451 (N.D. Cal. November 30, 2017).....17, 18, 20

11 *El Badrawi v. Dep't of Homeland Sec.,*583 F. Supp. 2d 285 (D. Conn. 2008).....6

12 *Elec. Frontier Found. v. CIA,* No. 09-3351, 2013 U.S. Dist. LEXIS 142146 (N.D. Cal. 2013).....11

13 *Elec. Privacy Info. Ctr. v. DOJ,* 416 F. Supp. 2d 30 (D.D.C. 2006).....19

14 *Fiducia v. U.S. Dep't of Justice,* 185 F.3d 1035 (9th Cir. 1999).....19

15 *Friends of the River v. Nat'l Marine Fisheries Serv.* No. 16-00818, Dkt. 39,  
(E.D. Cal. June 23, 2017).....17

16 *Gordon v. FBI,* 390 F. Supp. 2d 897 (N.D. Cal. 2004).....8

17 *Hercules, Inc. v. Marsh,* 839 F.2d 1027, 1028 (4th Cir. 1988).....3

18 *In re Sealed Case,* 676 F.2d 793 (D.C. Cir. 1982).....12

19 *In re United Mineworkers Employment Benefit Plans,* 159 F.R.D. 307 (D.D.C. 1994).....12

20 *Judicial Watch, Inc. v. Food & Drug Admin.,* 449 F.3d 141 (D.C. Cir. 2006).....14

21 *Kozacky & Weitzel, P.C. v. United States,* No. 07 -2246, 2008 U.S. Dist. LEXIS 29779  
(N.D. Ill. Apr. 10, 2008).....6

22 *Lion Raisins, Inc. v. U.S. Dep't of Agriculture,* 636 F. Supp. 2d 1081 (E.D. Cal 2009).....6

23 *Long v. IRS,* 693 F.2d 907 (9th Cir. 1982).....19

24

25

26

27

28 *Mead Data Central, Inc. v. U.S. Dept. of Air Force,* 566 F.2d 242 (D.C. Cir. 1977).....12, 16

1 *Morley v. CIA*, 508 F.3d 1108 (D.C. Cir. 2007).....11

2 *Nat'l Ass'n of Home Builders v. Norton*, 209 F.3d 26 (D.C. Cir. 2002).....11

3 *Natural Res. Def. Council, Inc. v. EPA* ("NRDC"), 966 F.2d 1292 (9th Cir.1992).....8,11

4 *Nat'l Wildlife Fed'n v. NMFS*, 481 F.3d 1224 (9th Cir. 2007).....18

5

6 *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).....16

7 *Oregon Natural Desert Asso. v. Dep't of Commerce*, 419 F. Supp. 2d 1284 (D. Or. 2006).....7

8 *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, Nos. 14-4365 & 14-1130,

9 2015 U.S. Dist. LEXIS 94997 (N.D. Cal. July 20, 2015 ) ("*OCE II*").....2, 19

10 *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, Nos. 14-4365 & 14-1130,

11 2015 U.S. Dist. LEXIS 143392 (N.D. Cal. Oct. 21, 2015) ("*OCE III*").....2

12 *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974). .....2

13 *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161 (D.C. Cir. 2011).....8, 19

14 *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. 06-2845,

15 2008 WL 2523819 (E.D. Cal. June 20, 2008).....3, 19

16 *Starkey v. DOI*, 238 F. Supp. 2d 1188 (S.D. Cal. 2002).....16

17 *Swisher v. Department of the Air Force*, 660 F.2d 369 (8th Cir. 1981).....16

18 *Tatum v. City & County of San Francisco*, 441 F.3d 1090 (9th Cir. 2006).....6

19 *Tracy v. Department of Justice*, 117 F. Supp. 3d 1 (D.D.C. July 31, 2015).....3

20 *United States v. An Article of Drug*, 661 F.2d 742 (9th Cir. 1981).....19

21 *United States v. Chen*, 99 F.3d 1495 (9th Cir. 1996).....13, 15

22 *United States v. Richey*, 632 F.3d 559 (9th Cir. 2011).....18

23 *Voinche v. FBI*, 999 F.2d 962 (5th Cir. 1993).....3

24 **Statutes**

25 5 U.S.C. § 552(a)(3)(A).....20, 21

26 5 U.S.C. § 552(a)(6)(A)(i).....9, 11

27 5 U.S.C. § 552(a)(6)(A)(ii).....20, 21

28 5 U.S.C. § 552(a)(6)(F).....9

1 5 U.S.C. § 552(a)(8).....10  
2 5 U.S.C. § 552(a)(8)(A)(ii).....19  
3 5 U.S.C. § 552(b)(6).....7  
4 5 U.S.C. § 552(b)(7)(C).....8  
5 **Other Authorities**  
6 15 C.F.R. § 4.10(e).....1  
7 15 C.F.R. § 4.1(a).....10, 18

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
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1 **I. INTRODUCTION**

2 EcoRights is entitled to summary judgment on all of its Freedom of Information Act ("FOIA")  
3 claims in this matter. EcoRights has demonstrated that its requested declaratory and injunctive relief is  
4 warranted. Defendant National Marine Fisheries Service ("NMFS") does not dispute that its  
5 determination for EcoRights' FOIA appeal was more than a year overdue. NMFS has failed to show that  
6 its searches were reasonably thorough and that the agency's withholdings were justified. Indeed, NMFS  
7 has withdrawn its claims that FOIA Exemptions 6 and 7(C) protected certain information from  
8 disclosure and has released in full emails previously redacted under these exemptions. NMFS's *Vaughn*  
9 index concerning its Exemption 5 withholdings is not sufficiently detailed and fails to overcome FOIA's  
10 strong presumption in favor of disclosure. Because NMFS has failed to carry its burden of proof the  
11 Court should deny NMFS's cross-motion for summary judgment.

12 **II. ARGUMENT**

13 **A. Declaratory Judgment is Warranted That NMFS Violated FOIA's Deadlines.**

14 At long last NMFS has issued its determination for EcoRights' appeal, more than a year past the  
15 statutory deadline. NMFS has not provided any explanation for its egregious delay in providing the  
16 appeal determination, other than to suggest, incredibly, that EcoRights' motion is to blame in part for the  
17 delay. Def. Mot. at 7. NMFS ignores that it indicated to EcoRights in October 2017 that the agency  
18 would release the determination within a week, and made the same promise in early February 2017. Dkt.  
19 12-24, ¶ 11; Dkt. 12-22; Dkt. 12-1, ¶ 2. Dkt. 12-2 at 3. If the agency was truly that close to finishing the  
20 determination, then it could have issued it shortly after EcoRights filed the complaint on February 10,  
21 2017. Department of Commerce regulations allow NMFS to continue working on an appeal  
22 determination even after a court action has been initiated. 15 C.F.R. § 4.10(e). However, instead of  
23 providing the appeal determination expeditiously after the complaint was filed, NMFS delayed the  
24 determination for another three and a half months and attempted to use it as a bargaining chip, even  
25 though there was no legal basis for NMFS's withholding of the appeal response. Def. Mot. at 7; Wang  
26 Decl., Dkt. 27, ¶ 5 (appeal determination issued May 25, 2018). It was only when NMFS had to answer  
27 to the Court for the agency's failure to respond to the appeal that NMFS finally released the  
28 determination, the same day that it filed its cross motion for summary judgment. *Id.*

1 NMFS does not dispute that its appeal determination was more than a year late, but contends,  
2 without merit, that EcoRights' requested declaratory relief is not warranted because the claim that  
3 NMFS violated FOIA's deadlines is moot. Def. Mot. at 19. However, EcoRights' claim of untimely  
4 response is not moot because it is capable of repetition yet could evade review. EcoRights is a public  
5 advocacy group that intends to continue its advocacy work on behalf of Endangered Species Act  
6 ("ESA") listed fish that are within NMFS's jurisdiction, and intends to send additional FOIA requests to  
7 NMFS in the future. Linn Reply Decl. ¶ 10. Thus, NMFS's unreasonable delay in responding to  
8 EcoRights' requests may continue. Indeed, NMFS's unreasonable delay in responding to the FOIA  
9 request at issue here is a repeat of the conduct that another judge of this Court previously found  
10 unlawful. *See Our Children's Earth Found., v. Nat'l Marine Fisheries Serv.*, Nos. 14-4365 & 14-1130,  
11 2015 U.S. Dist. LEXIS 143392) at \*29 (N.D. Cal. Oct. 21, 2015) (finding NMFS had a past pattern or  
12 practice of violating FOIA's deadlines in response to EcoRights' and its co-plaintiff's requests); *see also*  
13 *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, 2015 U.S. Dist. LEXIS 94997 at \*33  
14 (N.D. Cal. July 20, 2015 ) ("*OCE II*") (ordering NMFS to comply with FOIA's deadlines in response to  
15 future requests from EcoRights and its co-plaintiff due to the court's finding that NMFS "has failed to do  
16 so previously and the potential that these offenses might continue").

17 That NMFS belatedly provided the appeal determination does not absolve the agency of its FOIA  
18 deadline violation nor does it give NMFS carte blanche to defy FOIA's deadlines in the same way in the  
19 future. NMFS is wrong that the only proper remedy for an agency's failure to timely respond to a FOIA  
20 request is that the requester has a direct avenue to the district courts. FOIA imposes no limits on courts'  
21 equitable powers in enforcing its terms. *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 19-  
22 20 (1974).

23 NMFS should not be allowed to ignore a statutory deadline and respond to a FOIA appeal  
24 whenever it pleases without facing any consequence, particularly when the agency has been found to  
25 have a past pattern or practice of unreasonably delayed FOIA responses and has been enjoined by  
26 another judge of this Court to comply with FOIA's deadlines as a result of an earlier lawsuit brought by  
27 EcoRights. NMFS's contention that it is not bound by the injunction issued in *OCE II* and that  
28



1 EcoRights must re-litigate the issue of NMFS's pattern or practice of FOIA deadline violations before  
2 declaratory judgment can issue is without merit.

3 *Voinche v. FBI* and *Tracy v. Department of Justice* provide no support for NMFS's mootness  
4 argument. Def. Mot. at 20. Neither of these cases involved an agency that had been found to have a past  
5 pattern or practice of unreasonable delay in responding to the plaintiff's FOIA requests and neither of the  
6 agencies had been enjoined to comply with FOIA's deadlines in responding to the plaintiff's future  
7 requests. Further, in both of these cases the only issue raised in the complaint that was properly before  
8 the court was the timeliness of the response. *See Voinche v. FBI*, 999 F.2d 962, 963 (5th Cir. 1993);  
9 *Tracy v. Department of Justice*, 117 F. Supp. 3d 1, 5 (D.D.C. July 31, 2015). The plaintiffs did not  
10 challenge the adequacy of the response as EcoRights has done here.

11 The egregious delay in the instant case, NMFS's failure to comply with a court order, the past  
12 pattern or practice of NMFS's violations, and the possibility that they might recur with EcoRights's  
13 future requests show that a declaratory judgment is appropriate here. *Biodiversity Legal Found. v.*  
14 *Badgley*, 309 F.3d 1166, 1174-75 (9th Cir. 2002) ("the cessation of conduct does not necessarily render  
15 a declaratory judgment moot."); *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1028 (4th Cir. 1988) (action  
16 seeking to bar release of documents not mooted by the documents' release because new request for  
17 similar documents pending; agency action thus capable of repetition yet evading review); *OCE II*, 2015  
18 U.S. Dist. LEXIS 94997 at \*26; *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. 06-  
19 2845, 2008 WL 2523819 at \*6 (E.D. Cal. June 20, 2008) ("*SYRCL*").

20 **B. NMFS Has Not Carried Its Burden to Demonstrate Its Searches Were Adequate.**

21 **1. The Office of Law Enforcement Searches Were Not Adequate.**

22 NMFS is wrong that EcoRights' only alleged deficiency is the Office of Law Enforcement  
23 ("OLE")'s failure to search for responsive records. Def. Mot. at 11. EcoRights' motion also contends that  
24 the OLE search, if one was done, was not reasonably thorough. Pl. Mot. at 9-10. While the Def. Mot.  
25 has confirmed that OLE did perform a search, NMFS has not carried its burden to show its searches  
26 were reasonable.

27 First, it appears from the Graff declaration that the OLE, and particularly Agent Tanner, did not  
28 search paper files, and other files for information *not* stored electronically. The Graff declaration only

1 describes the regional FOIA coordinator and Agent Tanner performing an electronic search of his  
2 computer using a set of key words. Dkt. 26, ¶ 13.

3           Second, as EcoRights discusses in its motion, an email NMFS released in response to an earlier  
4 FOIA request indicated that Agent Tanner may have records concerning poaching at the Yuba River and  
5 concerning his observations of hazards in the Yuba River where fish strandings are occurring. Pl Mot. at  
6 9. Dkt. 12-9. EcoRights' purpose in providing this evidence was not to argue NMFS's search was  
7 inadequate because it did not locate this particular email. Instead, EcoRights' purpose was to provide  
8 evidence of the potential existence of other, relevant undisclosed records that NMFS failed to locate,  
9 such as, potentially, Agent Tanner's handwritten notes or photographs from his Yuba River visit. It is  
10 highly unlikely that Agent Tanner went to the Yuba to investigate poaching and observe hazards causing  
11 fish strandings near Narrows 2, looked around, but did not take any notes, or photographs, or collect any  
12 physical evidence and then concluded his investigation without writing any kind of report. NMFS does  
13 not deny that such material exists, instead taking the position that it need not check to see if it has  
14 overlooked such material because, in the agency's view, it has done enough to satisfy FOIA.

15           In addition to the above mentioned email, two weeks before NMFS's cross-motion was due  
16 EcoRights also provided NMFS with other evidence of potentially overlooked material suggesting  
17 insufficient search: 1) the February 13, 2014 email chain between Larry Thompson from the NMFS  
18 Hydro staff and Agent Tanner in which Mr. Thompson discussed contacting Agent Tanner in November  
19 2013 about fish strandings and Agent Tanner's reply indicating Agent Tanner is keeping track of the  
20 stranding reports; and 2) a letter from NMFS to FERC in February 2014 that states the OLE advised  
21 NMFS staff to ask the FERC Compliance division if any entity has collected and retained salmon  
22 carcass remains as a result of the strandings and to provide that information and other evidence to  
23 NMFS. Linn Reply Decl. ¶¶ 7, 8, Ex. 5. Dkt. 12-3. Taken together these documents indicate, at the very  
24 least, the presence of OLE record keeping of the 2013 fish strandings and potential collection of  
25 physical evidence. However, OLE's search did not locate any records that demonstrate Agent Tanner, or  
26 anyone else at OLE, is keeping track of these fish strandings as Agent Tanner indicated in his February  
27 2014 email that he is doing. *Id.* ¶ 9.

1 A further indication of overlooked material that EcoRights provided to NMFS is a series of  
2 emails that Agent Tanner was copied on about a fish stranding event in October 2015. Linn Reply Decl.  
3 ¶¶ 3-5. Exs. 2-4. These emails indicate Mr. Thompson spoke to Agent Tanner about the event and  
4 continued to follow up with him about the attempted rescue of stranded fish. *Id.* The emails indicate  
5 Agent Tanner told Mr. Thompson to contact the California Department of Fish and Wildlife ("CDFW")  
6 about the stranding, and after the stranding CDFW collected salmon carcass remains. *Id.* These emails  
7 indicate some OLE record keeping of this event and sharing of information between CDFW and the  
8 OLE. *Id.* However, OLE did not release any records of its own about the October 2015 stranding event  
9 and fish mortality, although Mr. Thompson indicated he contacted Agent Tanner numerous times and  
10 received direction from him about how to proceed. *Id.* ¶ 6.

11 The Def. Mot. does not address this additional evidence. Instead, NMFS contends that the  
12 agency is not required to do any more than it already has. However, by ignoring this evidence of  
13 potentially overlooked material, which EcoRights provided to NMFS two weeks before the agency filed  
14 its cross-motion, NMFS has not carried its burden to demonstrate its searches were reasonable. If NMFS  
15 fails to come forward with details in its reply explaining how, if it performed a reasonable search, it did  
16 not locate any OLE documents about poaching or fish stranding such as were discussed above,  
17 EcoRights should be granted summary judgment on this issue. *See Campbell v. United States Dep't of*  
18 *Justice*, 164 F.3d 20, 28 (D.C.Cir.1998) (search was inadequate when agency's disclosed documents  
19 revealed that searching other records systems might uncover the documents sought); *Center for National*  
20 *Security Studies v. United States Department of Justice*, 215 F. Supp.2d 94, 110 (D.D.C.2002) (finding  
21 search inadequate where disclosed document clearly indicated existence of earlier, relevant undisclosed  
22 documents); *SYRCL*, 2008 WL 2523819 at \*15, n.8 (the existence of unreleased but responsive  
23 documents might bear on adequacy of search).<sup>1</sup>

24  
25  
26 <sup>1</sup> The dearth of records generated by the OLE concerning the thousands of federally protected fish that  
27 have been taken without authorization by the Yuba River water diversions, Narrows 1 and 2  
28 powerplants, and other entities provides information in and of itself. EcoRights sent its request to find  
out what the OLE has been doing to enforce the Endangered Species Act prohibition of unauthorized  
take of Yuba River protected fish, and the answer from NMFS is, the OLE is doing nothing.

1           Alternatively, the Court should allow EcoRights to conduct limited discovery pursuant to Fed. R.  
2 Civ. P. 56(d) because NMFS has failed to show that its search was adequate, and facts pertaining to the  
3 search are currently unavailable to EcoRights. Fed. R. Civ. Pro. 56(d) (where a non-moving party shows  
4 by declaration that facts are unavailable to the non-moving party, a court may: (1) defer considering the  
5 motion or deny it; (2) allow the party time to obtain affidavits or declarations or to take discovery; or (3)  
6 issue any other appropriate order). Indeed, in similar FOIA cases where the adequacy of the search is in  
7 doubt on summary judgment, courts have allowed the FOIA requester to conduct limited discovery to  
8 gather additional relevant information. *Lion Raisins, Inc. v. U.S. Dep't of Agriculture*, 636 F. Supp. 2d  
9 1081, 1107 (E.D. Cal 2009) (denying summary judgment and allowing plaintiff to depose agency  
10 officials about the adequacy of their search and whether additional responsive documents  
11 exist); *Kozacky & Weitzel, P.C. v. United States*, No. 07 -2246, 2008 U.S. Dist. LEXIS 29779 at \*\*17-  
12 18 (N.D. Ill. Apr. 10, 2008) (permitting the use of interrogatories concerning the adequacy of the  
13 agency's search); *El Badrawi v. Dep't of Homeland Sec.*, 583 F. Supp. 2d 285, 321 (D. Conn.  
14 2008) (permitting plaintiff to take depositions of agency employees regarding the adequacy of the  
15 agency searches).

16           Here, the Linn Reply Declaration presents all of the requisite evidence to support postponing  
17 NMFS's cross-motion for further discovery. *See Tatum v. City & County of San Francisco*, 441 F.3d  
18 1090, 1100 (9th Cir. 2006) (“A party requesting a continuance pursuant to [Rule 56(d)] must identify by  
19 affidavit the specific facts that further discovery would reveal, and explain why those facts would  
20 preclude summary judgment.”); Linn Reply Decl. ¶¶ 3-9. As explained above and in the Linn Reply  
21 Declaration, the documents that NMFS has produced in response to EcoRights' request indicate  
22 overlooked material that appears to be responsive to the request and that NMFS has not produced. Thus,  
23 it is likely that additional responsive documents exist that have not been produced to EcoRights—  
24 controverting NMFS's summary judgment claim that it has produced a full and final response to  
25 EcoRights' request. Linn Reply Decl. ¶ 6,9. EcoRights could not have obtained evidence that NMFS had  
26 conducted an unreasonable search for documents earlier in this proceeding because NMFS did not  
27 provide the appeal determination and full description of its search until May 25, 2018 when it filed its  
28 cross-motion for summary judgment. In this case, only NMFS has access to the material facts related to

1 the adequacy of its search. Without discovery, EcoRights is limited to the description of the search in the  
2 Graff declaration. *Id.* ¶ 11.

3 **2. NMFS Has Not Provided Information On Its Search Cut-off Dates.**

4 EcoRights cannot ascertain whether NMFS complied with FOIA's mandate that the agency  
5 search for all responsive documents in its possession as of the date it commences its searches because  
6 NMFS has not provided its search cut-off dates. Since there were a series of searches, the last of which  
7 occurred in summer 2017, NMFS should have searched for and released records that were created  
8 through the summer of 2017. However, there is no indication which cut-off date for responsive records  
9 NMFS used. If NMFS only looked for records created as of the date the request was received, or as of  
10 the date of the first searches, that violates FOIA and demonstrates the searches were not adequate. *See*  
11 *Oregon Natural Desert Asso. v. Dep't of Commerce*, 419 F. Supp. 2d 1284 (D. Or. 2006) (practice of  
12 using date request received as the search cut-off date is unlawful). Because NMFS has not provided its  
13 search cut-off dates, the agency has not demonstrated that its searches were reasonably thorough.

14 **C. NMFS Has Conceded That Its Withholding of Records Under Exemptions 6 and**  
15 **7(C) Was Not Justified Warranting Declaratory Judgment.**

16 NMFS has determined that it is "no longer necessary to withhold information under exemption  
17 7(C)" and has released in full two emails, between Mr. Thompson of the NMFS Hydro staff and Agent  
18 Tanner, the only two documents that were released by the OLE. Dkt. 26, ¶ 17. Dkt. 26-1 at 10-11. The  
19 Graff declaration ignores that Agent's Tanner's name and work contact information were also redacted  
20 from these emails under Exemption 6 and that EcoRights also challenged the Exemption 6 claim. Pl.  
21 Mot. at 17. By failing to rebut EcoRights' Exemption 6 argument, and releasing the redacted emails in  
22 full, NMFS has conceded that withholding Agent Tanner's name and work contact information under  
23 Exemption 6 also was not justified.

25 Exemption 6 protects from disclosure information about individuals that constitutes personnel,  
26 medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion  
27 of personal privacy. 5 U.S.C. § 552(b)(6); *Am. Immigration Lawyers Ass'n v. Exec. Office for*  
28

1 *Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016). Exemption 7(C) authorizes the withholding of  
2 "records or information compiled for law enforcement purposes" only to the extent they "could  
3 reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. §  
4 552(b)(7)(C). NMFS's lack of explanation about why it originally believed release of Agent Tanner's  
5 name, work email address, and work phone in these two emails would be an unwarranted personal  
6 privacy invasion, but release of Mr. Thompson's name and work email address would not be, suggests  
7 that NMFS has a policy of asserting a blanket exemption protecting from disclosure the names and work  
8 contact information of OLE agents, regardless of the actual circumstances/justification for privacy.<sup>2</sup>  
9 NMFS seems to assert that any OLE record is a law enforcement record. However, such interpretations  
10 are wrong. There is no blanket exemption for the names and work contact information of OLE agents.  
11 *See, e.g., Gordon v. FBI*, 390 F. Supp. 2d 897, 902 (N.D. Cal. 2004) (names of agency employees are  
12 not personal information about those employees that meets Exemption 6 threshold), *summary judgment*  
13 *granted*, 388 F. Supp. 2d 1028, 1040-42 (N.D. Cal. 2005). Further, all OLE records are not law  
14 enforcement records simply by virtue of the function the OLE serves. *Roth v. U.S. Dept. of Justice*, 642  
15 F.3d 1161, 1173 (D.C. Cir. 2011) (internal citation omitted). To ensure that NMFS does not continue an  
16 apparent policy contrary to law, declaratory judgment is warranted that NMFS's withholding of Agent  
17 Tanner's name and work contact information under Exemptions 6 and 7(C) violated FOIA. Such  
18 judgment will "delineate [ ] important rights and responsibilities, and will be of "significant educational  
19 and lasting importance." *Natural Res. Def. Council, Inc. v. EPA ("NRDC")*, 966 F.2d 1292, 1299 (9th  
20 Cir.1992). The release of agency staff names and contact information, including OLE agents, serves an  
21 important public interest which enables EcoRights and other public interest groups to scrutinize whether  
22 NMFS staff are carrying out their ESA duties to protect endangered fish species in the Yuba River and  
23  
24  
25

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26 <sup>2</sup> Ironically, in this matter, it was Mr. Thompson who was performing the NMFS law enforcement  
27 function, identifying and investigating violations of ESA Section 9, while Agent Tanner, apparently,  
28 provided only moral support, yet NMFS never redacted Mr. Thompson's name from released  
documents, only Agent Tanner's name.

1 other waterways and to be able to follow intelligibly NMFS's document releases by using names to  
2 discern the common linkages between released documents.

3 **D. Declaratory Judgment Is Warranted That NMFS's Lack of Adequate Explanation**  
4 **at The Administrative Level Violates FOIA.**

5 NMFS is wrong that its identification of "the number of pages collected for processing and the  
6 specific exemptions being claimed for the withholdings" satisfied its obligations under FOIA at the  
7 administrative stage. Def. Mot. at 13. First, NMFS's administrative level determination did not indicate  
8 the number of *pages* collected for processing as the Def. Mot. contends. It merely indicated that 54  
9 *documents* had been partially withheld. *See* Dkt. 12-16 at 3. NMFS's determination did not satisfy  
10 FOIA's mandate that the agency estimate the volume of material withheld. 5 U.S.C. § 552(a)(6)(F).  
11 Simply stating 54 documents were redacted and then listing the exemptions being claimed does not  
12 provide adequate information. To satisfy FOIA, NMFS must estimate how many pages in those 54  
13 documents were redacted and specifically how many pages were withheld under attorney-client  
14 privilege, how many were withheld under attorney work product, how many were withheld under  
15 deliberative process privilege, and how many were withheld under Exemption 6. *Id.* Second, as the Def.  
16 Mot. concedes, NMFS's determination did not identify the specific exemptions claimed for *all* of the  
17 withholdings. NMFS failed to identify the specific exemption claimed for three redacted documents.  
18 One document had no indication which exemption was claimed and the other two documents merely  
19 identified "(b)(5)" as the exemption claimed. As EcoRights notes in its MSJ, "(b)(5)" could mean  
20 attorney-client privilege, attorney work product, or deliberate process privilege. Pl. Mot. at 11.

21 NMFS is wrong that EcoRights is asking for the agency to issue a *Vaughn* index at the  
22 administrative stage. Def. Mot. at 14. The law is clear that a *Vaughn* index is not required until a  
23 requester has exhausted administrative remedies. However, the law is also clear that the agency must, at  
24 the administrative level, review the responsive material it has collected, and make a determination about  
25 what information it will release and what information it will withhold, and provide the requester with the  
26 *reasons* for withholding any responsive information. 5 U.S.C. § 522(a)(6)(A)(i). NMFS contends that  
27 identifying the exemption(s) it is claiming for each specific document satisfies FOIA's mandate that the  
28 agency provide reasons for its withholdings. However, a bare bones, conclusory statement that an

1 exemption is being applied to withheld information is not an adequate reason, especially in light of the  
2 FOIA Improvement Act which requires more in-depth agency review and analysis at the administrative  
3 level. *See* Department of Justice Office of Information Policy Summary of the FOIA Improvement Act  
4 of 2016, available at <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016> (“OIP FOIA  
5 2016 Summary”).

6 Under the FOIA Improvement Act, NMFS is now required to evaluate each responsive record to  
7 determine whether an exemption applies, and then to *further* identify what foreseeable harm to a  
8 protected interest would result if the information is released, to consider whether a discretionary release  
9 is appropriate, and then to only withhold the information if a foreseeable harm to a protected interest  
10 would result from disclosure. 5 U.S.C. § 552(a)(8)(A).<sup>3</sup> NMFS presumably complied with this  
11 mandatory review process, and having determined to withhold information, should have included in its  
12 explanation for withholding material what foreseeable harm to a protected interest would result if the  
13 material was disclosed, since that was the basis upon which NMFS made its decision to withhold  
14 information.

15 Similarly, NMFS should have included in its explanation about the withholdings that the agency  
16 had reviewed each responsive record and, where full disclosure was not possible, identified and released  
17 the factual, non-exempt material that could reasonably be segregated from the exempt material, as  
18 required by 5 U.S.C. § 552(a)(8)(A). If NMFS complied, at the administrative stage, with the mandate to  
19 segregate non-exempt information NMFS should have included in its determination a statement to that  
20 effect.

21 Since FOIA mandates that NMFS make determinations about foreseeable harm, discretionary  
22 releases of exempt material, and segregability of non-exempt information at the administrative stage  
23 there is no reason NMFS should not have provided this explanatory information to EcoRights at the  
24 administrative stage.<sup>4</sup> Requiring that such information be provided to EcoRights at the point at which a  
25

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26 <sup>3</sup> Department of Commerce FOIA regulations also mandate that NMFS make discretionary releases of  
27 exempt information when required to do so in accordance with the FOIA Improvement Act. 15 C.F.R. §  
28 4.1(a).

<sup>4</sup> Indeed, NMFS's belated administrative response to EcoRights' appeal did provide an explanation of  
NMFS's segregability analysis and did not contend that the explanation was not required at the



1 determination is made will increase the likelihood that, in the future, NMFS will carefully look at  
2 whether its justifications for withholding information are truly defensible.

3 By failing to identify the specific exemption claimed for each withheld record, failing to identify  
4 the foreseeable harm to a protected interest that might result from disclosure of withheld information,  
5 failing to estimate the volume of material withheld, and failing to explain whether all reasonably  
6 segregable material had been released, NMFS did not provide an adequate explanation, at the  
7 administrative level, why its withholdings are justified, in violation of 5 U.S.C. § 552(a)(6)(A)(i).  
8 Declaratory judgment is therefore warranted that NMFS's approach of providing only a conclusory  
9 statement that an exemption has been applied to withheld information does not comport with 5 U.S.C. §  
10 552(a)(6)(A)(i). This will incentivize NMFS in the future to provide sufficiently detailed explanations  
11 why it contends the information it withholds is indeed FOIA exempt. Requesters can then evaluate  
12 NMFS's FOIA exemption claims and pursue meaningful administrative appeals *before seeking recourse*  
13 *to the courts*. The requested declaration is appropriate as it will "delineate[] important rights and  
14 responsibilities" by helping to ensure that NMFS only withholds information with proper justification  
15 when responding to EcoRights' future FOIA requests. *NRDC*, 966 F.2d at 1299.

16 **E. NMFS Has Not Shown that Attorney-Client and Deliberate Process Privileges**  
17 **Protect Redacted Information.**

18 The Def. Mot.'s boilerplate argument (at 17) that releasing the material withheld under  
19 deliberative process privilege "could have a chilling effect on the discussions within the agency in the  
20 future, discouraging a frank and open dialogue among agency employees" is not enough to overcome  
21 FOIA's strong presumption in favor of disclosure. *Nat'l Ass'n of Home Builders v. Norton*, 209 F.3d 26,  
22 32 (D.C. Cir. 2002) (internal citation omitted). NMFS must demonstrate *how*, if at all, releasing *each*  
23 redacted portion of a particular document would expose the agency's decision making process in such a  
24 way as to discourage candid discussion. *Morley v. CIA*, 508 F.3d 1108, 115 (D.C. Cir. 2007); *Elec.*  
25 *Frontier Foundation v. CIA*, 2013 U.S. Dist. LEXIS 142146 at \*48 (N.D. Cal. 2013).

26  
27 administrative stage: "...a line-by-line review of the document was conducted, and all segregable  
28 information was released. The information that would remain if additional segregation was attempted  
would leave information of minimal or no informational value." Dkt. 27-1 at 9.

1 For material redacted under the attorney-client privilege, NMFS makes no showing at all of the  
2 foreseeable harm to an interest protected by this privilege that would occur if the redacted material were  
3 disclosed. NMFS also does not provide a *particularized* explanation that *each* attorney-client  
4 communication at issue was kept confidential. There is only a conclusory statement in the Graff  
5 declaration that the communications were confidential. Dkt. 26 ¶ 32. If the redacted information was  
6 disclosed to a third party, the privilege has been waived. *In re Sealed Case*, 676 F.2d 793, 808-9 (D.C. Cir.  
7 1982). Voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-  
8 client relationship and waives the privilege, not only as to the specific communication disclosed but  
9 often as to all other communications relating to the same subject matter. *Id.*; *In re United Mineworkers*  
10 *Employment Benefit Plans*, 159 F.R.D. 307, 310 (D.D.C. 1994). NMFS must demonstrate the  
11 confidentiality of communications sought to be protected and the Court cannot assume confidentiality. *Mead*  
12 *Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977).

13 Because NMFS has failed to make an adequate showing of foreseeable harm to the interests  
14 protected by the deliberative process and attorney-client privileges, as required by the FOIA  
15 Improvement Act, and has not made a showing that attorney-client communications were kept  
16 confidential, the redacted material must be disclosed. Further, as discussed below, the explanations in  
17 NMFS's *Vaughn* index and the Graff declaration also do not carry NMFS's burden to show the  
18 Exemption 5 redactions are justified, warranting declaratory judgment and an order to release all  
19 withheld information.

20 **Documents 5079-1 and 5276-1.**<sup>5</sup> NMFS has not justified why the redacted information on the  
21 first page of this routing and tracking ledger sheet is protected under attorney-client privilege. Dkt. 12-  
22 18 at 2, 38. The second page of this document is a near duplicate of the first page and NMFS did not  
23 redact what appears to be the same information that is on the first page from the second page. *Id.* at 3,  
24 39. Further, the unredacted information on the second page, which EcoRights presumes is what was  
25 redacted from the first page, is not confidential in nature. The comment on the second page of the ledger  
26 that the document is a "[n]on routine informal sufficiency review letter" and "S7 & GC Review needed"

27 \_\_\_\_\_  
28 <sup>5</sup> For ease of reference EcoRights has adopted the document numbers used in NMFS's *Vaughn* index.

1 does not reveal anything more than what the unredacted email to which this ledger was attached  
2 explains-- that this document is the Yuba River Englebright Dam Project Informal Letter for the General  
3 Counsel's review. Dkt. 26, ¶ 38. Dkt. 26-1 at 22. If the comment on the second page is not the same as  
4 the comment redacted on the first page but is instead a comment "informing legal counsel that the letter  
5 related to a matter in active litigation" that is also not confidential information exempt from disclosure.  
6 *Id.* It was public knowledge that the Corps was requesting only informal consultation with NMFS about  
7 Englebright Dam and that the consultation was a matter in active litigation, so the agency was not  
8 conveying the type of private information to its counsel that would warrant withholding that  
9 information.

10 NMFS has also not justified withholding the other pages of this ledger under attorney-client  
11 privilege. Dkt. 2-18 at 6-10 and 42-46. There is no indication the information in these pages was kept  
12 confidential and NMFS has not identified the foreseeable harm that would occur if this information was  
13 disclosed.

14 **Document 5200.** This is an email chain between NMFS Fish Biologist Gary Sprague and  
15 NMFS attorney Christopher Keifer sent October 29-30, 2013. This is one of the documents with generic  
16 "b5" exemptions claimed. NMFS now asserts both deliberative-process and attorney-client privileges for  
17 these "b5" redactions. Def. Mot. at 13. NMFS is claiming that another redaction in this document is only  
18 attorney-client privileged information.

19 In regards to the attorney-client privilege claims, NMFS states the redacted material "consists  
20 solely of discussion between agency staff and an attorney regarding Biological Assessments received  
21 from the Corps." Dkt. 26, ¶ 39. Dkt. 26-1 at 16. This statement provides no basis for finding that the  
22 withheld information was a confidential communication related to the giving or receiving of legal  
23 advice. NMFS merely states a staff member and a staff attorney were having a discussion about Corps  
24 Biological Assessments. *Id.* For the attorney-client privilege to apply, there must be some *indicia* that  
25 the agency was dealing with its attorney as would any private party seeking legal advice to protect  
26 personal interests. *Coastal State Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980).  
27 There is no such indication here. Further, just because the emails were sent to and from an attorney does  
28 not make these communications privileged. *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996).

1 Additionally, there is no indication that this document was kept confidential and NMFS has not  
2 identified the foreseeable harm to a protected interest that would result from disclosure.

3 In regards to deliberative process privilege, NMFS states the redacted material is "deliberative  
4 and predecisional as it discusses "impressions regarding the ability to move forward towards  
5 consultation." Dkt. 26-1 at 16. While this communication may have been pre-decisional, as it pre-dates  
6 the May 2014 biological opinion, there is no basis for finding the communication deliberative. A  
7 document is "deliberative" if "it reflects the give-and-take of the consultative process." *Judicial Watch,*  
8 *Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (internal citation omitted). When an  
9 agency claims the deliberative process privilege it must establish the role played by the document at  
10 issue in the course of that process. *Animal Legal Def. Fund, Inc. v. Dep't of Air Force*, 44 F. Supp. 2d  
11 295, 299 (D.D.C. 1999); *Senate of Puerto Rico ex rel. Judiciary Comm. v. United States DOJ*, 823 F.2d  
12 574, 585-86 (D.C. Cir. 1987). NMFS fails to explain what role these emails played in the formulation of  
13 the May 2014 biological opinion. There does not appear to be any give-and-take discussion of the type  
14 intended to assist NMFS in arriving at the 2014 Biological Opinion. Rather, it appears Mr. Sprague and  
15 Mr. Kiefer were merely ruminating about the chances the consultation would move forward.

16 **Document 5215.** This document is an email chain from January 30, 2014 between NMFS  
17 Sacramento River Basin Chief, Howard Brown, and NMFS attorney, Christopher Keifer. This is another  
18 of the redacted documents with generic "b5" exemptions claimed and with no exemption at all indicated  
19 on one of the redactions. NMFS now asserts that both deliberative process and attorney-client privileges  
20 apply to all of these redactions. Def. Mot. at 13.

21 NMFS explains that material redacted from the emails "consists solely of a status update on the  
22 [Yuba] consultations." Dkt. 26-1 at 17. In regards to attorney-client privilege, this statement provides no  
23 basis for finding that the withheld information was a confidential communication related to the giving or  
24 receiving of legal advice. For the attorney-client privilege to apply, there must be some *indicia* that the  
25 agency was dealing with its attorney as would any private party seeking legal advice to protect personal  
26 interests. *Coastal State*, 617 F.2d 854 at 863. There is no such indication here. It appears Mr. Kiefer was  
27 merely requesting a status update and Mr. Brown provided one. Further, just because the emails were  
28 sent to and from an attorney does not make these communications privileged. *Chen*, 99 F.3d at 1501.

1 Additionally, there is no indication that this material was kept confidential and NMFS has not identified  
2 the foreseeable harm to a protected interest that would result from disclosure.

3 As for deliberative process privilege, NMFS's contention that the withheld material is protected  
4 because "it identified proposed future steps for consultation and a need for executive policy decision-  
5 making" provides no basis for finding the communication deliberative. Dkt. 26-1 at 17. NMFS fails to  
6 explain what role the withheld material played in the formulation of the May 2014 biological opinion.  
7 There does not appear to be any give-and-take discussion of the type intended to assist NMFS in  
8 arriving at the 2014 Biological Opinion. There is no indication that Mr. Brown was making  
9 recommendations or offering his opinion about steps to take. It appears he was merely reporting to Mr.  
10 Keifer about steps that had already been proposed and the lack of decision-making.

11 **Document 5224**. This document is a January 31, 2014 email, subject "Update on Yuba  
12 Consultations with U.S. Army Corps," from NMFS Sacramento River Basin Chief, Howard Brown, to a  
13 number of NMFS staff including attorney Christopher Keifer. This is another of the redacted documents  
14 with no exemption at all identified. NMFS now asserts that both deliberative process and attorney-client  
15 privileges apply to this redaction. Def. Mot. at 13.

16 NMFS contends the redacted material is exempt under these privileges because the material  
17 "discusses changes in the scope of the activities associated with the dams and the implications for the  
18 ongoing consultation." Dkt. 26-1 at 17. In regards to attorney-client privilege, this statement provides no  
19 basis for finding that the withheld information was a confidential communication related to the giving or  
20 receiving of legal advice. For the attorney-client privilege to apply, there must be some *indicia* that the  
21 agency was dealing with its attorney as would any private party seeking legal advice to protect personal  
22 interests. *Coastal State*, 617 F.2d 854 at 863. There is no such indication here. Mr. Brown was merely  
23 providing a status update. Further, just because a staff attorney was among those to whom the email was  
24 sent does not make the communication privileged. *Chen*, 99 F.3d at 1501. Additionally, there is no  
25 indication that this document was kept confidential and NMFS has not identified the foreseeable harm to  
26 a protected interest that would result from disclosure.

27 As for deliberative process privilege, while this communication may have been pre-decisional, as  
28 it pre-dates the May 2014 biological opinion, there is no basis for finding the communication

1 deliberative. NMFS fails to explain what role this email played in the formulation of the May 2014  
2 biological opinion. There does not appear to be any give-and-take discussion of the type intended to  
3 assist NMFS in arriving at the 2014 Biological Opinion. There is no indication that Mr. Brown was  
4 making recommendations or offering his opinion about how the consultation should proceed. It appears  
5 he was merely reporting to Mr. Keifer and other staff on the progress being made in the consultation.

6 **Document 5247**. This is an email from Howard Brown to Christopher Keifer subject,  
7 "Response to Environmental Advocates." Dkt. 12-18 at 18. The email had a draft letter attached, which  
8 is discussed below. NMFS has not justified withholding information from the email under attorney  
9 client privilege. There is no indication that the email was kept confidential and NMFS has not identified  
10 the foreseeable harm to a protected interest that would result from disclosure. Dkt. 26-1 at 17. The Court  
11 cannot assume confidentiality. *Mead Data Central*, 566 F.2d at 254.

12 **Document 5247-2**. This document is Mr. Brown's draft response to a letter from Christopher  
13 Sproul, an attorney for the South Yuba River Citizens League and Friends of the River, seeking to  
14 engage NMFS in a collaborative consultation process. Dkt 12-18 at 16-17. NMFS is wrong the  
15 information redacted from this response is protected deliberative process. NMFS makes no showing that  
16 the draft response played any part in the formulation of the May 2014 biological opinion. NMFS states  
17 the redacted material "revealed information about the ongoing consultation, and indicated future steps  
18 the agency would take to meet with stakeholders." Dkt. 26-1 at 18. It appears Mr. Brown was presenting  
19 the agency's position about the consultation to Mr. Sproul, and there is no indication that Mr. Brown was  
20 making recommendations or offering his own subjective opinions as part of the consultation process for  
21 the 2014 Biological Opinion.

22 **Documents 5250-1 and 20774-2** . These two documents are drafts of a letter from NMFS to the  
23 Corps concurring with the Corps that only informal ESA consultation concerning Englebright Dam was  
24 required because the Corps' operation of Englebright is not likely to adversely affect threatened fish  
25 species in the Yuba River ("concurrence letter"). Dkt. 12-18 at 19-37 and 47-72. NMFS contends the  
26 redacted information is protected deliberative process because it contains discussions of the proposed  
27 action, the authorities for the proposed action, the action area, the action agency's effects determination,  
28 the consultation history, litigation history, future actions requiring separate consultations, and

1 discretionary and non-discretionary actions. NMFS has not made a showing that this material is exempt  
2 from disclosure. It is likely the redacted material was adopted or incorporated by NMFS into the final  
3 concurrence letter and, if so, is not exempt from disclosure. *NLRB v. Sears*, 421 U.S. 132 (1975);  
4 *Swisher v. Department of the Air Force*, 660 F.2d 369 (8th Cir. 1981); *see also Starkey v. DOI*, 238 F.  
5 Supp. 2d 1188, 1193 (S.D. Cal. 2002) (where disclosure has already occurred the government has little  
6 interest in secrecy); *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (disclosure may be compelled even  
7 over otherwise valid agency exemption claim when agency has effectively revealed information);  
8 *Ecological Rights Found. v. Fed. Emergency Mgmt. Agency*, No. 16-05254 at \*\*15-16 (N.D. Cal.  
9 November 30, 2017) ("*EcoRights*").

10 NMFS and the Corps completed the Yuba River ESA consultation at issue in these documents  
11 more than four years ago. NMFS cannot demonstrate why it needs to keep the redacted information  
12 secret, especially where NMFS's decisions pertaining to this ESA consultation with the Corps are  
13 already so publicly known. NMFS and the Corps have publicly released numerous documents which  
14 have already revealed a great deal about these agencies' consideration of their ESA section 7 obligations  
15 concerning the Corps' Yuba River project--and shown that NMFS and the Corps decided not to engage  
16 in formal ESA section 7 consultation over much of the Corps' ongoing operation and maintenance of its  
17 two Yuba River dams and other Yuba activities because of the Corps' conclusions concerning the limits  
18 of its discretionary authority. Dkt. 12-1 ¶ 8. For example, NMFS's 2014 Yuba River Biological Opinion and  
19 Englebright concurrence letter have publicly disclosed this information. *Id.* NMFS and the Corps have also  
20 disclosed this information in their briefing in a lawsuit brought by Friends of the River against the agencies.  
21 *See Friends of the River v. Nat'l Marine Fisheries Serv.*, No. 16-00818, Dkt. 39 at 9-11 (E.D. Cal. June 23,  
22 2017). In response to Friends of the River's FOIA requests, NMFS has also released numerous documents  
23 commenting on the consultation, the sufficiency of the Yuba BAs, and drafts of the Englebright concurrence  
24 letter. Dkt. 12-1 ¶ 8. Given how public NMFS's decisionmaking pertaining to this consultation has been, it is  
25 unlikely there is content in these documents that NMFS has a legitimate need to keep secret.

26 Even if the withheld information would have been exempt from disclosure prior to enactment of  
27 the FOIA Improvement Act as technically falling within the attorney-client or deliberative process  
28 privilege, disclosure of the material should now be ordered under the new standard of the FOIA

1 Improvement Act. EcoRights' request was specifically tailored to gather information about government  
2 decision-making and, more importantly, the federal government's compliance with its own laws – in this  
3 case, the ESA. Information about government decision-making and consultation that is required by law  
4 is exactly the type of information that FOIA was intended to disclose to the public. Such disclosure  
5 ensures that citizens are informed and their government is held accountable. *See Coastal States*, 617  
6 F.2d at 868. NMFS's inclination to withhold such information under a claim of deliberative process  
7 privilege is contrary to the mandates of the FOIA Improvement Act and Department of Commerce  
8 FOIA regulations that mandate NMFS release exempt information when required to do so in accordance  
9 with the FOIA Improvement Act. 15 C.F.R. § 4.1(a).

10 **Document 30833**. This is a document entitled "Legal Analysis: Analyzing Ongoing Projects  
11 Under Section 7 of the Endangered Species Act (ESA)-*Draft*." Dkt. 12-18 at 73-88. On the face of the  
12 document, NMFS claims the withheld information is protected under attorney-client privilege. NMFS's  
13 appeal determination also explains the basis for withholding the redacted material under attorney-client  
14 privilege. Dkt. 27-1 at 7. However, in the *Vaughn* index NMFS also asserts the redacted material is  
15 protected by the deliberative process privilege. This belated claim that the material is protected  
16 deliberative process is mere *post hoc* rationalization for litigation purposes, not an administrative  
17 decision actually made by NMFS when it withheld the document, that the Court must ignore. *Nat'l*  
18 *Wildlife Fed'n v. NMFS*, 481 F.3d 1224 1237 n.9 (9th Cir. 2007).

19 In regards to attorney-client privilege, NMFS has failed to justify its claim. There is no  
20 indication this document was a confidential communication between attorney and client, made for the  
21 purpose of giving legal advice. *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). First, it does  
22 not appear the document was communicated at all. The agency does not identify which NMFS attorney  
23 authored the document, to whom it was communicated, how it was communicated, and when it was  
24 communicated. There is no email associated with this document. Second, there is no indication the  
25 document was prompted by a request for legal advice. Perhaps the attorney who drafted this document  
26 was simply working on a law review article about this subject. Without more detailed explanation from  
27 NMFS, there is no basis for finding this document a protected attorney-client communication.



1 Unless NMFS, in its reply, comes forward with evidence substantiating the claim that the  
2 information redacted in the ten documents described above falls within Exemption 5 deliberative  
3 process and/or attorney-client privileges and explaining how NMFS's interests would be harmed by the  
4 information's release, the Court must issue a declaration that NMFS has improperly invoked Exemption  
5 5, contrary to the requirements of FOIA (as amended by the FOIA Improvement Act) and enjoin NMFS  
6 to release the information withheld under this exemption. *See EcoRights*, 2017 U.S. Dist. LEXIS 197451  
7 at \*27. (Note: if NMFS does in fact come forward with such ostensible evidence, discovery or *in camera*  
8 review may be appropriate to probe the veracity of such assertions). *Fiducia v. U.S. Dep't of Justice*, 185  
9 F.3d 1035, 1043 (9th Cir. 1999); *Lion Raisins, Inc. v. U.S. Department of Agriculture*, 636 F. Supp. 2d  
10 1081, 1107 (E.D. Cal 2009).

11 **F. NMFS Has Failed to Segregate and Release All Non-Exempt Factual Material.**

12 FOIA requires that "any reasonably segregable portion of a record" must be released after  
13 application of the Act's nine exemptions. 5 U.S.C. § 552(b); 5 U.S.C. § 552(a)(8)(A)(ii); *Roth*, 642 F.3d  
14 at 1167. It appears likely that NMFS has not complied with FOIA's mandate to segregate and release  
15 non-exempt factual material in the two draft concurrence letters (Documents 5250-1 and 20774-2).  
16 NMFS claims the redacted material contains the consultation history and litigation history surrounding  
17 the NMFS and Corps Yuba River consultations. Dkt. 26-1 at 18. History is factual material--who did  
18 what, when did they do it, and what was the outcome. There is no basis for finding this information  
19 exempt from disclosure. Further, the consultation history and litigation history are discrete sections in a  
20 concurrence letter and can readily be segregated from other sections. NMFS should be enjoined to  
21 release this reasonably segregable, non-exempt factual material.

22 **G. NMFS Should Be Enjoined to Comply With FOIA's Mandates.**

23 The Court has authority to issue an injunction requiring agencies to take corrective action to  
24 come into compliance with existing FOIA obligations and to deter future FOIA violations that are likely  
25 to occur. 5 U.S.C. § 552(a)(4)(B); *Long v. IRS*, 693 F.2d 907, 909 (9th Cir. 1982); *see also United States*  
26 *v. An Article of Drug*, 661 F.2d 742, 747 (9th Cir. 1981). Given NMFS's more than year long delay in  
27 responding to EcoRights' appeal, injunctive relief is a proper remedy. *See, e.g., OCE II*, 2015 U.S. Dist.  
28 LEXIS 94997 at \*33 (enjoining NMFS to respond to plaintiffs' pending and future FOIA requests within

1 statutory deadlines); *SYRCL*, 2008 WL 2523819 at \*17 (same); *see also Elect. Privacy Info. Ctr. v. Dep't*  
2 *of Justice*, 416 F. Supp. 2d. 30, 43 (D.D.C. 2006) (ordering agency to process plaintiff's expedited FOIA  
3 request within 20 days). Injunctive relief in a FOIA context is appropriate where the public would be  
4 benefited by the disclosure. *Long*, 693 F.2d at 909. In making this determination, courts consider  
5 whether "there has been a voluntary cessation of allegedly illegal conduct, [whether] ... prolonged delays  
6 have repeatedly hindered the timely disclosure of non-exempt documents, ... the likelihood of  
7 recurrence, ... the good faith of any expressed intent to comply, the effectiveness, if any, of the  
8 discontinuance and the character of past violations." *Id.* These factors weigh in favor of granting an  
9 injunction. In the past NMFS failed, for the most part by exceedingly large margins, to respond within  
10 FOIA's deadlines to EcoRights' requests and appeals. Despite an order from a judge of this Court NMFS  
11 has not ceased its practice of untimely responses. Therefore, NMFS should be enjoined to comply with  
12 FOIA's deadlines in responding to EcoRights' future requests and appeals.

13 In regards to NMFS's withholding of information under Exemption 5, NMFS has failed to justify  
14 its withholdings in the ten records at issue. The Court should therefore enjoin NMFS to promptly release  
15 in full these ten records. *See e.g. EcoRights*, 2017 U.S. Dist. LEXIS 197451 at \* 27 (ordering agency to  
16 produce all documents redacted pursuant to Exemptions 5 and 6 within two weeks of the date of the  
17 order). NMFS should further be ordered to perform a renewed search and to promptly release any non-  
18 exempt records responsive to EcoRights' request.

19 EcoRights has been hindered by NMFS's year long delay in responding to EcoRights' appeal,  
20 NMFS's unreasonable search for responsive records, and its improper withholding of non-exempt  
21 information. EcoRights is a public advocacy group that intends to continue its advocacy work on behalf  
22 of ESA-listed anadromous fish that are within NMFS's jurisdiction, and thus will almost certainly send  
23 additional FOIA requests to NMFS in the future. Accordingly, there is a likelihood that NMFS's FOIA  
24 violations will recur.

### 25 **III. CONCLUSION**

26 For the reasons stated above, EcoRights requests that the Court grant declaratory judgment  
27 establishing that NMFS violated FOIA by: (1) failing to provide the determination for EcoRights' appeal  
28 within the deadline mandated by 5 U.S.C. § 552(a)(6)(A)(ii); (2) not providing all non-exempt

1 information promptly as mandated by 5 U.S.C. § 552(a)(3)(A); (3) not performing an adequate,  
2 reasonable search for responsive records; (4) failing to provide a legally adequate explanation, at the  
3 administrative level, for finding information exempt from disclosure; and (5) unlawfully withholding  
4 non-exempt information. EcoRights further requests that the Court issue appropriate injunctive relief  
5 requiring NMFS to: (1) immediately release all withheld information that is not exempt from disclosure;  
6 (2) perform an additional search for documents responsive to EcoRights' request that are in NMFS's  
7 possession at the time NMFS performs its new search, including a renewed search of files at the OLE;  
8 (3) produce responsive records located in the new search within 20 working days of the Court's order;  
9 and (4) respond to EcoRights future FOIA requests and appeals in accord with the deadlines imposed by  
10 5 U.S.C. § 552(a)(6)(A) and 5 U.S.C. § 552(a)(3)(A).

11  
12 Date: June 8, 2018

Respectfully submitted,

13 /s/Patricia Linn

Patricia Linn

14 Attorney for Plaintiff

15 Ecological Rights Foundation  
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November 21, 2017

MEMORANDUM FOR:           Bobbie Parsons, IOS                           Vernon E. Curry, CEN  
                                  Pam Moulder, ESA                           Stephen Kong, EDA  
                                  Grace Agyekum, BIS                       Victor Powers, ITA  
                                  Josephine Arnold, MBDA               Catherine Fletcher, NIST  
                                  Wayne Strickland, NTIS               Stacy Cheney, NTIA  
                                  Mark Graff, NOAA                       Jennifer Piel, OIG  
                                  Louis J. Boston, PTO                   Dondi Staunton, BEA

FROM:                       Michael J. Toland, Ph.D.  
                                  Deputy Chief Freedom of Information Act (FOIA) Officer

SUBJECT:                   FOIA Request Josh Loewenstein  
                                  DOC-OS-2017-000859

The U.S. Department of Commerce’s FOIA Office, Office of Privacy and Open Government, received a request seeking:

“...copies of all documents outlined in detail below: • Any direct correspondence, including electronic correspondence, to your agency from or on behalf of Congressman Fred Upton (MI-6) between January 2011- present. Direct correspondence should include letters, emails, reports, and other relevant material• Any direct correspondence, including electronic correspondence, to your agency from or on behalf of Congressman Fred Upton (MI-6) between January 2011- present. Direct correspondence should include letters, emails, reports, and other relevant material.”

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 January 1, 2011 to March 22, 2017; records created after March 22, 2017 are not responsive to the request.
- 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 December 6, 2017.
    - 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.
- Harriette Boyd is also available to answer any questions you may have about FOIA Exemptions or the FOIA request by phone at 202-482-1485, or by email at [hboyd1@doc.gov](mailto:hboyd1@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-2017-000859**

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.H**  
**YRUM.1514447**  
**892**

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: 2018.06.11 15:48:55 -04'00'

6/11/18

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.







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7 Telephone: (415) 388-2303  
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9 Fredric Evenson (State Bar No. 198059)  
Law Offices of Fredric Evenson  
10 109 Quarry Lane  
Santa Cruz, CA 95060  
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Facsimile: (415) 358-5695  
12 Email: ecorights@earthlink.net

13 Attorneys for Plaintiff  
ECOLOGICAL RIGHTS FOUNDATION

14  
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

**REPLY 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 Reply Declaration in Support of Plaintiff’s Motion for Summary Judgment.

4 2. On May 8, 2018, I sent an email to Defendant National Marine Fisheries Service ("NMFS")'s  
5 counsel, Jennifer Wang, requesting further details about NMFS's search for records responsive to  
6 EcoRights' FOIA request. I informed Ms. Wang that documents NMFS had released in response to the  
7 FOIA request indicate the presence of NOAA Office of Law Enforcement ("OLE") documents that were  
8 not located in the search. I attached seven documents to this email. Attached hereto as Exhibit 1 is a true  
9 and correct copy of my May 8, 2018 email to Ms. Wang.

10  
11 3. Attached hereto as Exhibit 2 is a true and correct copy of an attachment to my May 8, 2018 email  
12 to Ms. Wang. This attachment is a document that NMFS released in response to EcoRights' FOIA  
13 request. NMFS numbered this document 0.7.1707.5075. This document is an email chain dated October  
14 21, 2015 from Larry Thompson, a NMFS Fishery Biologist, to a number of NMFS staff, including OLE  
15 agent Don Tanner. I added the yellow highlighting to the document to direct Ms. Wang's attention to the  
16 pertinent parts of the email chain. The emails concern the stranding of nine Chinook salmon in a pool  
17 below the Narrows 2 powerhouse and an attempt to rescue the fish. In the email Mr. Thompson  
18 expresses concern that the fish may be ESA-listed spring-run Chinook. This document indicates Mr.  
19 Thompson contacted Agent Tanner about the "potential unauthorized take of ESA-listed species" and  
20 intended to "continue to keep in touch with him" about the stranding and attempted rescue.

21  
22 4. Attached hereto as Exhibit 3 is a true and correct copy of an attachment to my May 8, 2018 email  
23 to Ms. Wang. This attachment is a document that NMFS released in response to EcoRights' FOIA  
24 request. NMFS numbered this document 0.7.1707.5102. This document is an email chain dated October  
25 21, 2015. I added the yellow highlighting to the document to direct Ms. Wang's attention to the pertinent  
26 part of the email chain. The email at the top of the chain is from Larry Thompson to Anna Ewing, who I  
27  
28

1 believe was, at the time, with the California Department of Fish and Wildlife ("CDFW"). The email  
2 concerns the stranding of Chinook salmon in a pool below the Narrows 2 powerhouse, the same  
3 stranding event discussed in the Exhibit 2 email chain. Mr. Thompson states "I just spoke with Don  
4 Tanner (NOAA Law Enforcement) and he asked me if CDFW has been contacted about this event. This  
5 is why I am forwarding this email to you."

6 5. Attached hereto as Exhibit 4 is a true and correct copy of an attachment to my May 8, 2018 email  
7 to Ms. Wang. This attachment is a document that NMFS released in response to EcoRights' FOIA  
8 request. NMFS numbered this document 0.7.1707.5300. This document is a chain of emails between  
9 October 22, 2015 and October 27, 2015 from Larry Thompson, NMFS Fishery Biologist, to a number of  
10 NMFS staff including OLE agent Don Tanner. I added the yellow highlighting to the document to direct  
11 Ms. Wang's attention to the pertinent part of the email chain. This document pertains to the same fish  
12 stranding event and attempted rescue discussed in Exhibits 2 and 3. Mr. Thompson states, "CDFW  
13 discovered 6 adult Chinook salmon carcasses along the edge of the same pool, which they recovered for  
14 later analysis."  
15

16  
17 6. The emails in Exhibits 2, 3, and 4 indicate that Mr. Thompson spoke to Agent Tanner about the  
18 fish stranding event that occurred in October 2015 and continued to follow up with him about the  
19 attempted rescue of stranded fish. The emails indicate Agent Tanner told Mr. Thompson to contact the  
20 CDFW about the stranding, and after the stranding CDFW collected salmon carcass remains. These  
21 emails indicate some OLE record keeping of this event and sharing of information between CDFW and  
22 the OLE. However, OLE did not release any records of its own about the October 2015 stranding event  
23 and fish mortality, although Mr. Thompson indicated he contacted Agent Tanner numerous times and  
24 received direction from him about how to proceed.  
25

26 7. One of the attachments to my May 8, 2018 email to Ms. Wang. was Exhibit B from EcoRights'  
27 motion for summary judgment. *See* Dkt. 12-3. This document was released by NMFS in response to  
28

1 EcoRights' FOIA request. This document is an email chain from Larry Thompson to OLE agent Don  
2 Tanner. I added the yellow highlighting in this document to direct Ms. Wang's attention to the pertinent  
3 parts of the email chain. Although, Agent Tanner's name is redacted in the version of this email chain  
4 that was submitted as Exhibit B, and that was attached to my May 8, 2018 email, NMFS has now  
5 released this document in full, which reveals that Agent Tanner was the person whose name was  
6 redacted in these emails. *See* Dkt. 26-1 at 11-12. The email chain contains a February 13, 2014 email  
7 from Mr. Thompson to Agent Tanner pertaining to "Chinook salmon stranding events downstream of  
8 Englebright Dam that you and I discussed in November 2013." Mr. Thompson indicates he has written a  
9 letter to FERC about the fish stranding events which includes a request for a response from FERC about  
10 salmon carcass remains that have been collected and other evidence. The email chain also contains  
11 Agent Tanner's reply to Mr. Thompson in which he indicates he is keeping track of Mr. Thompson's  
12 reports.  
13

14 8. Attached hereto as Exhibit 5 is a true and correct copy of an attachment to my May 8, 2018 email  
15 to Ms. Wang. This attachment is a portion of one of the documents that NMFS released in response to  
16 EcoRights' FOIA request. NMFS numbered this document 0.7.1707.5394. I added the yellow  
17 highlighting to direct Ms. Wang's attention to the pertinent parts of the document which is a February  
18 2014 letter from NMFS to FERC about fish stranding events that had occurred in the vicinity of the  
19 Narrows 2 powerhouse. The letter states that "NOAA Law Enforcement has advised our staff to request  
20 that FERC's compliance staff determine if any salmon carcass remains have been collected and retained  
21 by an entity. We ask that you provide this information to NMFS, following your interviews, data  
22 gathering, and document reviews associated with your inquiry."  
23

24 9. Taken together, the emails in Exhibit B and the letter in Exhibit 5 indicate, at the very least, the  
25 presence of OLE record keeping of the 2013 fish strandings and potential collection of physical  
26 evidence. However, OLE's search did not locate any records that demonstrate Agent Tanner, or anyone  
27

1 else at OLE, is keeping track of these fish strandings as Agent Tanner indicated in his February 2014  
2 email that he is doing.

3 10. EcoRights is a public advocacy group that intends to continue its advocacy work on behalf of  
4 ESA-listed anadromous fish that are within NMFS's jurisdiction. EcoRights has sent NMFS several  
5 FOIA requests in the past concerning ESA-listed anadromous fish, and thus will almost certainly send  
6 additional FOIA requests to NMFS in the future.

7 11. In this case, only NMFS has access to the material facts related to the adequacy of its search.  
8 Without discovery, EcoRights is limited to the description of the search in the Graff declaration.  
9

10 12. I declare under penalty of perjury under the laws of the United States that the foregoing is true  
11 and correct, and that this Declaration was executed on June 8, 2018 in Mill Valley, California.  
12

13 /s/ Patricia Linn  
14 Patricia Linn  
15 Counsel for Plaintiff  
16 Ecological Rights Foundation  
17  
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20  
21  
22  
23  
24  
25  
26  
27

Linn Reply Declaration

# EXHIBIT 1





Patricia Linn &lt;patricialinn19@gmail.com&gt;

---

**ERF v. NMFS**

---

Patricia Linn <patricialinn19@gmail.com>  
To: "Wang, Jennifer (USACAN)" <Jennifer.S.Wang@usdoj.gov>  
Cc: Chris Sproul <csproul@enviroadvocates.com>

Tue, May 8, 2018 at 6:53 PM

Jennifer,

Thank you for providing the list of NMFS search terms and parameters. However, further details are still needed to assess whether the searches were adequate. **First, it appears all searches were conducted electronically, using key words to search network drives. Were other record systems searched** for handwritten notes, audio recordings, physical evidence of dead salmon or steelhead, types of information which may not be in the computer systems that were searched? EcoRights has requested records back to January 1, 2000. Were paper records searched? EcoRights would like to know which records systems were searched and who searched which records systems. Such information describing the search would be required in affidavits to the court.

**Second, EcoRights suggests the following additional search terms** relevant to take of Yuba River fish species: Yuba County Water Agency, YCWA, FERC, poach, and impinge.

**Third, documents that NMFS released indicate the presence of other OLE documents that were not located in the search (see attached):**

1) an email from Larry Thompson from the NMFS Hydro staff discussing contacting OLE agent, Don Tanner, in November 2013 about fish strandings, a letter from NMFS to FERC in February 2014 which states the OLE advised NMFS staff to ask the FERC Compliance division if any entity has collected and retained salmon carcass remains as a result of the strandings and to provide that information to NMFS, and a February 2014 email from Don Tanner to Larry Thompson indicating Mr. Tanner is keeping track of the stranding reports. Taken together these 3 documents indicate, at the very least, the presence of OLE record keeping of the 2013 fish strandings and potential collection of evidence;

2) an email from Larry Thompson indicating that he and Don Tanner went on a site visit of the Yuba River in September 2014 to investigate poaching and observe hazards causing fish strandings near Narrows 2. If Mr. Tanner went on a site visit it stands to reason there is some record of his observations, either handwritten notes, photographs, and/or a followup memo or report;

3) a series of emails on October 21, 2015 that Don Tanner was copied on, about a fish stranding in October 2015 indicating Larry Thompson spoke to Mr. Tanner about the event and continued to follow up with him about the attempted rescue of stranded fish. The emails indicate Mr. Tanner told Mr. Thompson to contact CDFW about the stranding, and after the stranding CDFW collected salmon carcass remains. These emails indicate some OLE record keeping of this event and sharing of information between CDFW and the OLE.

Despite these indications that OLE has been keeping track of strandings caused by Narrows 1 and 2, advising NMFS staff about how to proceed in the wake of the strandings, seeking evidence of dead fish, investigating poaching on the Yuba River, and going on a site visit to the Yuba, the OLE asserts it does not have a single record of its own about these incidents of unauthorized take.

Given these concerns is NMFS amenable to doing another search? Please let me know how you would like to proceed. I am available tomorrow until noon and most of the day on Thursday and Friday.


Patti

Law Office of Patricia Linn  
115 Oakdale Avenue  
Mill Valley, CA 94941  
(415) 388-2303

[Quoted text hidden]


---

**7 attachments**

 **0.7.1707.5075-I'll continue to stay in touch with Don.pdf**  
111K

 **0.7.1707.5102-Thompson email re. contacting enforcement.pdf**  
94K

 **0.7.1707.5300-LT email chain re. six dead fish.pdf**  
109K

 **filed Ex. H.pdf**  
534K

 **0.7.1707.5394-NMFS letter re. 2013 strandings.pdf**  
280K

 **filed Ex. A.pdf**  
106K

 **filed Ex. B.pdf**  
119K

Linn Reply Declaration

# EXHIBIT 2

---

**From:** Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>  
**Sent:** Wednesday, October 21, 2015 12:58 PM  
**To:** Howard Brown - NOAA Federal  
**Cc:** Gary Sprague - NOAA Federal; Tom Holley; Jeff McLain - NOAA Federal; Jonathan Ambrose - NOAA Federal; Edmondson, Steve; John Wooster; Don Tanner - NOAA Federal; John Aedo  
**Subject:** Re: Potential fish rescue on the Yuba

Hi HOward,

I'll continue to keep in touch with Don, and follow up to see what CDFW plans and carries out.

Without having to contact the Corps or YCWA, the area in question can be viewed from a lookout above Englebright Dam. I am contemplating a visit tomorrow, with camera and binoculars in hand...

LT

On Wed, Oct 21, 2015 at 11:19 AM, Howard Brown - NOAA Federal <[howard.brown@noaa.gov](mailto:howard.brown@noaa.gov)> wrote:  
Thanks Gary. I appreciate the follow up and agree that it is CDFW's hands from here out.  
Howard

Sent from my iPhone

On Oct 21, 2015, at 11:17 AM, Gary Sprague - NOAA Federal <[gary.sprague@noaa.gov](mailto:gary.sprague@noaa.gov)> wrote:

Hello Tom,  
I do not have the flow details. Geoff said that the bypass operated longer than planned, because of equipment difficulties at Narrows I.

At this point we are leaving the decision on any action(s) up to CDFW. They have indicated they will have people on site today.  
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](mailto:gary.sprague@noaa.gov)  
<http://www.westcoast.fisheries.noaa.gov/>

On Wed, Oct 21, 2015 at 10:59 AM, Tom Holley <[thomas.holley@noaa.gov](mailto:thomas.holley@noaa.gov)> wrote:  
Gary,

I would also request from Geoff flow records from all the Narrows facilities over the past two months. From my current understanding none of the facilities, including the full bypass, have been used since September 9. If that is the case then the fish were attracted to the Narrows 2 bypass pool by nothing other than seepage from Englebright- a situation that none of the potential remedies will stop from happening again, regardless of how these fish are rescued.

Thanks,

Tom

On Wed, Oct 21, 2015 at 10:27 AM, Gary Sprague - NOAA Federal <[gary.sprague@noaa.gov](mailto:gary.sprague@noaa.gov)> wrote:

No, this is an adjacent pool. This pool is where water is discharged, that result in rock be washed up and creating the pool project we recently consulted on.

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](mailto:gary.sprague@noaa.gov)  
<http://www.westcoast.fisheries.noaa.gov/>

On Wed, Oct 21, 2015 at 10:04 AM, Howard Brown - NOAA Federal <[howard.brown@noaa.gov](mailto:howard.brown@noaa.gov)> wrote:

Thanks for the heads up on this Gary and Jeff for the guidance on fish rescues. I will offer to follow up with Collin Purdy on that. Gary, is this the same pool where we just completed the consultation to fill it in? I am wondering if this might be a good opportunity to move the fish out and fill in the pool.

Howard

Sent from my iPhone

On Oct 21, 2015, at 9:51 AM, Jeff McLain - NOAA Federal <[jeff.mclain@noaa.gov](mailto:jeff.mclain@noaa.gov)> wrote:

Hi all - I am in Portland and on e-mail. I would pursue your FERC-related notifications as you suggest. Regarding the potential rescue, I would start by notifying your DFW contacts as they technically have the lead on fish rescues. They have the staff and expertise. They will need to go through a bit of an internal process, including the development of a rescue plan. If they agree to pursue a rescue, we need to approve if there are listed species present. Easy enough to use

the 4(d) rule if they are threatened. I am attaching the fish rescue agreement. I am learning to like the two-agency approach to these. I know they take more coordination, but fish rescues are so controversial. It is nice to get us fish agencies on the same page...Let me know if you have any questions.

**Jeffrey McLain**

*Division Manager*  
NOAA Fisheries West Coast Region  
U.S. Department of Commerce  
Office: [916 930-5647](tel:9169305647)  
Mobile: [916 600-5410](tel:9166005410)  
[Jeff.McLain@noaa.gov](mailto:Jeff.McLain@noaa.gov)

**Find us online**

[www.westcoast.fisheries.noaa.gov](http://www.westcoast.fisheries.noaa.gov)

On Wed, Oct 21, 2015 at 9:19 AM, Larry Thompson - NOAA Federal  
<[larry.thompson@noaa.gov](mailto:larry.thompson@noaa.gov)> wrote:

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](mailto: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](mailto: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)  
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[larry.thompson@noaa.gov](mailto:larry.thompson@noaa.gov)

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<5.19.14 CA Interagency Fish Rescue Agreement FINAL.pdf>

--

Tom Holley | Hydrologist  
NOAA Fisheries West Coast Region  
U.S. Department of Commerce  
Office: [\(916\) 930-5592](tel:916-930-5592)  
[thomas.holley@noaa.gov](mailto:thomas.holley@noaa.gov)

--

**Larry Thompson**

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Linn Reply Declaration

# EXHIBIT 3

---

**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  
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[gary.sprague@noaa.gov](mailto:gary.sprague@noaa.gov)  
<http://www.westcoast.fisheries.noaa.gov/>



--

**Larry Thompson**  
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--

**Larry Thompson**

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Linn Reply Declaration

# EXHIBIT 4

---

**From:** Larry Thompson - NOAA Federal <larry.thompson@noaa.gov>  
**Sent:** Tuesday, October 27, 2015 12:05 PM  
**To:** Maria Rea - NOAA Federal; Jeff McLain - NOAA Federal; Steve Edmondson - NOAA Federal; Thomas Holley - NOAA Federal; John Wooster - NOAA Federal; Don Tanner - NOAA Federal; Jonathan Ambrose - NOAA Federal; William Foster - NOAA Federal; Howard Brown - NOAA Federal; Gary Sprague - NOAA Federal  
**Subject:** Fwd: Status Update on Full Bypass Shutdown at Narrows 2 PH on Lower Yuba River

To all:

I received a phone call this morning from CDFW, and the conversation included an update on yesterday's fish rescue (see background below). While more formal notification may be coming from CDFW, I wanted you to know:

CDFW biologists discovered only 2 live adult Chinook salmon stranded in the isolated pool downstream of Englebright. They seined/netted these fish, and rescued them by placing them in the Yuba River downstream.

CDFW discovered 6 adult Chinook salmon carcasses along the edge of the same pool, which they recovered for later analysis.

I plan to await CDFW's written notification before reporting anything to FERC or Corps' personnel.

Regards,

Larry

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

**From:** Purdy, Colin@Wildlife <Colin.Purdy@wildlife.ca.gov>  
**Date:** Mon, Oct 26, 2015 at 8:15 AM  
**Subject:** RE: Status Update on Full Bypass Shutdown at Narrows 2 PH on Lower Yuba River  
**To:** Geoff Rabone <grabone@ycwa.com>, "Rea, Maria@NOAA" <Maria.Rea@noaa.gov>, Jeff McClain <jeff.mclain@noaa.gov>, "steve.edmondson@noaa.gov" <steve.edmondson@noaa.gov>, "Larry.Thompson@noaa.gov" <Larry.Thompson@noaa.gov>, "Debbie.Giglio@fws.gov" <Debbie.Giglio@fws.gov>, "Thaler, Parker@Waterboards" <parker.thaler@waterboards.ca.gov>, "Lynch, MaryLisa@Wildlife" <MaryLisa.Lynch@wildlife.ca.gov>, "Ewing, Anna@Wildlife" <Anna.Ewing@wildlife.ca.gov>, "Hoobler, Sean@Wildlife" <Sean.Hoobler@wildlife.ca.gov>, "Tierney, Marilyn -FS" <mtierney@fs.fed.us>, "Gary.Sprague@noaa.gov" <Gary.Sprague@noaa.gov>  
**Cc:** "Aikens, Curt@YCWA" <caikens@ycwa.com>, "Lynch, Jim" <Jim.Lynch@hdrinc.com>, "Passovoy, Joel" <Joel.Passovoy@hdrinc.com>, Maury Miller <mmiller@ycwa.com>, Marcel Bos <mbos@ycwa.com>

Good morning Geoff,

After evaluating the situation we've decided to proceed with a fish rescue. The main drivers in this are the small number of adults returning to the Yuba this year and limited ability of the stranded fish to successfully

spawn. Additionally, as it looks like the pool became isolated around the 6<sup>th</sup> of October, there is the potential that these are spring-run Chinook salmon.

If possible we would like to move forward with the rescue today. I'm hoping you can help provide access to the dam. I know there is a gate we'll need to get through. I'll try calling you shortly.

Thanks,

Colin Purdy, M.S.

Supervisor - Low Elevation Fisheries

CA Department of Fish and Wildlife - North Central Region

1701 Nimbus Rd., Rancho Cordova, CA I Phone [\(916\) 704-2154](tel:9167042154) I Fax [\(916\) 358-2912](tel:9163582912)

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**From:** Purdy, Colin@Wildlife

**Sent:** Thursday, October 22, 2015 12:14 PM

**To:** 'Geoff Rabone'; Rea, Maria@NOAA; Jeff McClain; [steve.edmondson@noaa.gov](mailto:steve.edmondson@noaa.gov); [Larry.Thompson@noaa.gov](mailto:Larry.Thompson@noaa.gov); [Debbie.Giglio@fws.gov](mailto:Debbie.Giglio@fws.gov); Thaler, Parker@Waterboards; Lynch, MaryLisa@Wildlife; Ewing, Anna@Wildlife; Hoobler, Sean@Wildlife; Tierney, Marilyn -FS; [Gary.Sprague@noaa.gov](mailto:Gary.Sprague@noaa.gov)

**Cc:** Aikens, Curt@YCWA; Lynch, Jim; Passovoy, Joel; Maury Miller; Marcel Bos

**Subject:** RE: Status Update on Full Bypass Shutdown at Narrows 2 PH on Lower Yuba River

Geoff,

Thanks for sending this information around and I appreciate the coordination. As I mentioned on the phone yesterday, we are still evaluating next steps. Just to clarify, based on the initial site visit, it did not appear there was an imminent threat of fish perishing. There still may be a need for intervention and we will let you know as this develops.

Thanks,

Colin Purdy, M.S.

Supervisor - Low Elevation Fisheries

CA Department of Fish and Wildlife - North Central Region

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**From:** Geoff Rabone [<mailto:grabone@ycwa.com>]

**Sent:** Thursday, October 22, 2015 8:37 AM

**To:** Rea, Maria@NOAA; Jeff McClain; [steve.edmondson@noaa.gov](mailto:steve.edmondson@noaa.gov); [Larry.Thompson@noaa.gov](mailto:Larry.Thompson@noaa.gov); [Debbie.Giglio@fws.gov](mailto:Debbie.Giglio@fws.gov); Purdy, Colin@Wildlife; Thaler, Parker@Waterboards; Lynch, MaryLisa@Wildlife; Ewing, Anna@Wildlife; Hoobler, Sean@Wildlife; Tierney, Marilyn -FS; [Gary.Sprague@noaa.gov](mailto:Gary.Sprague@noaa.gov)

**Cc:** Aikens, Curt@YCWA; Lynch, Jim; Passovoy, Joel; Maury Miller; Marcel Bos; Geoff Rabone

**Subject:** Status Update on Full Bypass Shutdown at Narrows 2 PH on Lower Yuba River

Hello,

I appreciate everyone's interest and assistance in evaluating and advising YCWA about a small group of Chinook salmon that are currently residing in a pool directly below the Full Bypass at our Narrows 2 Powerhouse. HDR Engineering helped YCWA prepare this memo to bring everyone up to speed and provide the currently available information.

As background, PG&E's Narrows (1) Powerhouse (PH) and YCWA's Narrows 2 PH typically undergo outages in the fall when flows are generally low. This year, both outages were extended, and Narrows 2 is currently offline while new parts are being obtained. Because Narrows 2 was not operating, and while Narrows 1 was still in outage, all flow in the lower Yuba River was being provided through the Narrows 2 Full Bypass. Now Narrows 1 is back online, after extended repairs and testing. As Narrows 1 was put back into service and testing was performed, the Narrows 1 PH took on more flow. Flow through the Narrows 2 Full Bypass was used to supplement flows through the Narrows 1 PH during testing. Once testing was successfully completed, flow was transferred over to Narrows 1 completely. That brings you up to the point in time that the attached status report begins. I am out in the field today, but am happy to provide more explanation or receive any advice you care to offer, when I return.

--

**Larry Thompson**

*Fishery Biologist*

*NOAA Fisheries West Coast Region*

*U.S. Department of Commerce*



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Linn Reply Declaration

# EXHIBIT 5



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE

West Coast Region

9

5

Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street NE, Washington, D.C. 20426.

RE: NMFS Response to the Information Request of the Commission's Division of Hydropower Administration and the Response of the Yuba County Water Agency, Regarding Salmon Stranding Incidents Downstream of the Narrows 2 Development, Yuba River Development Project, P-2246-061.

Dear Secretary Bose,

NOAA's National Marine Fisheries Service (NMFS) has reviewed the request (November 25, 2013) of the Federal Energy Regulatory Commission regarding salmon stranding in the lower Yuba River, downstream of Englebright Dam and near the Narrows 2 Development facilities operated under a FERC license for the Yuba River Project (P-2246).

Our comments and suggestions are enclosed.

If you have questions about NMFS' response, please contact Mr. Larry Thompson, at 916-930-3613.

Sincerely,

Steve Edmondson  
Hydropower Program Supervisor  
West Coast Region

Enclosures

cc: Maria Rea, Don Tanner, Steve Edmondson, Howard Brown, NMFS Sacramento, CA

NOAA's National Marine Fisheries Service (NMFS) has reviewed the request (November 25, 2013) of the Federal Energy Regulatory Commission (Commission or FERC) regarding salmon stranding in the lower Yuba River, downstream of Englebright Dam and near the Narrows 2 Development facilities operated under a FERC license for the Yuba River Project (P-2246).

Background:

FERC's information request was prompted by an email from NMFS (Larry Thompson) to FERC staff (Ken Hogan) on November 1, 2013 (attached). Mr. Thompson's email was not a detailed report of the incident(s), but rather a notification to FERC that NMFS had become aware of salmon strandings -- events that had not been reported to our agency by FERC staff or by Yuba County Water Agency (YCWA), the Project licensee. Aside from notifying FERC, a second purpose of NMFS' notification was to gain a greater understanding about how Project operations played a role in the salmon strandings. Mr. Hogan responded directly to Mr. Thompson (by telephone on November 4, 2013), informing NMFS that he considered the issue to be one of existing license compliance and therefore had contacted Mr. John Aedo, Division of Hydropower Administration and Compliance.

NMFS' concern is that two Endangered Species Act (ESA)-listed species (spring-run Chinook salmon and Central Valley steelhead), as well as their ESA-designated critical habitats, are directly influenced by the Project facilities in question (the Narrows 2 Powerhouse, Narrows 2 Partial Bypass, and Full Flow Bypass) as well as by the Narrows Powerhouse of the Narrows Project (P-1403). Fall-run Chinook salmon are also found in this area, which is also identified as "essential fish habitat" (Magnuson-Stevens Fishery Management Act) for Chinook salmon. A third ESA-listed species, the North American green sturgeon, is not known to currently exist upstream of Daguerre Dam (~12 miles downstream), but could in the future inhabit the area where the strandings occurred. Therefore, understanding the environmental effects of the Project's facilities and operations in the area directly downstream of Englebright Dam appears relevant to both: 1) the suitability of existing license conditions for anadromous fish resources; and 2) the development of new conditions for the new FERC license sought by YCWA; the license expiration date is April 30, 2016, and an Integrated Licensing Process is currently underway.

Prior to the commissioning of the Full Flow Bypass into service in January, 2007, when the Narrows 2 Powerhouse was shut down the Narrows 2 Partial Bypass was capable of releasing a maximum of 650 cubic feet per second (cfs) of flow. Emergency shutdowns at the Narrows 2 Powerhouse caused by lightning or other acts of nature could reduce flows into the lower Yuba River until the Powerhouse could be brought back on-line. To improve the situation, the CALFED program financed approximately \$8.5 million of the Full Flow Bypass project's costs through California Resources Agency grants, while YCWA financed the local share of more than \$4 million. The Full Flow Bypass was envisioned to "ensure a continuous release of cold water flows into the lower Yuba River for protected fall-run Chinook salmon, spring run Chinook salmon and steelhead, in the event of emergency outages or during scheduled maintenance." (See attached CALFED Fact Sheet).



We provide the following comments regarding the Commission's request, and the YCWA response.

- 1) Until notified by NMFS, FERC's Division of Hydropower Administration and Compliance was unaware of salmon strandings downstream of the Englebright Dam, near and subject to the operations of the Project's Narrows 2 Powerhouse, Narrows 2 Partial Bypass, and Full Flow Bypass facilities. This is a shortcoming of the existing license in need of correction. YCWA's response states a willingness to discuss procedures for contacting NMFS when YCWA observes stranding or other potential harm to anadromous fishes. We strongly recommend FERC lead this discussion, to assure that the lead agency (FERC) is notified, as well as NMFS. In any case, both FERC and NMFS should be notified; protocols should be established to account for cases where agency personnel are not present to receive notification in real-time, or person-to-person.
- 2) The Project's Narrows 2 Powerhouse, Narrows 2 Partial Bypass, and Full Flow Bypass facilities appear to be operated for purposes that FERC did not envision in its Order Modifying and Approving Amendment of License (November 22, 2005), issued to amend the Project license to include the installation of the Full Flow Bypass. This can be observed by reviewing the descriptions of Project operations in YCWA's response (including footnote 6, page 3), which do not correlate well with the following text from the 2005 Order:

"Three types of shutdowns can take place at the Narrows 2 development. Short-term emergency shutdowns can be caused by momentary failure of the PG&E transmission line as a result of interference by birds, fire, lightning, storm, failure of transmission equipment, or by a momentary plant malfunction. Flows can be reduced from 3,400 cfs to 0-650 cfs for a period ranging from about a minute to more than an hour. Although corrective actions have been taken by both the licensee and PG&E to minimize shutdowns of this type, they still can occur. Long-term emergency shutdowns can result from catastrophic failure of the PG&E transmission system that links the plant to the transmission grid or from major component failure at the plant. Flows through the plant can be reduced from 3,400 cfs to 0-650 cfs, depending on whether the malfunction allows the bypass to be operated. Such shutdowns are rare (two in the last 30 years) but could last from days to months. Partial downstream flow can be restored through the PG&E Narrows 1 Powerhouse within about 30-60 minutes, and full downstream flow can be resumed in 1-2 days by allowing water to spill over the top of Englebright Dam. High spill rates between May and October, however, can increase downstream temperatures. Maintenance activity shutdowns are required for generator brush replacement, which in the past involved a 6-hour shutdown two or three times per year, and annual maintenance, which typically requires a shutdown of 2-3 weeks or longer (in some instances, months) if major maintenance is performed. In recent years, maintenance activities typically have been scheduled during a time when no impact would result on

downstream flows. During brush replacement, the licensee can open the 650-cfs bypass valve and can request that PG&E operate the Narrows 1 Project to maintain downstream flow when flow is 1,350 cfs or less. During the annual maintenance period, the bypass valve usually cannot be operated, so downstream flow is entirely dependent on Narrows 1 releases or Englebright Reservoir spill. In recent years, annual maintenance has been conducted when Narrows 1 can handle the entire flow or during the winter so that the river flow can be held relatively constant with cool-water spills over Englebright Dam.” (2005 FERC Order, p. 3). [Underline emphasis added].

Therefore, it appears FERC envisioned operations of the Full Bypass for “shutdowns” and described three types: 1) short-term emergency shutdowns; 2) long-term emergency shutdowns; and 3) maintenance activity shutdowns. These shutdown types do not include, for example, shutting down or bypassing flows at the Narrows 2 Powerhouse so that PG&E (licensee for the Narrows Project, P-1403) may generate electricity at the Narrows 1 Powerhouse that qualifies for California Renewable Portfolio Standard credit and revenue – or for other purposes. We suggest FERC request additional information regarding the uses of the Project, to understand how and when it is operated in its various configurations.

- 3) The 2005 FERC Order Modifying and Approving Amendment of License (November 22, 2005) was also issued to amend the Project license to implement more stringent ramping and flow fluctuation criteria for flows downstream of the Narrows 2 development. However, FERC cannot monitor (or have knowledge of) the full range of Project operations or the resulting flow fluctuations because instream flow compliance is determined at a flow gaging station well downstream of the Project’s Narrows 2 Powerhouse, Narrows 2 Partial Bypass, and Full Flow Bypass facilities (and those of the Narrows Project, P-1403). There appears to be no FERC monitoring, recording, or reporting of flows, of transitions between the Narrows 2 Development facilities, of flow ramping, or of other operational details with respect to these facilities. Under this practice, FERC’s Compliance staff cannot possibly understand in a meaningful way when or how these Project facilities are locally operated, and when and how they are affecting environmental conditions for anadromous fish resources downstream of the Narrows 2 Development and upstream of the gaging station.
- 4) YCWA’s Response (p. 3) suggests that additional information is available about the flows through the Project facilities in question (e.g., the penstock acoustic velocity meter, Narrows 2 Powerhouse generation records, licensee operator log that records which bypass is used and when, etc.). FERC should obtain this existing information, and make use of it to understand how the Project is operated in the vicinity below Englebright Dam, and to determine the adjustments needed to the existing license.
- 5) Due to the close coordination of Project operations with those of the Narrows Project (P-1403),

flow data through the Narrows 1 Powerhouse may be needed for the FERC assessments suggested above. YCWA's response suggests that Narrows 1 Powerhouse flow information is available from PG&E (licensee for P-1403). We suggest that consultation with PG&E may be needed to resolve the stranding issues, not only due to their licensed operations at the Narrows 1 Powerhouse, but because YCWA's response indicates (footnote 6, p. 3) that it is PG&E's decisions under a power purchase agreement with YCWA that often dictate how and when flows impounded in the U.S. Army Corps of Engineers' Englebright Reservoir (by its Englebright Dam) are directed through YCWA's Narrows 2 Powerhouse, Narrows 2 Partial Bypass, and Full Flow Bypass facilities, as well as through the Narrows 1 Powerhouse. There may be alternatives to obtaining flow information for Narrows 1 Powerhouse via monitoring by the Corps that may (or could) occur within their Englebright Dam outlet works (to which PG&E's Narrows Project works are appended) (see attached 1994 Agreement for Operation and Maintenance of Narrows #1 Hydroelectric Project Between the United States of America and Pacific Gas and Electric Company, required by Article 102, of the license for P-1403).

- 6) The information discussed in #'s 4 and 5 above would inform FERC's future decisions pertinent to "reopener" Article 411 of the Narrows Project because the License Order for P-1403 recognized that P-2246 and P-1403 operate jointly and both affect the fish resources of the lower Yuba River. For this reason, the FERC Order includes Article 411, which "reopens PG&E's license for the limited purpose of considering the role of Project 1403 in maintaining instream flows in the lower Yuba River whenever the license for Project 2246 expires, is reopened, or is amended regarding instream flows in the lower Yuba River." (FERC Order Issuing New License, February 11, 1993). We also suggest the information would be useful to other resource agencies and interested parties to understand lower Yuba hydro operations, inform the development of terms or conditions for the new license due in 2016, and inform future ESA consultation(s) between FERC and NMFS, including over how these coordinated operations may change in the future, under any new power purchase contract(s).
- 7) The existing license requires YCWA to take measures to prevent or minimize salmon stranding. We recommend FERC staff review YCWA's response to identify the preventive measures taken during the various Project operational procedures, and report these back to NMFS. We could not fully understand what ramping or transition measures occurred on the various dates in October, 2013, to prevent stranding, but we noted that complete flow transitions between facilities often occurred over very short time frames, such as 15 minutes or less. We strongly recommend FERC evaluate these operations with the intent of placing new conditions in the existing license. This is because sufficient information now exists to indicate that Project facilities and operations are causing adverse biological effects to salmon in the vicinity below Englebright Dam (but the details and frequency of the effects are sketchy).
- 8) To assist your understanding of the current and past salmon stranding incidents, and the related



Project operations that may have caused or contributed, we suggest FERC staff will need to review (at the least) several documents, including:

- a. YCWA's Interim Technical Memorandum (TM) 7-11, "Fish Behavior and Hydraulics Near the Narrows 2 Powerhouse" (dated November 2012);
- b. NMFS' "Comments on the Initial Study Report..." filed January 28, 2013, in the FERC docket for P-2246.
- c. The YCWA response of November 25, 2013.
- d. YCWA's Updated Study Report (dated December 2013)
- e. YCWA's Draft License Application (filed December 2, 2013)

Given our experience reviewing these documents (thus far), we suggest FERC press YCWA to gain clarity on the varied and complex terminology they use in these documents and reports. In our view, FERC will need to understand and differentiate between these terms (such as between "observation" and "incidental observation"; or between "planned shutdown" and "forced shutdown"; or between a shutdown and a "planned operational event"). Results of studies and observations will be found to be separated for "operational events" versus "planned outages" versus "unplanned outages." FERC staff will find information about the strandings and associated operations across hundreds of pages of these documents. We suggest that you will need to understand the terminology to understand why the information is presented in so many different tables in different locations, and in text discussions (but not tables) – this will be required in order for your staff to locate and interpret the meaning of the information in the context of understanding the Project's effects on anadromous fish resources.

- 9) Technical Memorandum (TM) 7-11. We recommend FERC staff begin your review with Figure 2.4-1, because it provides an aerial view of the vicinity downstream of Englebright Dam, and is helpful to understand places near the facilities where salmon could be stranded. These include the area along the steep rocky shoreline of the area labeled "Narrows 2 Pool." From Figure 2.4-1, it is clear this area is directly downstream of the facilities labeled Narrows 2 Powerhouse "Draft Tube Outlet" and the Narrows 2 "Partial Bypass." This shoreline is inundated to various degrees as the Partial Bypass is operated, and then dewatered when its flow is reduced or shut off – and therefore is a stranding hazard area. FERC's goal should be to understand what measures licensee is undertaking to prevent or minimize potential stranding in this area. A second area of concern is the depression labeled "Bypass Pool." This pool is "perched" above the Narrows 2 Pool, and is inundated and filled to various degrees as the facility labeled "Full Bypass" is operated. Naturally, pool conditions change (potentially rapidly) as flows through the Full Bypass are reduced or shut off. As is the case with the area downstream of the Partial Bypass, the Bypass Pool area is directly downstream of another Project facility, the Full Bypass, and clearly represents a stranding hazard area. FERC's goal should be to understand what measures licensee is undertaking to prevent or minimize potential stranding in this area.

We also suggest review of TM 7-11, Table 3.3-2. "Presence or absence of fish observed during snorkel surveys at Narrows 2 Powerhouse in 2012 by event and location." (p. 19-20). It contains entries indicating that Chinook salmon were observed in the "Bypass Pool" on July 18 and October 25, 2012; there may be text explaining this somewhere in TM 7-11, but it is unclear to NMFS how, or when, the salmon exited the Bypass Pool when flow conditions associated with Project operations changed. The Bypass Pool observations were primarily from snorkeling surveys, so information about salmon presence was not obtained when the Full Bypass was on or if an operational change occurred, due to safety concerns (p. 20). However, even an incomplete monitoring record indicates that on two occasions in 2012, salmon were present in a known stranding hazard area that is influenced by Project operations.

Please also see the text on (p. 19, footnote 6) stating, "YCWA does not maintain on record a distinction of whether the full or partial bypass was used, but rather the volume of water bypassed." This view has also been conveyed orally (by Mr. Geoff Rabone, YCWA, and James Lynch, HDR, consultant to YCWA) to NMFS (Larry Thompson) in discussions during ILP meetings. This information appears inconsistent with text in YCWA's response (p. ): "YCWA estimates flow through the Narrows 2 Powerhouse, Partial Bypass and Full Bypass based on: 1) recorded flow at the AVM; 2) records of Narrows 2 Powerhouse generation; and 3) YCWA operators' log that records which bypass is used and when." We suggest FERC obtain clarification on this very important point, as emphasized earlier in this letter.

Please note text on p. 24, that on October 12, 2012, "The full bypass was open during the snorkeling event so only the Narrows 2 Pool was surveyed. Instantaneous temperature and DO in the Narrows 2 Pool were 11.8°C and 11.3 mg/L, respectively. Discharge from the bypass valve was 329 cfs on the day of the survey. Two full snorkel passes in the Narrows 2 Pool did not observe any Chinook salmon." This suggests that Chinook may have moved upstream into the Full Bypass pool or flows, as it would be unusual for no Chinook to hold downstream of the Narrows 2 Powerhouse, unless no flows were released from that facility.

Note also text on p. 24, that on October 25, 2012, an operational change from the partial bypass to the full bypass valve occurred (but no snorkeling occurred in the Dam Pool and Bypass Pool due to safety concerns): "Before the operational change, approximately 25 Chinook salmon were observed in the Bypass Pool from the powerhouse deck overlooking the pool. As flow was transferred from the partial bypass to the full bypass, the water became too rough to visually observe what the Chinook salmon did in response to the flow change. Approximately an hour following the flow change from the partial bypass to the full bypass, a fresh Chinook carcass was observed approximately 5 feet on shore. Its location was above the high water line and, thus, the fish was not considered stranded." This text should be cross-compared with NMFS' filing of January 28, 2013, in the docket for P-2246 (discussed below).

10) NMFS' "Comments on the Initial Study Report..." (January 28, 2013). This information may be

the earliest written report of salmon stranding (during an event in the previous year, in October of 2012). Please see Enclosure A, especially the text regarding “Monitoring of Partial-Bypass Impacts” (beginning on p. 21). Note “Photo 1” of the Narrows 2 Partial Bypass in operation (October 25, 2012) at ~300 cubic feet per second (cfs) flow. Note “Photo 2” of a fresh salmon carcass recovered ~40 minutes after the Partial Bypass was shut off. Enclosure A (p. 22) describes how that carcass was recovered from a crevice previously inundated under the plume of the Partial Bypass discharge, which was thought to spray about 100 to 130 feet downstream as it operated at 300 cfs, an estimated one-half of its flow capacity. The text also refers to a NMFS video recording of the Partial Bypass operation as flow was reduced from 300 cfs to 0; FERC staff may view this video upon your request. Additional photos in NMFS’s possession (but not yet filed) include those showing the Full Bypass and Partial Bypass operating at the same time; these photos do not support YCWA’s contention (TM 7-11, p. 4), “YCWA does not operate either the full or partial bypasses when Narrows 2 Powerhouse is operating, and does not operate both bypasses at the same time.” As discussed above, FERC should consider that adverse biological effects (such as strandings) are probably more likely to take place during operational transitions between the Project facilities, when river conditions experienced by salmon are caused to change. FERC’s goal should be to understand what measures licensee is undertaking to prevent or minimize potential stranding during these facility transitions, not only during “typical” operations.

11) YCWA’s Updated Study Report (dated December 2013). As the report suggests, there are several studies that may be relevant for FERC staff review, including:

Study 7.13 “Fish Stranding Associated with Shutdowns of the Narrows 2 Powerhouse Partial Bypass”

Study 7.11 “Fish Behavior and Hydraulics Near Narrows 2 Powerhouse”

Study 7.11a “Radio Telemetry Study of Spring- and Fall-run Chinook Salmon Downstream of Narrows 2 Powerhouse”

Study 7.10 “Instream Flow Downstream of Englebright Dam”

Study 7.8 “ESA/CESA-Listed Salmonids Downstream of Englebright Dam”

To understand the results, you will need to obtain and review the corresponding technical memorandum for each study. As you perform your review, we believe you will gain a better appreciation of the difficulty of obtaining a cohesive view of the Project’s effects in the vicinity downstream of Englebright Dam and the Narrows 2 Development facilities.

We especially suggest you review the text referring to Study 7.11, and to Table 2.7-1. “Summary of planned and actual operational events from July through November 2013.” Again, the terminology used is confusing, and we hope you are able to understand Project effects when results are separated for “operational event” versus “planned outages” versus “unplanned outage.” Please note the entry for October 7, 2013, “Stranded fish were not observed, but fish were observed from the waters surface.” Please cross-compare this entry with the YCWA response text pertaining to the “incidental observations”(and the photos in Figures 4, 5, and 6)

of a salmon carcass recovered on October 7, 2013, about 15 feet downstream from the face of the Narrows 2 Powerhouse (along the rocky shoreline of the area labeled “Narrows 2 Pool” in TM 7-11, Figure 2.4-1). This discovery is now reported in response to FERC’s inquiry. The YCWA response states (p. 6) that staff removed the salmon carcass found on October 7, 2013, and cut off the tail to be sure it would not be counted during the study. In this way, YCWA apparently felt it could then report that no stranded salmon were observed during the study. Clearly, these actions reflect a less-than-genuine approach to investigation of the potential effects of the Project’s facilities and operations.

Note also the summary entries in Table 2.7-1 for October 11 and 13, 2013, which do not report live salmon stranding observations. Please cross-compare the entries with the accounts (and photos, Figure 8, Figure 9) of live stranded adult salmon downstream in the Bypass Pool, now reported in the YCWA response. We ask that your staff cross-review these documents to obtain a full account of the facts concerning the stranding events and their associated operational events.

- 12) The YCWA Draft License Application (filed December 2, 2013). Please review Table 3.3.3-35, “Summary of planned and actual operational events from July through November 2013” (p. E3.3.3-69). We note it contains no entry acknowledging or describing the October 7, 2013, discovery of the salmon carcass (beginning p. 5). The same table (3.3.3-35, p. E3.3.3-69) also contains no entry acknowledging or describing the October 11, 2013, stranding of live salmon now reported in the YCWA response (beginning p. 7). This document is several volumes, so we suggest you “scan” it for terms such as “stranding”, “carcass”, etc.
- 13) **The YCWA response (November 25, 2013) contains accounts of stranding events in October of 2013. As discussed above, additional salmon carcasses have been reported observed and recovered in 2012. NOAA Law Enforcement has advised our staff to request that FERC’s Compliance staff determine if any salmon carcass remains have been collected and retained by any entity. We ask that you provide this information to NMFS, following your interviews, data gathering, and document reviews associated with your inquiry.**

We also request that you obtain, and retain, all other information pertinent to the facts of this case, including written accounts, field notes, and transcripts of interviews with on-site personnel and managers, emails, photographs, videos, or other relevant information. As you know, “take” of ESA-listed salmon is not limited to mortality. We noted that the YCWA response (p. 7) contains accounts of live adult (30+ inch) salmon observed leaping out of a small area of the Bypass Pool (where they had been stranded) and on to dry land – and then flipping back into the pool. Such accounts are relevant in this inquiry.

14) YCWA proposes 2 measures to prevent future salmon stranding incidents: 1) Physical removal of the cobble bar downstream of the Full Bypass; and 2) Notification to NMFS and Cal Fish and Wildlife if dead or stranded fish are observed in the future. We note that neither measure proposed any change to the operations of the Project's facilities, either under the existing or a future license. We understand YCWA's aversion to a regulatory approach, but voluntary ramping and flow fluctuation control by the licensee does not appear to have been effective in avoiding harm to anadromous fishery resources. In addition, it may be several years before a new license is issued, and there is no certainty that FERC will require additional flow ramping and fluctuation control (terms and conditions) to remedy the situation. While removal of a cobble (not gravel) bar within a river channel that is ESA-designated critical habitat is not an action quickly realized, changes to Project operations could be in place soon, with the benefits realized by the time adult spring-run Chinook salmon inhabit the area in 2014.

The second measure, after-the-fact notification of harm or take of ESA-listed fishes is not a preventive measure; notification was discussed (in point #1 above) and NMFS recommends FERC's involvement and leadership. At present, there appears to be little appreciation that notification measures are in need of repair. Please review YCWA's response (p. 23) and note the email of YCWA's consultant (Mr. Jim Lynch) to the email request of the California Department of Fish and Wildlife (Mr. Sean Hoobler), who asks for an update on the status of adult Chinook salmon known to be stranded 3 days earlier. Mr. Lynch responds that the information will be contained in a technical memorandum available 2 months later (see Updated Study Report, suggesting the update will be available December 2012).

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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  
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Case No. 3:18-cv-00888-JSC

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT, AND  
REPLY IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

Hearing date: July 19, 2018

Time: 2:00pm

Location: Courtroom F, 15th Floor

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. INTRODUCTION.....1

II. ARGUMENT.....1

    A. Declaratory Judgment is Warranted That NMFS Violated FOIA's Deadlines.....1

    B. NMFS Has Not Carried Its Burden to Demonstrate Its Searches Were Adequate.....3

        1. The Office of Law Enforcement Searches Were Not Adequate.....3

        2. NMFS Has Not Provided Information On Its Search Cut-off Dates.....6

    C. NMFS Has Conceded That Its Withholding of Records Under Exemptions 6 and 7(C) Was Not Justified Warranting Declaratory Judgment.....7

    D. Declaratory Judgment Is Warranted That NMFS's Lack of Adequate Explanation at The Administrative Level Violates FOIA.....9

    E. NMFS Has Not Shown that Attorney-Client and Deliberate Process Privileges Protect Redacted Information. ....11

    F. NMFS Has Failed to Segregate and Release All Non-Exempt Factual Material.....19

    G. NMFS Should Be Enjoined to Comply With FOIA's Mandates.....19

III. CONCLUSION.....20

**TABLE OF AUTHORITIES**

**Cases**

1

2

3 *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review,*  
830 F.3d 667 (D.C. Cir. 2016).....7

4 *Biodiversity Legal Found. v. Badgley,* 309 F.3d 1166 (9th Cir. 2002).....3

5

6 *Campbell v. United States Dep't of Justice,* 164 F.3d 20 (D.C. Cir. 1998).....5

7 *Center for National Security Studies v. United States Department of Justice,*  
215 F. Supp. 2d 94 (D.D.C. 2002).....5

8

9 *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854 (D.C.Cir.1980).....13, 15, 17

10 *Ecological Rights Found. v. Fed. Emergency Mgmt. Agency,* No. 16-05254,  
U.S. Dist. LEXIS 197451 (N.D. Cal. November 30, 2017).....17, 18, 20

11 *El Badrawi v. Dep't of Homeland Sec.,*583 F. Supp. 2d 285 (D. Conn. 2008).....6

12 *Elec. Frontier Found. v. CIA,* No. 09-3351, 2013 U.S. Dist. LEXIS 142146 (N.D. Cal. 2013).....11

13 *Elec. Privacy Info. Ctr. v. DOJ,* 416 F. Supp. 2d 30 (D.D.C. 2006).....19

14 *Fiducia v. U.S. Dep't of Justice,* 185 F.3d 1035 (9th Cir. 1999).....19

15 *Friends of the River v. Nat'l Marine Fisheries Serv.* No. 16-00818, Dkt. 39,  
(E.D. Cal. June 23, 2017).....17

16 *Gordon v. FBI,* 390 F. Supp. 2d 897 (N.D. Cal. 2004).....8

17 *Hercules, Inc. v. Marsh,* 839 F.2d 1027, 1028 (4th Cir. 1988).....3

18 *In re Sealed Case,* 676 F.2d 793 (D.C. Cir. 1982).....12

19 *In re United Mineworkers Employment Benefit Plans,* 159 F.R.D. 307 (D.D.C. 1994).....12

20 *Judicial Watch, Inc. v. Food & Drug Admin.,* 449 F.3d 141 (D.C. Cir. 2006).....14

21 *Kozacky & Weitzel, P.C. v. United States,* No. 07 -2246, 2008 U.S. Dist. LEXIS 29779  
(N.D. Ill. Apr. 10, 2008).....6

22 *Lion Raisins, Inc. v. U.S. Dep't of Agriculture,* 636 F. Supp. 2d 1081 (E.D. Cal 2009).....6

23 *Long v. IRS,* 693 F.2d 907 (9th Cir. 1982).....19

24

25

26

27

28 *Mead Data Central, Inc. v. U.S. Dept. of Air Force,* 566 F.2d 242 (D.C. Cir. 1977).....12, 16



1 *Morley v. CIA*, 508 F.3d 1108 (D.C. Cir. 2007).....11

2 *Nat'l Ass'n of Home Builders v. Norton*, 209 F.3d 26 (D.C. Cir. 2002).....11

3 *Natural Res. Def. Council, Inc. v. EPA* ("NRDC"), 966 F.2d 1292 (9th Cir.1992).....8,11

4 *Nat'l Wildlife Fed'n v. NMFS*, 481 F.3d 1224 (9th Cir. 2007).....18

5

6 *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).....16

7 *Oregon Natural Desert Asso. v. Dep't of Commerce*, 419 F. Supp. 2d 1284 (D. Or. 2006).....7

8 *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, Nos. 14-4365 & 14-1130,

9 2015 U.S. Dist. LEXIS 94997 (N.D. Cal. July 20, 2015 ) ("*OCE II*").....2, 19

10 *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, Nos. 14-4365 & 14-1130,

11 2015 U.S. Dist. LEXIS 143392 (N.D. Cal. Oct. 21, 2015) ("*OCE III*").....2

12 *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974). .....2

13 *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161 (D.C. Cir. 2011).....8, 19

14 *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. 06-2845,

15 2008 WL 2523819 (E.D. Cal. June 20, 2008).....3, 19

16 *Starkey v. DOI*, 238 F. Supp. 2d 1188 (S.D. Cal. 2002).....16

17 *Swisher v. Department of the Air Force*, 660 F.2d 369 (8th Cir. 1981).....16

18 *Tatum v. City & County of San Francisco*, 441 F.3d 1090 (9th Cir. 2006).....6

19 *Tracy v. Department of Justice*, 117 F. Supp. 3d 1 (D.D.C. July 31, 2015).....3

20 *United States v. An Article of Drug*, 661 F.2d 742 (9th Cir. 1981).....19

21 *United States v. Chen*, 99 F.3d 1495 (9th Cir. 1996).....13, 15

22 *United States v. Richey*, 632 F.3d 559 (9th Cir. 2011).....18

23 *Voinche v. FBI*, 999 F.2d 962 (5th Cir. 1993).....3

24 **Statutes**

25 5 U.S.C. § 552(a)(3)(A).....20, 21

26 5 U.S.C. § 552(a)(6)(A)(i).....9, 11

27 5 U.S.C. § 552(a)(6)(A)(ii).....20, 21

28 5 U.S.C. § 552(a)(6)(F).....9

1 5 U.S.C. § 552(a)(8).....10  
2 5 U.S.C. § 552(a)(8)(A)(ii).....19  
3 5 U.S.C. § 552(b)(6).....7  
4 5 U.S.C. § 552(b)(7)(C).....8  
5 **Other Authorities**  
6 15 C.F.R. § 4.10(e).....1  
7 15 C.F.R. § 4.1(a).....10, 18

8  
9  
10  
11  
12  
13  
14  
15  
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18  
19  
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21  
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23  
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1 **I. INTRODUCTION**

2 EcoRights is entitled to summary judgment on all of its Freedom of Information Act ("FOIA")  
3 claims in this matter. EcoRights has demonstrated that its requested declaratory and injunctive relief is  
4 warranted. Defendant National Marine Fisheries Service ("NMFS") does not dispute that its  
5 determination for EcoRights' FOIA appeal was more than a year overdue. NMFS has failed to show that  
6 its searches were reasonably thorough and that the agency's withholdings were justified. Indeed, NMFS  
7 has withdrawn its claims that FOIA Exemptions 6 and 7(C) protected certain information from  
8 disclosure and has released in full emails previously redacted under these exemptions. NMFS's *Vaughn*  
9 index concerning its Exemption 5 withholdings is not sufficiently detailed and fails to overcome FOIA's  
10 strong presumption in favor of disclosure. Because NMFS has failed to carry its burden of proof the  
11 Court should deny NMFS's cross-motion for summary judgment.

12 **II. ARGUMENT**

13 **A. Declaratory Judgment is Warranted That NMFS Violated FOIA's Deadlines.**

14 At long last NMFS has issued its determination for EcoRights' appeal, more than a year past the  
15 statutory deadline. NMFS has not provided any explanation for its egregious delay in providing the  
16 appeal determination, other than to suggest, incredibly, that EcoRights' motion is to blame in part for the  
17 delay. Def. Mot. at 7. NMFS ignores that it indicated to EcoRights in October 2017 that the agency  
18 would release the determination within a week, and made the same promise in early February 2017. Dkt.  
19 12-24, ¶ 11; Dkt. 12-22; Dkt. 12-1, ¶ 2. Dkt. 12-2 at 3. If the agency was truly that close to finishing the  
20 determination, then it could have issued it shortly after EcoRights filed the complaint on February 10,  
21 2017. Department of Commerce regulations allow NMFS to continue working on an appeal  
22 determination even after a court action has been initiated. 15 C.F.R. § 4.10(e). However, instead of  
23 providing the appeal determination expeditiously after the complaint was filed, NMFS delayed the  
24 determination for another three and a half months and attempted to use it as a bargaining chip, even  
25 though there was no legal basis for NMFS's withholding of the appeal response. Def. Mot. at 7; Wang  
26 Decl., Dkt. 27, ¶ 5 (appeal determination issued May 25, 2018). It was only when NMFS had to answer  
27 to the Court for the agency's failure to respond to the appeal that NMFS finally released the  
28 determination, the same day that it filed its cross motion for summary judgment. *Id.*

1 NMFS does not dispute that its appeal determination was more than a year late, but contends,  
2 without merit, that EcoRights' requested declaratory relief is not warranted because the claim that  
3 NMFS violated FOIA's deadlines is moot. Def. Mot. at 19. However, EcoRights' claim of untimely  
4 response is not moot because it is capable of repetition yet could evade review. EcoRights is a public  
5 advocacy group that intends to continue its advocacy work on behalf of Endangered Species Act  
6 ("ESA") listed fish that are within NMFS's jurisdiction, and intends to send additional FOIA requests to  
7 NMFS in the future. Linn Reply Decl. ¶ 10. Thus, NMFS's unreasonable delay in responding to  
8 EcoRights' requests may continue. Indeed, NMFS's unreasonable delay in responding to the FOIA  
9 request at issue here is a repeat of the conduct that another judge of this Court previously found  
10 unlawful. *See Our Children's Earth Found., v. Nat'l Marine Fisheries Serv.*, Nos. 14-4365 & 14-1130,  
11 2015 U.S. Dist. LEXIS 143392) at \*29 (N.D. Cal. Oct. 21, 2015) (finding NMFS had a past pattern or  
12 practice of violating FOIA's deadlines in response to EcoRights' and its co-plaintiff's requests); *see also*  
13 *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, 2015 U.S. Dist. LEXIS 94997 at \*33  
14 (N.D. Cal. July 20, 2015 ) ("*OCE II*") (ordering NMFS to comply with FOIA's deadlines in response to  
15 future requests from EcoRights and its co-plaintiff due to the court's finding that NMFS "has failed to do  
16 so previously and the potential that these offenses might continue").

17 That NMFS belatedly provided the appeal determination does not absolve the agency of its FOIA  
18 deadline violation nor does it give NMFS carte blanche to defy FOIA's deadlines in the same way in the  
19 future. NMFS is wrong that the only proper remedy for an agency's failure to timely respond to a FOIA  
20 request is that the requester has a direct avenue to the district courts. FOIA imposes no limits on courts'  
21 equitable powers in enforcing its terms. *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 19-  
22 20 (1974).

23 NMFS should not be allowed to ignore a statutory deadline and respond to a FOIA appeal  
24 whenever it pleases without facing any consequence, particularly when the agency has been found to  
25 have a past pattern or practice of unreasonably delayed FOIA responses and has been enjoined by  
26 another judge of this Court to comply with FOIA's deadlines as a result of an earlier lawsuit brought by  
27 EcoRights. NMFS's contention that it is not bound by the injunction issued in *OCE II* and that  
28

1 EcoRights must re-litigate the issue of NMFS's pattern or practice of FOIA deadline violations before  
2 declaratory judgment can issue is without merit.

3 *Voinche v. FBI* and *Tracy v. Department of Justice* provide no support for NMFS's mootness  
4 argument. Def. Mot. at 20. Neither of these cases involved an agency that had been found to have a past  
5 pattern or practice of unreasonable delay in responding to the plaintiff's FOIA requests and neither of the  
6 agencies had been enjoined to comply with FOIA's deadlines in responding to the plaintiff's future  
7 requests. Further, in both of these cases the only issue raised in the complaint that was properly before  
8 the court was the timeliness of the response. *See Voinche v. FBI*, 999 F.2d 962, 963 (5th Cir. 1993);  
9 *Tracy v. Department of Justice*, 117 F. Supp. 3d 1, 5 (D.D.C. July 31, 2015). The plaintiffs did not  
10 challenge the adequacy of the response as EcoRights has done here.

11 The egregious delay in the instant case, NMFS's failure to comply with a court order, the past  
12 pattern or practice of NMFS's violations, and the possibility that they might recur with EcoRights's  
13 future requests show that a declaratory judgment is appropriate here. *Biodiversity Legal Found. v.*  
14 *Badgley*, 309 F.3d 1166, 1174-75 (9th Cir. 2002) ("the cessation of conduct does not necessarily render  
15 a declaratory judgment moot."); *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1028 (4th Cir. 1988) (action  
16 seeking to bar release of documents not mooted by the documents' release because new request for  
17 similar documents pending; agency action thus capable of repetition yet evading review); *OCE II*, 2015  
18 U.S. Dist. LEXIS 94997 at \*26; *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. 06-  
19 2845, 2008 WL 2523819 at \*6 (E.D. Cal. June 20, 2008) ("*SYRCL*").

20 **B. NMFS Has Not Carried Its Burden to Demonstrate Its Searches Were Adequate.**

21 **1. The Office of Law Enforcement Searches Were Not Adequate.**

22 NMFS is wrong that EcoRights' only alleged deficiency is the Office of Law Enforcement  
23 ("OLE")'s failure to search for responsive records. Def. Mot. at 11. EcoRights' motion also contends that  
24 the OLE search, if one was done, was not reasonably thorough. Pl. Mot. at 9-10. While the Def. Mot.  
25 has confirmed that OLE did perform a search, NMFS has not carried its burden to show its searches  
26 were reasonable.

27 First, it appears from the Graff declaration that the OLE, and particularly Agent Tanner, did not  
28 search paper files, and other files for information *not* stored electronically. The Graff declaration only

1 describes the regional FOIA coordinator and Agent Tanner performing an electronic search of his  
2 computer using a set of key words. Dkt. 26, ¶ 13.

3 Second, as EcoRights discusses in its motion, an email NMFS released in response to an earlier  
4 FOIA request indicated that Agent Tanner may have records concerning poaching at the Yuba River and  
5 concerning his observations of hazards in the Yuba River where fish strandings are occurring. Pl Mot. at  
6 9. Dkt. 12-9. EcoRights' purpose in providing this evidence was not to argue NMFS's search was  
7 inadequate because it did not locate this particular email. Instead, EcoRights' purpose was to provide  
8 evidence of the potential existence of other, relevant undisclosed records that NMFS failed to locate,  
9 such as, potentially, Agent Tanner's handwritten notes or photographs from his Yuba River visit. It is  
10 highly unlikely that Agent Tanner went to the Yuba to investigate poaching and observe hazards causing  
11 fish strandings near Narrows 2, looked around, but did not take any notes, or photographs, or collect any  
12 physical evidence and then concluded his investigation without writing any kind of report. NMFS does  
13 not deny that such material exists, instead taking the position that it need not check to see if it has  
14 overlooked such material because, in the agency's view, it has done enough to satisfy FOIA.

15 In addition to the above mentioned email, two weeks before NMFS's cross-motion was due  
16 EcoRights also provided NMFS with other evidence of potentially overlooked material suggesting  
17 insufficient search: 1) the February 13, 2014 email chain between Larry Thompson from the NMFS  
18 Hydro staff and Agent Tanner in which Mr. Thompson discussed contacting Agent Tanner in November  
19 2013 about fish strandings and Agent Tanner's reply indicating Agent Tanner is keeping track of the  
20 stranding reports; and 2) a letter from NMFS to FERC in February 2014 that states the OLE advised  
21 NMFS staff to ask the FERC Compliance division if any entity has collected and retained salmon  
22 carcass remains as a result of the strandings and to provide that information and other evidence to  
23 NMFS. Linn Reply Decl. ¶¶ 7, 8, Ex. 5. Dkt. 12-3. Taken together these documents indicate, at the very  
24 least, the presence of OLE record keeping of the 2013 fish strandings and potential collection of  
25 physical evidence. However, OLE's search did not locate any records that demonstrate Agent Tanner, or  
26 anyone else at OLE, is keeping track of these fish strandings as Agent Tanner indicated in his February  
27 2014 email that he is doing. *Id.* ¶ 9.

1 A further indication of overlooked material that EcoRights provided to NMFS is a series of  
2 emails that Agent Tanner was copied on about a fish stranding event in October 2015. Linn Reply Decl.  
3 ¶¶ 3-5. Exs. 2-4. These emails indicate Mr. Thompson spoke to Agent Tanner about the event and  
4 continued to follow up with him about the attempted rescue of stranded fish. *Id.* The emails indicate  
5 Agent Tanner told Mr. Thompson to contact the California Department of Fish and Wildlife ("CDFW")  
6 about the stranding, and after the stranding CDFW collected salmon carcass remains. *Id.* These emails  
7 indicate some OLE record keeping of this event and sharing of information between CDFW and the  
8 OLE. *Id.* However, OLE did not release any records of its own about the October 2015 stranding event  
9 and fish mortality, although Mr. Thompson indicated he contacted Agent Tanner numerous times and  
10 received direction from him about how to proceed. *Id.* ¶ 6.

11 The Def. Mot. does not address this additional evidence. Instead, NMFS contends that the  
12 agency is not required to do any more than it already has. However, by ignoring this evidence of  
13 potentially overlooked material, which EcoRights provided to NMFS two weeks before the agency filed  
14 its cross-motion, NMFS has not carried its burden to demonstrate its searches were reasonable. If NMFS  
15 fails to come forward with details in its reply explaining how, if it performed a reasonable search, it did  
16 not locate any OLE documents about poaching or fish stranding such as were discussed above,  
17 EcoRights should be granted summary judgment on this issue. *See Campbell v. United States Dep't of*  
18 *Justice*, 164 F.3d 20, 28 (D.C.Cir.1998) (search was inadequate when agency's disclosed documents  
19 revealed that searching other records systems might uncover the documents sought); *Center for National*  
20 *Security Studies v. United States Department of Justice*, 215 F. Supp.2d 94, 110 (D.D.C.2002) (finding  
21 search inadequate where disclosed document clearly indicated existence of earlier, relevant undisclosed  
22 documents); *SYRCL*, 2008 WL 2523819 at \*15, n.8 (the existence of unreleased but responsive  
23 documents might bear on adequacy of search).<sup>1</sup>

24  
25  
26 <sup>1</sup> The dearth of records generated by the OLE concerning the thousands of federally protected fish that  
27 have been taken without authorization by the Yuba River water diversions, Narrows 1 and 2  
28 powerplants, and other entities provides information in and of itself. EcoRights sent its request to find  
out what the OLE has been doing to enforce the Endangered Species Act prohibition of unauthorized  
take of Yuba River protected fish, and the answer from NMFS is, the OLE is doing nothing.

1           Alternatively, the Court should allow EcoRights to conduct limited discovery pursuant to Fed. R.  
2 Civ. P. 56(d) because NMFS has failed to show that its search was adequate, and facts pertaining to the  
3 search are currently unavailable to EcoRights. Fed. R. Civ. Pro. 56(d) (where a non-moving party shows  
4 by declaration that facts are unavailable to the non-moving party, a court may: (1) defer considering the  
5 motion or deny it; (2) allow the party time to obtain affidavits or declarations or to take discovery; or (3)  
6 issue any other appropriate order). Indeed, in similar FOIA cases where the adequacy of the search is in  
7 doubt on summary judgment, courts have allowed the FOIA requester to conduct limited discovery to  
8 gather additional relevant information. *Lion Raisins, Inc. v. U.S. Dep't of Agriculture*, 636 F. Supp. 2d  
9 1081, 1107 (E.D. Cal 2009) (denying summary judgment and allowing plaintiff to depose agency  
10 officials about the adequacy of their search and whether additional responsive documents  
11 exist); *Kozacky & Weitzel, P.C. v. United States*, No. 07 -2246, 2008 U.S. Dist. LEXIS 29779 at \*\*17-  
12 18 (N.D. Ill. Apr. 10, 2008) (permitting the use of interrogatories concerning the adequacy of the  
13 agency's search); *El Badrawi v. Dep't of Homeland Sec.*, 583 F. Supp. 2d 285, 321 (D. Conn.  
14 2008) (permitting plaintiff to take depositions of agency employees regarding the adequacy of the  
15 agency searches).

16           Here, the Linn Reply Declaration presents all of the requisite evidence to support postponing  
17 NMFS's cross-motion for further discovery. *See Tatum v. City & County of San Francisco*, 441 F.3d  
18 1090, 1100 (9th Cir. 2006) (“A party requesting a continuance pursuant to [Rule 56(d)] must identify by  
19 affidavit the specific facts that further discovery would reveal, and explain why those facts would  
20 preclude summary judgment.”); Linn Reply Decl. ¶¶ 3-9. As explained above and in the Linn Reply  
21 Declaration, the documents that NMFS has produced in response to EcoRights' request indicate  
22 overlooked material that appears to be responsive to the request and that NMFS has not produced. Thus,  
23 it is likely that additional responsive documents exist that have not been produced to EcoRights—  
24 controverting NMFS's summary judgment claim that it has produced a full and final response to  
25 EcoRights' request. Linn Reply Decl. ¶ 6,9. EcoRights could not have obtained evidence that NMFS had  
26 conducted an unreasonable search for documents earlier in this proceeding because NMFS did not  
27 provide the appeal determination and full description of its search until May 25, 2018 when it filed its  
28 cross-motion for summary judgment. In this case, only NMFS has access to the material facts related to



1 the adequacy of its search. Without discovery, EcoRights is limited to the description of the search in the  
2 Graff declaration. *Id.* ¶ 11.

3 **2. NMFS Has Not Provided Information On Its Search Cut-off Dates.**

4 EcoRights cannot ascertain whether NMFS complied with FOIA's mandate that the agency  
5 search for all responsive documents in its possession as of the date it commences its searches because  
6 NMFS has not provided its search cut-off dates. Since there were a series of searches, the last of which  
7 occurred in summer 2017, NMFS should have searched for and released records that were created  
8 through the summer of 2017. However, there is no indication which cut-off date for responsive records  
9 NMFS used. If NMFS only looked for records created as of the date the request was received, or as of  
10 the date of the first searches, that violates FOIA and demonstrates the searches were not adequate. *See*  
11 *Oregon Natural Desert Asso. v. Dep't of Commerce*, 419 F. Supp. 2d 1284 (D. Or. 2006) (practice of  
12 using date request received as the search cut-off date is unlawful). Because NMFS has not provided its  
13 search cut-off dates, the agency has not demonstrated that its searches were reasonably thorough.

14 **C. NMFS Has Conceded That Its Withholding of Records Under Exemptions 6 and**  
15 **7(C) Was Not Justified Warranting Declaratory Judgment.**

16 NMFS has determined that it is "no longer necessary to withhold information under exemption  
17 7(C)" and has released in full two emails, between Mr. Thompson of the NMFS Hydro staff and Agent  
18 Tanner, the only two documents that were released by the OLE. Dkt. 26, ¶ 17. Dkt. 26-1 at 10-11. The  
19 Graff declaration ignores that Agent's Tanner's name and work contact information were also redacted  
20 from these emails under Exemption 6 and that EcoRights also challenged the Exemption 6 claim. Pl.  
21 Mot. at 17. By failing to rebut EcoRights' Exemption 6 argument, and releasing the redacted emails in  
22 full, NMFS has conceded that withholding Agent Tanner's name and work contact information under  
23 Exemption 6 also was not justified.

25 Exemption 6 protects from disclosure information about individuals that constitutes personnel,  
26 medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion  
27 of personal privacy. 5 U.S.C. § 552(b)(6); *Am. Immigration Lawyers Ass'n v. Exec. Office for*  
28

1 *Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016). Exemption 7(C) authorizes the withholding of  
2 "records or information compiled for law enforcement purposes" only to the extent they "could  
3 reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. §  
4 552(b)(7)(C). NMFS's lack of explanation about why it originally believed release of Agent Tanner's  
5 name, work email address, and work phone in these two emails would be an unwarranted personal  
6 privacy invasion, but release of Mr. Thompson's name and work email address would not be, suggests  
7 that NMFS has a policy of asserting a blanket exemption protecting from disclosure the names and work  
8 contact information of OLE agents, regardless of the actual circumstances/justification for privacy.<sup>2</sup>  
9 NMFS seems to assert that any OLE record is a law enforcement record. However, such interpretations  
10 are wrong. There is no blanket exemption for the names and work contact information of OLE agents.  
11 *See, e.g., Gordon v. FBI*, 390 F. Supp. 2d 897, 902 (N.D. Cal. 2004) (names of agency employees are  
12 not personal information about those employees that meets Exemption 6 threshold), *summary judgment*  
13 *granted*, 388 F. Supp. 2d 1028, 1040-42 (N.D. Cal. 2005). Further, all OLE records are not law  
14 enforcement records simply by virtue of the function the OLE serves. *Roth v. U.S. Dept. of Justice*, 642  
15 F.3d 1161, 1173 (D.C. Cir. 2011) (internal citation omitted). To ensure that NMFS does not continue an  
16 apparent policy contrary to law, declaratory judgment is warranted that NMFS's withholding of Agent  
17 Tanner's name and work contact information under Exemptions 6 and 7(C) violated FOIA. Such  
18 judgment will "delineate [ ] important rights and responsibilities, and will be of "significant educational  
19 and lasting importance." *Natural Res. Def. Council, Inc. v. EPA ("NRDC")*, 966 F.2d 1292, 1299 (9th  
20 Cir.1992). The release of agency staff names and contact information, including OLE agents, serves an  
21 important public interest which enables EcoRights and other public interest groups to scrutinize whether  
22 NMFS staff are carrying out their ESA duties to protect endangered fish species in the Yuba River and  
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26 <sup>2</sup> Ironically, in this matter, it was Mr. Thompson who was performing the NMFS law enforcement  
27 function, identifying and investigating violations of ESA Section 9, while Agent Tanner, apparently,  
28 provided only moral support, yet NMFS never redacted Mr. Thompson's name from released  
documents, only Agent Tanner's name.

1 other waterways and to be able to follow intelligibly NMFS's document releases by using names to  
2 discern the common linkages between released documents.

3 **D. Declaratory Judgment Is Warranted That NMFS's Lack of Adequate Explanation**  
4 **at The Administrative Level Violates FOIA.**

5 NMFS is wrong that its identification of "the number of pages collected for processing and the  
6 specific exemptions being claimed for the withholdings" satisfied its obligations under FOIA at the  
7 administrative stage. Def. Mot. at 13. First, NMFS's administrative level determination did not indicate  
8 the number of *pages* collected for processing as the Def. Mot. contends. It merely indicated that 54  
9 *documents* had been partially withheld. *See* Dkt. 12-16 at 3. NMFS's determination did not satisfy  
10 FOIA's mandate that the agency estimate the volume of material withheld. 5 U.S.C. § 552(a)(6)(F).  
11 Simply stating 54 documents were redacted and then listing the exemptions being claimed does not  
12 provide adequate information. To satisfy FOIA, NMFS must estimate how many pages in those 54  
13 documents were redacted and specifically how many pages were withheld under attorney-client  
14 privilege, how many were withheld under attorney work product, how many were withheld under  
15 deliberative process privilege, and how many were withheld under Exemption 6. *Id.* Second, as the Def.  
16 Mot. concedes, NMFS's determination did not identify the specific exemptions claimed for *all* of the  
17 withholdings. NMFS failed to identify the specific exemption claimed for three redacted documents.  
18 One document had no indication which exemption was claimed and the other two documents merely  
19 identified "(b)(5)" as the exemption claimed. As EcoRights notes in its MSJ, "(b)(5)" could mean  
20 attorney-client privilege, attorney work product, or deliberate process privilege. Pl. Mot. at 11.

21 NMFS is wrong that EcoRights is asking for the agency to issue a *Vaughn* index at the  
22 administrative stage. Def. Mot. at 14. The law is clear that a *Vaughn* index is not required until a  
23 requester has exhausted administrative remedies. However, the law is also clear that the agency must, at  
24 the administrative level, review the responsive material it has collected, and make a determination about  
25 what information it will release and what information it will withhold, and provide the requester with the  
26 *reasons* for withholding any responsive information. 5 U.S.C. § 522(a)(6)(A)(i). NMFS contends that  
27 identifying the exemption(s) it is claiming for each specific document satisfies FOIA's mandate that the  
28 agency provide reasons for its withholdings. However, a bare bones, conclusory statement that an

1 exemption is being applied to withheld information is not an adequate reason, especially in light of the  
2 FOIA Improvement Act which requires more in-depth agency review and analysis at the administrative  
3 level. *See* Department of Justice Office of Information Policy Summary of the FOIA Improvement Act  
4 of 2016, available at <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016> (“OIP FOIA  
5 2016 Summary”).

6 Under the FOIA Improvement Act, NMFS is now required to evaluate each responsive record to  
7 determine whether an exemption applies, and then to *further* identify what foreseeable harm to a  
8 protected interest would result if the information is released, to consider whether a discretionary release  
9 is appropriate, and then to only withhold the information if a foreseeable harm to a protected interest  
10 would result from disclosure. 5 U.S.C. § 552(a)(8)(A).<sup>3</sup> NMFS presumably complied with this  
11 mandatory review process, and having determined to withhold information, should have included in its  
12 explanation for withholding material what foreseeable harm to a protected interest would result if the  
13 material was disclosed, since that was the basis upon which NMFS made its decision to withhold  
14 information.

15 Similarly, NMFS should have included in its explanation about the withholdings that the agency  
16 had reviewed each responsive record and, where full disclosure was not possible, identified and released  
17 the factual, non-exempt material that could reasonably be segregated from the exempt material, as  
18 required by 5 U.S.C. § 552(a)(8)(A). If NMFS complied, at the administrative stage, with the mandate to  
19 segregate non-exempt information NMFS should have included in its determination a statement to that  
20 effect.

21 Since FOIA mandates that NMFS make determinations about foreseeable harm, discretionary  
22 releases of exempt material, and segregability of non-exempt information at the administrative stage  
23 there is no reason NMFS should not have provided this explanatory information to EcoRights at the  
24 administrative stage.<sup>4</sup> Requiring that such information be provided to EcoRights at the point at which a  
25

26 <sup>3</sup> Department of Commerce FOIA regulations also mandate that NMFS make discretionary releases of  
27 exempt information when required to do so in accordance with the FOIA Improvement Act. 15 C.F.R. §  
28 4.1(a).

<sup>4</sup> Indeed, NMFS's belated administrative response to EcoRights' appeal did provide an explanation of  
NMFS's segregability analysis and did not contend that the explanation was not required at the

1 determination is made will increase the likelihood that, in the future, NMFS will carefully look at  
2 whether its justifications for withholding information are truly defensible.

3 By failing to identify the specific exemption claimed for each withheld record, failing to identify  
4 the foreseeable harm to a protected interest that might result from disclosure of withheld information,  
5 failing to estimate the volume of material withheld, and failing to explain whether all reasonably  
6 segregable material had been released, NMFS did not provide an adequate explanation, at the  
7 administrative level, why its withholdings are justified, in violation of 5 U.S.C. § 552(a)(6)(A)(i).  
8 Declaratory judgment is therefore warranted that NMFS's approach of providing only a conclusory  
9 statement that an exemption has been applied to withheld information does not comport with 5 U.S.C. §  
10 552(a)(6)(A)(i). This will incentivize NMFS in the future to provide sufficiently detailed explanations  
11 why it contends the information it withholds is indeed FOIA exempt. Requesters can then evaluate  
12 NMFS's FOIA exemption claims and pursue meaningful administrative appeals *before seeking recourse*  
13 *to the courts*. The requested declaration is appropriate as it will "delineate[] important rights and  
14 responsibilities" by helping to ensure that NMFS only withholds information with proper justification  
15 when responding to EcoRights' future FOIA requests. *NRDC*, 966 F.2d at 1299.

16 **E. NMFS Has Not Shown that Attorney-Client and Deliberate Process Privileges**  
17 **Protect Redacted Information.**

18 The Def. Mot.'s boilerplate argument (at 17) that releasing the material withheld under  
19 deliberative process privilege "could have a chilling effect on the discussions within the agency in the  
20 future, discouraging a frank and open dialogue among agency employees" is not enough to overcome  
21 FOIA's strong presumption in favor of disclosure. *Nat'l Ass'n of Home Builders v. Norton*, 209 F.3d 26,  
22 32 (D.C. Cir. 2002) (internal citation omitted). NMFS must demonstrate *how*, if at all, releasing *each*  
23 redacted portion of a particular document would expose the agency's decision making process in such a  
24 way as to discourage candid discussion. *Morley v. CIA*, 508 F.3d 1108, 115 (D.C. Cir. 2007); *Elec.*  
25 *Frontier Foundation v. CIA*, 2013 U.S. Dist. LEXIS 142146 at \*48 (N.D. Cal. 2013).

26  
27 administrative stage: "...a line-by-line review of the document was conducted, and all segregable  
28 information was released. The information that would remain if additional segregation was attempted  
would leave information of minimal or no informational value." Dkt. 27-1 at 9.

1 For material redacted under the attorney-client privilege, NMFS makes no showing at all of the  
2 foreseeable harm to an interest protected by this privilege that would occur if the redacted material were  
3 disclosed. NMFS also does not provide a *particularized* explanation that *each* attorney-client  
4 communication at issue was kept confidential. There is only a conclusory statement in the Graff  
5 declaration that the communications were confidential. Dkt. 26 ¶ 32. If the redacted information was  
6 disclosed to a third party, the privilege has been waived. *In re Sealed Case*, 676 F.2d 793, 808-9 (D.C. Cir.  
7 1982). Voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-  
8 client relationship and waives the privilege, not only as to the specific communication disclosed but  
9 often as to all other communications relating to the same subject matter. *Id.*; *In re United Mineworkers*  
10 *Employment Benefit Plans*, 159 F.R.D. 307, 310 (D.D.C. 1994). NMFS must demonstrate the  
11 confidentiality of communications sought to be protected and the Court cannot assume confidentiality. *Mead*  
12 *Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977).

13 Because NMFS has failed to make an adequate showing of foreseeable harm to the interests  
14 protected by the deliberative process and attorney-client privileges, as required by the FOIA  
15 Improvement Act, and has not made a showing that attorney-client communications were kept  
16 confidential, the redacted material must be disclosed. Further, as discussed below, the explanations in  
17 NMFS's *Vaughn* index and the Graff declaration also do not carry NMFS's burden to show the  
18 Exemption 5 redactions are justified, warranting declaratory judgment and an order to release all  
19 withheld information.

20 **Documents 5079-1 and 5276-1.**<sup>5</sup> NMFS has not justified why the redacted information on the  
21 first page of this routing and tracking ledger sheet is protected under attorney-client privilege. Dkt. 12-  
22 18 at 2, 38. The second page of this document is a near duplicate of the first page and NMFS did not  
23 redact what appears to be the same information that is on the first page from the second page. *Id.* at 3,  
24 39. Further, the unredacted information on the second page, which EcoRights presumes is what was  
25 redacted from the first page, is not confidential in nature. The comment on the second page of the ledger  
26 that the document is a "[n]on routine informal sufficiency review letter" and "S7 & GC Review needed"

27 \_\_\_\_\_  
28 <sup>5</sup> For ease of reference EcoRights has adopted the document numbers used in NMFS's *Vaughn* index.

1 does not reveal anything more than what the unredacted email to which this ledger was attached  
2 explains-- that this document is the Yuba River Englebright Dam Project Informal Letter for the General  
3 Counsel's review. Dkt. 26, ¶ 38. Dkt. 26-1 at 22. If the comment on the second page is not the same as  
4 the comment redacted on the first page but is instead a comment "informing legal counsel that the letter  
5 related to a matter in active litigation" that is also not confidential information exempt from disclosure.  
6 *Id.* It was public knowledge that the Corps was requesting only informal consultation with NMFS about  
7 Englebright Dam and that the consultation was a matter in active litigation, so the agency was not  
8 conveying the type of private information to its counsel that would warrant withholding that  
9 information.

10 NMFS has also not justified withholding the other pages of this ledger under attorney-client  
11 privilege. Dkt. 2-18 at 6-10 and 42-46. There is no indication the information in these pages was kept  
12 confidential and NMFS has not identified the foreseeable harm that would occur if this information was  
13 disclosed.

14 **Document 5200.** This is an email chain between NMFS Fish Biologist Gary Sprague and  
15 NMFS attorney Christopher Keifer sent October 29-30, 2013. This is one of the documents with generic  
16 "b5" exemptions claimed. NMFS now asserts both deliberative-process and attorney-client privileges for  
17 these "b5" redactions. Def. Mot. at 13. NMFS is claiming that another redaction in this document is only  
18 attorney-client privileged information.

19 In regards to the attorney-client privilege claims, NMFS states the redacted material "consists  
20 solely of discussion between agency staff and an attorney regarding Biological Assessments received  
21 from the Corps." Dkt. 26, ¶ 39. Dkt. 26-1 at 16. This statement provides no basis for finding that the  
22 withheld information was a confidential communication related to the giving or receiving of legal  
23 advice. NMFS merely states a staff member and a staff attorney were having a discussion about Corps  
24 Biological Assessments. *Id.* For the attorney-client privilege to apply, there must be some *indicia* that  
25 the agency was dealing with its attorney as would any private party seeking legal advice to protect  
26 personal interests. *Coastal State Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980).  
27 There is no such indication here. Further, just because the emails were sent to and from an attorney does  
28 not make these communications privileged. *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996).

1 Additionally, there is no indication that this document was kept confidential and NMFS has not  
2 identified the foreseeable harm to a protected interest that would result from disclosure.

3 In regards to deliberative process privilege, NMFS states the redacted material is "deliberative  
4 and predecisional as it discusses "impressions regarding the ability to move forward towards  
5 consultation." Dkt. 26-1 at 16. While this communication may have been pre-decisional, as it pre-dates  
6 the May 2014 biological opinion, there is no basis for finding the communication deliberative. A  
7 document is "deliberative" if "it reflects the give-and-take of the consultative process." *Judicial Watch,*  
8 *Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (internal citation omitted). When an  
9 agency claims the deliberative process privilege it must establish the role played by the document at  
10 issue in the course of that process. *Animal Legal Def. Fund, Inc. v. Dep't of Air Force*, 44 F. Supp. 2d  
11 295, 299 (D.D.C. 1999); *Senate of Puerto Rico ex rel. Judiciary Comm. v. United States DOJ*, 823 F.2d  
12 574, 585-86 (D.C. Cir. 1987). NMFS fails to explain what role these emails played in the formulation of  
13 the May 2014 biological opinion. There does not appear to be any give-and-take discussion of the type  
14 intended to assist NMFS in arriving at the 2014 Biological Opinion. Rather, it appears Mr. Sprague and  
15 Mr. Kiefer were merely ruminating about the chances the consultation would move forward.

16 **Document 5215**. This document is an email chain from January 30, 2014 between NMFS  
17 Sacramento River Basin Chief, Howard Brown, and NMFS attorney, Christopher Keifer. This is another  
18 of the redacted documents with generic "b5" exemptions claimed and with no exemption at all indicated  
19 on one of the redactions. NMFS now asserts that both deliberative process and attorney-client privileges  
20 apply to all of these redactions. Def. Mot. at 13.

21 NMFS explains that material redacted from the emails "consists solely of a status update on the  
22 [Yuba] consultations." Dkt. 26-1 at 17. In regards to attorney-client privilege, this statement provides no  
23 basis for finding that the withheld information was a confidential communication related to the giving or  
24 receiving of legal advice. For the attorney-client privilege to apply, there must be some *indicia* that the  
25 agency was dealing with its attorney as would any private party seeking legal advice to protect personal  
26 interests. *Coastal State*, 617 F.2d 854 at 863. There is no such indication here. It appears Mr. Kiefer was  
27 merely requesting a status update and Mr. Brown provided one. Further, just because the emails were  
28 sent to and from an attorney does not make these communications privileged. *Chen*, 99 F.3d at 1501.



1 Additionally, there is no indication that this material was kept confidential and NMFS has not identified  
2 the foreseeable harm to a protected interest that would result from disclosure.

3 As for deliberative process privilege, NMFS's contention that the withheld material is protected  
4 because "it identified proposed future steps for consultation and a need for executive policy decision-  
5 making" provides no basis for finding the communication deliberative. Dkt. 26-1 at 17. NMFS fails to  
6 explain what role the withheld material played in the formulation of the May 2014 biological opinion.  
7 There does not appear to be any give-and-take discussion of the type intended to assist NMFS in  
8 arriving at the 2014 Biological Opinion. There is no indication that Mr. Brown was making  
9 recommendations or offering his opinion about steps to take. It appears he was merely reporting to Mr.  
10 Keifer about steps that had already been proposed and the lack of decision-making.

11 **Document 5224**. This document is a January 31, 2014 email, subject "Update on Yuba  
12 Consultations with U.S. Army Corps," from NMFS Sacramento River Basin Chief, Howard Brown, to a  
13 number of NMFS staff including attorney Christopher Keifer. This is another of the redacted documents  
14 with no exemption at all identified. NMFS now asserts that both deliberative process and attorney-client  
15 privileges apply to this redaction. Def. Mot. at 13.

16 NMFS contends the redacted material is exempt under these privileges because the material  
17 "discusses changes in the scope of the activities associated with the dams and the implications for the  
18 ongoing consultation." Dkt. 26-1 at 17. In regards to attorney-client privilege, this statement provides no  
19 basis for finding that the withheld information was a confidential communication related to the giving or  
20 receiving of legal advice. For the attorney-client privilege to apply, there must be some *indicia* that the  
21 agency was dealing with its attorney as would any private party seeking legal advice to protect personal  
22 interests. *Coastal State*, 617 F.2d 854 at 863. There is no such indication here. Mr. Brown was merely  
23 providing a status update. Further, just because a staff attorney was among those to whom the email was  
24 sent does not make the communication privileged. *Chen*, 99 F.3d at 1501. Additionally, there is no  
25 indication that this document was kept confidential and NMFS has not identified the foreseeable harm to  
26 a protected interest that would result from disclosure.

27 As for deliberative process privilege, while this communication may have been pre-decisional, as  
28 it pre-dates the May 2014 biological opinion, there is no basis for finding the communication

1 deliberative. NMFS fails to explain what role this email played in the formulation of the May 2014  
2 biological opinion. There does not appear to be any give-and-take discussion of the type intended to  
3 assist NMFS in arriving at the 2014 Biological Opinion. There is no indication that Mr. Brown was  
4 making recommendations or offering his opinion about how the consultation should proceed. It appears  
5 he was merely reporting to Mr. Keifer and other staff on the progress being made in the consultation.

6 **Document 5247**. This is an email from Howard Brown to Christopher Keifer subject,  
7 "Response to Environmental Advocates." Dkt. 12-18 at 18. The email had a draft letter attached, which  
8 is discussed below. NMFS has not justified withholding information from the email under attorney  
9 client privilege. There is no indication that the email was kept confidential and NMFS has not identified  
10 the foreseeable harm to a protected interest that would result from disclosure. Dkt. 26-1 at 17. The Court  
11 cannot assume confidentiality. *Mead Data Central*, 566 F.2d at 254.

12 **Document 5247-2**. This document is Mr. Brown's draft response to a letter from Christopher  
13 Sproul, an attorney for the South Yuba River Citizens League and Friends of the River, seeking to  
14 engage NMFS in a collaborative consultation process. Dkt 12-18 at 16-17. NMFS is wrong the  
15 information redacted from this response is protected deliberative process. NMFS makes no showing that  
16 the draft response played any part in the formulation of the May 2014 biological opinion. NMFS states  
17 the redacted material "revealed information about the ongoing consultation, and indicated future steps  
18 the agency would take to meet with stakeholders." Dkt. 26-1 at 18. It appears Mr. Brown was presenting  
19 the agency's position about the consultation to Mr. Sproul, and there is no indication that Mr. Brown was  
20 making recommendations or offering his own subjective opinions as part of the consultation process for  
21 the 2014 Biological Opinion.

22 **Documents 5250-1 and 20774-2** . These two documents are drafts of a letter from NMFS to the  
23 Corps concurring with the Corps that only informal ESA consultation concerning Englebright Dam was  
24 required because the Corps' operation of Englebright is not likely to adversely affect threatened fish  
25 species in the Yuba River ("concurrence letter"). Dkt. 12-18 at 19-37 and 47-72. NMFS contends the  
26 redacted information is protected deliberative process because it contains discussions of the proposed  
27 action, the authorities for the proposed action, the action area, the action agency's effects determination,  
28 the consultation history, litigation history, future actions requiring separate consultations, and

1 discretionary and non-discretionary actions. NMFS has not made a showing that this material is exempt  
2 from disclosure. It is likely the redacted material was adopted or incorporated by NMFS into the final  
3 concurrence letter and, if so, is not exempt from disclosure. *NLRB v. Sears*, 421 U.S. 132 (1975);  
4 *Swisher v. Department of the Air Force*, 660 F.2d 369 (8th Cir. 1981); *see also Starkey v. DOI*, 238 F.  
5 Supp. 2d 1188, 1193 (S.D. Cal. 2002) (where disclosure has already occurred the government has little  
6 interest in secrecy); *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (disclosure may be compelled even  
7 over otherwise valid agency exemption claim when agency has effectively revealed information);  
8 *Ecological Rights Found. v. Fed. Emergency Mgmt. Agency*, No. 16-05254 at \*\*15-16 (N.D. Cal.  
9 November 30, 2017) ("*EcoRights*").

10 NMFS and the Corps completed the Yuba River ESA consultation at issue in these documents  
11 more than four years ago. NMFS cannot demonstrate why it needs to keep the redacted information  
12 secret, especially where NMFS's decisions pertaining to this ESA consultation with the Corps are  
13 already so publicly known. NMFS and the Corps have publicly released numerous documents which  
14 have already revealed a great deal about these agencies' consideration of their ESA section 7 obligations  
15 concerning the Corps' Yuba River project--and shown that NMFS and the Corps decided not to engage  
16 in formal ESA section 7 consultation over much of the Corps' ongoing operation and maintenance of its  
17 two Yuba River dams and other Yuba activities because of the Corps' conclusions concerning the limits  
18 of its discretionary authority. Dkt. 12-1 ¶ 8. For example, NMFS's 2014 Yuba River Biological Opinion and  
19 Englebright concurrence letter have publicly disclosed this information. *Id.* NMFS and the Corps have also  
20 disclosed this information in their briefing in a lawsuit brought by Friends of the River against the agencies.  
21 *See Friends of the River v. Nat'l Marine Fisheries Serv.*, No. 16-00818, Dkt. 39 at 9-11 (E.D. Cal. June 23,  
22 2017). In response to Friends of the River's FOIA requests, NMFS has also released numerous documents  
23 commenting on the consultation, the sufficiency of the Yuba BAs, and drafts of the Englebright concurrence  
24 letter. Dkt. 12-1 ¶ 8. Given how public NMFS's decisionmaking pertaining to this consultation has been, it is  
25 unlikely there is content in these documents that NMFS has a legitimate need to keep secret.

26 Even if the withheld information would have been exempt from disclosure prior to enactment of  
27 the FOIA Improvement Act as technically falling within the attorney-client or deliberative process  
28 privilege, disclosure of the material should now be ordered under the new standard of the FOIA

1 Improvement Act. EcoRights' request was specifically tailored to gather information about government  
2 decision-making and, more importantly, the federal government's compliance with its own laws – in this  
3 case, the ESA. Information about government decision-making and consultation that is required by law  
4 is exactly the type of information that FOIA was intended to disclose to the public. Such disclosure  
5 ensures that citizens are informed and their government is held accountable. *See Coastal States*, 617  
6 F.2d at 868. NMFS's inclination to withhold such information under a claim of deliberative process  
7 privilege is contrary to the mandates of the FOIA Improvement Act and Department of Commerce  
8 FOIA regulations that mandate NMFS release exempt information when required to do so in accordance  
9 with the FOIA Improvement Act. 15 C.F.R. § 4.1(a).

10 **Document 30833**. This is a document entitled "Legal Analysis: Analyzing Ongoing Projects  
11 Under Section 7 of the Endangered Species Act (ESA)-*Draft*." Dkt. 12-18 at 73-88. On the face of the  
12 document, NMFS claims the withheld information is protected under attorney-client privilege. NMFS's  
13 appeal determination also explains the basis for withholding the redacted material under attorney-client  
14 privilege. Dkt. 27-1 at 7. However, in the *Vaughn* index NMFS also asserts the redacted material is  
15 protected by the deliberative process privilege. This belated claim that the material is protected  
16 deliberative process is mere *post hoc* rationalization for litigation purposes, not an administrative  
17 decision actually made by NMFS when it withheld the document, that the Court must ignore. *Nat'l*  
18 *Wildlife Fed'n v. NMFS*, 481 F.3d 1224 1237 n.9 (9th Cir. 2007).

19 In regards to attorney-client privilege, NMFS has failed to justify its claim. There is no  
20 indication this document was a confidential communication between attorney and client, made for the  
21 purpose of giving legal advice. *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). First, it does  
22 not appear the document was communicated at all. The agency does not identify which NMFS attorney  
23 authored the document, to whom it was communicated, how it was communicated, and when it was  
24 communicated. There is no email associated with this document. Second, there is no indication the  
25 document was prompted by a request for legal advice. Perhaps the attorney who drafted this document  
26 was simply working on a law review article about this subject. Without more detailed explanation from  
27 NMFS, there is no basis for finding this document a protected attorney-client communication.

1 Unless NMFS, in its reply, comes forward with evidence substantiating the claim that the  
2 information redacted in the ten documents described above falls within Exemption 5 deliberative  
3 process and/or attorney-client privileges and explaining how NMFS's interests would be harmed by the  
4 information's release, the Court must issue a declaration that NMFS has improperly invoked Exemption  
5 5, contrary to the requirements of FOIA (as amended by the FOIA Improvement Act) and enjoin NMFS  
6 to release the information withheld under this exemption. *See EcoRights*, 2017 U.S. Dist. LEXIS 197451  
7 at \*27. (Note: if NMFS does in fact come forward with such ostensible evidence, discovery or *in camera*  
8 review may be appropriate to probe the veracity of such assertions). *Fiducia v. U.S. Dep't of Justice*, 185  
9 F.3d 1035, 1043 (9th Cir. 1999); *Lion Raisins, Inc. v. U.S. Department of Agriculture*, 636 F. Supp. 2d  
10 1081, 1107 (E.D. Cal 2009).

11 **F. NMFS Has Failed to Segregate and Release All Non-Exempt Factual Material.**

12 FOIA requires that "any reasonably segregable portion of a record" must be released after  
13 application of the Act's nine exemptions. 5 U.S.C. § 552(b); 5 U.S.C. § 552(a)(8)(A)(ii); *Roth*, 642 F.3d  
14 at 1167. It appears likely that NMFS has not complied with FOIA's mandate to segregate and release  
15 non-exempt factual material in the two draft concurrence letters (Documents 5250-1 and 20774-2).  
16 NMFS claims the redacted material contains the consultation history and litigation history surrounding  
17 the NMFS and Corps Yuba River consultations. Dkt. 26-1 at 18. History is factual material--who did  
18 what, when did they do it, and what was the outcome. There is no basis for finding this information  
19 exempt from disclosure. Further, the consultation history and litigation history are discrete sections in a  
20 concurrence letter and can readily be segregated from other sections. NMFS should be enjoined to  
21 release this reasonably segregable, non-exempt factual material.

22 **G. NMFS Should Be Enjoined to Comply With FOIA's Mandates.**

23 The Court has authority to issue an injunction requiring agencies to take corrective action to  
24 come into compliance with existing FOIA obligations and to deter future FOIA violations that are likely  
25 to occur. 5 U.S.C. § 552(a)(4)(B); *Long v. IRS*, 693 F.2d 907, 909 (9th Cir. 1982); *see also United States*  
26 *v. An Article of Drug*, 661 F.2d 742, 747 (9th Cir. 1981). Given NMFS's more than year long delay in  
27 responding to EcoRights' appeal, injunctive relief is a proper remedy. *See, e.g., OCE II*, 2015 U.S. Dist.  
28 LEXIS 94997 at \*33 (enjoining NMFS to respond to plaintiffs' pending and future FOIA requests within

1 statutory deadlines); *SYRCL*, 2008 WL 2523819 at \*17 (same); *see also Elect. Privacy Info. Ctr. v. Dep't*  
2 *of Justice*, 416 F. Supp. 2d. 30, 43 (D.D.C. 2006) (ordering agency to process plaintiff's expedited FOIA  
3 request within 20 days). Injunctive relief in a FOIA context is appropriate where the public would be  
4 benefited by the disclosure. *Long*, 693 F.2d at 909. In making this determination, courts consider  
5 whether "there has been a voluntary cessation of allegedly illegal conduct, [whether] ... prolonged delays  
6 have repeatedly hindered the timely disclosure of non-exempt documents, ... the likelihood of  
7 recurrence, ... the good faith of any expressed intent to comply, the effectiveness, if any, of the  
8 discontinuance and the character of past violations." *Id.* These factors weigh in favor of granting an  
9 injunction. In the past NMFS failed, for the most part by exceedingly large margins, to respond within  
10 FOIA's deadlines to EcoRights' requests and appeals. Despite an order from a judge of this Court NMFS  
11 has not ceased its practice of untimely responses. Therefore, NMFS should be enjoined to comply with  
12 FOIA's deadlines in responding to EcoRights' future requests and appeals.

13 In regards to NMFS's withholding of information under Exemption 5, NMFS has failed to justify  
14 its withholdings in the ten records at issue. The Court should therefore enjoin NMFS to promptly release  
15 in full these ten records. *See e.g. EcoRights*, 2017 U.S. Dist. LEXIS 197451 at \* 27 (ordering agency to  
16 produce all documents redacted pursuant to Exemptions 5 and 6 within two weeks of the date of the  
17 order). NMFS should further be ordered to perform a renewed search and to promptly release any non-  
18 exempt records responsive to EcoRights' request.

19 EcoRights has been hindered by NMFS's year long delay in responding to EcoRights' appeal,  
20 NMFS's unreasonable search for responsive records, and its improper withholding of non-exempt  
21 information. EcoRights is a public advocacy group that intends to continue its advocacy work on behalf  
22 of ESA-listed anadromous fish that are within NMFS's jurisdiction, and thus will almost certainly send  
23 additional FOIA requests to NMFS in the future. Accordingly, there is a likelihood that NMFS's FOIA  
24 violations will recur.

### 25 **III. CONCLUSION**

26 For the reasons stated above, EcoRights requests that the Court grant declaratory judgment  
27 establishing that NMFS violated FOIA by: (1) failing to provide the determination for EcoRights' appeal  
28 within the deadline mandated by 5 U.S.C. § 552(a)(6)(A)(ii); (2) not providing all non-exempt

1 information promptly as mandated by 5 U.S.C. § 552(a)(3)(A); (3) not performing an adequate,  
2 reasonable search for responsive records; (4) failing to provide a legally adequate explanation, at the  
3 administrative level, for finding information exempt from disclosure; and (5) unlawfully withholding  
4 non-exempt information. EcoRights further requests that the Court issue appropriate injunctive relief  
5 requiring NMFS to: (1) immediately release all withheld information that is not exempt from disclosure;  
6 (2) perform an additional search for documents responsive to EcoRights' request that are in NMFS's  
7 possession at the time NMFS performs its new search, including a renewed search of files at the OLE;  
8 (3) produce responsive records located in the new search within 20 working days of the Court's order;  
9 and (4) respond to EcoRights future FOIA requests and appeals in accord with the deadlines imposed by  
10 5 U.S.C. § 552(a)(6)(A) and 5 U.S.C. § 552(a)(3)(A).

11  
12 Date: June 8, 2018

Respectfully submitted,

13 /s/Patricia Linn

14 Patricia Linn

15 Attorney for Plaintiff

16 Ecological Rights Foundation  
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**From:** Arcserve  
**Sent:** Tuesday, June 12, 2018 10:08 AM  
**To:** mark.graff@noaa.gov  
**Subject:** Six Factors to Consider Before Buying Email Archiving



## Comply with FOIA, HIPAA, GDPR, PCI DSS, and more

If your organization is subject to the Freedom of Information Act, HIPAA, GDPR, or similar regulations, chances are you either have or require an email archiving solution.

Before investing in an add-on tool or renewing your existing solution, make sure you can:

1. **Meet email retention requirements** and respond quickly to regulatory and employee requests
2. **Collect and manage** new and historic email records automatically, according to corporate policies
3. **Be 100% prepared** for any legal eDiscovery request with powerful search capabilities
4. **Maintain a safe work environment**, resolving HR and employee complaints, providing unalterable email records and resolving conflicts
5. **Move older emails** to your long-term archive, reduce costs and increase employee productivity and IT efficiency



- 6. **Reduce IT workload** and increase user satisfaction with employee access to archived emails right in Outlook and/or web access, so they can easily find lost or deleted emails

Consider the only technology built from the ground up to safeguard your compliance on-premises and in the cloud:  
**Arcserve UDP Cloud Archiving.**

Going far beyond traditional email archiving solutions, it blends an instinctive UI for remarkable ease of use with feature-rich capabilities for you to be fully compliant and ready.

Join more than 45,000 customers worldwide who trust Arcserve to protect their data, time and budget.

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This email was sent to mark.graff@noaa.gov. If you no longer wish to receive emails from Arcserve you may [unsubscribe](#) at any time.

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Arcserve, 8855 Columbine Road, Suite 150, Eden Prairie, Minnesota, USA 55347

**U.S. Department of Commerce  
National Oceanic and Atmospheric Administration (NOAA)  
Office of the Chief Information Officer (OCIO)  
Information Technology Security Program (ITSP)**



**Privacy Threshold Analysis  
for the  
NOAA High Availability Enterprise Services (HAES)  
(NOAA0700)**

## **U.S. Department of Commerce Privacy Threshold Analysis**

### **NOAA High Availability Enterprise Services**

**Unique Project Identifier: NOAA0700 HAES**

**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 on information 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:**

HAES (NOAA0700) will modularize disparate system functionalities into a centralized “discrete” set of enterprise services that will be consolidated as needed to quickly enable new/improved functionality. HAES establishes standard middleware architecture that enables superior interoperability, improved manageability, and reduce platform costs.

HAES will provide a collection of services grouped into 3 subsystems. HAES will provide:

1. Centralized/Unified Enterprise service model
2. Program Management :
  - Mission service management through collaboration and transparency with IT infrastructure configuration/improvement and qualitative/quantitative performance metrics to ensure availability and continuity of services.
  - IT governance and transparency through comprehensive service cost, quality, and risk information to provide balance in IT investment (portfolio) aligned to mission requirements.
3. Security governance and management through assisting identities and security access to the IT services to mitigate mission risks, meeting compliance, and audit requirements:
  - Ensure all systems are secured using best practices standards.
  - Monitoring and Logging.
  - Ensure security compliance and enforcement.
  - Ensure reporting is complete & on time.
  - Coordination with Cybersecurity on initiatives & tickets.
4. Communications and Collaboration - All enterprise service points of contact, escalation, and infrastructure services information/plans are communicated/shared and transparent with mission customers and leadership.

## SYSTEM ENVIRONMENT

HAES (NOAA0700) is a General Support System (GSS) with a boundary that comprises the following subsystems:

1. **Identity, Credential, and Access Management (ICAM)** strategy and management approach ensures that NOAA ICAM solutions exhibit a balance between usability and security. As such, Homeland Security Presidential Directive (HSPD) 12 PKI infrastructure was built for all Line Offices and system owners to implement 2-Factor Authentication (2FA) on their Microsoft domains. The ICAM team employed a waterfall approach to build a cornerstone solution, by unifying the identity stores and correlating all enrollment processes in NOAA and DOD. ICAM provides Identify Management Services and Systems (IDMS) and Single Sign-On (SSO) solutions to Line Offices and System Owners. The ICAM system operates a set of servers to manage and serve information that assists in the implementation of the HSPD-12 mandates for NOAA.

ICAM system uses the following connections:

1. LDAPS connection to DOD Global Directory Service (GDS) for obtaining NOAA user's CAC information e.g. EDIPI, certificate, UPN and CN.
2. Database connection to DOD DEERS for certificate information.
3. LDAPS connection to NOAA NEMS for user profiles.
4. Database connection to NOAA Staff Directory (NSD) for Federal employee status/manager.

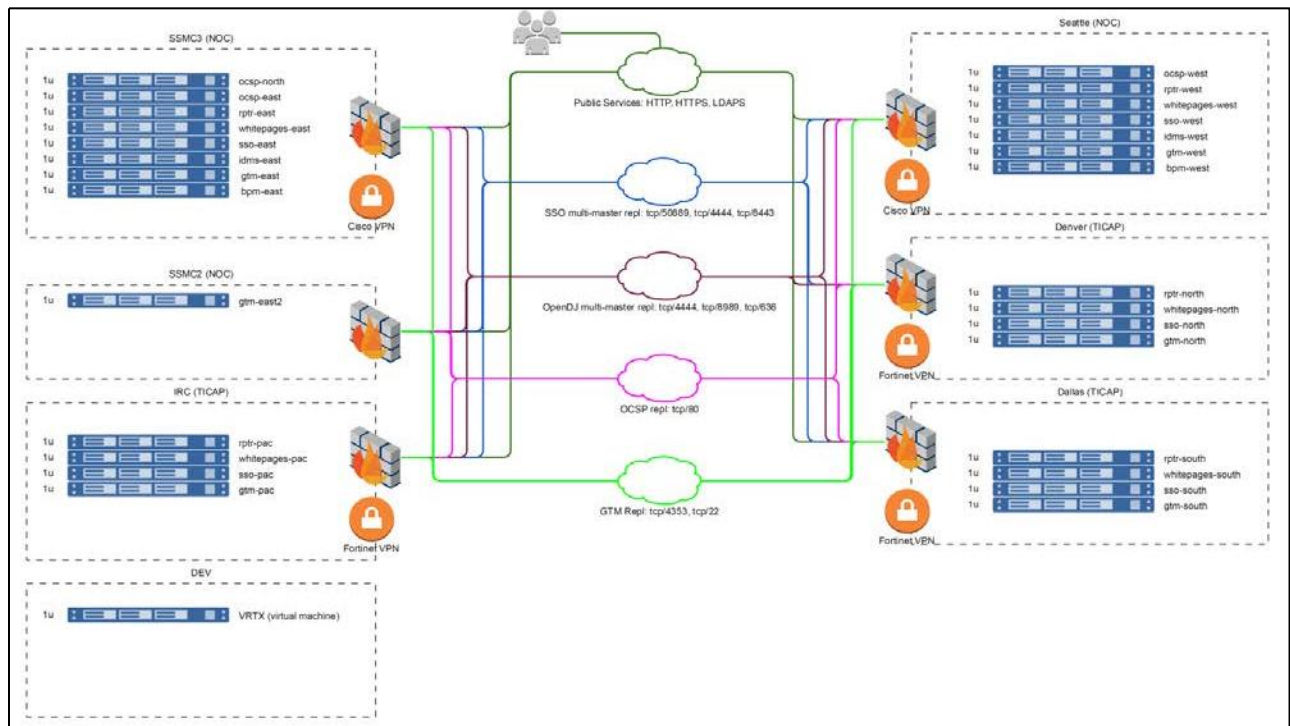
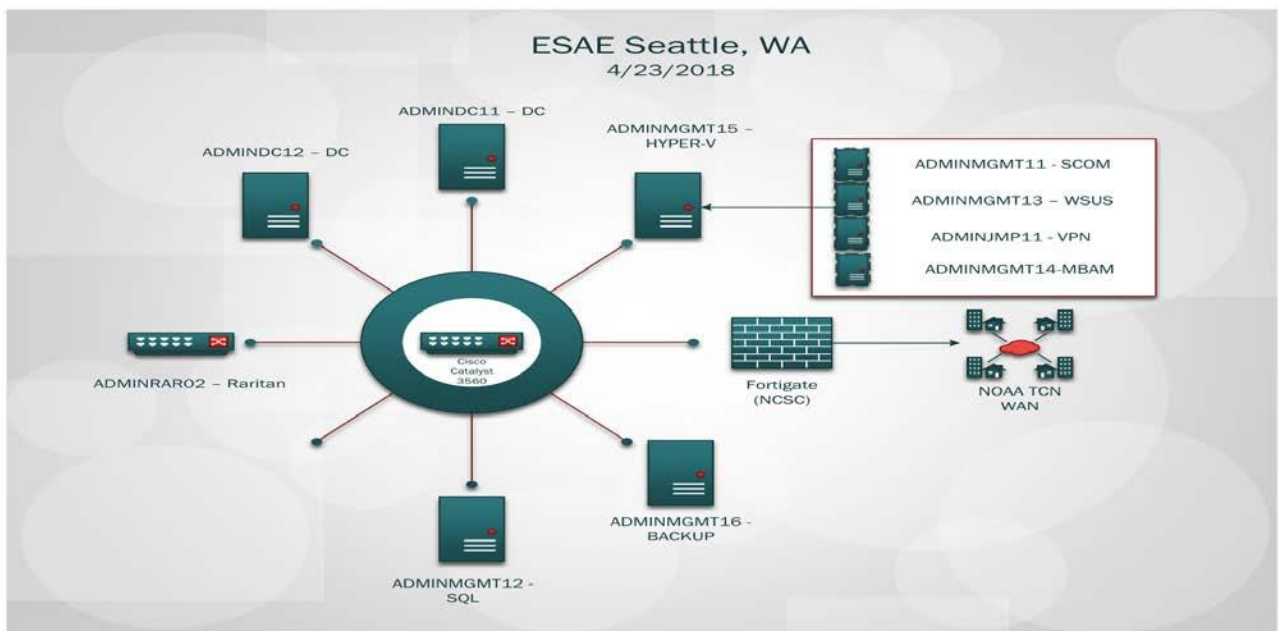


Figure 1: ICAM System Boundary Diagram

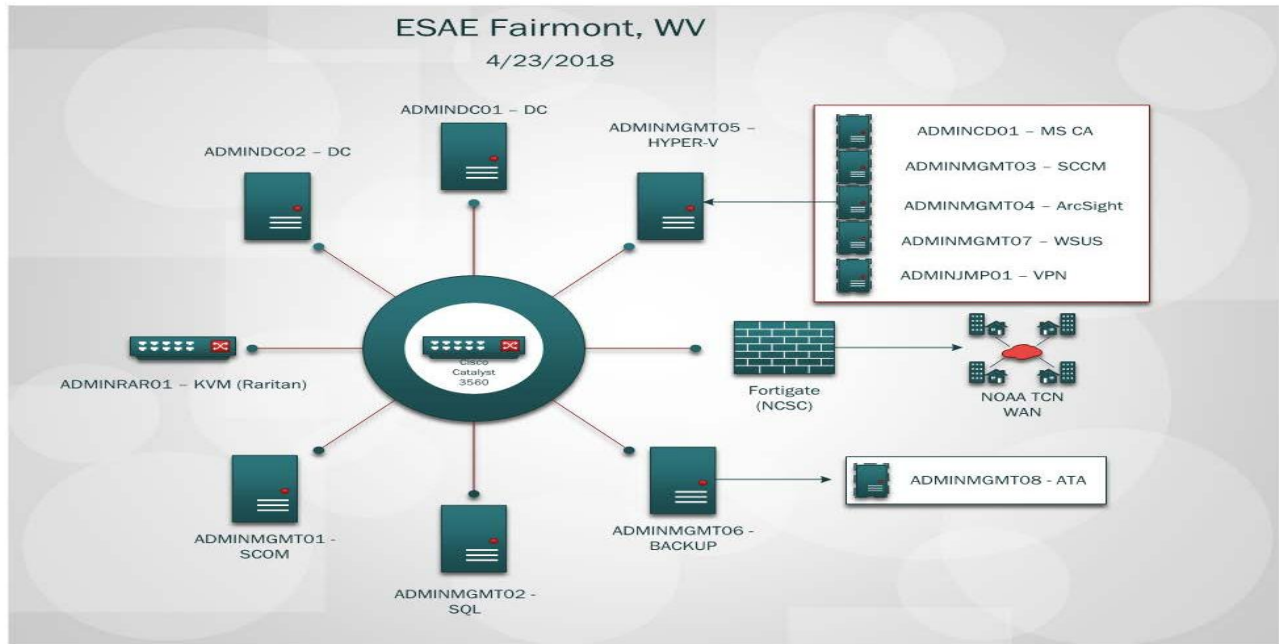
2. **Enhanced Security Administrative Environment (ESAE)** is designed to enhance security of the NOAA Active Directory production environment by limiting the exposure of privileged administrative credentials. NOAA believes this implementation will improve the likelihood of avoiding significant financial, reputation, and operational impacts of potential future security breaches. The business impact from a successful malicious compromise of an organization's information systems can vary greatly from organization to organization and may encompass a wide spectrum of negative outcomes. Some of the impacts that have been experienced by organizations suffering from modern cyber-attacks include:

- Loss of reputation
- Significant cost of recovery and remediation
- Reduction in revenue
- Loss of competitive advantage
- Unauthorized reproduction of proprietary designs or other intellectual Property

ESAE is designed to thwart cyber-attackers business impact by mitigating credential theft techniques as well as other several other known attack techniques. NOAA believes this will improve the likelihood of avoiding significant financial, reputation, and operational impacts of potential future security breaches.



**Figure 2: ESAE Seattle, WA Diagram**



**Figure 3: ESAE Fairmont System Diagram**

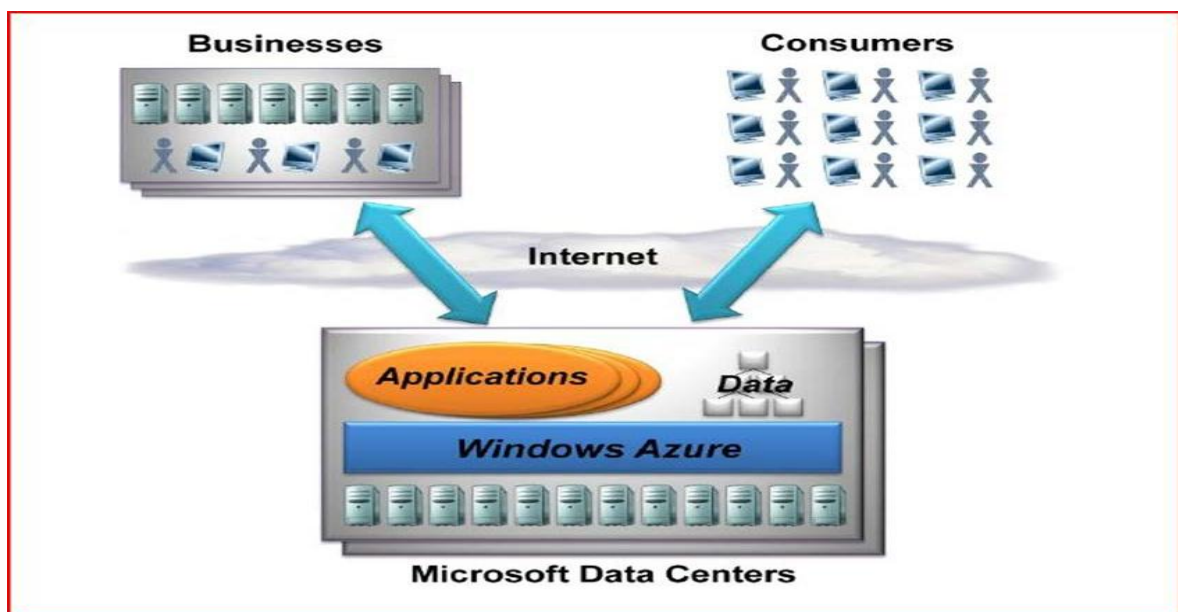
- Microsoft Azure for Government** is an open and flexible cloud platform that will enable HAES to quickly build, test, deploy, and manage their applications, services, and product development across a network of Microsoft-managed datacenters within the United States which in turn will help make HAES's data available to NOAA in a rapid and scalable manner. The Microsoft Azure platform exports savings to HAES by delivering the software, platform, and IT infrastructure resources where and when it is needed via the Internet. The Microsoft Azure for Government service allows the government to use cloud platforms to tap into HAES's data by consolidating HAES'S datasets and making them available on the Azure for Government platform. Thus, HAES customers can help to speed the rate of innovation and create new insights that will positively affect NOAA through mission-critical applications. The Microsoft Azure Government platform offers the same functionality in an environment dedicated to Government customers.

HAES can leverage the Microsoft Azure for Government service in a variety of ways. Microsoft Azure is used for building, deploying, and managing applications and services through a network of Microsoft-managed data centers. It provides both Platform as a Service (PaaS) and Infrastructure as a Service (IaaS) services and supports many different programming languages, tools and frameworks, including both Microsoft-specific and third-party software and systems. The advantages for NOAA in using Microsoft Azure include the ability to build large scalable applications serving large populations of users by scaling up or scaling down in relatively short periods of time.

Microsoft Azure authorizes connections from the information system to other information systems outside of the authorization boundary through the use of vendor agreements, Memoranda of Understanding (MOUs), Interconnection Security Agreements (ISAs) Terms of Conditions (T&C), and/or Service Level Agreements (SLAs). Microsoft has developed the

necessary vendor agreements, MOUs, ISAs, T&C, and SLAs that document connections outside of the Federal authorization boundary. Microsoft Azure follows FedRAMP guidance regarding Government agencies in that Interconnection Security Agreements (ISAs) are not designed for use between a CSP and Federal Agency. An Agency ATO memo should be the governing document for Agency and Azure interaction and security requirement communications. The only interconnections are between internal Microsoft services and Major Applications. Azure also uses the above documents to maintain interconnection agreements with these internal groups.

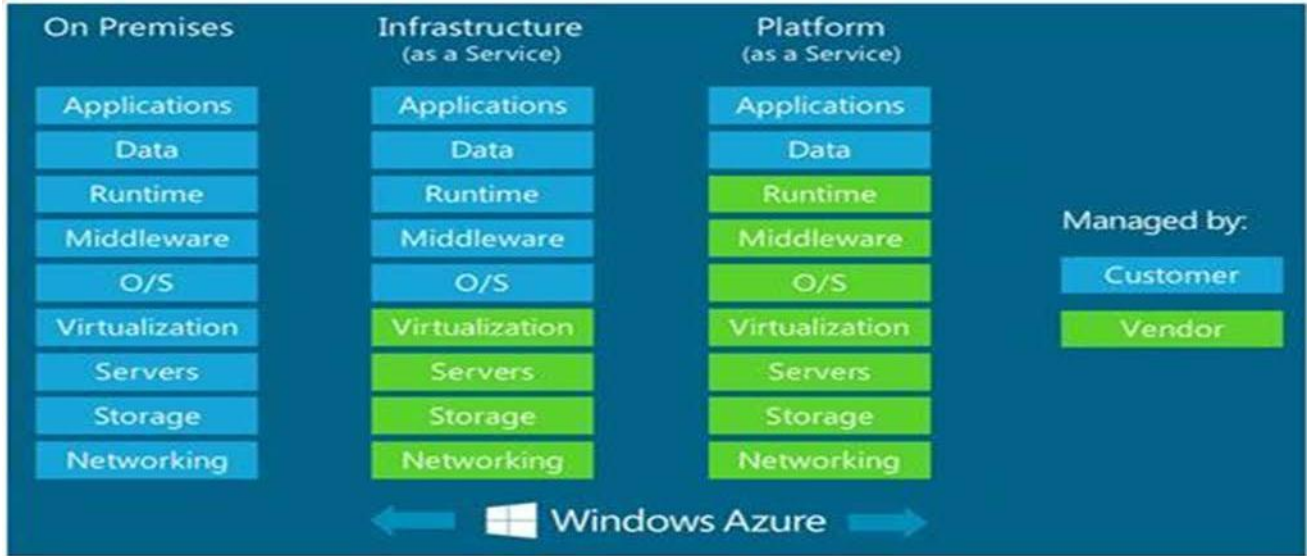
At this time, Microsoft Azure does not have any dependencies on information systems external to Microsoft that require ISAs. As a large ISP provider, Microsoft peers with a large amount (over 2,000) of ISPs.



**Figure 4: Hosted Microsoft Azure for Government Tenant Breakdown**

Microsoft Azure provides a multi-tenant public cloud service platform that will offer HAES the functionality to support capacities such as Platform as a Service (PaaS), and Infrastructure as a Service (IaaS) cloud service models. Software as a Service (SaaS) is also supported by Microsoft Azure if HAES needs to manage its own email platform servers within Microsoft Azure. Microsoft is responsible for Microsoft Azure and the physical security of its datacenters through the use of security protections such as locked badge entry doors, fences, and guards. In addition, Microsoft Azure provides strong levels of cloud security at the software layer that meets the security, privacy, and compliance needs of HAES. HAES must comply with various regulatory or business agreement requirements; therefore HAES will be utilizing various tools for additional security requirements for file integrity monitoring and log file monitoring.



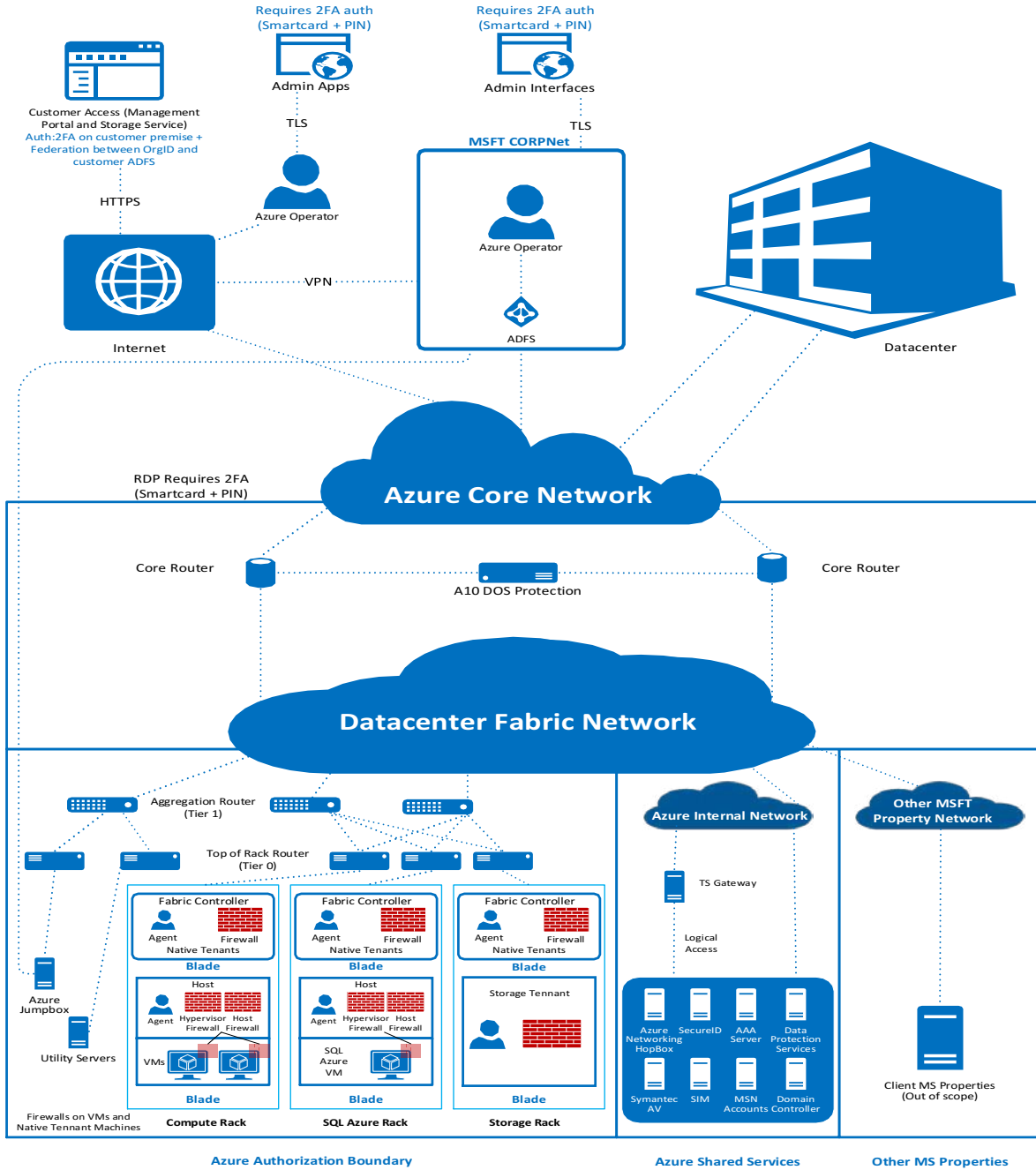


**Figure 5: Shared Microsoft and Customer Responsibility**

Additional customer responsibilities include managing their applications, data content, virtual machines, access credentials, and compliance with regulatory requirements or business agreements applicable to their particular industry and locale. The Microsoft Azure Customer Responsibility Matrix documents the customer responsibilities at the NIST SP 800-53 Revision 4 control level.

To achieve FedRAMP certification and compliance, Microsoft must pass a rigorous and in-depth comprehensive system-wide testing of its security controls based upon the requirements and security controls that are documented in NIST SP 800-53 Rev. 4, Security and Privacy Controls for Federal Information Systems and Organizations publication, revised January 2015. Security controls are implemented based upon the impact level rating needed to meet the security objectives of confidentiality, integrity, and availability. Microsoft Azure for Government Cloud has been categorized as a High security control baseline system based upon the FIPS 199 document which HAES will leverage as a part of its environment.

Microsoft Azure is the customer’s responsibility as documented in the Microsoft Azure Customer Responsibility Matrix. HAES will ensure that its security policies, procedures, applications, and controls are assessed separately and authorized in agreement with the requirements documented in NIST 800-37, Rev. 1, Guide for Applying the Risk Management Framework to Federal Information Systems.



**Figure 6: Microsoft Azure for Government Overview**

The E-Government Act of 2002 defines “information system” by reference to the definition section of Title 44 of the United States Code. The following is a summary of the definition: “Information system” means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information. See: 44. U.S.C. § 3502(8).

**Questionnaire:**

1. What is the status of this information system?

- This is a new information system. *Continue to answer questions and complete certification.*
- This is an existing information system with changes that create new privacy risks. *Complete chart below, continue to answer questions, and complete certification.*

<b>Changes That Create New Privacy Risks (CTCNPR)</b>			
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.

**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

I certify the criteria implied by one or more of the questions above **apply** to the NOAA0700 HAES system 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 NOAA0700 HAES system and as a consequence of this non-applicability, a PIA for this IT system is not necessary.

Name of Information System Security Officer (ISSO): Kevin Mitchell

Signature of ISSO or SO: MITCHELL.KEVIN.A.139 8622886 Digitally signed by MITCHELL.KEVIN.A.1398622886 Date: 2018.06.11 15:06:37 -04'00' Date: \_\_\_\_\_

Name of Information Technology Security Officer (ITSO): Jean Apedo

Signature of ITSO: APEDO.JEAN.11880 76064 Digitally signed by APEDO.JEAN.1188076064 Date: 2018.06.12 08:26:35 -04'00' Date: \_\_\_\_\_

Name of Authorizing Official (AO): Doug Perry

Signature of AO: \_\_\_\_\_ Date: \_\_\_\_\_

Name of Bureau Chief Privacy Officer (BCPO):

Signature of BCPO: \_\_\_\_\_ Date: \_\_\_\_\_



April 3, 2018

*Submitted via FOIAonline.*

NOAA Fisheries  
1315 East-West Highway  
Silver Spring, MD 20910

**Re: Freedom of Information Act Request for Records Relating to proposals submitted under Sea Grant aquaculture funding project**

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Friends of the Earth requests all records pertaining to any applications or proposals for certain finfish aquaculture projects submitted pursuant to the National Sea Grant College Program 2018 Ocean, Coastal and Great Lakes National Aquaculture Initiative (Sea Grant).<sup>1</sup> This request pertains specifically to all applications or proposals for marine aquaculture projects involving the culturing, rearing, and/or harvesting of finfish species in the ocean, which have been received pursuant to the Sea Grant by NOAA or any of its Interstate Marine Fisheries Commissions.

For this request, the term “records” refers to, but is not limited to, correspondence of any kind, memoranda, letters, notes, schedules, electronic mail, telephone logs, minutes of meetings, work papers, reports, studies, or data.

The FOIA provides that if portions of a document are exempt from release, the remainder must nevertheless be segregated and disclosed, so please provide us with all non-exempt portions of any exempt records. 5 U.S.C. § 552(b); 7 C.F.R. § 1.15(b). Please explain any redactions by reference to specific provisions of the FOIA that allow information to be exempt from disclosure. *See* 7 C.F.R. § 1.7.

**Fee Waiver Request:** As a non-profit organization, Friends of the Earth also requests a waiver of all fees incurred in providing these records. Disclosure of the requested information “is in the public interest because it is likely to contribute significantly to the public understanding of the operation 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); 15 C.F.R. § 4.11(l) (“Records responsive to a request will be furnished without charge . . . if the requester asks for such a waiver in writing and . . . has demonstrated that [d]isclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the

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<sup>1</sup> NOAA recently announced federal funding opportunity for aquaculture projects on December 14, 2017, in which it has available a total of \$7,000,000 to \$11,500,000 across fiscal years 2018, 2019 and 2020 to support aquaculture projects in the U.S. Coastal and Great Lakes regions. The Request for Proposals period ended on March 30, 2018. This project announcement can be found at <https://www.grants.gov/web/grants/view-opportunity.html?oppId=299412>.



Government; and [d]isclosure of the information is not primarily in the commercial interest of the requester.” (internal punctuation marks omitted)).

Disclosure of the requested records “is likely to contribute significantly to public understanding of the operations or activities of the Government” that affect their safety, health, and environment. 15 C.F.R. § 4.11(l)(1)(i). Friends of the Earth has over 1.5 million members and activists across the United States who place a priority on ensuring that the federal government takes proper considerations for the impacts of its actions on the environment and public health. This starts with knowing what the government is doing, and whether it has fulfilled its legal obligations prior to carrying out federal action. As such, these records have a high “informative value;” they will be “meaningfully informative about Government operations or activities” related to the NEPA and ESA processes, and are not “already in the public domain.” *Id.* at § 4.11(l)(2)(ii).

This records request concerns identifiable operations and activities of the federal government, and will be meaningfully informative as to those operations and activities. NOAA is currently placing a high priority on legitimizing and advancing the commercial, net pen aquaculture of finfish in marine waters. This is essentially the equivalent of allowing concentrated animal feedlot operations in our oceans, which have devastating environmental, socio-economic, and public health impacts. Specifically for this request, NOAA has made available Sea Grant funding to marine finfish aquaculture projects. The requested records will be meaningfully informative as to the various Sea Grant applications for federal funding assistance that NOAA is in the process of reviewing. The records may also shed light on NOAA’s support of industrial ocean fish farming industry in U.S. waters, as well as what review processes the federal government has taken to protect coastal communities, and prevent impairment to the environment, including endangered and threatened species, from this industry.

The requested records is likely to contribute significantly to the broader public’s increased understanding of government operations and activities. Through these records, Friends of the Earth expects to significantly increase the public’s understanding of whether the Sea Grant will result in federal funding assistance of finfish aquaculture projects. A broad sector of the public is concerned that NOAA is legitimizing and supporting marine finfish aquaculture without first taking proper steps to consider the array of harms that this industry poses on the ocean ecosystem and public health. 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 significantly contribute to educating the public about NOAA’s operations and activities. We will utilize the released records and our organizational expertise to help our members, activists, the general public, and the media to increase their understanding of these important issues.

Friends of the Earth has a demonstrated “expertise in the subject area [of aquaculture] and ability and intention to effectively convey information to the public.” 15 C.F.R. § 4.11(l)(2)(iii). To that end, we utilize various means of communication to update its members and activists, as well as







purpose in requesting the documents is to increase public knowledge and participation in the government process so fundamental to the effective working of a democracy.<sup>3</sup>

Because of the non-profit, public interest nature of Friends of the Earth, we have extremely limited financial resources with which to cover the copying and search expenses of this request. If our request for a fee waiver is denied and any expenses associated with this request are in excess of \$25.00, please obtain our approval before any such charges are incurred.

**Timely Response and Request for Rolling Release:** Pursuant to 5 U.S.C. § 552(a)(6)(E)(ii)(I), we expect a response within ten (10) working days of your receipt of this request. If this request is denied in whole or in part, we expect a detailed justification for withholding the records. We also request any segregable portions of records that are otherwise not expected to be disclosed by NOAA in response to this request. Finally, we request that any documents responsive to this request be released by NOAA to Friends of the Earth on a rolling basis rather than NOAA holding all of the documents for a one-time release. Friends of the Earth reserves the right to appeal any denial of this request.

If you are not the appropriate official to handle this request, please forward this letter to the appropriate person, and let us know that you have done so. Please contact me at the below email address with any questions you may have about the materials I am requesting. Thank you for your immediate attention to this matter.

Sincerely,

Hallie Templeton  
Senior Oceans Campaigner  
Friends of the Earth  
1101 15<sup>th</sup> Street NW  
Washington, DC 20001  
htempleton@foe.org

---

<sup>3</sup> Friends of the Earth also qualifies as a “representative of the news media,” and is further entitled to document search and review without charge (as well as the first 100 pages of paper copies free of charge). *See* 15 C.F.R. § 4.11(b)(6) (“Representative of the news media, or news media requester, means any person or entity organized and operated to publish or broadcast news to the public that actively 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..”). Friends of the Earth “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.” *See* 5 U.S.C. § 552(a)(4)(A)(ii); *Nat’l Security Archive v. U.S. Dep’t of Defense*, 800 F.2d 1381, 1387 (D.C. Cir. 1989). Friends of the Earth has extensive and well-exercised means to keep the public informed on the operations and activities of the federal government. Friends of the Earth does not merely obtain information and then contact members of the press to relate that information; rather, we independently analyzes the information, draft our own reports and articles on the issues, and disseminate the information broadly through our own publications to our members and other interested persons. *See, e.g., supra*, note 2.



Trenika Tapscott - NOAA Federal <trenika.tapscott@noaa.gov>

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## GC Clearance on DOC-NOAA-2018-001106

---

**Roxie Allison-Holman - NOAA Federal** <roxie.allison-holman@noaa.gov>

Thu, May 10, 2018 at 5:42 PM

To: Trenika Tapscott - NOAA Federal <trenika.tapscott@noaa.gov>

Cc: Annie Thomson - NOAA Federal <annie.thomson@noaa.gov>

Trenika,

Please find the revised FAL for FOIA 2018-001106. Please let me know if you have any questions.

[Quoted text hidden]

<b>Tracking Number</b>	<b>Type</b>	<b>Requester</b>	<b>Requester Organization</b>	<b>Submitted</b>	<b>Received</b>
DOC-NOAA-2018-001520	Request	Jackson Wallace		06/12/2018	06/12/2018
DOC-NOAA-2018-001518	Request	Michael L. Johnson		06/11/2018	06/11/2018
DOC-NOAA-2018-001510	Request	Jordan Waltz		06/07/2018	06/07/2018
DOC-NOAA-2018-001509	Request	Rachel D'Oro	The Associated Press	06/07/2018	06/07/2018
DOC-NOAA-2018-001495	Request	Jeff Ruch	PEER	06/06/2018	06/06/2018

**Custom Report - 06/13/2018 10:33:39**

<b>Assigned To</b>	<b>Case File</b>	<b>Assigned To</b>	<b>Perfect?</b>	<b>Due</b>	<b>Closed Date</b>	<b>Status</b>	<b>Dispositions</b>
NOAA	NOAA	No	TBD	TBD	Submitted		
NOAA	NOAA	No	TBD	TBD	Submitted		
NOAA	NOAA	No	TBD	TBD	Submitted		
NOAA	NOAA	No	TBD	TBD	Submitted		
NOAA	NOAA	No	TBD	TBD	Initial Evaluation		

**Detail**

I am requesting a copy of the marine mammal inventory report (MMIR/NIMM), I want this copy to include all marine  
I request a copy of the report "Hawaii Fishing Vessel Monitoring System: Report of the Pilot Project" to include "Ap  
I would like to request a digital or DVD hard copy of a VHS or VHS-c tape from Terry L. Kennemore. This tape has  
Dear FOIA Officer: This is a request under the Freedom of Information Act. I request that a copy of the following dc  
See attached

› mammals (cetaceans & pinnipeds), also all dispositions (living, dead, released, etc.) and all facilities  
› Appendix A – Chronology of VMS Activities.” The report was published by the National Marine Fisheries Service  
› footage of a violent incident between two killer whales, Kandu and Corky, at SeaWorld San Diego on April 1, 2001.  
› Documents [or documents containing the following information] be provided to me: — Copies of any and all

ies.

Service (NMFS), Office of Enforcement, Southwest Region, Honolulu, Hawaii in 1997.

August 21, 1989. The VHS tape was originally sent to then Attorney General John Van de Kamp of California. The tape contains all correspondence with Alaska communities including but not exclusive of the communities of Napaskiak.

nia. The postmark of this video is between August 22 - September 30, 1989.

↳, Atmautluak, Bethel, Akiachak, Tuluksak and Akiak in regard to the illegal killing of a protected gray wolf



ale by Alaska Native hunters after the animal strayed into the Kuskokwim River in July 2017 near the cc

ommunities of Bethel an









NIST Special Publication 800-171A

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# Assessing Security Requirements for Controlled Unclassified Information

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RON ROSS  
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**NIST**  
National Institute of  
Standards and Technology  
U.S. Department of Commerce

NIST Special Publication 800-171A

# Assessing Security Requirements for Controlled Unclassified Information

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*Computer Security Division*  
*National Institute of Standards and Technology*

**June 2018**



U.S. Department of Commerce  
*Wilbur L. Ross, Jr., Secretary*

National Institute of Standards and Technology  
*Walter Copan, NIST Director and Under Secretary of Commerce for Standards and Technology*



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### Abstract

The protection of Controlled Unclassified Information (CUI) resident in nonfederal systems and organizations is of paramount importance to federal agencies and can directly impact the ability of the federal government to successfully conduct its assigned missions and business operations. This publication provides federal and nonfederal organizations with assessment procedures and a methodology that can be employed to conduct assessments of the CUI security requirements in [NIST Special Publication 800-171](#), *Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations*. The assessment procedures are flexible and can be customized to the needs of the organizations and the assessors conducting the assessments. Security assessments can be conducted as self-assessments; independent, third-party assessments; or government-sponsored assessments and can be applied with various degrees of rigor, based on customer-defined depth and coverage attributes. The findings and evidence produced during the security assessments can facilitate risk-based decisions by organizations related to the CUI requirements.

### Keywords

Assessment; Assessment Method; Assessment Object; Assessment Procedure; Assurance; Basic Security Requirement; Controlled Unclassified Information; Coverage; CUI Registry; Depth; Derived Security Requirement; Executive Order 13556; FISMA; NIST Special Publication 800-53; NIST Special Publication 800-53A; Nonfederal Organization; Nonfederal System; Security Assessment; Security Control.

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### CAUTIONARY NOTE

The generalized assessment procedures described in this publication provide a framework and a starting point for developing specific procedures to assess the CUI security requirements in [NIST Special Publication 800-171](#). The assessment procedures can be used to generate relevant evidence to determine if the security safeguards employed by organizations are implemented correctly, are operating as intended, and satisfy the CUI security requirements. Organizations have the flexibility to specialize the assessment procedures by selecting the specific assessment methods and the set of assessment objects to achieve the assessment objectives. There is no expectation that all assessment methods and all objects will be used for every assessment. There is also significant flexibility on the scope of the assessment and the degree of rigor applied during the assessment process. The assessment procedures and methods can be applied across a continuum of approaches—including self-assessments; independent, third-party assessments; and assessments conducted by sponsoring organizations (e.g., government agencies). Such approaches may be specified in contracts or in agreements by participating parties.

### **DEFINITION AND USAGE OF THE TERM INFORMATION SYSTEM**

Unless otherwise specified by legislation, regulation, or governmentwide policy, the use of the term *information system* in this publication is replaced by the term *system*. This change reflects a more broad-based and holistic definition of information systems that includes, for example: general purpose information systems; industrial and process control systems; cyber-physical systems; and individual devices that are part of the Internet of Things. As computing platforms and information technologies are increasingly deployed ubiquitously worldwide and systems and components are connected through wired and wireless networks, the susceptibility of Controlled Unclassified Information to loss or compromise grows—as does the potential for adverse consequences resulting from such occurrences.

### OTHER RESOURCES TO SUPPORT ASSESSMENTS

NIST Special Publication 800-171A is a companion publication developed to support assessments of the CUI security requirements in [NIST Special Publication 800-171](#). As such, it is the primary and authoritative source of guidance for organizations conducting such assessments. However, since it is recognized that the communities of interest affected by the CUI security requirements are broad and diverse, other supporting assessment guidance may be developed for those communities. For example, the NIST Manufacturing Extension Partnership (MEP) developed [Handbook 162, NIST MEP Cybersecurity Self-Assessment Handbook for Assessing NIST SP 800-171 Security Requirements in Response to DFARS Cybersecurity Requirements](#). This resource, along with other assessment resources that may be developed in the future, can complement the assessment procedures in NIST Special Publication 800-171A, thus helping sector-specific organizations generate the evidence needed to determine if the CUI security requirements have been satisfied.

## Table of Contents

<b>CHAPTER ONE</b>	<b>INTRODUCTION .....</b>	<b>1</b>
1.1	PURPOSE AND APPLICABILITY .....	1
1.2	TARGET AUDIENCE.....	2
1.3	ORGANIZATION OF THIS SPECIAL PUBLICATION.....	2
<b>CHAPTER TWO</b>	<b>THE FUNDAMENTALS.....</b>	<b>4</b>
2.1	ASSESSMENT PROCEDURES .....	4
2.2	ASSURANCE CASES .....	6
<b>CHAPTER THREE</b>	<b>THE PROCEDURES.....</b>	<b>8</b>
3.1	ACCESS CONTROL .....	9
3.2	AWARENESS AND TRAINING .....	19
3.3	AUDIT AND ACCOUNTABILITY.....	21
3.4	CONFIGURATION MANAGEMENT .....	26
3.5	IDENTIFICATION AND AUTHENTICATION .....	31
3.6	INCIDENT RESPONSE.....	36
3.7	MAINTENANCE .....	38
3.8	MEDIA PROTECTION .....	41
3.9	PERSONNEL SECURITY .....	45
3.10	PHYSICAL PROTECTION .....	46
3.11	RISK ASSESSMENT.....	49
3.12	SECURITY ASSESSMENT .....	51
3.13	SYSTEM AND COMMUNICATIONS PROTECTION.....	53
3.14	SYSTEM AND INFORMATION INTEGRITY .....	61
<b>APPENDIX A</b>	<b>REFERENCES .....</b>	<b>65</b>
<b>APPENDIX B</b>	<b>GLOSSARY.....</b>	<b>67</b>
<b>APPENDIX C</b>	<b>ACRONYMS .....</b>	<b>75</b>
<b>APPENDIX D</b>	<b>ASSESSMENT METHODS.....</b>	<b>76</b>

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## CHAPTER ONE

# INTRODUCTION

## THE NEED TO ASSESS CUI SECURITY REQUIREMENTS

The protection of unclassified federal information in nonfederal systems and organizations is dependent on the federal government providing a process for identifying the different types of information that are used by federal agencies. [Executive Order 13556](#) established a governmentwide Controlled Unclassified Information (CUI)<sup>1</sup> Program to standardize the way the executive branch handles unclassified information that requires protection. The implementing regulation for the CUI Program is [32 CFR part 2002](#), *Controlled Unclassified Information*. Only federal information that requires safeguarding or dissemination controls pursuant to federal law, regulation, or governmentwide policy may be designated as CUI.<sup>2</sup> [NIST Special Publication 800-171](#), *Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations*, specifies the security requirements to ensure the confidentiality of CUI.

### 1.1 PURPOSE AND APPLICABILITY

The purpose of this publication is to provide procedures for assessing the CUI requirements in [NIST Special Publication 800-171](#). Compliance with the security requirements is addressed in CUI guidance and the CUI Federal Acquisition Regulation (FAR)<sup>3</sup> or as supplemented by federal agencies (e.g., Department of Defense Federal Acquisition Regulation). Organizations can use the assessment procedures to generate evidence to support the assertion that the security requirements have been satisfied.

The assessment process is an information-gathering and evidence-producing activity to determine the effectiveness of the safeguards intended to meet the set of security requirements specified in NIST Special Publication 800-171. In this context, the information gathered and the evidence produced can be used by an organization to:

- Identify potential problems or shortfalls in the organization's security and risk management programs;
- Identify security weaknesses and deficiencies in its systems and in the environments in which those systems operate;
- Prioritize risk mitigation decisions and activities;
- Confirm that identified security weaknesses and deficiencies in the system and in the environment of operation have been addressed; and
- Support continuous monitoring activities and provide information security situational awareness.

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<sup>1</sup> *Controlled Unclassified Information* is information the Government creates or possesses, or that an entity creates or possesses for or on behalf of the Government, that a law, regulation, or governmentwide policy requires or permits an agency to handle using safeguarding or dissemination controls, excluding information that is classified under [Executive Order 13526](#), *Classified National Security Information*, December 29, 2009, or any predecessor or successor order, or the Atomic Energy Act of 1954, as amended.

<sup>2</sup> The [CUI Registry](#) is the online repository for information, guidance, policy, and requirements on handling CUI.

<sup>3</sup> The CUI Executive Agent is actively engaged in the process of developing a FAR clause that will apply the requirements of the federal CUI regulation and [NIST Special Publication 800-171](#) to contractors.

The assessment procedures in this publication offer the flexibility to customize assessments based on organizational policies and requirements, known threat and vulnerability information, system and platform dependencies, operational considerations, and tolerance for risk.<sup>4</sup>

### THE SCOPE OF CUI SECURITY REQUIREMENT ASSESSMENTS

For the CUI security requirements in [NIST Special Publication 800-171](#), nonfederal organizations describe in a *system security plan*, how the specified requirements are met or how organizations plan to meet the requirements. The plan describes the system boundary; the environment in which the system operates; how the requirements are implemented; and the relationships with or connections to other systems. The scope of the assessments conducted using the procedures described in this publication are guided and informed by the individual system security plans for the organizational systems processing, storing, or transmitting CUI. The assessments focus on the implementation and effectiveness of the safeguards intended to meet a fixed set of security requirements as defined in NIST Special Publication 800-171.

## 1.2 TARGET AUDIENCE

This publication serves system, information security, and privacy<sup>5</sup> professionals including individuals with:

- System development responsibilities (e.g., program managers, system developers, system owners, systems integrators, system security engineers);
- Information security assessment and monitoring responsibilities (e.g., system evaluators, assessors, independent verifiers/validators, auditors, analysts, system owners);
- Information security, privacy, risk management, governance, and oversight responsibilities (e.g., authorizing officials, chief information officers, chief privacy officers, chief information security officers, system managers, information security managers); and
- Information security implementation and operational responsibilities (e.g., system owners, information owners/stewards, mission and business owners, systems administrators, system security officers).

## 1.3 ORGANIZATION OF THIS SPECIAL PUBLICATION

The remainder of this special publication is organized as follows:

- [Chapter Two](#) describes the fundamental concepts associated with assessments of CUI security requirements including assessment procedures, methods, objects, and assurance cases that can be created using evidence produced during assessments.

<sup>4</sup> The term *risk* is used to mean risk to organizational operations (i.e., mission, functions, image, and reputation), organizational assets, individuals, other organizations, and the Nation. See [NIST Special Publication 800-39](#) for additional information on organizational risk management and risk tolerance.

<sup>5</sup> References to privacy in this publication are made *only* in the context of where security and privacy considerations overlap—that is, in the security objective of *confidentiality*, which generally supports privacy and the protection of personally identifiable information from unauthorized disclosure. [NIST Internal Report 8062](#) provides additional information on the overlapping and complementary nature of security and privacy disciplines.

- [Chapter Three](#) provides a catalog of assessment procedures for the fourteen families of CUI security requirements in NIST Special Publication 800-171, including assessment objectives and potential assessment methods and objects for each procedure.
- [Supporting appendices](#) provide additional assessment-related information including general references; definitions and terms; acronyms; and a description of the assessment methods used in assessment procedures.

## CHAPTER TWO

# THE FUNDAMENTALS

### BASIC CONCEPTS FOR ASSESSMENTS OF CUI SECURITY REQUIREMENTS

The CUI security requirements in [NIST Special Publication 800-171](#) are organized into fourteen families. Each family contains the requirements related to the general security topic of the family. Table 1 lists the CUI security requirement families addressed in this publication. The assessment procedures in [Chapter Three](#) are grouped by family designations to help ensure completeness and consistency of assessments.

**TABLE 1: CUI SECURITY REQUIREMENT FAMILIES**

FAMILY	FAMILY
<a href="#">Access Control</a>	<a href="#">Media Protection</a>
<a href="#">Awareness and Training</a>	<a href="#">Personnel Security</a>
<a href="#">Audit and Accountability</a>	<a href="#">Physical Protection</a>
<a href="#">Configuration Management</a>	<a href="#">Risk Assessment</a>
<a href="#">Identification and Authentication</a>	<a href="#">Security Assessment</a>
<a href="#">Incident Response</a>	<a href="#">System and Communications Protection</a>
<a href="#">Maintenance</a>	<a href="#">System and Information Integrity</a>

## 2.1 ASSESSMENT PROCEDURES

An assessment procedure consists of an assessment *objective* and a set of potential assessment *methods* and assessment *objects* that can be used to conduct the assessment. Each assessment objective includes a determination statement related to the CUI security requirement that is the subject of the assessment. The determination statements are linked to the content of the CUI security requirements to ensure traceability of the assessment results to the requirements. The application of an assessment procedure to a security requirement produces assessment *findings*. These findings reflect, or are subsequently used, to help determine if the security requirement has been satisfied.

Assessment objects identify the specific items being assessed and can include specifications, mechanisms, activities, and individuals. Specifications are the document-based artifacts (e.g., policies, procedures, security plans, security requirements, functional specifications, architectural designs) associated with a system. Mechanisms are the specific hardware, software, or firmware safeguards employed within a system. Activities are the protection-related actions supporting a system that involve people (e.g., conducting system backup operations, exercising a contingency plan, and monitoring network traffic). Individuals, or groups of individuals, are people applying the specifications, mechanisms, or activities described above.

The assessment methods define the nature and the extent of the assessor’s actions. The methods include *examine*, *interview*, and *test*. The examine method is the process of reviewing, inspecting, observing, studying, or analyzing assessment objects (i.e., specifications, mechanisms, activities). The purpose of the examine method is to facilitate understanding, achieve clarification, or obtain evidence. The interview method is the process of holding discussions with individuals or groups

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of individuals to facilitate understanding, achieve clarification, or obtain evidence. And finally, the test method is the process of exercising assessment objects (i.e., activities, mechanisms) under specified conditions to compare actual with expected behavior. In all three assessment methods, the results are used in making specific determinations called for in the determination statements and thereby achieving the objectives for the assessment procedure.

The assessment methods described above have associated attributes of *depth* and *coverage*, which define the level of effort for the assessment. These attributes provide a means to define the rigor and scope of the assessment for the increased assurance of security requirements. A description of assessment methods and objects is provided in [Appendix D](#).<sup>6</sup> Figure 1 illustrates an example of an assessment procedure for CUI security requirement 3.1.3 from NIST Special Publication 800-171.

<b>3.1.3</b>	<b>SECURITY REQUIREMENT</b>	
	Control the flow of CUI in accordance with approved authorizations.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.1.3[a]</b>	<i>information flow control policies are defined.</i>
	<b>3.1.3[b]</b>	<i>methods and enforcement mechanisms for controlling the flow of CUI are defined.</i>
	<b>3.1.3[c]</b>	<i>designated sources and destinations (e.g., networks, individuals, and devices) for CUI within the system and between interconnected systems are identified.</i>
	<b>3.1.3[d]</b>	<i>authorizations for controlling the flow of CUI are defined.</i>
<b>3.1.3[e]</b>	<i>approved authorizations for controlling the flow of CUI are enforced.</i>	
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>		
<p><b>Examine:</b> [SELECT FROM: Access control policy; information flow control policies; procedures addressing information flow enforcement; system security plan; system design documentation; system configuration settings and associated documentation; list of information flow authorizations; system baseline configuration; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing information flow enforcement policy].</p>		

**FIGURE 1: ASSESSMENT PROCEDURE FOR CUI SECURITY REQUIREMENT**

Organizations are not expected to employ *all* assessment methods and objects contained within the assessment procedures identified in this publication. Rather, organizations have the flexibility to determine the level of effort needed and the assurance required for an assessment (e.g., which assessment methods and assessment objects are deemed to be the most useful in obtaining the desired results). This determination is made based on how the organization can accomplish the assessment objectives in the most cost-effective manner and with sufficient confidence to support the determination that the CUI requirements have been satisfied.

<sup>6</sup> Additional information on assessment methods and objects and the attributes of depth and coverage is provided in [NIST Special Publication 800-53A](#).

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## 2.2 ASSURANCE CASES

Building an effective assurance case for determining compliance to CUI security requirements is a process that involves compiling evidence from a variety of sources and conducting different types of activities during an assessment. An assurance case is a body of evidence organized into an argument demonstrating that some claim about a system is true. For assessments conducted using the procedures in this publication, that claim is *compliance* with the security requirements specified in [NIST Special Publication 800-171](#). Assessors gather evidence during the assessment process to allow designated officials<sup>7</sup> to make objective determinations about compliance to the CUI security requirements. The evidence needed to make such determinations can be obtained from various sources including self-assessments, independent third-party assessments, or other types of assessments, depending on the needs of the organization establishing the requirements and the organization conducting the assessments.

For example, many technical security requirements are satisfied by security capabilities that are built in to commercial information technology products and systems. Product assessments are typically conducted by independent, third-party testing organizations.<sup>8</sup> These assessments examine the security functions of products and established configuration settings. Assessments can also be conducted to demonstrate compliance to industry, national, or international security standards as well as developer and vendor claims. Since many information technology products are assessed by commercial testing organizations and then subsequently deployed in hundreds of thousands of systems, these types of assessments can be carried out at a greater level of depth and provide deeper insights into the security capabilities of the products.

Ultimately, evidence needed to determine compliance comes from the implementation of the selected safeguards to satisfy the CUI security requirements and from the assessments of that implementation. Assessors can build on previously developed materials that started with the specification of the organization's information security needs and is further developed during the design, development, and implementation of the system and system components. These materials, developed while implementing security throughout the life cycle of the system, provide the initial evidence for an assurance case.

Assessments can be conducted by systems developers, systems integrators, auditors, system owners, or the security staffs of organizations. The assessors or assessment teams bring together available information about the system such as the results from individual component product assessments. The assessors can conduct additional system-level assessments using the procedures and methods contained in this publication and based on the implementation information provided by the nonfederal organization in its system security plan. System assessments can be used to compile and evaluate the evidence needed by organizations to help determine the effectiveness of the safeguards implemented to protect CUI; the actions needed to mitigate security-related risks to the organization; and compliance to the CUI security requirements.

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<sup>7</sup> A *designated official* is an official, either internal or external to the nonfederal organization, with the responsibility to determine organizational compliance to CUI security requirements.

<sup>8</sup> Examples include Common Criteria Testing Laboratories evaluating commercial IT products in accordance with ISO/IEC 15408 and Cryptographic Module Validation Program Testing Laboratories evaluating cryptographic modules in accordance with Federal Information Processing Standard (FIPS) 140.

### APPLICABLE CUI SECURITY REQUIREMENTS

The system security plan is used to describe how the organization meets or plans to meet the CUI security requirements. Any security requirements that are deemed *non-applicable* by the organization (e.g., no wireless capability in the system or the system component processing, storing, or transmitting CUI), are documented as such in the system security plan. Once the system security plan is completed, a security assessment plan can be developed using the assessment procedures described in Chapter Three and tailoring those procedures as needed. An assessment procedure is developed for every CUI security requirement that is applicable to the system, system component, or the organization. Conversely, security requirements that are deemed non-applicable in the system security plan are *not* assessed.

## CHAPTER THREE

# THE PROCEDURES

### ASSESSMENT PROCEDURES, METHODS, AND OBJECTS FOR CUI SECURITY REQUIREMENTS

This chapter provides assessment procedures for all CUI security requirements defined in [NIST Special Publication 800-171](#). The assessment procedures are organized into fourteen families. Organizations conducting CUI security requirement assessments can build their assessment plans using the information provided in the generic assessment procedures—selecting the specific assessment methods and objects that meet the organization’s needs. Organizations also have flexibility in defining the level of rigor and detail associated with the assessment based on the assurance requirements of the organization. [Appendix D](#) provides additional information on the different levels of rigor and detail for assessments.

The assessment objective defined for each assessment procedure is achieved by applying the designated assessment methods to the selected assessment objects and compiling/producing the evidence necessary to make the determination associated with each assessment objective. Each determination statement contained within an assessment procedure produces one of the following findings: *satisfied* or *other than satisfied*. A finding of “satisfied” indicates that for the security requirement addressed by the determination statement, the assessment information obtained (i.e., the evidence collected) indicates that the assessment objective has been met producing a fully acceptable result. A finding of “other than satisfied” indicates that for the security requirement addressed by the determination statement, the assessment findings obtained indicate potential anomalies that may need to be addressed by the organization. A finding of “other than satisfied” may also indicate that for reasons specified in the assessment report, the assessor was unable to obtain sufficient information to make the determination called for in the determination statement.

For assessment findings that are other than satisfied, organizations may define subcategories of findings indicating the severity or criticality of the weaknesses or deficiencies discovered and the potential adverse effects of those weaknesses or deficiencies on organizational missions and/or business functions. Defining such subcategories can help to establish priorities for needed risk mitigation actions.

#### CAUTIONARY NOTE

The content in this publication can be used for many different assessment-related purposes in determining organizational compliance to the CUI security requirements. The broad range of potential assessment methods and objects listed in this publication do not necessarily reflect, and should not be directly associated with, actual compliance or noncompliance. Rather, the selection of specific assessment methods and objects from the list provided, can help generate a picture of overall compliance with the CUI security requirements. There is no expectation about the number of methods or objects needed to determine compliance to the CUI security requirements. Moreover, the entire list of potential assessment objects should not be viewed as required artifacts needed to determine compliance to the requirements. Organizations have the flexibility to determine the specific methods and objects sufficient to obtain the needed evidence to support claims of compliance.



### 3.1 ACCESS CONTROL

<b>3.1.1</b>	<b>SECURITY REQUIREMENT</b> Limit system access to authorized users, processes acting on behalf of authorized users, and devices (including other systems).
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.1.1[a]</b> <i>authorized users are identified.</i>
	<b>3.1.1[b]</b> <i>processes acting on behalf of authorized users are identified.</i>
	<b>3.1.1[c]</b> <i>devices (and other systems) authorized to connect to the system are identified.</i>
	<b>3.1.1[d]</b> <i>system access is limited to authorized users.</i>
	<b>3.1.1[e]</b> <i>system access is limited to processes acting on behalf of authorized users.</i>
	<b>3.1.1[f]</b> <i>system access is limited to authorized devices (including other systems).</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing account management; system security plan; system design documentation; system configuration settings and associated documentation; list of active system accounts and the name of the individual associated with each account; notifications or records of recently transferred, separated, or terminated employees; list of conditions for group and role membership; list of recently disabled system accounts along with the name of the individual associated with each account; access authorization records; account management compliance reviews; system monitoring records; system audit logs and records; list of devices and systems authorized to connect to organizational systems; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with account management responsibilities; system or network administrators; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Organizational processes for managing system accounts; mechanisms for implementing account management].

<b>3.1.2</b>	<b>SECURITY REQUIREMENT</b> Limit system access to the types of transactions and functions that authorized users are permitted to execute.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.1.2[a]</b> <i>the types of transactions and functions that authorized users are permitted to execute are defined.</i>
	<b>3.1.2[b]</b> <i>system access is limited to the defined types of transactions and functions for authorized users.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing access enforcement; system security plan; system design documentation; list of approved authorizations including remote access authorizations; system audit logs and records; system configuration settings and associated documentation; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with access enforcement responsibilities; system or network administrators; personnel with information security responsibilities; system developers]. <b>Test:</b> [SELECT FROM: Mechanisms implementing access control policy].

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<b>3.1.3</b>	<b>SECURITY REQUIREMENT</b>	
	Control the flow of CUI in accordance with approved authorizations.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.1.3[a]</b>	<i>information flow control policies are defined.</i>
	<b>3.1.3[b]</b>	<i>methods and enforcement mechanisms for controlling the flow of CUI are defined.</i>
	<b>3.1.3[c]</b>	<i>designated sources and destinations (e.g., networks, individuals, and devices) for CUI within the system and between interconnected systems are identified.</i>
	<b>3.1.3[d]</b>	<i>authorizations for controlling the flow of CUI are defined.</i>
	<b>3.1.3[e]</b>	<i>approved authorizations for controlling the flow of CUI are enforced.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Access control policy; information flow control policies; procedures addressing information flow enforcement; system security plan; system design documentation; system configuration settings and associated documentation; list of information flow authorizations; system baseline configuration; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing information flow enforcement policy].</p>	

<b>3.1.4</b>	<b>SECURITY REQUIREMENT</b>	
	Separate the duties of individuals to reduce the risk of malevolent activity without collusion.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.1.4[a]</b>	<i>the duties of individuals requiring separation are defined.</i>
	<b>3.1.4[b]</b>	<i>responsibilities for duties that require separation are assigned to separate individuals.</i>
	<b>3.1.4[c]</b>	<i>access privileges that enable individuals to exercise the duties that require separation are granted to separate individuals.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing divisions of responsibility and separation of duties; system security plan; system configuration settings and associated documentation; list of divisions of responsibility and separation of duties; system access authorizations; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with responsibilities for defining divisions of responsibility and separation of duties; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing separation of duties policy].</p>	

<b>3.1.5</b>	<b>SECURITY REQUIREMENT</b>	
	Employ the principle of least privilege, including for specific security functions and privileged accounts.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.1.5[a]</b>	<i>privileged accounts are identified.</i>
	<b>3.1.5[b]</b>	<i>access to privileged accounts is authorized in accordance with the principle of least privilege.</i>
	<b>3.1.5[c]</b>	<i>security functions are identified.</i>
	<b>3.1.5[d]</b>	<i>access to security functions is authorized in accordance with the principle of least privilege.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing account management; system security plan; system design documentation; system configuration settings and associated documentation; list of active system accounts and the name of the individual associated with each account; list of conditions for group and role membership; notifications or records of recently transferred, separated, or terminated employees; list of recently disabled system accounts along with the name of the individual associated with each account; access authorization records; account management compliance reviews; system monitoring/audit records; procedures addressing least privilege; list of security functions (deployed in hardware, software, and firmware) and security-relevant information for which access is to be explicitly authorized; list of system-generated privileged accounts; list of system administration personnel; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with account management responsibilities; system or network administrators; personnel with information security responsibilities; personnel with responsibilities for defining least privileges necessary to accomplish specified tasks].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for managing system accounts; mechanisms for implementing account management; mechanisms implementing least privilege functions; mechanisms prohibiting privileged access to the system].</p>	

<b>3.1.6</b>	<b>SECURITY REQUIREMENT</b>	
	Use non-privileged accounts or roles when accessing nonsecurity functions.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.1.6[a]</b>	<i>nonsecurity functions are identified.</i>
	<b>3.1.6[b]</b>	<i>users are required to use non-privileged accounts or roles when accessing nonsecurity functions.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing least privilege; system security plan; list of system-generated security functions assigned to system accounts or roles; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with responsibilities for defining least privileges necessary to accomplish specified organizational tasks; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing least privilege functions].</p>	

<b>3.1.7</b>	<b>SECURITY REQUIREMENT</b>	
	Prevent non-privileged users from executing privileged functions and capture the execution of such functions in audit logs.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.1.7[a]</b>	<i>privileged functions are defined.</i>
	<b>3.1.7[b]</b>	<i>non-privileged users are defined.</i>
	<b>3.1.7[c]</b>	<i>non-privileged users are prevented from executing privileged functions.</i>
	<b>3.1.7[d]</b>	<i>the execution of privileged functions is captured in audit logs.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing least privilege; system security plan; system design documentation; list of privileged functions and associated user account assignments; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with responsibilities for defining least privileges necessary to accomplish specified tasks; personnel with information security responsibilities; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing least privilege functions for non-privileged users; mechanisms auditing the execution of privileged functions].</p>	

<b>3.1.8</b>	<b>SECURITY REQUIREMENT</b>	
	Limit unsuccessful logon attempts.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.1.8[a]</b>	<i>the means of limiting unsuccessful logon attempts is defined.</i>
	<b>3.1.8[b]</b>	<i>the defined means of limiting unsuccessful logon attempts is implemented.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing unsuccessful logon attempts; system security plan; system design documentation; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with information security responsibilities; system developers; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing access control policy for unsuccessful logon attempts].</p>	

<b>3.1.9</b>	<b>SECURITY REQUIREMENT</b>	
	Provide privacy and security notices consistent with applicable CUI rules.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.1.9[a]</b>	<i>privacy and security notices required by CUI-specified rules are identified, consistent, and associated with the specific CUI category.</i>

<b>3.1.9[b]</b>	<i>privacy and security notices are displayed.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: Privacy and security policies, procedures addressing system use notification; documented approval of system use notification messages or banners; system audit logs and records; system design documentation; user acknowledgements of notification message or banner; system security plan; system use notification messages; system configuration settings and associated documentation; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; personnel with responsibility for providing legal advice; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing system use notification].</p>	

<b>3.1.10</b>	<b>SECURITY REQUIREMENT</b> Use session lock with pattern-hiding displays to prevent access and viewing of data after a period of inactivity.
<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
<b>3.1.10[a]</b>	<i>the period of inactivity after which the system initiates a session lock is defined.</i>
<b>3.1.10[b]</b>	<i>access to the system and viewing of data is prevented by initiating a session lock after the defined period of inactivity.</i>
<b>3.1.10[c]</b>	<i>previously visible information is concealed via a pattern-hiding display after the defined period of inactivity.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing session lock; procedures addressing identification and authentication; system design documentation; system configuration settings and associated documentation; system security plan; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing access control policy for session lock].</p>	

<b>3.1.11</b>	<b>SECURITY REQUIREMENT</b> Terminate (automatically) a user session after a defined condition.
<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
<b>3.1.11[a]</b>	<i>conditions requiring a user session to terminate are defined.</i>
<b>3.1.11[b]</b>	<i>a user session is automatically terminated after any of the defined conditions occur.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing session termination; system design documentation; system security plan; system configuration settings and associated documentation; list of conditions or trigger events requiring session disconnect; system audit logs and records; other relevant documents or records].</p>	

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	<p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing user session termination].</p>
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<b>3.1.12</b>	<b>SECURITY REQUIREMENT</b>
Monitor and control remote access sessions.	
<b>ASSESSMENT OBJECTIVE</b>	
<i>Determine if:</i>	
<b>3.1.12[a]</b>	<i>remote access sessions are permitted.</i>
<b>3.1.12[b]</b>	<i>the types of permitted remote access are identified.</i>
<b>3.1.12[c]</b>	<i>remote access sessions are controlled.</i>
<b>3.1.12[d]</b>	<i>remote access sessions are monitored.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing remote access implementation and usage (including restrictions); configuration management plan; system security plan; system design documentation; system configuration settings and associated documentation; remote access authorizations; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with responsibilities for managing remote access connections; system or network administrators; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Remote access management capability for the system].</p>	

<b>3.1.13</b>	<b>SECURITY REQUIREMENT</b>
Employ cryptographic mechanisms to protect the confidentiality of remote access sessions.	
<b>ASSESSMENT OBJECTIVE</b>	
<i>Determine if:</i>	
<b>3.1.13[a]</b>	<i>cryptographic mechanisms to protect the confidentiality of remote access sessions are identified.</i>
<b>3.1.13[b]</b>	<i>cryptographic mechanisms to protect the confidentiality of remote access sessions are implemented.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing remote access to the system; system security plan; system design documentation; system configuration settings and associated documentation; cryptographic mechanisms and associated configuration documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developers].</p> <p><b>Test:</b> [SELECT FROM: Cryptographic mechanisms protecting remote access sessions].</p>	

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<b>3.1.14</b>	<b>SECURITY REQUIREMENT</b> Route remote access via managed access control points.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
	<b>3.1.14[a]</b>	<i>managed access control points are identified and implemented.</i>
	<b>3.1.14[b]</b>	<i>remote access is routed through managed network access control points.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing remote access to the system; system security plan; system design documentation; list of all managed network access control points; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms routing all remote accesses through managed network access control points].</p>	

<b>3.1.15</b>	<b>SECURITY REQUIREMENT</b> Authorize remote execution of privileged commands and remote access to security-relevant information.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
	<b>3.1.15[a]</b>	<i>privileged commands authorized for remote execution are identified.</i>
	<b>3.1.15[b]</b>	<i>security-relevant information authorized to be accessed remotely is identified.</i>
	<b>3.1.15[c]</b>	<i>the execution of the identified privileged commands via remote access is authorized.</i>
	<b>3.1.15[d]</b>	<i>access to the identified security-relevant information via remote access is authorized.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing remote access to the system; system configuration settings and associated documentation; system security plan; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing remote access management].</p>		

<b>3.1.16</b>	<b>SECURITY REQUIREMENT</b> Authorize wireless access prior to allowing such connections.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
	<b>3.1.16[a]</b>	<i>wireless access points are identified.</i>
	<b>3.1.16[b]</b>	<i>wireless access is authorized prior to allowing such connections.</i>

<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>
<p><b>Examine:</b> [SELECT FROM: Access control policy; configuration management plan; procedures addressing wireless access implementation and usage (including restrictions); system security plan; system design documentation; system configuration settings and associated documentation; wireless access authorizations; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with responsibilities for managing wireless access connections; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Wireless access management capability for the system].</p>

<b>3.1.17</b>	<b>SECURITY REQUIREMENT</b>
Protect wireless access using authentication and encryption.	
<b>ASSESSMENT OBJECTIVE</b>	
Determine if:	
<b>3.1.17[a]</b>	<i>wireless access to the system is protected using authentication.</i>
<b>3.1.17[b]</b>	<i>wireless access to the system is protected using encryption.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: Access control policy; system design documentation; procedures addressing wireless implementation and usage (including restrictions); system security plan; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing wireless access protections to the system].</p>	

<b>3.1.18</b>	<b>SECURITY REQUIREMENT</b>
Control connection of mobile devices.	
<b>ASSESSMENT OBJECTIVE</b>	
Determine if:	
<b>3.1.18[a]</b>	<i>mobile devices that process, store, or transmit CUI are identified.</i>
<b>3.1.18[b]</b>	<i>mobile device connections are authorized.</i>
<b>3.1.18[c]</b>	<i>mobile device connections are monitored and logged.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: Access control policy; authorizations for mobile device connections to organizational systems; procedures addressing access control for mobile device usage (including restrictions); system design documentation; configuration management plan; system security plan; system audit logs and records; system configuration settings and associated documentation; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel using mobile devices to access organizational systems; system or network administrators; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Access control capability authorizing mobile device connections to organizational systems].</p>	

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<b>3.1.19</b>	<b>SECURITY REQUIREMENT</b> Encrypt CUI on mobile devices and mobile computing platforms.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.1.19[a]</b> <i>mobile devices and mobile computing platforms that process, store, or transmit CUI are identified.</i>
	<b>3.1.19[b]</b> <i>encryption is employed to protect CUI on identified mobile devices and mobile computing platforms.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing access control for mobile devices; system design documentation; system configuration settings and associated documentation; encryption mechanisms and associated configuration documentation; system security plan; system audit logs and records; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with access control responsibilities for mobile devices; system or network administrators; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Encryption mechanisms protecting confidentiality of information on mobile devices].

<b>3.1.20</b>	<b>SECURITY REQUIREMENT</b> Verify and control/limit connections to and use of external systems.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.1.20[a]</b> <i>connections to external systems are identified.</i>
	<b>3.1.20[b]</b> <i>the use of external systems is identified.</i>
	<b>3.1.20[c]</b> <i>connections to external systems are verified.</i>
	<b>3.1.20[d]</b> <i>the use of external systems is verified.</i>
	<b>3.1.20[e]</b> <i>connections to external systems are controlled/limited.</i>
	<b>3.1.20[f]</b> <i>the use of external systems is controlled/limited.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing the use of external systems; terms and conditions for external systems; system security plan; list of applications accessible from external systems; system configuration settings and associated documentation; system connection or processing agreements; account management documents; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with responsibilities for defining terms and conditions for use of external systems to access organizational systems; system or network administrators; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Mechanisms implementing terms and conditions on use of external systems].

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<b>3.1.21</b>	<b>SECURITY REQUIREMENT</b> Limit use of portable storage devices on external systems.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.1.21[a]</b> <i>the use of portable storage devices containing CUI on external systems is identified and documented.</i>
	<b>3.1.21[b]</b> <i>limits on the use of portable storage devices containing CUI on external systems are defined.</i>
	<b>3.1.21[c]</b> <i>the use of portable storage devices containing CUI on external systems is limited as defined.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing the use of external systems; system security plan; system configuration settings and associated documentation; system connection or processing agreements; account management documents; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with responsibilities for restricting or prohibiting use of organization-controlled storage devices on external systems; system or network administrators; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Mechanisms implementing restrictions on use of portable storage devices].

<b>3.1.22</b>	<b>SECURITY REQUIREMENT</b> Control CUI posted or processed on publicly accessible systems.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.1.22[a]</b> <i>individuals authorized to post or process information on publicly accessible systems are identified.</i>
	<b>3.1.22[b]</b> <i>procedures to ensure CUI is not posted or processed on publicly accessible systems are identified.</i>
	<b>3.1.22[c]</b> <i>a review process is in place prior to posting of any content to publicly accessible systems.</i>
	<b>3.1.22[d]</b> <i>content on publicly accessible systems is reviewed to ensure that it does not include CUI.</i>
	<b>3.1.22[e]</b> <i>mechanisms are in place to remove and address improper posting of CUI.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Access control policy; procedures addressing publicly accessible content; system security plan; list of users authorized to post publicly accessible content on organizational systems; training materials and/or records; records of publicly accessible information reviews; records of response to nonpublic information on public websites; system audit logs and records; security awareness training records; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with responsibilities for managing publicly accessible information posted on organizational systems; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Mechanisms implementing management of publicly accessible content].

### 3.2 AWARENESS AND TRAINING

<b>3.2.1</b>	<b>SECURITY REQUIREMENT</b>								
	Ensure that managers, systems administrators, and users of organizational systems are made aware of the security risks associated with their activities and of the applicable policies, standards, and procedures related to the security of those systems.								
	<b>ASSESSMENT OBJECTIVE</b>								
	<i>Determine if:</i>								
	<table border="1" style="width: 100%;"> <tr> <td style="width: 15%;"><b>3.2.1[a]</b></td> <td><i>security risks associated with organizational activities involving CUI are identified.</i></td> </tr> <tr> <td><b>3.2.1[b]</b></td> <td><i>policies, standards, and procedures related to the security of the system are identified.</i></td> </tr> <tr> <td><b>3.2.1[c]</b></td> <td><i>managers, systems administrators, and users of the system are made aware of the security risks associated with their activities.</i></td> </tr> <tr> <td><b>3.2.1[d]</b></td> <td><i>managers, systems administrators, and users of the system are made aware of the applicable policies, standards, and procedures related to the security of the system.</i></td> </tr> </table>	<b>3.2.1[a]</b>	<i>security risks associated with organizational activities involving CUI are identified.</i>	<b>3.2.1[b]</b>	<i>policies, standards, and procedures related to the security of the system are identified.</i>	<b>3.2.1[c]</b>	<i>managers, systems administrators, and users of the system are made aware of the security risks associated with their activities.</i>	<b>3.2.1[d]</b>	<i>managers, systems administrators, and users of the system are made aware of the applicable policies, standards, and procedures related to the security of the system.</i>
<b>3.2.1[a]</b>	<i>security risks associated with organizational activities involving CUI are identified.</i>								
<b>3.2.1[b]</b>	<i>policies, standards, and procedures related to the security of the system are identified.</i>								
<b>3.2.1[c]</b>	<i>managers, systems administrators, and users of the system are made aware of the security risks associated with their activities.</i>								
<b>3.2.1[d]</b>	<i>managers, systems administrators, and users of the system are made aware of the applicable policies, standards, and procedures related to the security of the system.</i>								
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>								
	<p><b>Examine:</b> [SELECT FROM: Security awareness and training policy; procedures addressing security awareness training implementation; relevant codes of federal regulations; security awareness training curriculum; security awareness training materials; system security plan; training records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with responsibilities for security awareness training; personnel with information security responsibilities; personnel composing the general system user community; personnel with responsibilities for role-based awareness training].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms managing security awareness training; mechanisms managing role-based security training].</p>								

<b>3.2.2</b>	<b>SECURITY REQUIREMENT</b>						
	Ensure that personnel are trained to carry out their assigned information security-related duties and responsibilities.						
	<b>ASSESSMENT OBJECTIVE</b>						
	<i>Determine if:</i>						
	<table border="1" style="width: 100%;"> <tr> <td style="width: 15%;"><b>3.2.2[a]</b></td> <td><i>information security-related duties, roles, and responsibilities are defined.</i></td> </tr> <tr> <td><b>3.2.2[b]</b></td> <td><i>information security-related duties, roles, and responsibilities are assigned to designated personnel.</i></td> </tr> <tr> <td><b>3.2.2[c]</b></td> <td><i>personnel are adequately trained to carry out their assigned information security-related duties, roles, and responsibilities.</i></td> </tr> </table>	<b>3.2.2[a]</b>	<i>information security-related duties, roles, and responsibilities are defined.</i>	<b>3.2.2[b]</b>	<i>information security-related duties, roles, and responsibilities are assigned to designated personnel.</i>	<b>3.2.2[c]</b>	<i>personnel are adequately trained to carry out their assigned information security-related duties, roles, and responsibilities.</i>
<b>3.2.2[a]</b>	<i>information security-related duties, roles, and responsibilities are defined.</i>						
<b>3.2.2[b]</b>	<i>information security-related duties, roles, and responsibilities are assigned to designated personnel.</i>						
<b>3.2.2[c]</b>	<i>personnel are adequately trained to carry out their assigned information security-related duties, roles, and responsibilities.</i>						
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>						
	<p><b>Examine:</b> [SELECT FROM: Security awareness and training policy; procedures addressing security training implementation; codes of federal regulations; security training curriculum; security training materials; system security plan; training records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with responsibilities for role-based security training; personnel with assigned system security roles and responsibilities; personnel with responsibilities</p>						

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	<p>for security awareness training; personnel with information security responsibilities; personnel representing the general system user community].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms managing role-based security training; mechanisms managing security awareness training].</p>
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<b>3.2.3</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Provide security awareness training on recognizing and reporting potential indicators of insider threat.</p>				
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if:</i></p>				
	<table border="1" style="width: 100%;"> <tr> <td style="background-color: #1a3d4d; width: 15%; text-align: center; vertical-align: top;"><b>3.2.3[a]</b></td> <td><i>potential indicators associated with insider threats are identified.</i></td> </tr> <tr> <td style="background-color: #1a3d4d; text-align: center; vertical-align: top;"><b>3.2.3[b]</b></td> <td><i>security awareness training on recognizing and reporting potential indicators of insider threat is provided to managers and employees.</i></td> </tr> </table>	<b>3.2.3[a]</b>	<i>potential indicators associated with insider threats are identified.</i>	<b>3.2.3[b]</b>	<i>security awareness training on recognizing and reporting potential indicators of insider threat is provided to managers and employees.</i>
<b>3.2.3[a]</b>	<i>potential indicators associated with insider threats are identified.</i>				
<b>3.2.3[b]</b>	<i>security awareness training on recognizing and reporting potential indicators of insider threat is provided to managers and employees.</i>				
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: Security awareness and training policy; procedures addressing security awareness training implementation; security awareness training curriculum; security awareness training materials; insider threat policy and procedures; system security plan; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel that participate in security awareness training; personnel with responsibilities for basic security awareness training; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms managing insider threat training].</p>				

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### 3.3 AUDIT AND ACCOUNTABILITY

<b>3.3.1</b>	<b>SECURITY REQUIREMENT</b> Create and retain system audit logs and records to the extent needed to enable the monitoring, analysis, investigation, and reporting of unlawful or unauthorized system activity.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.3.1[a]</b> <i>audit logs needed (i.e., event types to be logged) to enable the monitoring, analysis, investigation, and reporting of unlawful or unauthorized system activity are specified.</i>
	<b>3.3.1[b]</b> <i>the content of audit records needed to support monitoring, analysis, investigation, and reporting of unlawful or unauthorized system activity is defined.</i>
	<b>3.3.1[c]</b> <i>audit records are created (generated).</i>
	<b>3.3.1[d]</b> <i>audit records, once created, contain the defined content.</i>
	<b>3.3.1[e]</b> <i>retention requirements for audit records are defined.</i>
	<b>3.3.1[f]</b> <i>audit records are retained as defined.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Audit and accountability policy; procedures addressing auditable events; system security plan; system design documentation; system configuration settings and associated documentation; procedures addressing control of audit records; procedures addressing audit record generation; system audit logs and records; system auditable events; system incident reports; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with audit and accountability responsibilities; personnel with information security responsibilities; personnel with audit review, analysis and reporting responsibilities; system or network administrators]. <b>Test:</b> [SELECT FROM: Mechanisms implementing system audit logging].

<b>3.3.2</b>	<b>SECURITY REQUIREMENT</b> Ensure that the actions of individual system users can be uniquely traced to those users so they can be held accountable for their actions.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.3.2[a]</b> <i>the content of the audit records needed to support the ability to uniquely trace users to their actions is defined.</i>
	<b>3.3.2[b]</b> <i>audit records, once created, contain the defined content.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Audit and accountability policy; procedures addressing audit records and event types; system security plan; system design documentation; system configuration settings and associated documentation; procedures addressing audit record generation; procedures addressing audit review, analysis, and reporting; reports of audit findings; system audit logs and records; system events; system incident reports; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with audit and accountability responsibilities; personnel with information security responsibilities; system or network administrators].

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	<b>Test:</b> [SELECT FROM: Mechanisms implementing system audit logging].
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<b>3.3.3</b>	<b>SECURITY REQUIREMENT</b> Review and update logged events.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
	<b>3.3.3[a]</b>	<i>a process for determining when to review logged events is defined.</i>
	<b>3.3.3[b]</b>	<i>event types being logged are reviewed in accordance with the defined review process.</i>
	<b>3.3.3[c]</b>	<i>event types being logged are updated based on the review.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<b>Examine:</b> [SELECT FROM: Audit and accountability policy; procedures addressing audit records and event types; system security plan; list of organization-defined event types to be logged; reviewed and updated records of logged event types; system audit logs and records; system incident reports; other relevant documents or records].	
	<b>Interview:</b> [SELECT FROM: Personnel with audit and accountability responsibilities; personnel with information security responsibilities].	
	<b>Test:</b> [SELECT FROM: Mechanisms supporting review and update of logged event types].	

<b>3.3.4</b>	<b>SECURITY REQUIREMENT</b> Alert in the event of an audit logging process failure.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
	<b>3.3.4[a]</b>	<i>personnel or roles to be alerted in the event of an audit logging process failure are identified.</i>
	<b>3.3.4[b]</b>	<i>types of audit logging process failures for which alert will be generated are defined.</i>
	<b>3.3.4[c]</b>	<i>identified personnel or roles are alerted in the event of an audit logging process failure.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<b>Examine:</b> [SELECT FROM: Audit and accountability policy; procedures addressing response to audit logging processing failures; system design documentation; system security plan; system configuration settings and associated documentation; list of personnel to be notified in case of an audit logging processing failure; system incident reports; system audit logs and records; other relevant documents or records].	
	<b>Interview:</b> [SELECT FROM: Personnel with audit and accountability responsibilities; personnel with information security responsibilities; system or network administrators; system developers].	
	<b>Test:</b> [SELECT FROM: Mechanisms implementing system response to audit logging processing failures].	

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<b>3.3.5</b>	<b>SECURITY REQUIREMENT</b>	
	Correlate audit record review, analysis, and reporting processes for investigation and response to indications of unlawful, unauthorized, suspicious, or unusual activity.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.3.5[a]</b>	<i>audit record review, analysis, and reporting processes for investigation and response to indications of unlawful, unauthorized, suspicious, or unusual activity are defined.</i>
	<b>3.3.5[b]</b>	<i>defined audit record review, analysis, and reporting processes are correlated.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<b>Examine:</b> [SELECT FROM: Audit and accountability policy; procedures addressing audit record review, analysis, and reporting; system security plan; system design documentation; system configuration settings and associated documentation; procedures addressing investigation of and response to suspicious activities; system audit logs and records across different repositories; other relevant documents or records].	
	<b>Interview:</b> [SELECT FROM: Personnel with audit record review, analysis, and reporting responsibilities; personnel with information security responsibilities].	
	<b>Test:</b> [SELECT FROM: Mechanisms supporting analysis and correlation of audit records; mechanisms integrating audit review, analysis and reporting].	

<b>3.3.6</b>	<b>SECURITY REQUIREMENT</b>	
	Provide audit record reduction and report generation to support on-demand analysis and reporting.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.3.6[a]</b>	<i>an audit record reduction capability that supports on-demand analysis is provided.</i>
	<b>3.3.6[b]</b>	<i>a report generation capability that supports on-demand reporting is provided.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<b>Examine:</b> [SELECT FROM: Audit and accountability policy; procedures addressing audit record reduction and report generation; system design documentation; system security plan; system configuration settings and associated documentation; audit record reduction, review, analysis, and reporting tools; system audit logs and records; other relevant documents or records].	
	<b>Interview:</b> [SELECT FROM: Personnel with audit record reduction and report generation responsibilities; personnel with information security responsibilities].	
	<b>Test:</b> [SELECT FROM: Audit record reduction and report generation capability].	

<b>3.3.7</b>	<b>SECURITY REQUIREMENT</b>	
	Provide a system capability that compares and synchronizes internal system clocks with an authoritative source to generate time stamps for audit records.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.3.7[a]</b>	<i>internal system clocks are used to generate time stamps for audit records.</i>

	<b>3.3.7[b]</b>	<i>an authoritative source with which to compare and synchronize internal system clocks is specified.</i>
	<b>3.3.7[c]</b>	<i>internal system clocks used to generate time stamps for audit records are compared to and synchronized with the specified authoritative time source.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <u>Examine:</u> [SELECT FROM: Audit and accountability policy; procedures addressing time stamp generation; system design documentation; system security plan; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records]. <u>Interview:</u> [SELECT FROM: Personnel with information security responsibilities; system or network administrators; system developers]. <u>Test:</u> [SELECT FROM: Mechanisms implementing time stamp generation; mechanisms implementing internal information system clock synchronization].	

<b>3.3.8</b>	<b>SECURITY REQUIREMENT</b> Protect audit information and audit logging tools from unauthorized access, modification, and deletion.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
	<b>3.3.8[a]</b>	<i>audit information is protected from unauthorized access.</i>
	<b>3.3.8[b]</b>	<i>audit information is protected from unauthorized modification.</i>
	<b>3.3.8[c]</b>	<i>audit information is protected from unauthorized deletion.</i>
	<b>3.3.8[d]</b>	<i>audit logging tools are protected from unauthorized access.</i>
	<b>3.3.8[e]</b>	<i>audit logging tools are protected from unauthorized modification.</i>
	<b>3.3.8[f]</b>	<i>audit logging tools are protected from unauthorized deletion.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <u>Examine:</u> [SELECT FROM: Audit and accountability policy; access control policy and procedures; procedures addressing protection of audit information; system security plan; system design documentation; system configuration settings and associated documentation, system audit logs and records; audit logging tools; other relevant documents or records]. <u>Interview:</u> [SELECT FROM: Personnel with audit and accountability responsibilities; personnel with information security responsibilities; system or network administrators; system developers]. <u>Test:</u> [SELECT FROM: Mechanisms implementing audit information protection].	

<b>3.3.9</b>	<b>SECURITY REQUIREMENT</b> Limit management of audit logging functionality to a subset of privileged users.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
	<b>3.3.9[a]</b>	<i>a subset of privileged users granted access to manage audit logging functionality is defined.</i>
	<b>3.3.9[b]</b>	<i>management of audit logging functionality is limited to the defined subset of privileged users.</i>

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**POTENTIAL ASSESSMENT METHODS AND OBJECTS**

**Examine:** [*SELECT FROM:* Audit and accountability policy; access control policy and procedures; procedures addressing protection of audit information; system security plan; system design documentation; system configuration settings and associated documentation; access authorizations; system-generated list of privileged users with access to management of audit logging functionality; access control list; system audit logs and records; other relevant documents or records].

**Interview:** [*SELECT FROM:* Personnel with audit and accountability responsibilities; personnel with information security responsibilities; system or network administrators; system developers].

**Test:** [*SELECT FROM:* Mechanisms managing access to audit logging functionality].

### 3.4 CONFIGURATION MANAGEMENT

<b>3.4.1</b>	<b>SECURITY REQUIREMENT</b> Establish and maintain baseline configurations and inventories of organizational systems (including hardware, software, firmware, and documentation) throughout the respective system development life cycles.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.4.1[a]</b> <i>a baseline configuration is established.</i>
	<b>3.4.1[b]</b> <i>the baseline configuration includes hardware, software, firmware, and documentation.</i>
	<b>3.4.1[c]</b> <i>the baseline configuration is maintained (reviewed and updated) throughout the system development life cycle.</i>
	<b>3.4.1[d]</b> <i>a system inventory is established.</i>
	<b>3.4.1[e]</b> <i>the system inventory includes hardware, software, firmware, and documentation.</i>
	<b>3.4.1[f]</b> <i>the inventory is maintained (reviewed and updated) throughout the system development life cycle.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Configuration management policy; procedures addressing the baseline configuration of the system; procedures addressing system inventory; system security plan; configuration management plan; system inventory records; inventory review and update records; enterprise architecture documentation; system design documentation; system architecture and configuration documentation; system configuration settings and associated documentation; change control records; system component installation records; system component removal records; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with configuration management responsibilities; personnel with responsibilities for establishing the system inventory; personnel with responsibilities for updating the system inventory; personnel with information security responsibilities; system or network administrators]. <b>Test:</b> [SELECT FROM: Organizational processes for managing baseline configurations; mechanisms supporting configuration control of the baseline configuration; organizational processes for developing and documenting an inventory of system components; organizational processes for updating inventory of system components; mechanisms supporting or implementing the system inventory; mechanisms implementing updating of the system inventory].

<b>3.4.2</b>	<b>SECURITY REQUIREMENT</b> Establish and enforce security configuration settings for information technology products employed in organizational systems.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.4.2[a]</b> <i>security configuration settings for information technology products employed in the system are established and included in the baseline configuration.</i>
	<b>3.4.2[b]</b> <i>security configuration settings for information technology products employed in the system are enforced.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	

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	<p><b>Examine:</b> [SELECT FROM: Configuration management policy; baseline configuration; procedures addressing configuration settings for the system; configuration management plan; system security plan; system design documentation; system configuration settings and associated documentation; security configuration checklists; evidence supporting approved deviations from established configuration settings; change control records; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with security configuration management responsibilities; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for managing configuration settings; mechanisms that implement, monitor, and/or control system configuration settings; mechanisms that identify and/or document deviations from established configuration settings; processes for managing baseline configurations; mechanisms supporting configuration control of baseline configurations].</p>
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<b>3.4.3</b>	<b>SECURITY REQUIREMENT</b>								
	Track, review, approve or disapprove, and log changes to organizational systems.								
	<b>ASSESSMENT OBJECTIVE</b>								
	<i>Determine if:</i>								
	<table border="1" style="width: 100%;"> <tr> <td style="width: 15%; background-color: #1a3d4d; color: white;"><b>3.4.3[a]</b></td> <td><i>changes to the system are tracked.</i></td> </tr> <tr> <td style="background-color: #1a3d4d; color: white;"><b>3.4.3[b]</b></td> <td><i>changes to the system are reviewed.</i></td> </tr> <tr> <td style="background-color: #1a3d4d; color: white;"><b>3.4.3[c]</b></td> <td><i>changes to the system are approved or disapproved.</i></td> </tr> <tr> <td style="background-color: #1a3d4d; color: white;"><b>3.4.3[d]</b></td> <td><i>changes to the system are logged.</i></td> </tr> </table>	<b>3.4.3[a]</b>	<i>changes to the system are tracked.</i>	<b>3.4.3[b]</b>	<i>changes to the system are reviewed.</i>	<b>3.4.3[c]</b>	<i>changes to the system are approved or disapproved.</i>	<b>3.4.3[d]</b>	<i>changes to the system are logged.</i>
<b>3.4.3[a]</b>	<i>changes to the system are tracked.</i>								
<b>3.4.3[b]</b>	<i>changes to the system are reviewed.</i>								
<b>3.4.3[c]</b>	<i>changes to the system are approved or disapproved.</i>								
<b>3.4.3[d]</b>	<i>changes to the system are logged.</i>								
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>								
	<p><b>Examine:</b> [SELECT FROM: Configuration management policy; procedures addressing system configuration change control; configuration management plan; system architecture and configuration documentation; system security plan; change control records; system audit logs and records; change control audit and review reports; agenda/minutes from configuration change control oversight meetings; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with configuration change control responsibilities; personnel with information security responsibilities; system or network administrators; members of change control board or similar].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for configuration change control; mechanisms that implement configuration change control].</p>								

<b>3.4.4</b>	<b>SECURITY REQUIREMENT</b>
	Analyze the security impact of changes prior to implementation.
	<b>ASSESSMENT OBJECTIVE</b>
	<i>Determine if the security impact of changes to the system is analyzed prior to implementation.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>
	<p><b>Examine:</b> [SELECT FROM: Configuration management policy; procedures addressing security impact analysis for system changes; configuration management plan; security impact analysis documentation; system security plan; analysis tools and associated outputs; change control records; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with responsibility for conducting security impact analysis; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for security impact analysis].</p>

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<b>3.4.5</b>	<b>SECURITY REQUIREMENT</b>	
	Define, document, approve, and enforce physical and logical access restrictions associated with changes to organizational systems.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.4.5[a]</b>	<i>physical access restrictions associated with changes to the system are defined.</i>
	<b>3.4.5[b]</b>	<i>physical access restrictions associated with changes to the system are documented.</i>
	<b>3.4.5[c]</b>	<i>physical access restrictions associated with changes to the system are approved.</i>
	<b>3.4.5[d]</b>	<i>physical access restrictions associated with changes to the system are enforced.</i>
	<b>3.4.5[e]</b>	<i>logical access restrictions associated with changes to the system are defined.</i>
	<b>3.4.5[f]</b>	<i>logical access restrictions associated with changes to the system are documented.</i>
	<b>3.4.5[g]</b>	<i>logical access restrictions associated with changes to the system are approved.</i>
	<b>3.4.5[h]</b>	<i>logical access restrictions associated with changes to the system are enforced.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Configuration management policy; procedures addressing access restrictions for changes to the system; system security plan; configuration management plan; system design documentation; system architecture and configuration documentation; system configuration settings and associated documentation; logical access approvals; physical access approvals; access credentials; change control records; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with logical access control responsibilities; personnel with physical access control responsibilities; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for managing access restrictions associated with changes to the system; mechanisms supporting, implementing, and enforcing access restrictions associated with changes to the system].</p>	

<b>3.4.6</b>	<b>SECURITY REQUIREMENT</b>	
	Employ the principle of least functionality by configuring organizational systems to provide only essential capabilities.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.4.6[a]</b>	<i>essential system capabilities are defined based on the principle of least functionality.</i>
	<b>3.4.6[b]</b>	<i>the system is configured to provide only the defined essential capabilities.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Configuration management policy; configuration management plan; procedures addressing least functionality in the system; system security plan; system design documentation; system configuration settings and associated documentation; security configuration checklists; other relevant documents or records].</p>	

<b>3.4.7</b>	<p><b>Interview:</b> [SELECT FROM: Personnel with security configuration management responsibilities; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes prohibiting or restricting functions, ports, protocols, or services; mechanisms implementing restrictions or prohibition of functions, ports, protocols, or services].</p>
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<b>3.4.7</b>	<b>SECURITY REQUIREMENT</b>	
	Restrict, disable, or prevent the use of nonessential programs, functions, ports, protocols, and services.	
	<b>ASSESSMENT OBJECTIVE</b>	
	Determine if:	
	<b>3.4.7[a]</b>	<i>essential programs are defined.</i>
	<b>3.4.7[b]</b>	<i>the use of nonessential programs is defined.</i>
	<b>3.4.7[c]</b>	<i>the use of nonessential programs is restricted, disabled, or prevented as defined.</i>
	<b>3.4.7[d]</b>	<i>essential functions are defined.</i>
	<b>3.4.7[e]</b>	<i>the use of nonessential functions is defined.</i>
	<b>3.4.7[f]</b>	<i>the use of nonessential functions is restricted, disabled, or prevented as defined.</i>
	<b>3.4.7[g]</b>	<i>essential ports are defined.</i>
	<b>3.4.7[h]</b>	<i>the use of nonessential ports is defined.</i>
	<b>3.4.7[i]</b>	<i>the use of nonessential ports is restricted, disabled, or prevented as defined.</i>
	<b>3.4.7[j]</b>	<i>essential protocols are defined.</i>
	<b>3.4.7[k]</b>	<i>the use of nonessential protocols is defined.</i>
	<b>3.4.7[l]</b>	<i>the use of nonessential protocols is restricted, disabled, or prevented as defined.</i>
	<b>3.4.7[m]</b>	<i>essential services are defined.</i>
	<b>3.4.7[n]</b>	<i>the use of nonessential services is defined.</i>
	<b>3.4.7[o]</b>	<i>the use of nonessential services is restricted, disabled, or prevented as defined.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Configuration management policy; procedures addressing least functionality in the system; configuration management plan; system security plan; system design documentation; security configuration checklists; system configuration settings and associated documentation; specifications for preventing software program execution; documented reviews of programs, functions, ports, protocols, and/or services; change control records; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with responsibilities for reviewing programs, functions, ports, protocols, and services on the system; personnel with information security responsibilities; system or network administrators; system developers].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for reviewing and disabling nonessential programs, functions, ports, protocols, or services; mechanisms implementing review and handling of nonessential programs, functions, ports, protocols, or services; organizational processes preventing program execution on the system; organizational processes for software program usage and restrictions; mechanisms supporting or implementing software program usage and restrictions; mechanisms preventing program execution on the system].</p>	

<b>3.4.8</b>	<b>SECURITY REQUIREMENT</b>	
	Apply deny-by-exception (blacklisting) policy to prevent the use of unauthorized software or deny-all, permit-by-exception (whitelisting) policy to allow the execution of authorized software.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.4.8[a]</b>	<i>a policy specifying whether whitelisting or blacklisting is to be implemented is specified.</i>
	<b>3.4.8[b]</b>	<i>the software allowed to execute under whitelisting or denied use under blacklisting is specified.</i>
	<b>3.4.8[c]</b>	<i>whitelisting to allow the execution of authorized software or blacklisting to prevent the use of unauthorized software is implemented as specified.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Configuration management policy; procedures addressing least functionality in the system; system security plan; configuration management plan; system design documentation; system configuration settings and associated documentation; list of software programs not authorized to execute on the system; list of software programs authorized to execute on the system; security configuration checklists; review and update records associated with list of authorized or unauthorized software programs; change control records; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with responsibilities for identifying software authorized or not authorized to execute on the system; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Organizational process for identifying, reviewing, and updating programs authorized or not authorized to execute on the system; process for implementing blacklisting or whitelisting; mechanisms supporting or implementing blacklisting or whitelisting].</p>	

<b>3.4.9</b>	<b>SECURITY REQUIREMENT</b>	
	Control and monitor user-installed software.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.4.9[a]</b>	<i>a policy for controlling the installation of software by users is established.</i>
	<b>3.4.9[b]</b>	<i>installation of software by users is controlled based on the established policy.</i>
	<b>3.4.9[c]</b>	<i>installation of software by users is monitored.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Configuration management policy; procedures addressing user installed software; configuration management plan; system security plan; system design documentation; system configuration settings and associated documentation; list of rules governing user-installed software; system monitoring records; system audit logs and records; continuous monitoring strategy; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with responsibilities for governing user-installed software; personnel operating, using, or maintaining the system; personnel monitoring compliance with user-installed software policy; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes governing user-installed software on the system; mechanisms enforcing rules or methods for governing the installation of software by users; mechanisms monitoring policy compliance].</p>	

### 3.5 IDENTIFICATION AND AUTHENTICATION

<b>3.5.1</b>	<b>SECURITY REQUIREMENT</b>	
	Identify system users, processes acting on behalf of users, and devices.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.5.1[a]</b>	<i>system users are identified.</i>
	<b>3.5.1[b]</b>	<i>processes acting on behalf of users are identified.</i>
	<b>3.5.1[c]</b>	<i>devices accessing the system are identified.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Identification and authentication policy; procedures addressing user identification and authentication; system security plan, system design documentation; system configuration settings and associated documentation; system audit logs and records; list of system accounts; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with system operations responsibilities; personnel with information security responsibilities; system or network administrators; personnel with account management responsibilities; system developers].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for uniquely identifying and authenticating users; mechanisms supporting or implementing identification and authentication capability].</p>	

<b>3.5.2</b>	<b>SECURITY REQUIREMENT</b>	
	Authenticate (or verify) the identities of users, processes, or devices, as a prerequisite to allowing access to organizational systems.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.5.2[a]</b>	<i>the identity of each user is authenticated or verified as a prerequisite to system access.</i>
	<b>3.5.2[b]</b>	<i>the identity of each process acting on behalf of a user is authenticated or verified as a prerequisite to system access.</i>
	<b>3.5.2[c]</b>	<i>the identity of each device accessing or connecting to the system is authenticated or verified as a prerequisite to system access.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Identification and authentication policy; system security plan; procedures addressing authenticator management; procedures addressing user identification and authentication; system design documentation; list of system authenticator types; system configuration settings and associated documentation; change control records associated with managing system authenticators; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with authenticator management responsibilities; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing authenticator management capability].</p>	

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<b>3.5.3</b>	<b>SECURITY REQUIREMENT</b> Use multifactor authentication for local and network access to privileged accounts and for network access to non-privileged accounts.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
	<b>3.5.3[a]</b>	<i>privileged accounts are identified.</i>
	<b>3.5.3[b]</b>	<i>multifactor authentication is implemented for local access to privileged accounts.</i>
	<b>3.5.3[c]</b>	<i>multifactor authentication is implemented for network access to privileged accounts.</i>
	<b>3.5.3[d]</b>	<i>multifactor authentication is implemented for network access to non-privileged accounts.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>		
<p><b>Examine:</b> [SELECT FROM: Identification and authentication policy; procedures addressing user identification and authentication; system security plan; system design documentation; system configuration settings and associated documentation; system audit logs and records; list of system accounts; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with system operations responsibilities; personnel with account management responsibilities; personnel with information security responsibilities; system or network administrators; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing multifactor authentication capability].</p>		

<b>3.5.4</b>	<b>SECURITY REQUIREMENT</b> Employ replay-resistant authentication mechanisms for network access to privileged and non-privileged accounts.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if replay-resistant authentication mechanisms are implemented for network account access to privileged and non-privileged accounts.</i>	
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Identification and authentication policy; procedures addressing user identification and authentication; system security plan; system design documentation; system configuration settings and associated documentation; system audit logs and records; list of privileged system accounts; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with system operations responsibilities; personnel with account management responsibilities; personnel with information security responsibilities; system or network administrators; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing identification and authentication capability or replay resistant authentication mechanisms].</p>	

<b>3.5.5</b>	<b>SECURITY REQUIREMENT</b> Prevent reuse of identifiers for a defined period.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
	<b>3.5.5[a]</b>	<i>a period within which identifiers cannot be reused is defined.</i>



	<b>3.5.5[b]</b>	<i>reuse of identifiers is prevented within the defined period.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <u>Examine:</u> [SELECT FROM: Identification and authentication policy; procedures addressing identifier management; procedures addressing account management; system security plan; system design documentation; system configuration settings and associated documentation; list of system accounts; list of identifiers generated from physical access control devices; other relevant documents or records]. <u>Interview:</u> [SELECT FROM: Personnel with identifier management responsibilities; personnel with information security responsibilities; system or network administrators; system developers]. <u>Test:</u> [SELECT FROM: Mechanisms supporting or implementing identifier management].	

<b>3.5.6</b>	<b>SECURITY REQUIREMENT</b>	
	Disable identifiers after a defined period of inactivity.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.5.6[a]</b>	<i>a period of inactivity after which an identifier is disabled is defined.</i>
	<b>3.5.6[b]</b>	<i>identifiers are disabled after the defined period of inactivity.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <u>Examine:</u> [SELECT FROM: Identification and authentication policy; procedures addressing identifier management; procedures addressing account management; system security plan; system design documentation; system configuration settings and associated documentation; list of system accounts; list of identifiers generated from physical access control devices; other relevant documents or records]. <u>Interview:</u> [SELECT FROM: Personnel with identifier management responsibilities; personnel with information security responsibilities; system or network administrators; system developers]. <u>Test:</u> [SELECT FROM: Mechanisms supporting or implementing identifier management].	

<b>3.5.7</b>	<b>SECURITY REQUIREMENT</b>	
	Enforce a minimum password complexity and change of characters when new passwords are created.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>	
	<b>3.5.7[a]</b>	<i>password complexity requirements are defined.</i>
	<b>3.5.7[b]</b>	<i>password change of character requirements are defined.</i>
	<b>3.5.7[c]</b>	<i>minimum password complexity requirements as defined are enforced when new passwords are created.</i>
	<b>3.5.7[d]</b>	<i>minimum password change of character requirements as defined are enforced when new passwords are created.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <u>Examine:</u> [SELECT FROM: Identification and authentication policy; password policy; procedures addressing authenticator management; system security plan; system configuration settings and associated documentation; system design documentation; password configurations and associated documentation; other relevant documents or records].	

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	<p><b>Interview:</b> [SELECT FROM: Personnel with authenticator management responsibilities; personnel with information security responsibilities; system or network administrators; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing password-based authenticator management capability].</p>
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<b>3.5.8</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Prohibit password reuse for a specified number of generations.</p>				
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if:</i></p>				
	<table border="1" style="width: 100%;"> <tr> <td style="background-color: #1a3d4d; color: white; width: 15%; text-align: center;"><b>3.5.8[a]</b></td> <td><i>the number of generations during which a password cannot be reused is specified.</i></td> </tr> <tr> <td style="background-color: #1a3d4d; color: white; text-align: center;"><b>3.5.8[b]</b></td> <td><i>reuse of passwords is prohibited during the specified number of generations.</i></td> </tr> </table>	<b>3.5.8[a]</b>	<i>the number of generations during which a password cannot be reused is specified.</i>	<b>3.5.8[b]</b>	<i>reuse of passwords is prohibited during the specified number of generations.</i>
<b>3.5.8[a]</b>	<i>the number of generations during which a password cannot be reused is specified.</i>				
<b>3.5.8[b]</b>	<i>reuse of passwords is prohibited during the specified number of generations.</i>				
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: Identification and authentication policy; password policy; procedures addressing authenticator management; system security plan; system design documentation; system configuration settings and associated documentation; password configurations and associated documentation; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with authenticator management responsibilities; personnel with information security responsibilities; system or network administrators; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing password-based authenticator management capability].</p>				

<b>3.5.9</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Allow temporary password use for system logons with an immediate change to a permanent password.</p>
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if an immediate change to a permanent password is required when a temporary password is used for system logon.</i></p>
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: Identification and authentication policy; password policy; procedures addressing authenticator management; system security plan; system configuration settings and associated documentation; system design documentation; password configurations and associated documentation; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with authenticator management responsibilities; personnel with information security responsibilities; system or network administrators; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing password-based authenticator management capability].</p>

<b>3.5.10</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Store and transmit only cryptographically-protected passwords.</p>
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if:</i></p>

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	<b>3.5.10[a]</b>	<i>passwords are cryptographically protected in storage.</i>
	<b>3.5.10[b]</b>	<i>passwords are cryptographically protected in transit.</i>
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: Identification and authentication policy; password policy; procedures addressing authenticator management; system security plan; system configuration settings and associated documentation; system design documentation; password configurations and associated documentation; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with authenticator management responsibilities; personnel with information security responsibilities; system or network administrators; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing password-based authenticator management capability].</p>	

<b>3.5.11</b>	<b>SECURITY REQUIREMENT</b>	
	Obscure feedback of authentication information.	
	<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if authentication information is obscured during the authentication process.</i>	
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Identification and authentication policy; procedures addressing authenticator feedback; system security plan; system design documentation; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with information security responsibilities; system or network administrators; system developers].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing the obscuring of feedback of authentication information during authentication].</p>	

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### 3.6 INCIDENT RESPONSE

<b>3.6.1</b>	<b>SECURITY REQUIREMENT</b>
	Establish an operational incident-handling capability for organizational systems that includes preparation, detection, analysis, containment, recovery, and user response activities.
	<b>ASSESSMENT OBJECTIVE</b>
	<i>Determine if:</i>
	<b>3.6.1[a]</b> <i>an operational incident-handling capability is established.</i>
	<b>3.6.1[b]</b> <i>the operational incident-handling capability includes preparation.</i>
	<b>3.6.1[c]</b> <i>the operational incident-handling capability includes detection.</i>
	<b>3.6.1[d]</b> <i>the operational incident-handling capability includes analysis.</i>
	<b>3.6.1[e]</b> <i>the operational incident-handling capability includes containment.</i>
	<b>3.6.1[f]</b> <i>the operational incident-handling capability includes recovery.</i>
	<b>3.6.1[g]</b> <i>the operational incident-handling capability includes user response activities.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>
	<b>Examine:</b> [SELECT FROM: Incident response policy; contingency planning policy; procedures addressing incident handling; procedures addressing incident response assistance; incident response plan; contingency plan; system security plan; procedures addressing incident response training; incident response training curriculum; incident response training materials; incident response training records; other relevant documents or records].
	<b>Interview:</b> [SELECT FROM: Personnel with incident handling responsibilities; personnel with contingency planning responsibilities; personnel with incident response training and operational responsibilities; personnel with incident response assistance and support responsibilities; personnel with access to incident response support and assistance capability; personnel with information security responsibilities].
	<b>Test:</b> [SELECT FROM: Incident-handling capability for the organization; organizational processes for incident response assistance; mechanisms supporting or implementing incident response assistance].

<b>3.6.2</b>	<b>SECURITY REQUIREMENT</b>
	Track, document, and report incidents to designated officials and/or authorities both internal and external to the organization.
	<b>ASSESSMENT OBJECTIVE</b>
	<i>Determine if:</i>
	<b>3.6.2[a]</b> <i>incidents are tracked.</i>
	<b>3.6.2[b]</b> <i>incidents are documented.</i>
	<b>3.6.2[c]</b> <i>authorities to whom incidents are to be reported are identified.</i>
	<b>3.6.2[d]</b> <i>organizational officials to whom incidents are to be reported are identified.</i>
	<b>3.6.2[e]</b> <i>identified authorities are notified of incidents.</i>
	<b>3.6.2[f]</b> <i>identified organizational officials are notified of incidents.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>

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	<p><b>Examine:</b> [SELECT FROM: Incident response policy; procedures addressing incident monitoring; incident response records and documentation; procedures addressing incident reporting; incident reporting records and documentation; incident response plan; system security plan; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with incident monitoring responsibilities; personnel with incident reporting responsibilities; personnel who have or should have reported incidents; personnel (authorities) to whom incident information is to be reported; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Incident monitoring capability for the organization; mechanisms supporting or implementing tracking and documenting of system security incidents; organizational processes for incident reporting; mechanisms supporting or implementing incident reporting].</p>
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<b>3.6.3</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Test the organizational incident response capability.</p>
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if the incident response capability is tested.</i></p>
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: Incident response policy; contingency planning policy; procedures addressing incident response testing; procedures addressing contingency plan testing; incident response testing material; incident response test results; incident response test plan; incident response plan; contingency plan; system security plan; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with incident response testing responsibilities; personnel with information security responsibilities; personnel with responsibilities for testing plans related to incident response].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms and processes for incident response].</p>

### 3.7 MAINTENANCE

<b>3.7.1</b>	<b>SECURITY REQUIREMENT</b> Perform maintenance on organizational systems.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if system maintenance is performed.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System maintenance policy; procedures addressing controlled system maintenance; maintenance records; manufacturer or vendor maintenance specifications; equipment sanitization records; media sanitization records; system security plan; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with system maintenance responsibilities; personnel with information security responsibilities; personnel responsible for media sanitization; system or network administrators]. <b>Test:</b> [SELECT FROM: Organizational processes for scheduling, performing, documenting, reviewing, approving, and monitoring maintenance and repairs for systems; organizational processes for sanitizing system components; mechanisms supporting or implementing controlled maintenance; mechanisms implementing sanitization of system components].

<b>3.7.2</b>	<b>SECURITY REQUIREMENT</b> Provide controls on the tools, techniques, mechanisms, and personnel used to conduct system maintenance.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.7.2[a]</b> <i>tools used to conduct system maintenance are controlled.</i>
	<b>3.7.2[b]</b> <i>techniques used to conduct system maintenance are controlled.</i>
	<b>3.7.2[c]</b> <i>mechanisms used to conduct system maintenance are controlled.</i>
	<b>3.7.2[d]</b> <i>personnel used to conduct system maintenance are controlled.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System maintenance policy; procedures addressing system maintenance tools and media; maintenance records; system maintenance tools and associated documentation; maintenance tool inspection records; system security plan; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with system maintenance responsibilities; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Organizational processes for approving, controlling, and monitoring maintenance tools; mechanisms supporting or implementing approval, control, and monitoring of maintenance tools; organizational processes for inspecting maintenance tools; mechanisms supporting or implementing inspection of maintenance tools; organizational process for inspecting media for malicious code; mechanisms supporting or implementing inspection of media used for maintenance].

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<b>3.7.3</b>	<b>SECURITY REQUIREMENT</b> Ensure equipment removed for off-site maintenance is sanitized of any CUI.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if equipment to be removed from organizational spaces for off-site maintenance is sanitized of any CUI.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System maintenance policy; procedures addressing controlled system maintenance; maintenance records; manufacturer or vendor maintenance specifications; equipment sanitization records; media sanitization records; system security plan; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with system maintenance responsibilities; personnel with information security responsibilities; personnel responsible for media sanitization; system or network administrators]. <b>Test:</b> [SELECT FROM: Organizational processes for scheduling, performing, documenting, reviewing, approving, and monitoring maintenance and repairs for systems; organizational processes for sanitizing system components; mechanisms supporting or implementing controlled maintenance; mechanisms implementing sanitization of system components].

<b>3.7.4</b>	<b>SECURITY REQUIREMENT</b> Check media containing diagnostic and test programs for malicious code before the media are used in organizational systems.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if media containing diagnostic and test programs are checked for malicious code before being used in organizational systems that process, store, or transmit CUI.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System maintenance policy; procedures addressing system maintenance tools; system maintenance tools and associated documentation; maintenance records; system security plan; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with system maintenance responsibilities; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Organizational process for inspecting media for malicious code; mechanisms supporting or implementing inspection of media used for maintenance].

<b>3.7.5</b>	<b>SECURITY REQUIREMENT</b> Require multifactor authentication to establish nonlocal maintenance sessions via external network connections and terminate such connections when nonlocal maintenance is complete.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
	<b>3.7.5[a]</b>	<i>multifactor authentication is used to establish nonlocal maintenance sessions via external network connections.</i>
	<b>3.7.5[b]</b>	<i>nonlocal maintenance sessions established via external network connections are terminated when nonlocal maintenance is complete.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System maintenance policy; procedures addressing nonlocal system maintenance; system security plan; system design documentation; system configuration	

	<p>settings and associated documentation; maintenance records; diagnostic records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with system maintenance responsibilities; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for managing nonlocal maintenance; mechanisms implementing, supporting, and managing nonlocal maintenance; mechanisms for strong authentication of nonlocal maintenance diagnostic sessions; mechanisms for terminating nonlocal maintenance sessions and network connections].</p>
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<b>3.7.6</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Supervise the maintenance activities of maintenance personnel without required access authorization.</p>
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if maintenance personnel without required access authorization are supervised during maintenance activities.</i></p>
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: System maintenance policy; procedures addressing maintenance personnel; service provider contracts; service-level agreements; list of authorized personnel; maintenance records; access control records; system security plan; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with system maintenance responsibilities; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for authorizing and managing maintenance personnel; mechanisms supporting or implementing authorization of maintenance personnel].</p>



### 3.8 MEDIA PROTECTION

<b>3.8.1</b>	<b>SECURITY REQUIREMENT</b> Protect (i.e., physically control and securely store) system media containing CUI, both paper and digital.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.8.1[a]</b> <i>paper media containing CUI is physically controlled.</i>
	<b>3.8.1[b]</b> <i>digital media containing CUI is physically controlled.</i>
	<b>3.8.1[c]</b> <i>paper media containing CUI is securely stored.</i>
	<b>3.8.1[d]</b> <i>digital media containing CUI is securely stored.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System media protection policy; procedures addressing media storage; procedures addressing media access restrictions; access control policy and procedures; physical and environmental protection policy and procedures; system security plan; media storage facilities; access control records; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with system media protection responsibilities; personnel with information security responsibilities; system or network administrators]. <b>Test:</b> [SELECT FROM: Organizational processes for restricting information media; mechanisms supporting or implementing media access restrictions].

<b>3.8.2</b>	<b>SECURITY REQUIREMENT</b> Limit access to CUI on system media to authorized users.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if access to CUI on system media is limited to authorized users.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System media protection policy; procedures addressing media storage; physical and environmental protection policy and procedures; access control policy and procedures; system security plan; system media; designated controlled areas; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with system media protection and storage responsibilities; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Organizational processes for storing media; mechanisms supporting or implementing secure media storage and media protection].

<b>3.8.3</b>	<b>SECURITY REQUIREMENT</b> Sanitize or destroy system media containing CUI before disposal or release for reuse.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.8.3[a]</b> <i>system media containing CUI is sanitized or destroyed before disposal.</i>
	<b>3.8.3[b]</b> <i>system media containing CUI is sanitized before it is released for reuse.</i>

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<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>
<p><b>Examine:</b> [SELECT FROM: System media protection policy; procedures addressing media sanitization and disposal; applicable standards and policies addressing media sanitization; system security plan; media sanitization records; system audit logs and records; system design documentation; system configuration settings and associated documentation; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with media sanitization responsibilities; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for media sanitization; mechanisms supporting or implementing media sanitization].</p>

<b>3.8.4</b>	<b>SECURITY REQUIREMENT</b>
	Mark media with necessary CUI markings and distribution limitations.
	<b>ASSESSMENT OBJECTIVE</b>
	Determine if:
<b>3.8.4[a]</b>	<i>media containing CUI is marked with applicable CUI markings.</i>
<b>3.8.4[b]</b>	<i>media containing CUI is marked with distribution limitations.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>
	<p><b>Examine:</b> [SELECT FROM: System media protection policy; procedures addressing media marking; physical and environmental protection policy and procedures; system security plan; list of system media marking security attributes; designated controlled areas; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with system media protection and marking responsibilities; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for marking information media; mechanisms supporting or implementing media marking].</p>

<b>3.8.5</b>	<b>SECURITY REQUIREMENT</b>
	Control access to media containing CUI and maintain accountability for media during transport outside of controlled areas.
	<b>ASSESSMENT OBJECTIVE</b>
	Determine if:
<b>3.8.5[a]</b>	<i>access to media containing CUI is controlled.</i>
<b>3.8.5[b]</b>	<i>accountability for media containing CUI is maintained during transport outside of controlled areas.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>
	<p><b>Examine:</b> [SELECT FROM: System media protection policy; procedures addressing media storage; physical and environmental protection policy and procedures; access control policy and procedures; system security plan; system media; designated controlled areas; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with system media protection and storage responsibilities; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for storing media; mechanisms supporting or implementing media storage and media protection].</p>

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<b>3.8.6</b>	<b>SECURITY REQUIREMENT</b> Implement cryptographic mechanisms to protect the confidentiality of CUI stored on digital media during transport unless otherwise protected by alternative physical safeguards.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if the confidentiality of CUI stored on digital media is protected during transport using cryptographic mechanisms or alternative physical safeguards.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System media protection policy; procedures addressing media transport; system design documentation; system security plan; system configuration settings and associated documentation; system media transport records; system audit logs and records; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with system media transport responsibilities; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Cryptographic mechanisms protecting information on digital media during transportation outside controlled areas].

<b>3.8.7</b>	<b>SECURITY REQUIREMENT</b> Control the use of removable media on system components.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if the use of removable media on system components is controlled.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System media protection policy; system use policy; procedures addressing media usage restrictions; system security plan; rules of behavior; system design documentation; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with system media use responsibilities; personnel with information security responsibilities; system or network administrators]. <b>Test:</b> [SELECT FROM: Organizational processes for media use; mechanisms restricting or prohibiting use of system media on systems or system components].

<b>3.8.8</b>	<b>SECURITY REQUIREMENT</b> Prohibit the use of portable storage devices when such devices have no identifiable owner.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if the use of portable storage devices is prohibited when such devices have no identifiable owner.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System media protection policy; system use policy; procedures addressing media usage restrictions; system security plan; rules of behavior; system configuration settings and associated documentation; system design documentation; system audit logs and records; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with system media use responsibilities; personnel with information security responsibilities; system or network administrators]. <b>Test:</b> [SELECT FROM: Organizational processes for media use; mechanisms prohibiting use of media on systems or system components].

<p><b>3.8.9</b></p>	<p><b>SECURITY REQUIREMENT</b> Protect the confidentiality of backup CUI at storage locations.</p>
	<p><b>ASSESSMENT OBJECTIVE</b> <i>Determine if the confidentiality of backup CUI is protected at storage locations.</i></p>
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: Procedures addressing system backup; system configuration settings and associated documentation; security plan; backup storage locations; system backup logs or records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with system backup responsibilities; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for conducting system backups; mechanisms supporting or implementing system backups].</p>

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### 3.9 PERSONNEL SECURITY

<b>3.9.1</b>	<b>SECURITY REQUIREMENT</b> Screen individuals prior to authorizing access to organizational systems containing CUI.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if individuals are screened prior to authorizing access to organizational systems containing CUI.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Personnel security policy; procedures addressing personnel screening; records of screened personnel; system security plan; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with personnel security responsibilities; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Organizational processes for personnel screening].

<b>3.9.2</b>	<b>SECURITY REQUIREMENT</b> Ensure that organizational systems containing CUI are protected during and after personnel actions such as terminations and transfers.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.9.2[a]</b> <i>a policy and/or process for terminating system access and any credentials coincident with personnel actions is established.</i>
	<b>3.9.2[b]</b> <i>system access and credentials are terminated consistent with personnel actions such as termination or transfer.</i>
	<b>3.9.2[c]</b> <i>the system is protected during and after personnel transfer actions.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Personnel security policy; procedures addressing personnel transfer and termination; records of personnel transfer and termination actions; list of system accounts; records of terminated or revoked authenticators and credentials; records of exit interviews; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with personnel security responsibilities; personnel with account management responsibilities; system or network administrators; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Organizational processes for personnel transfer and termination; mechanisms supporting or implementing personnel transfer and termination notifications; mechanisms for disabling system access and revoking authenticators].

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### 3.10 PHYSICAL PROTECTION

<b>3.10.1</b>	<b>SECURITY REQUIREMENT</b>
	Limit physical access to organizational systems, equipment, and the respective operating environments to authorized individuals.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.10.1[a]</b> <i>authorized individuals allowed physical access are identified.</i>
	<b>3.10.1[b]</b> <i>physical access to organizational systems is limited to authorized individuals.</i>
	<b>3.10.1[c]</b> <i>physical access to equipment is limited to authorized individuals.</i>
	<b>3.10.1[d]</b> <i>physical access to operating environments is limited to authorized individuals.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>
	<b>Examine:</b> [SELECT FROM: Physical and environmental protection policy; procedures addressing physical access authorizations; system security plan; authorized personnel access list; authorization credentials; physical access list reviews; physical access termination records and associated documentation; other relevant documents or records].
	<b>Interview:</b> [SELECT FROM: Personnel with physical access authorization responsibilities; personnel with physical access to system facility; personnel with information security responsibilities].
	<b>Test:</b> [SELECT FROM: Organizational processes for physical access authorizations; mechanisms supporting or implementing physical access authorizations].

<b>3.10.2</b>	<b>SECURITY REQUIREMENT</b>
	Protect and monitor the physical facility and support infrastructure for organizational systems.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.10.2[a]</b> <i>the physical facility where organizational systems reside is protected.</i>
	<b>3.10.2[b]</b> <i>the support infrastructure for organizational systems is protected.</i>
	<b>3.10.2[c]</b> <i>the physical facility where organizational systems reside is monitored.</i>
	<b>3.10.2[d]</b> <i>the support infrastructure for organizational systems is monitored.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>
	<b>Examine:</b> [SELECT FROM: Physical and environmental protection policy; procedures addressing physical access monitoring; system security plan; physical access logs or records; physical access monitoring records; physical access log reviews; other relevant documents or records].
	<b>Interview:</b> [SELECT FROM: Personnel with physical access monitoring responsibilities; personnel with incident response responsibilities; personnel with information security responsibilities].
	<b>Test:</b> [SELECT FROM: Organizational processes for monitoring physical access; mechanisms supporting or implementing physical access monitoring; mechanisms supporting or implementing the review of physical access logs].

<b>3.10.3</b>	<b>SECURITY REQUIREMENT</b> Escort visitors and monitor visitor activity.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.10.3[a]</b>   <i>visitors are escorted.</i>
	<b>3.10.3[b]</b>   <i>visitor activity is monitored.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Physical and environmental protection policy; procedures addressing physical access control; system security plan; physical access control logs or records; inventory records of physical access control devices; system entry and exit points; records of key and lock combination changes; storage locations for physical access control devices; physical access control devices; list of security safeguards controlling access to designated publicly accessible areas within facility; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with physical access control responsibilities; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Organizational processes for physical access control; mechanisms supporting or implementing physical access control; physical access control devices].

<b>3.10.4</b>	<b>SECURITY REQUIREMENT</b> Maintain audit logs of physical access.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if audit logs of physical access are maintained.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Physical and environmental protection policy; procedures addressing physical access control; system security plan; physical access control logs or records; inventory records of physical access control devices; system entry and exit points; records of key and lock combination changes; storage locations for physical access control devices; physical access control devices; list of security safeguards controlling access to designated publicly accessible areas within facility; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with physical access control responsibilities; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Organizational processes for physical access control; mechanisms supporting or implementing physical access control; physical access control devices].

<b>3.10.5</b>	<b>SECURITY REQUIREMENT</b> Control and manage physical access devices.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.10.5[a]</b>   <i>physical access devices are identified.</i>
	<b>3.10.5[b]</b>   <i>physical access devices are controlled.</i>
	<b>3.10.5[c]</b>   <i>physical access devices are managed.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Physical and environmental protection policy; procedures addressing physical access control; system security plan; physical access control logs or records;

	<p>inventory records of physical access control devices; system entry and exit points; records of key and lock combination changes; storage locations for physical access control devices; physical access control devices; list of security safeguards controlling access to designated publicly accessible areas within facility; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with physical access control responsibilities; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for physical access control; mechanisms supporting or implementing physical access control; physical access control devices].</p>
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<b>3.10.6</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Enforce safeguarding measures for CUI at alternate work sites.</p>				
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if:</i></p>				
	<table border="1" style="width: 100%;"> <tr> <td style="width: 15%; background-color: #1a3d4d; color: white;"><b>3.10.6[a]</b></td> <td><i>safeguarding measures for CUI are defined for alternate work sites.</i></td> </tr> <tr> <td style="background-color: #1a3d4d; color: white;"><b>3.10.6[b]</b></td> <td><i>safeguarding measures for CUI are enforced for alternate work sites.</i></td> </tr> </table>	<b>3.10.6[a]</b>	<i>safeguarding measures for CUI are defined for alternate work sites.</i>	<b>3.10.6[b]</b>	<i>safeguarding measures for CUI are enforced for alternate work sites.</i>
<b>3.10.6[a]</b>	<i>safeguarding measures for CUI are defined for alternate work sites.</i>				
<b>3.10.6[b]</b>	<i>safeguarding measures for CUI are enforced for alternate work sites.</i>				
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: Physical and environmental protection policy; procedures addressing alternate work sites for personnel; system security plan; list of safeguards required for alternate work sites; assessments of safeguards at alternate work sites; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel approving use of alternate work sites; personnel using alternate work sites; personnel assessing controls at alternate work sites; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for security at alternate work sites; mechanisms supporting alternate work sites; safeguards employed at alternate work sites; means of communications between personnel at alternate work sites and security personnel].</p>				

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### 3.11 RISK ASSESSMENT

<b>3.11.1</b>	<b>SECURITY REQUIREMENT</b> Periodically assess the risk to organizational operations (including mission, functions, image, or reputation), organizational assets, and individuals, resulting from the operation of organizational systems and the associated processing, storage, or transmission of CUI.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.11.1[a]</b> <i>the frequency to assess risk to organizational operations, organizational assets, and individuals is defined.</i>
	<b>3.11.1[b]</b> <i>risk to organizational operations, organizational assets, and individuals resulting from the operation of an organizational system that processes, stores, or transmits CUI is assessed with the defined frequency.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Risk assessment policy; security planning policy and procedures; procedures addressing organizational risk assessments; system security plan; risk assessment; risk assessment results; risk assessment reviews; risk assessment updates; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with risk assessment responsibilities; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Organizational processes for risk assessment; mechanisms supporting or for conducting, documenting, reviewing, disseminating, and updating the risk assessment].

<b>3.11.2</b>	<b>SECURITY REQUIREMENT</b> Scan for vulnerabilities in organizational systems and applications periodically and when new vulnerabilities affecting those systems and applications are identified.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.11.2[a]</b> <i>the frequency to scan for vulnerabilities in organizational systems and applications is defined.</i>
	<b>3.11.2[b]</b> <i>vulnerability scans are performed on organizational systems with the defined frequency.</i>
	<b>3.11.2[c]</b> <i>vulnerability scans are performed on applications with the defined frequency.</i>
	<b>3.11.2[d]</b> <i>vulnerability scans are performed on organizational systems when new vulnerabilities are identified.</i>
	<b>3.11.2[e]</b> <i>vulnerability scans are performed on applications when new vulnerabilities are identified.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Risk assessment policy; procedures addressing vulnerability scanning; risk assessment; system security plan; security assessment report; vulnerability scanning tools and associated configuration documentation; vulnerability scanning results; patch and vulnerability management records; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with risk assessment, security assessment and vulnerability scanning responsibilities; personnel with vulnerability scan analysis and remediation responsibilities; personnel with information security responsibilities; system or network administrators].

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	<p><b>Test:</b> [SELECT FROM: Organizational processes for vulnerability scanning, analysis, remediation, and information sharing; mechanisms supporting or implementing vulnerability scanning, analysis, remediation, and information sharing].</p>
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<b>3.11.3</b>	<p><b>SECURITY REQUIREMENT</b> Remediate vulnerabilities in accordance with risk assessments.</p>				
	<p><b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i></p>				
	<table border="1"> <tr> <td style="background-color: #1a3d4d; color: white; text-align: center; vertical-align: middle;"><b>3.11.3[a]</b></td> <td><i>vulnerabilities are identified.</i></td> </tr> <tr> <td style="background-color: #1a3d4d; color: white; text-align: center; vertical-align: middle;"><b>3.11.3[b]</b></td> <td><i>vulnerabilities are remediated in accordance with risk assessments.</i></td> </tr> </table>	<b>3.11.3[a]</b>	<i>vulnerabilities are identified.</i>	<b>3.11.3[b]</b>	<i>vulnerabilities are remediated in accordance with risk assessments.</i>
<b>3.11.3[a]</b>	<i>vulnerabilities are identified.</i>				
<b>3.11.3[b]</b>	<i>vulnerabilities are remediated in accordance with risk assessments.</i>				
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: Risk assessment policy; procedures addressing vulnerability scanning; risk assessment; system security plan; security assessment report; vulnerability scanning tools and associated configuration documentation; vulnerability scanning results; patch and vulnerability management records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with risk assessment, security assessment and vulnerability scanning responsibilities; personnel with vulnerability scan analysis responsibilities; personnel with vulnerability remediation responsibilities; personnel with information security responsibilities; system or network administrators].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for vulnerability scanning, analysis, remediation, and information sharing; mechanisms supporting or implementing vulnerability scanning, analysis, remediation, and information sharing].</p>				

### 3.12 SECURITY ASSESSMENT

<b>3.12.1</b>	<b>SECURITY REQUIREMENT</b> Periodically assess the security controls in organizational systems to determine if the controls are effective in their application.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
	<b>3.12.1[a]</b>	<i>the frequency of security control assessments is defined.</i>
	<b>3.12.1[b]</b>	<i>security controls are assessed with the defined frequency to determine if the controls are effective in their application.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Security assessment and authorization policy; procedures addressing security assessment planning; procedures addressing security assessments; security assessment plan; system security plan; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with security assessment responsibilities; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Mechanisms supporting security assessment, security assessment plan development, and security assessment reporting].	

<b>3.12.2</b>	<b>SECURITY REQUIREMENT</b> Develop and implement plans of action designed to correct deficiencies and reduce or eliminate vulnerabilities in organizational systems.	
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
	<b>3.12.2[a]</b>	<i>deficiencies and vulnerabilities to be addressed by the plan of action are identified.</i>
	<b>3.12.2[b]</b>	<i>a plan of action is developed to correct identified deficiencies and reduce or eliminate identified vulnerabilities.</i>
	<b>3.12.2[c]</b>	<i>the plan of action is implemented to correct identified deficiencies and reduce or eliminate identified vulnerabilities.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Security assessment and authorization policy; procedures addressing plan of action; system security plan; security assessment plan; security assessment report; security assessment evidence; plan of action; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with plan of action development and implementation responsibilities; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Mechanisms for developing, implementing, and maintaining plan of action].	

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<b>3.12.3</b>	<b>SECURITY REQUIREMENT</b> Monitor security controls on an ongoing basis to ensure the continued effectiveness of the controls.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if security controls are monitored on an ongoing basis to ensure the continued effectiveness of those controls.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Security planning policy; organizational procedures addressing system security plan development and implementation; procedures addressing system security plan reviews and updates; enterprise architecture documentation; system security plan; records of system security plan reviews and updates; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with security planning and system security plan implementation responsibilities; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Organizational processes for system security plan development, review, update, and approval; mechanisms supporting the system security plan].

<b>3.12.4</b>	<b>SECURITY REQUIREMENT</b> Develop, document, and periodically update system security plans that describe system boundaries, system environments of operation, how security requirements are implemented, and the relationships with or connections to other systems.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.12.4[a]</b> <i>a system security plan is developed.</i>
	<b>3.12.4[b]</b> <i>the system boundary is described and documented in the system security plan.</i>
	<b>3.12.4[c]</b> <i>the system environment of operation is described and documented in the system security plan.</i>
	<b>3.12.4[d]</b> <i>the security requirements identified and approved by the designated authority as non-applicable are identified.</i>
	<b>3.12.4[e]</b> <i>the method of security requirement implementation is described and documented in the system security plan.</i>
	<b>3.12.4[f]</b> <i>the relationship with or connection to other systems is described and documented in the system security plan.</i>
	<b>3.12.4[g]</b> <i>the frequency to update the system security plan is defined.</i>
	<b>3.12.4[h]</b> <i>system security plan is updated with the defined frequency.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: Security planning policy; procedures addressing system security plan development and implementation; procedures addressing system security plan reviews and updates; enterprise architecture documentation; system security plan; records of system security plan reviews and updates; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: Personnel with security planning and system security plan implementation responsibilities; personnel with information security responsibilities]. <b>Test:</b> [SELECT FROM: Organizational processes for system security plan development, review, update, and approval; mechanisms supporting the system security plan].

### 3.13 SYSTEM AND COMMUNICATIONS PROTECTION

<b>3.13.1</b>	<b>SECURITY REQUIREMENT</b> Monitor, control, and protect communications (i.e., information transmitted or received by organizational systems) at the external boundaries and key internal boundaries of organizational systems.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.13.1[a]</b> <i>the external system boundary is defined.</i>
	<b>3.13.1[b]</b> <i>key internal system boundaries are defined.</i>
	<b>3.13.1[c]</b> <i>communications are monitored at the external system boundary.</i>
	<b>3.13.1[d]</b> <i>communications are monitored at key internal boundaries.</i>
	<b>3.13.1[e]</b> <i>communications are controlled at the external system boundary.</i>
	<b>3.13.1[f]</b> <i>communications are controlled at key internal boundaries.</i>
	<b>3.13.1[g]</b> <i>communications are protected at the external system boundary.</i>
	<b>3.13.1[h]</b> <i>communications are protected at key internal boundaries.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing boundary protection; system security plan; list of key internal boundaries of the system; system design documentation; boundary protection hardware and software; enterprise security architecture documentation; system audit logs and records; system configuration settings and associated documentation; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developer; personnel with boundary protection responsibilities]. <b>Test:</b> [SELECT FROM: Mechanisms implementing boundary protection capability].

<b>3.13.2</b>	<b>SECURITY REQUIREMENT</b> Employ architectural designs, software development techniques, and systems engineering principles that promote effective information security within organizational systems.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.13.2[a]</b> <i>architectural designs that promote effective information security are identified.</i>
	<b>3.13.2[b]</b> <i>software development techniques that promote effective information security are identified.</i>
	<b>3.13.2[c]</b> <i>systems engineering principles that promote effective information security are identified.</i>
	<b>3.13.2[d]</b> <i>identified architectural designs that promote effective information security are employed.</i>
	<b>3.13.2[e]</b> <i>identified software development techniques that promote effective information security are employed.</i>

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<b>3.13.2[f]</b>	<i>identified systems engineering principles that promote effective information security are employed.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: Security planning policy; procedures addressing system security plan development and implementation; procedures addressing system security plan reviews and updates; enterprise architecture documentation; system security plan; records of system security plan reviews and updates; system and communications protection policy; procedures addressing security engineering principles used in the specification, design, development, implementation, and modification of the system; security architecture documentation; security requirements and specifications for the system; system design documentation; system configuration settings and associated documentation; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: Personnel with responsibility for determining information system security requirements; personnel with information system design, development, implementation, and modification responsibilities; personnel with security planning and system security plan implementation responsibilities; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for system security plan development, review, update, and approval; mechanisms supporting the system security plan; processes for applying security engineering principles in system specification, design, development, implementation, and modification; automated mechanisms supporting the application of security engineering principles in information system specification, design, development, implementation, and modification].</p>	

<b>3.13.3</b>	<b>SECURITY REQUIREMENT</b> Separate user functionality from system management functionality.
<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>	
<b>3.13.3[a]</b>	<i>user functionality is identified.</i>
<b>3.13.3[b]</b>	<i>system management functionality is identified.</i>
<b>3.13.3[c]</b>	<i>user functionality is separated from system management functionality.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing application partitioning; system design documentation; system configuration settings and associated documentation; system security plan; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developer].</p> <p><b>Test:</b> [SELECT FROM: Separation of user functionality from system management functionality].</p>	

<b>3.13.4</b>	<b>SECURITY REQUIREMENT</b> Prevent unauthorized and unintended information transfer via shared system resources.
<b>ASSESSMENT OBJECTIVE</b> <i>Determine if unauthorized and unintended information transfer via shared system resources is prevented.</i>	
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing application partitioning; system security plan; system design documentation; system</p>	

	<p>configuration settings and associated documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developer].</p> <p><b>Test:</b> [SELECT FROM: Separation of user functionality from system management functionality].</p>
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<b>3.13.5</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Implement subnetworks for publicly accessible system components that are physically or logically separated from internal networks.</p>				
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if:</i></p>				
	<table border="1" style="width: 100%;"> <tr> <td style="background-color: #1a3d4d; color: white; width: 15%; text-align: center;"><b>3.13.5[a]</b></td> <td><i>publicly accessible system components are identified.</i></td> </tr> <tr> <td style="background-color: #1a3d4d; color: white; text-align: center;"><b>3.13.5[b]</b></td> <td><i>subnetworks for publicly accessible system components are physically or logically separated from internal networks.</i></td> </tr> </table>	<b>3.13.5[a]</b>	<i>publicly accessible system components are identified.</i>	<b>3.13.5[b]</b>	<i>subnetworks for publicly accessible system components are physically or logically separated from internal networks.</i>
<b>3.13.5[a]</b>	<i>publicly accessible system components are identified.</i>				
<b>3.13.5[b]</b>	<i>subnetworks for publicly accessible system components are physically or logically separated from internal networks.</i>				
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing boundary protection; system security plan; list of key internal boundaries of the system; system design documentation; boundary protection hardware and software; system configuration settings and associated documentation; enterprise security architecture documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developer; personnel with boundary protection responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing boundary protection capability].</p>				

<b>3.13.6</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Deny network communications traffic by default and allow network communications traffic by exception (i.e., deny all, permit by exception).</p>				
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if:</i></p>				
	<table border="1" style="width: 100%;"> <tr> <td style="background-color: #1a3d4d; color: white; width: 15%; text-align: center;"><b>3.13.6[a]</b></td> <td><i>network communications traffic is denied by default.</i></td> </tr> <tr> <td style="background-color: #1a3d4d; color: white; text-align: center;"><b>3.13.6[b]</b></td> <td><i>network communications traffic is allowed by exception.</i></td> </tr> </table>	<b>3.13.6[a]</b>	<i>network communications traffic is denied by default.</i>	<b>3.13.6[b]</b>	<i>network communications traffic is allowed by exception.</i>
<b>3.13.6[a]</b>	<i>network communications traffic is denied by default.</i>				
<b>3.13.6[b]</b>	<i>network communications traffic is allowed by exception.</i>				
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing boundary protection; system security plan; system design documentation; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developer; personnel with boundary protection responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms implementing traffic management at managed interfaces].</p>				

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<b>3.13.7</b>	<b>SECURITY REQUIREMENT</b> Prevent remote devices from simultaneously establishing non-remote connections with organizational systems and communicating via some other connection to resources in external networks (i.e., split tunneling).
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if remote devices are prevented from simultaneously establishing non-remote connections with the system and communicating via some other connection to resources in external networks (i.e., split tunneling).</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing boundary protection; system security plan; system design documentation; system hardware and software; system architecture; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developer; personnel with boundary protection responsibilities]. <b>Test:</b> [SELECT FROM: Mechanisms implementing boundary protection capability; mechanisms supporting or restricting non-remote connections].

<b>3.13.8</b>	<b>SECURITY REQUIREMENT</b> Implement cryptographic mechanisms to prevent unauthorized disclosure of CUI during transmission unless otherwise protected by alternative physical safeguards.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.13.8[a]</b> <i>cryptographic mechanisms intended to prevent unauthorized disclosure of CUI are identified.</i>
	<b>3.13.8[b]</b> <i>alternative physical safeguards intended to prevent unauthorized disclosure of CUI are identified.</i>
	<b>3.13.8[c]</b> <i>either cryptographic mechanisms or alternative physical safeguards are implemented to prevent unauthorized disclosure of CUI during transmission.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing transmission confidentiality and integrity; system security plan; system design documentation; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developer]. <b>Test:</b> [SELECT FROM: Cryptographic mechanisms or mechanisms supporting or implementing transmission confidentiality; organizational processes for defining and implementing alternative physical safeguards].



<b>3.13.9</b>	<b>SECURITY REQUIREMENT</b>	
Terminate network connections associated with communications sessions at the end of the sessions or after a defined period of inactivity.		
<b>ASSESSMENT OBJECTIVE</b>		
<i>Determine if:</i>		
<b>3.13.9[a]</b>	<i>a period of inactivity to terminate network connections associated with communications sessions is defined.</i>	
<b>3.13.9[b]</b>	<i>network connections associated with communications sessions are terminated at the end of the sessions.</i>	
<b>3.13.9[c]</b>	<i>network connections associated with communications sessions are terminated after the defined period of inactivity.</i>	
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>		
<p><b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing network disconnect; system design documentation; system security plan; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developer].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing network disconnect capability].</p>		

<b>3.13.10</b>	<b>SECURITY REQUIREMENT</b>	
Establish and manage cryptographic keys for cryptography employed in organizational systems.		
<b>ASSESSMENT OBJECTIVE</b>		
<i>Determine if:</i>		
<b>3.13.10[a]</b>	<i>cryptographic keys are established whenever cryptography is employed.</i>	
<b>3.13.10[b]</b>	<i>cryptographic keys are managed whenever cryptography is employed.</i>	
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>		
<p><b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing cryptographic key establishment and management; system security plan; system design documentation; cryptographic mechanisms; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; personnel with responsibilities for cryptographic key establishment and management].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing cryptographic key establishment and management].</p>		

<b>3.13.11</b>	<b>SECURITY REQUIREMENT</b>	
Employ FIPS-validated cryptography when used to protect the confidentiality of CUI.		
<b>ASSESSMENT OBJECTIVE</b>		
<i>Determine if FIPS-validated cryptography is employed to protect the confidentiality of CUI.</i>		
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>		

	<p><b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing cryptographic protection; system security plan; system design documentation; system configuration settings and associated documentation; cryptographic module validation certificates; list of FIPS-validated cryptographic modules; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developer; personnel with responsibilities for cryptographic protection].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing cryptographic protection].</p>
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<b>3.13.12</b>	<b>SECURITY REQUIREMENT</b>
Prohibit remote activation of collaborative computing devices and provide indication of devices in use to users present at the device.	
<b>ASSESSMENT OBJECTIVE</b>	
<i>Determine if:</i>	
<b>3.13.12[a]</b>	<i>collaborative computing devices are identified.</i>
<b>3.13.12[b]</b>	<i>collaborative computing devices provide indication to users of devices in use.</i>
<b>3.13.12[c]</b>	<i>remote activation of collaborative computing devices is prohibited.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing collaborative computing; access control policy and procedures; system security plan; system design documentation; system audit logs and records; system configuration settings and associated documentation; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; system developer; personnel with responsibilities for managing collaborative computing devices].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing management of remote activation of collaborative computing devices; mechanisms providing an indication of use of collaborative computing devices].</p>	

<b>3.13.13</b>	<b>SECURITY REQUIREMENT</b>
Control and monitor the use of mobile code.	
<b>ASSESSMENT OBJECTIVE</b>	
<i>Determine if:</i>	
<b>3.13.13[a]</b>	<i>use of mobile code is controlled.</i>
<b>3.13.13[b]</b>	<i>use of mobile code is monitored.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
<p><b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing mobile code; mobile code usage restrictions, mobile code implementation policy and procedures; system audit logs and records; system security plan; list of acceptable mobile code and mobile code technologies; list of unacceptable mobile code and mobile technologies; authorization records; system monitoring records; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; personnel with responsibilities for managing mobile code].</p>	

	<p><b>Test:</b> [SELECT FROM: Organizational process for controlling, authorizing, monitoring, and restricting mobile code; mechanisms supporting or implementing the management of mobile code; mechanisms supporting or implementing the monitoring of mobile code].</p>
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<b>3.13.14</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Control and monitor the use of Voice over Internet Protocol (VoIP) technologies.</p>				
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if:</i></p>				
	<table border="1" style="width: 100%;"> <tr> <td style="background-color: #1a3d4d; color: white; width: 100px; text-align: center;"><b>3.13.14[a]</b></td> <td><i>use of Voice over Internet Protocol (VoIP) technologies is controlled.</i></td> </tr> <tr> <td style="background-color: #1a3d4d; color: white; text-align: center;"><b>3.13.14[b]</b></td> <td><i>use of Voice over Internet Protocol (VoIP) technologies is monitored.</i></td> </tr> </table>	<b>3.13.14[a]</b>	<i>use of Voice over Internet Protocol (VoIP) technologies is controlled.</i>	<b>3.13.14[b]</b>	<i>use of Voice over Internet Protocol (VoIP) technologies is monitored.</i>
<b>3.13.14[a]</b>	<i>use of Voice over Internet Protocol (VoIP) technologies is controlled.</i>				
<b>3.13.14[b]</b>	<i>use of Voice over Internet Protocol (VoIP) technologies is monitored.</i>				
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing VoIP; VoIP usage restrictions; VoIP implementation guidance; system security plan; system design documentation; system audit logs and records; system configuration settings and associated documentation; system monitoring records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; personnel with responsibilities for managing VoIP].</p> <p><b>Test:</b> [SELECT FROM: Organizational process for authorizing, monitoring, and controlling VoIP; mechanisms supporting or implementing authorizing, monitoring, and controlling VoIP].</p>				

<b>3.13.15</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Protect the authenticity of communications sessions.</p>
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if the authenticity of communications sessions is protected.</i></p>
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: System and communications protection policy; procedures addressing session authenticity; system security plan; system design documentation; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities].</p> <p><b>Test:</b> [SELECT FROM: Mechanisms supporting or implementing session authenticity].</p>

<b>3.13.16</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Protect the confidentiality of CUI at rest.</p>
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if the confidentiality of CUI at rest is protected.</i></p>

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**POTENTIAL ASSESSMENT METHODS AND OBJECTS**

**Examine:** [*SELECT FROM:* System and communications protection policy; procedures addressing protection of information at rest; system security plan; system design documentation; list of information at rest requiring confidentiality protections; system configuration settings and associated documentation; cryptographic mechanisms and associated configuration documentation; other relevant documents or records].

**Interview:** [*SELECT FROM:* System or network administrators; personnel with information security responsibilities; system developer].

**Test:** [*SELECT FROM:* Mechanisms supporting or implementing confidentiality protections for information at rest].

### 3.14 SYSTEM AND INFORMATION INTEGRITY

<b>3.14.1</b>	<b>SECURITY REQUIREMENT</b> Identify, report, and correct system flaws in a timely manner.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.14.1[a]</b>   <i>the time within which to identify system flaws is specified.</i>
	<b>3.14.1[b]</b>   <i>system flaws are identified within the specified time frame.</i>
	<b>3.14.1[c]</b>   <i>the time within which to report system flaws is specified.</i>
	<b>3.14.1[d]</b>   <i>system flaws are reported within the specified time frame.</i>
	<b>3.14.1[e]</b>   <i>the time within which to correct system flaws is specified.</i>
	<b>3.14.1[f]</b>   <i>system flaws are corrected within the specified time frame.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System and information integrity policy; procedures addressing flaw remediation; procedures addressing configuration management; system security plan; list of flaws and vulnerabilities potentially affecting the system; list of recent security flaw remediation actions performed on the system (e.g., list of installed patches, service packs, hot fixes, and other software updates to correct system flaws); test results from the installation of software and firmware updates to correct system flaws; installation/change control records for security-relevant software and firmware updates; other relevant documents or records]. <b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; personnel installing, configuring, and maintaining the system; personnel with responsibility for flaw remediation; personnel with configuration management responsibility]. <b>Test:</b> [SELECT FROM: Organizational processes for identifying, reporting, and correcting system flaws; organizational process for installing software and firmware updates; mechanisms supporting or implementing reporting, and correcting system flaws; mechanisms supporting or implementing testing software and firmware updates].

<b>3.14.2</b>	<b>SECURITY REQUIREMENT</b> Provide protection from malicious code at designated locations within organizational systems.
	<b>ASSESSMENT OBJECTIVE</b> <i>Determine if:</i>
	<b>3.14.2[a]</b>   <i>designated locations for malicious code protection are identified.</i>
	<b>3.14.2[b]</b>   <i>protection from malicious code at designated locations is provided.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b> <b>Examine:</b> [SELECT FROM: System and information integrity policy; configuration management policy and procedures; procedures addressing malicious code protection; records of malicious code protection updates; malicious code protection mechanisms; system security plan; system configuration settings and associated documentation; record of actions initiated by malicious code protection mechanisms in response to malicious code detection; scan results from malicious code protection mechanisms; system design documentation; system audit logs and records; other relevant documents or records].

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	<p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; personnel installing, configuring, and maintaining the system; personnel with responsibility for malicious code protection; personnel with configuration management responsibility].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for employing, updating, and configuring malicious code protection mechanisms; organizational process for addressing false positives and resulting potential impact; mechanisms supporting or implementing employing, updating, and configuring malicious code protection mechanisms; mechanisms supporting or implementing malicious code scanning and subsequent actions].</p>
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<b>3.14.3</b>	<b>SECURITY REQUIREMENT</b>
	Monitor system security alerts and advisories and take action in response.
	<b>ASSESSMENT OBJECTIVE</b>
	<i>Determine if:</i>
	<b>3.14.3[a]</b> <i>response actions to system security alerts and advisories are identified.</i>
	<b>3.14.3[b]</b> <i>system security alerts and advisories are monitored.</i>
	<b>3.14.3[c]</b> <i>actions in response to system security alerts and advisories are taken.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>
	<b>Examine:</b> [SELECT FROM: System and information integrity policy; procedures addressing security alerts, advisories, and directives; system security plan; records of security alerts and advisories; other relevant documents or records].
	<b>Interview:</b> [SELECT FROM: Personnel with security alert and advisory responsibilities; personnel implementing, operating, maintaining, and using the system; personnel, organizational elements, and external organizations to whom alerts, advisories, and directives are to be disseminated; system or network administrators; personnel with information security responsibilities].
	<b>Test:</b> [SELECT FROM: Organizational processes for defining, receiving, generating, disseminating, and complying with security alerts, advisories, and directives; mechanisms supporting or implementing definition, receipt, generation, and dissemination of security alerts, advisories, and directives; mechanisms supporting or implementing security directives].

<b>3.14.4</b>	<b>SECURITY REQUIREMENT</b>
	Update malicious code protection mechanisms when new releases are available.
	<b>ASSESSMENT OBJECTIVE</b>
	<i>Determine if malicious code protection mechanisms are updated when new releases are available.</i>
	<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>
	<b>Examine:</b> [SELECT FROM: System and information integrity policy; configuration management policy and procedures; procedures addressing malicious code protection; malicious code protection mechanisms; records of malicious code protection updates; system security plan; system design documentation; system configuration settings and associated documentation; scan results from malicious code protection mechanisms; record of actions initiated by malicious code protection mechanisms in response to malicious code detection; system audit logs and records; other relevant documents or records].
	<b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; personnel installing, configuring, and maintaining the system; personnel with responsibility for malicious code protection; personnel with configuration management responsibility].

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	<p><b>Test:</b> [SELECT FROM: Organizational processes for employing, updating, and configuring malicious code protection mechanisms; organizational process for addressing false positives and resulting potential impact; mechanisms supporting or implementing malicious code protection mechanisms (including updates and configurations); mechanisms supporting or implementing malicious code scanning and subsequent actions].</p>
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<b>3.14.5</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Perform periodic scans of organizational systems and real-time scans of files from external sources as files are downloaded, opened, or executed.</p>						
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if:</i></p>						
	<table border="1" style="width: 100%;"> <tr> <td style="width: 15%; background-color: #003366; color: white; text-align: center;"><b>3.14.5[a]</b></td> <td><i>the frequency for malicious code scans is defined.</i></td> </tr> <tr> <td style="background-color: #003366; color: white; text-align: center;"><b>3.14.5[b]</b></td> <td><i>malicious code scans are performed with the defined frequency.</i></td> </tr> <tr> <td style="background-color: #003366; color: white; text-align: center;"><b>3.14.5[c]</b></td> <td><i>real-time malicious code scans of files from external sources as files are downloaded, opened, or executed are performed.</i></td> </tr> </table>	<b>3.14.5[a]</b>	<i>the frequency for malicious code scans is defined.</i>	<b>3.14.5[b]</b>	<i>malicious code scans are performed with the defined frequency.</i>	<b>3.14.5[c]</b>	<i>real-time malicious code scans of files from external sources as files are downloaded, opened, or executed are performed.</i>
<b>3.14.5[a]</b>	<i>the frequency for malicious code scans is defined.</i>						
<b>3.14.5[b]</b>	<i>malicious code scans are performed with the defined frequency.</i>						
<b>3.14.5[c]</b>	<i>real-time malicious code scans of files from external sources as files are downloaded, opened, or executed are performed.</i>						
	<p><b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b></p> <p><b>Examine:</b> [SELECT FROM: System and information integrity policy; configuration management policy and procedures; procedures addressing malicious code protection; malicious code protection mechanisms; records of malicious code protection updates; system security plan; system design documentation; system configuration settings and associated documentation; scan results from malicious code protection mechanisms; record of actions initiated by malicious code protection mechanisms in response to malicious code detection; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; personnel installing, configuring, and maintaining the system; personnel with responsibility for malicious code protection; personnel with configuration management responsibility].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for employing, updating, and configuring malicious code protection mechanisms; organizational process for addressing false positives and resulting potential impact; mechanisms supporting or implementing malicious code protection mechanisms (including updates and configurations); mechanisms supporting or implementing malicious code scanning and subsequent actions].</p>						

<b>3.14.6</b>	<p><b>SECURITY REQUIREMENT</b></p> <p>Monitor organizational systems, including inbound and outbound communications traffic, to detect attacks and indicators of potential attacks.</p>						
	<p><b>ASSESSMENT OBJECTIVE</b></p> <p><i>Determine if:</i></p>						
	<table border="1" style="width: 100%;"> <tr> <td style="width: 15%; background-color: #003366; color: white; text-align: center;"><b>3.14.6[a]</b></td> <td><i>the system is monitored to detect attacks and indicators of potential attacks.</i></td> </tr> <tr> <td style="background-color: #003366; color: white; text-align: center;"><b>3.14.6[b]</b></td> <td><i>inbound communications traffic is monitored to detect attacks and indicators of potential attacks.</i></td> </tr> <tr> <td style="background-color: #003366; color: white; text-align: center;"><b>3.14.6[c]</b></td> <td><i>outbound communications traffic is monitored to detect attacks and indicators of potential attacks.</i></td> </tr> </table>	<b>3.14.6[a]</b>	<i>the system is monitored to detect attacks and indicators of potential attacks.</i>	<b>3.14.6[b]</b>	<i>inbound communications traffic is monitored to detect attacks and indicators of potential attacks.</i>	<b>3.14.6[c]</b>	<i>outbound communications traffic is monitored to detect attacks and indicators of potential attacks.</i>
<b>3.14.6[a]</b>	<i>the system is monitored to detect attacks and indicators of potential attacks.</i>						
<b>3.14.6[b]</b>	<i>inbound communications traffic is monitored to detect attacks and indicators of potential attacks.</i>						
<b>3.14.6[c]</b>	<i>outbound communications traffic is monitored to detect attacks and indicators of potential attacks.</i>						

<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>
<p><b>Examine:</b> [SELECT FROM: System and information integrity policy; procedures addressing system monitoring tools and techniques; continuous monitoring strategy; system and information integrity policy; procedures addressing system monitoring tools and techniques; facility diagram or layout; system security plan; system monitoring tools and techniques documentation; system design documentation; locations within system where monitoring devices are deployed; system protocols; system configuration settings and associated documentation; system audit logs and records; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; personnel installing, configuring, and maintaining the system; personnel with responsibility monitoring the system; personnel with responsibility for the intrusion detection system].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for system monitoring; mechanisms supporting or implementing intrusion detection capability and system monitoring; mechanisms supporting or implementing system monitoring capability; organizational processes for intrusion detection and system monitoring; mechanisms supporting or implementing the monitoring of inbound and outbound communications traffic].</p>

<b>3.14.7</b>	<b>SECURITY REQUIREMENT</b>
	Identify unauthorized use of organizational systems.
<b>ASSESSMENT OBJECTIVE</b>	
	<i>Determine if:</i>
<b>3.14.7[a]</b>	<i>authorized use of the system is defined.</i>
<b>3.14.7[b]</b>	<i>unauthorized use of the system is identified.</i>
<b>POTENTIAL ASSESSMENT METHODS AND OBJECTS</b>	
	<p><b>Examine:</b> [SELECT FROM: Continuous monitoring strategy; system and information integrity policy; procedures addressing system monitoring tools and techniques; facility diagram/layout; system security plan; system design documentation; system monitoring tools and techniques documentation; locations within system where monitoring devices are deployed; system configuration settings and associated documentation; other relevant documents or records].</p> <p><b>Interview:</b> [SELECT FROM: System or network administrators; personnel with information security responsibilities; personnel installing, configuring, and maintaining the system; personnel with responsibility for monitoring the system].</p> <p><b>Test:</b> [SELECT FROM: Organizational processes for system monitoring; mechanisms supporting or implementing system monitoring capability].</p>



## APPENDIX A

### REFERENCES

LAWS, EXECUTIVE ORDERS, REGULATIONS, INSTRUCTIONS, STANDARDS, AND GUIDELINES<sup>9</sup>

#### LEGISLATION, EXECUTIVE ORDERS, AND REGULATIONS

1. Federal Information Security Modernization Act of 2014 (P.L. 113-283), December 2014.  
<https://www.gpo.gov/fdsys/pkg/PLAW-113publ283/pdf/PLAW-113publ283.pdf>
2. Executive Order 13526, *Classified National Security Information*, December 2009.  
<https://www.archives.gov/isoo/policy-documents/cnsi-eo.html>
3. Executive Order 13556, *Controlled Unclassified Information*, November 2010.  
<https://www.gpo.gov/fdsys/pkg/FR-2010-11-09/pdf/2010-28360.pdf>
4. Executive Order 13636, *Improving Critical Infrastructure Cybersecurity*, February 2013.  
<https://www.gpo.gov/fdsys/pkg/FR-2013-02-19/pdf/2013-03915.pdf>
5. 32 CFR Part 2002, *Controlled Unclassified Information*, September 2016.  
<https://www.gpo.gov/fdsys/pkg/CFR-2017-title32-vol6/pdf/CFR-2017-title32-vol6-part2002.pdf>

#### STANDARDS, GUIDELINES, INTERAGENCY REPORTS, AND INSTRUCTIONS

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## APPENDIX B

# GLOSSARY

### COMMON TERMS AND DEFINITIONS

**A**ppendix B provides definitions for security terminology used within Special Publication 800-171. Unless specifically defined in this glossary, all terms used in this publication are consistent with the definitions contained in [CNSS Instruction 4009](#), *National Information Assurance Glossary*.

<b>agency</b>	See <i>executive agency</i> .
<b>assessment</b>	See <i>Security Control Assessment</i> .
<b>assessor</b>	See <i>Security Control Assessor</i> .
<b>audit log</b>	A chronological record of system activities, including records of system accesses and operations performed in a given period.
<b>audit record</b>	An individual entry in an audit log related to an audited event.
<b>authentication</b> [FIPS 200, Adapted]	Verifying the identity of a user, process, or device, often as a prerequisite to allowing access to resources in a system.
<b>availability</b> [44 U.S.C., Sec. 3542]	Ensuring timely and reliable access to and use of information.
<b>baseline configuration</b>	A documented set of specifications for a system, or a configuration item within a system, that has been formally reviewed and agreed on at a given point in time, and which can be changed only through change control procedures.
<b>blacklisting</b>	A process used to identify software programs that are not authorized to execute on a system or prohibited Universal Resource Locators (URL)/websites.
<b>confidentiality</b> [44 U.S.C., Sec. 3542]	Preserving authorized restrictions on information access and disclosure, including means for protecting personal privacy and proprietary information.
<b>configuration management</b>	A collection of activities focused on establishing and maintaining the integrity of information technology products and systems, through control of processes for initializing, changing, and monitoring the configurations of those products and systems throughout the system development life cycle.
<b>configuration settings</b>	The set of parameters that can be changed in hardware, software, or firmware that affect the security posture and/or functionality of the system.
<b>controlled area</b>	Any area or space for which the organization has confidence that the physical and procedural protections provided are sufficient to meet the requirements established for protecting the information or system.

<p><b>controlled unclassified information</b> [E.O. 13556]</p>	<p>Information that law, regulation, or governmentwide policy requires to have safeguarding or disseminating controls, excluding information that is classified under Executive Order 13526, <i>Classified National Security Information</i>, December 29, 2009, or any predecessor or successor order, or the Atomic Energy Act of 1954, as amended.</p>
<p><b>CUI categories or subcategories</b> [Title 32 CFR, Part 2002]</p>	<p>Those types of information for which laws, regulations, or governmentwide policies require or permit agencies to exercise safeguarding or dissemination controls, and which the CUI Executive Agent has approved and listed in the CUI Registry.</p>
<p><b>CUI Executive Agent</b> [Title 32 CFR, Part 2002]</p>	<p>The National Archives and Records Administration (NARA), which implements the executive branch-wide CUI Program and oversees federal agency actions to comply with Executive Order 13556. NARA has delegated this authority to the Director of the Information Security Oversight Office (ISOO).</p>
<p><b>CUI program</b> [Title 32 CFR, Part 2002]</p>	<p>The executive branch-wide program to standardize CUI handling by all federal agencies. The program includes the rules, organization, and procedures for CUI, established by Executive Order 13556, 32 CFR Part 2002, and the CUI Registry.</p>
<p><b>CUI registry</b> [Title 32 CFR, Part 2002]</p>	<p>The online repository for all information, guidance, policy, and requirements on handling CUI, including everything issued by the CUI Executive Agent other than 32 CFR Part 2002. Among other information, the CUI Registry identifies all approved CUI categories and subcategories, provides general descriptions for each, identifies the basis for controls, establishes markings, and includes guidance on handling procedures.</p>
<p><b>environment of operation</b> [NIST SP 800-37, Adapted]</p>	<p>The physical surroundings in which a system processes, stores, and transmits information.</p>
<p><b>executive agency</b> [41 U.S.C., Sec. 403]</p>	<p>An executive department specified in 5 U.S.C., Sec. 105; a military department specified in 5 U.S.C., Sec. 102; an independent establishment as defined in 5 U.S.C., Sec. 104(1); and a wholly owned Government corporation fully subject to the provisions of 31 U.S.C., Chapter 91.</p>
<p><b>external system (or component)</b></p>	<p>A system or component of a system that is outside of the authorization boundary established by the organization and for which the organization typically has no direct control over the application of required security controls or the assessment of security control effectiveness.</p>
<p><b>external system service</b></p>	<p>A system service that is implemented outside of the authorization boundary of the organizational system (i.e., a service that is used by, but not a part of, the organizational system) and for which the organization typically has no direct control over the application of required security controls or the assessment of security control effectiveness.</p>

<b>external system service provider</b>	A provider of external system services to an organization through a variety of consumer-producer relationships including but not limited to: joint ventures; business partnerships; outsourcing arrangements (i.e., through contracts, interagency agreements, lines of business arrangements); licensing agreements; and/or supply chain exchanges.
<b>external network</b>	A network not controlled by the organization.
<b>federal agency</b>	See <i>executive agency</i> .
<b>federal information system</b> [40 U.S.C., Sec. 11331]	An information system used or operated by an executive agency, by a contractor of an executive agency, or by another organization on behalf of an executive agency. See <i>on behalf of (an agency)</i> for additional information.
<b>FIPS-validated cryptography</b>	A cryptographic module validated by the Cryptographic Module Validation Program (CMVP) to meet requirements specified in FIPS Publication 140-2 (as amended). As a prerequisite to CMVP validation, the cryptographic module is required to employ a cryptographic algorithm implementation that has successfully passed validation testing by the Cryptographic Algorithm Validation Program (CAVP). See <i>NSA-Approved Cryptography</i> .
<b>firmware</b>	Computer programs and data stored in hardware - typically in read-only memory (ROM) or programmable read-only memory (PROM) - such that the programs and data cannot be dynamically written or modified during execution of the programs.
<b>hardware</b>	The physical components of a system. See <i>Software</i> and <i>Firmware</i> .
<b>identifier</b>	Unique data used to represent a person's identity and associated attributes. A name or a card number are examples of identifiers. A unique label used by a system to indicate a specific entity, object, or group.
<b>impact</b>	The effect on organizational operations, organizational assets, individuals, other organizations, or the Nation (including the national security interests of the United States) of a loss of confidentiality, integrity, or availability of information or a system.
<b>impact value</b>	The assessed potential impact resulting from a compromise of the confidentiality of information (e.g., CUI) expressed as a value of low, moderate, or high.
<b>incident</b> [FIPS 200, Adapted]	An occurrence that actually or potentially jeopardizes the confidentiality, integrity, or availability of a system or the information the system processes, stores, or transmits or that constitutes a violation or imminent threat of violation of security policies, security procedures, or acceptable use policies.
<b>information</b>	Any communication or representation of knowledge such as facts, data, or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual.

<b>information flow control</b>	Procedure to ensure that information transfers within a system are not made in violation of the security policy.
<b>information resources</b> [44 U.S.C., Sec. 3502]	Information and related resources, such as personnel, equipment, funds, and information technology.
<b>information security</b> [44 U.S.C., Sec. 3542]	The protection of information and information systems from unauthorized access, use, disclosure, disruption, modification, or destruction in order to provide confidentiality, integrity, and availability.
<b>information system</b> [44 U.S.C., Sec. 3502]	A discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.
<b>information technology</b> [40 U.S.C., Sec. 1401]	Any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency. For purposes of the preceding sentence, equipment is used by an executive agency if the equipment is used by the executive agency directly or is used by a contractor under a contract with the executive agency which: (i) requires the use of such equipment; or (ii) requires the use, to a significant extent, of such equipment in the performance of a service or the furnishing of a product. The term <i>information technology</i> includes computers, ancillary equipment, software, firmware, and similar procedures, services (including support services), and related resources.
<b>insider threat</b>	The threat that an insider will use her/his authorized access, wittingly or unwittingly, to do harm to the security of the United States. This threat can include damage to the United States through espionage, terrorism, unauthorized disclosure, or through the loss or degradation of departmental resources or capabilities.
<b>integrity</b> [44 U.S.C., Sec. 3542]	Guarding against improper information modification or destruction, and includes ensuring information non-repudiation and authenticity.
<b>internal network</b>	A network where establishment, maintenance, and provisioning of security controls are under the direct control of organizational employees or contractors; or the cryptographic encapsulation or similar security technology implemented between organization-controlled endpoints, provides the same effect (with regard to confidentiality and integrity). An internal network is typically organization-owned, yet may be organization-controlled while not being organization-owned.
<b>least privilege</b>	The principle that a system security architecture is designed so that each entity is granted the minimum system resources and authorizations that the entity needs to perform its function.

<b>local access</b>	Access to an organizational system by a user (or process acting on behalf of a user) communicating through a direct connection without the use of a network.
<b>malicious code</b>	Software or firmware intended to perform an unauthorized process that will have adverse impact on the confidentiality, integrity, or availability of a system. A virus, worm, Trojan horse, or other code-based entity that infects a host. Spyware and some forms of adware are also examples of malicious code.
<b>media</b> [FIPS 200]	Physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, Large-Scale Integration (LSI) memory chips, and printouts (but not including display media) onto which information is recorded, stored, or printed within a system.
<b>mobile code</b>	Software programs or parts of programs obtained from remote systems, transmitted across a network, and executed on a local system without explicit installation or execution by the recipient.
<b>mobile device</b>	A portable computing device that has a small form factor such that it can easily be carried by a single individual; is designed to operate without a physical connection (e.g., wirelessly transmit or receive information); possesses local, non-removable/removable data storage; and includes a self-contained power source. Mobile devices may also include voice communication capabilities, on-board sensors that allow the devices to capture information, or built-in features that synchronize local data with remote locations. Examples include smartphones, tablets, and E-readers.
<b>multifactor authentication</b>	Authentication using two or more different factors to achieve authentication. Factors include something you know (e.g., PIN, password); something you have (e.g., cryptographic identification device, token); or something you are (e.g., biometric). See also <i>Authenticator</i> .
<b>nonfederal organization</b>	An entity that owns, operates, or maintains a nonfederal system.
<b>nonfederal system</b>	A system that does not meet the criteria for a federal system.
<b>network</b>	A system implemented with a collection of interconnected components. Such components may include routers, hubs, cabling, telecommunications controllers, key distribution centers, and technical control devices.
<b>network access</b>	Access to a system by a user (or a process acting on behalf of a user) communicating through a network (e.g., local area network, wide area network, Internet).
<b>nonlocal maintenance</b>	Maintenance activities conducted by individuals communicating through a network, either an external network (e.g., the Internet) or an internal network.

<b>on behalf of (an agency)</b> [32 CFR Part 2002]	A situation that occurs when: (i) a non-executive branch entity uses or operates an information system or maintains or collects information for the purpose of processing, storing, or transmitting Federal information; and (ii) those activities are not incidental to providing a service or product to the government.
<b>organization</b> [FIPS 200, Adapted]	An entity of any size, complexity, or positioning within an organizational structure.
<b>portable storage device</b>	A system component that can be inserted into and removed from a system, and that is used to store data or information (e.g., text, video, audio, and/or image data). Such components are typically implemented on magnetic, optical, or solid-state devices (e.g., floppy disks, compact/digital video disks, flash/thumb drives, external hard disk drives, and flash memory cards/drives that contain nonvolatile memory).
<b>potential impact</b> [FIPS 199]	The loss of confidentiality, integrity, or availability could be expected to have: (i) a <i>limited</i> adverse effect (FIPS Publication 199 low); (ii) a <i>serious</i> adverse effect (FIPS Publication 199 moderate); or (iii) a <i>severe</i> or <i>catastrophic</i> adverse effect (FIPS Publication 199 high) on organizational operations, organizational assets, or individuals.
<b>privileged account</b>	A system account with authorizations of a privileged user.
<b>privileged user</b>	A user that is authorized (and therefore, trusted) to perform security-relevant functions that ordinary users are not authorized to perform.
<b>records</b>	The recordings (automated and/or manual) of evidence of activities performed or results achieved (e.g., forms, reports, test results), which serve as a basis for verifying that the organization and the system are performing as intended. Also used to refer to units of related data fields (i.e., groups of data fields that can be accessed by a program and that contain the complete set of information on particular items).
<b>remote access</b>	Access to an organizational system by a user (or a process acting on behalf of a user) communicating through an external network (e.g., the Internet).
<b>remote maintenance</b>	Maintenance activities conducted by individuals communicating through an external network (e.g., the Internet).
<b>replay resistance</b>	Protection against the capture of transmitted authentication or access control information and its subsequent retransmission with the intent of producing an unauthorized effect or gaining unauthorized access.



<b>risk</b> [FIPS 200, Adapted]	<p>A measure of the extent to which an entity is threatened by a potential circumstance or event, and typically a function of: (i) the adverse impacts that would arise if the circumstance or event occurs; and (ii) the likelihood of occurrence.</p> <p>System-related security risks are those risks that arise from the loss of confidentiality, integrity, or availability of information or systems. Such risks reflect the potential adverse impacts to organizational operations, organizational assets, individuals, other organizations, and the Nation.</p>
<b>risk assessment</b>	<p>The process of identifying risks to organizational operations (including mission, functions, image, reputation), organizational assets, individuals, other organizations, and the Nation, resulting from the operation of a system.</p> <p>Part of risk management, incorporates threat and vulnerability analyses, and considers mitigations provided by security controls planned or in place. Synonymous with risk analysis.</p>
<b>sanitization</b>	<p>Actions taken to render data written on media unrecoverable by both ordinary and, for some forms of sanitization, extraordinary means.</p> <p>Process to remove information from media such that data recovery is not possible. It includes removing all classified labels, markings, and activity logs.</p>
<b>security</b>	<p>A condition that results from the establishment and maintenance of protective measures that enable an enterprise to perform its mission or critical functions despite risks posed by threats to its use of systems. Protective measures may involve a combination of deterrence, avoidance, prevention, detection, recovery, and correction that form part of the enterprise's risk management approach.</p>
<b>security assessment</b>	<p>See <i>Security Control Assessment</i>.</p>
<b>security control</b> [FIPS 199, Adapted]	<p>A safeguard or countermeasure prescribed for a system or an organization designed to protect the confidentiality, integrity, and availability of its information and to meet a set of defined security requirements.</p>
<b>security control assessment</b> [CNSSI 4009, Adapted]	<p>The testing or evaluation of security controls to determine the extent to which the controls are implemented correctly, operating as intended, and producing the desired outcome with respect to meeting the security requirements for a system or organization.</p>
<b>security functionality</b>	<p>The security-related features, functions, mechanisms, services, procedures, and architectures implemented within organizational systems or the environments in which those systems operate.</p>
<b>security functions</b>	<p>The hardware, software, or firmware of the system responsible for enforcing the system security policy and supporting the isolation of code and data on which the protection is based.</p>

<b>security relevance</b>	Functions or mechanisms that are relied upon, directly or indirectly, to enforce a security policy that governs confidentiality, integrity, and availability protections.
<b>situational awareness</b> [CNSSI 4009]	Within a volume of time and space, the perception of an enterprise's security posture and its threat environment; the comprehension/meaning of both taken together (risk); and the projection of their status into the near future.
<b>split tunneling</b>	The process of allowing a remote user or device to establish a non-remote connection with a system and simultaneously communicate via some other connection to a resource in an external network. This method of network access enables a user to access remote devices (e.g., a networked printer) at the same time as accessing uncontrolled networks.
<b>supplemental guidance</b>	Statements used to provide additional explanatory information for security controls or security control enhancements.
<b>system</b>	See <i>Information System</i> .
<b>system component</b> [NIST SP 800-128, Adapted]	A discrete, identifiable information technology asset (hardware, software, firmware) that represents a building block of a system. System components include commercial information technology products.
<b>system security plan</b>	A document that describes how an organization meets the security requirements for a system or how an organization plans to meet the requirements. The system security plan describes the system boundary; the environment in which the system operates; the relationships with or connections to other systems; and how the security requirements are implemented.
<b>system service</b>	A capability provided by a system that facilitates information processing, storage, or transmission.
<b>threat</b> [CNSSI 4009, Adapted]	Any circumstance or event with the potential to adversely impact organizational operations, organizational assets, individuals, other organizations, or the Nation through a system via unauthorized access, destruction, disclosure, modification of information, and/or denial of service.
<b>user</b> [CNSSI 4009, Adapted]	Individual, or (system) process acting on behalf of an individual, authorized to access a system.
<b>whitelisting</b>	A process used to identify software programs that are authorized to execute on a system or authorized Universal Resource Locators (URL)/websites.
<b>wireless technology</b>	Technology that permits the transfer of information between separated points without physical connection.

## APPENDIX C

### ACRONYMS

#### COMMON ABBREVIATIONS

CFR	Code of Federal Regulations
CIO	Chief Information Officer
CNSS	Committee on National Security Systems
CUI	Controlled Unclassified Information
FIPS	Federal Information Processing Standards
FISMA	Federal Information Security Modernization Act
ISO/IEC	International Organization for Standardization/International Electrotechnical Commission
ISOO	Information Security Oversight Office
ITL	Information Technology Laboratory
NARA	National Archives and Records Administration
NFO	Nonfederal Organization
NIST	National Institute of Standards and Technology
OMB	Office of Management and Budget
SP	Special Publication
SSP	System Security Plan

## APPENDIX D

### ASSESSMENT METHODS

#### ASSESSMENT METHOD DEFINITIONS, APPLICABLE OBJECTS, AND ATTRIBUTES

This appendix defines three assessment methods that can be used to assess the CUI security requirements in [NIST Special Publication 800-171](#): *examine*, *interview*, and *test*. Included in the definition of each assessment method are types of objects to which the method can be applied. The application of each method is described in terms of the attributes of *depth* and *coverage*, progressing from *basic* to *focused* to *comprehensive*. The attribute values correlate to the assurance requirements specified by the organization.

The depth attribute addresses the rigor and level of detail of the assessment. For the depth attribute, the *focused* attribute value includes and builds upon the assessment rigor and level of detail defined for the *basic* attribute value; the *comprehensive* attribute value includes and builds upon the assessment rigor and level of detail defined for the *focused* attribute value.

The coverage attribute addresses the scope or breadth of the assessment. For the coverage attribute, the *focused* attribute value includes and builds upon the number and type of assessment objects defined for the *basic* attribute value; the *comprehensive* attribute value includes and builds upon the number and type of assessment objects defined for the *focused* attribute value.

Tables D-1 through D-3 provide complete descriptions of the *examine*, *interview*, and *test* assessment methods. The use of **bolded text** in the assessment method description indicates the content that was added to and appears for the first time, in the description indicating greater rigor and level of detail for the attribute value.

**TABLE D-1: EXAMINE ASSESSMENT METHOD**

<b>Method</b>	<b>EXAMINE</b> The process of checking, inspecting, reviewing, observing, studying, or analyzing one or more assessment objects to facilitate understanding, achieve clarification, or obtain evidence. The results are used to support the determination of security safeguard existence, functionality, correctness, completeness, and potential for improvement over time.						
<b>Objects</b>	<i>Specifications</i>	Examples: policies, plans, procedures, system requirements, designs.					
	<i>Mechanisms</i>	Examples: functionality implemented in hardware, software, firmware.					
	<i>Activities</i>	Examples: system operations, administration, management, exercises.					
<b>Attributes</b>	<i>Depth</i>						
	<i>Depth</i>	Addresses the rigor of and level of detail in the <i>examination</i> process.					
		<table border="1"> <tr> <td data-bbox="561 877 620 877" rowspan="3" style="writing-mode: vertical-rl; transform: rotate(180deg);"><b>Basic</b></td> <td data-bbox="620 877 1380 1262">Examination that consists of high-level reviews, checks, observations, or inspections of the assessment object. This type of examination is conducted using a limited body of evidence or documentation. Examples include: functional-level descriptions for mechanisms; high-level process descriptions for activities; and documents for specifications. Basic examinations provide a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors.</td> </tr> <tr> <td data-bbox="561 1262 620 1262" rowspan="2" style="writing-mode: vertical-rl; transform: rotate(180deg);"><b>Focused</b></td> <td data-bbox="620 1262 1380 1472">Examination that consists of high-level reviews, checks, observations, or inspections <b>and more in-depth studies and analyses</b> of the assessment object. This type of examination is conducted using a <b>substantial</b> body of evidence or documentation. Examples include: functional-level descriptions <b>and where appropriate and available, high-level design information</b> for mechanisms; high-level process descriptions <b>and implementation procedures</b> for activities; and documents <b>and related documents</b> for specifications. <b>Focused</b> examinations provide a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors <b>and whether there are increased grounds for confidence that the safeguards are implemented correctly and operating as intended.</b></td> </tr> <tr> <td data-bbox="561 1472 620 1472" rowspan="2" style="writing-mode: vertical-rl; transform: rotate(180deg);"><b>Comprehensive</b></td> <td data-bbox="620 1472 1380 1728">Examination that consists of high-level reviews, checks, observations, or inspections and more in-depth, <b>detailed, and thorough</b> studies and analyses of the assessment object. This type of examination is conducted using an <b>extensive</b> body of evidence or documentation. Examples include: functional-level descriptions and where appropriate and available, high-level design information, <b>low-level design information, and implementation information</b> for mechanisms; high-level process descriptions and <b>detailed</b> implementation procedures for activities; and documents and related documents for specifications.<sup>10</sup> <b>Comprehensive</b> examinations provide a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors and whether there are <b>further</b> increased grounds for confidence that the safeguards are implemented correctly and operating as intended <b>on an ongoing and consistent basis, and that there is support for continuous improvement in the effectiveness of the safeguards.</b></td> </tr> </table>	<b>Basic</b>	Examination that consists of high-level reviews, checks, observations, or inspections of the assessment object. This type of examination is conducted using a limited body of evidence or documentation. Examples include: functional-level descriptions for mechanisms; high-level process descriptions for activities; and documents for specifications. Basic examinations provide a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors.	<b>Focused</b>	Examination that consists of high-level reviews, checks, observations, or inspections <b>and more in-depth studies and analyses</b> of the assessment object. This type of examination is conducted using a <b>substantial</b> body of evidence or documentation. Examples include: functional-level descriptions <b>and where appropriate and available, high-level design information</b> for mechanisms; high-level process descriptions <b>and implementation procedures</b> for activities; and documents <b>and related documents</b> for specifications. <b>Focused</b> examinations provide a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors <b>and whether there are increased grounds for confidence that the safeguards are implemented correctly and operating as intended.</b>	<b>Comprehensive</b>
<b>Basic</b>		Examination that consists of high-level reviews, checks, observations, or inspections of the assessment object. This type of examination is conducted using a limited body of evidence or documentation. Examples include: functional-level descriptions for mechanisms; high-level process descriptions for activities; and documents for specifications. Basic examinations provide a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors.					
	<b>Focused</b>	Examination that consists of high-level reviews, checks, observations, or inspections <b>and more in-depth studies and analyses</b> of the assessment object. This type of examination is conducted using a <b>substantial</b> body of evidence or documentation. Examples include: functional-level descriptions <b>and where appropriate and available, high-level design information</b> for mechanisms; high-level process descriptions <b>and implementation procedures</b> for activities; and documents <b>and related documents</b> for specifications. <b>Focused</b> examinations provide a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors <b>and whether there are increased grounds for confidence that the safeguards are implemented correctly and operating as intended.</b>					
		<b>Comprehensive</b>	Examination that consists of high-level reviews, checks, observations, or inspections and more in-depth, <b>detailed, and thorough</b> studies and analyses of the assessment object. This type of examination is conducted using an <b>extensive</b> body of evidence or documentation. Examples include: functional-level descriptions and where appropriate and available, high-level design information, <b>low-level design information, and implementation information</b> for mechanisms; high-level process descriptions and <b>detailed</b> implementation procedures for activities; and documents and related documents for specifications. <sup>10</sup> <b>Comprehensive</b> examinations provide a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors and whether there are <b>further</b> increased grounds for confidence that the safeguards are implemented correctly and operating as intended <b>on an ongoing and consistent basis, and that there is support for continuous improvement in the effectiveness of the safeguards.</b>				

<sup>10</sup> While additional documentation is likely for mechanisms when moving from basic to focused to comprehensive examinations, the documentation associated with specifications and activities may be the same or similar for focused and comprehensive examinations, with the rigor of the examinations of these documents being increased at the comprehensive level.

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	<b>Coverage</b>	Addresses the scope or breadth of the examination process and includes the types of assessment objects to be examined; the number of objects to be examined by type; and specific objects to be examined. <sup>11</sup>	
		<b>Basic</b>	Examination that uses a representative sample of assessment objects (by type and number within type) to provide a level of coverage necessary for determining whether the security safeguards are implemented and free of obvious errors.
		<b>Focused</b>	Examination that uses a representative sample of assessment objects (by type and number within type) <b>and other specific assessment objects deemed particularly important to achieving the assessment objective</b> to provide a level of coverage necessary for determining whether the security safeguards are implemented and free of obvious errors <b>and whether there are increased grounds for confidence that the safeguards are implemented correctly and operating as intended.</b>
		<b>Comprehensive</b>	Examination that uses a <b>sufficiently large</b> sample of assessment objects (by type and number within type) and other specific assessment objects deemed particularly important to achieving the assessment objective to provide a level of coverage necessary for determining whether the security safeguards are implemented and free of obvious errors and whether there are <b>further</b> increased grounds for confidence that the safeguards are implemented correctly and operating as intended <b>on an ongoing and consistent basis, and that there is support for continuous improvement in the effectiveness of the safeguards.</b>
	<b>DISCUSSION</b>	Typical assessor actions may include, for example: reviewing information security policies, plans, and procedures; analyzing system design documentation and interface specifications; observing system backup operations; reviewing training records; reviewing audit records; observing incident response activities; studying technical manuals and user/administrator guides; checking, studying, or observing the operation of an information technology mechanism in the system hardware or software; or checking, studying, or observing physical security measures related to the operation of a system.	

<sup>11</sup> The organization, considering a variety of factors (e.g., available resources, importance of the assessment, the organization’s overall assessment goals and objectives), confers with assessors and provides direction on the type, number, and specific objects to be examined for the attribute value described.

**TABLE D-2: INTERVIEW ASSESSMENT METHOD**

<b>Method</b>	<b>INTERVIEW</b> The process of conducting discussions with individuals or groups of individuals in an organization to facilitate understanding, achieve clarification, or lead to the location of evidence. The results are used to support the determination of security safeguard existence, functionality, correctness, completeness, and potential for improvement over time.	
<b>Objects</b>	<b>Individuals or Groups</b>	Examples: Personnel with risk assessment responsibilities; personnel with information security responsibilities; system or network administrators; personnel with account management responsibilities.
<b>Attributes</b>	<b>Depth</b>	Addresses the rigor of and level of detail in the <i>interview</i> process.
	<b>Basic</b>	Interview that consists of broad-based, high-level discussions with individuals or groups of individuals. This type of interview is conducted using a set of generalized, high-level questions. Basic interviews provide a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors.
	<b>Focused</b>	Interview that consists of broad-based, high-level discussions <b>and more in-depth discussions in specific areas</b> with individuals or groups of individuals. This type of interview is conducted using a set of generalized, high-level questions <b>and more in-depth questions in specific areas where responses indicate a need for more in-depth investigation. Focused</b> interviews provide a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors <b>and whether there are increased grounds for confidence that the safeguards are implemented correctly and operating as intended.</b>
	<b>Comprehensive</b>	Interview that consists of broad-based, high-level discussions and more in-depth, <b>probing</b> discussions in specific areas with individuals or groups of individuals. This type of interview is conducted using a set of generalized, high-level questions and more in-depth, <b>probing</b> questions in specific areas where responses indicate a need for more in-depth investigation. <b>Comprehensive</b> interviews provide a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors and whether there are <b>further</b> increased grounds for confidence that the safeguards are implemented correctly and operating as intended <b>on an ongoing and consistent basis, and that there is support for continuous improvement in the effectiveness of the safeguards.</b>
	<b>Coverage</b>	Addresses the scope or breadth of the interview process and includes the types of individuals to be interviewed by role and responsibility; the number of individuals to be interviewed by type; and specific individuals to be interviewed. <sup>12</sup>
	<b>Basic</b>	Interview that uses a representative sample of individuals in organizational roles to provide a level of coverage necessary for determining whether the security safeguards are implemented and free of obvious errors.

<sup>12</sup> The organization, considering a variety of factors (e.g., available resources, importance of the assessment, the organization’s overall assessment goals and objectives), confers with assessors and provides direction on the type, number, and specific individuals to be interviewed for the attribute value described.

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		<i>Focused</i>	Interview that uses a representative sample of individuals in organizational roles <b>and other specific individuals deemed particularly important to achieving the assessment objective</b> to provide a level of coverage necessary for determining whether the security safeguards are implemented and free of obvious errors <b>and whether there are increased grounds for confidence that the safeguards are implemented correctly and operating as intended.</b>
		<i>Comprehensive</i>	Interview that uses a <b>sufficiently large</b> sample of individuals in organizational roles and other specific individuals deemed particularly important to achieving the assessment objective to provide a level of coverage necessary for determining whether the security safeguards are implemented and free of obvious errors and whether there are <b>further increased grounds for confidence that the safeguards are implemented correctly and operating as intended on an ongoing and consistent basis, and that there is support for continuous improvement in the effectiveness of the safeguards.</b>
	<p><b>DISCUSSION</b></p> <p>Typical assessor actions may include, for example, interviewing chief executive officers, chief information officers, senior information security officers, information owners, system and mission owners, system security officers, system security managers, personnel officers, human resource managers, network and system administrators, facilities managers, training officers, physical security officers, system operators, site managers, and users.</p>		

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**TABLE D-3: TEST ASSESSMENT METHOD**

<b>Method</b>	<b>TEST</b> The process of exercising one or more assessment objects under specified conditions to compare actual with expected behavior. The results are used to support the determination of security safeguard existence, functionality, correctness, completeness, and potential for improvement over time. <sup>13</sup>	
<b>Objects</b>	<b>Mechanisms</b>	Examples: hardware, software, firmware.
	<b>Activities</b>	Examples: system operations, administration, management; exercises.
<b>Attributes</b>	<b>Depth</b>	Addresses the types of testing to be conducted.
		<b>Basic</b> Test methodology (also known as <i>black box</i> testing) that assumes no knowledge of the internal structure and implementation detail of the assessment object. This type of testing is conducted using a functional specification for mechanisms and a high-level process description for activities. Basic testing provides a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors.
		<b>Focused</b> Test methodology (also known as <i>gray box</i> testing) that assumes <b>some</b> knowledge of the internal structure and implementation detail of the assessment object. This type of testing is conducted using a functional specification <b>and limited system architectural information (e.g., high-level design)</b> for mechanisms and a high-level process description <b>and high-level description of integration into the operational environment</b> for activities. Focused testing provides a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors <b>and whether there are increased grounds for confidence that the safeguards are implemented correctly and operating as intended.</b>
	<b>Comprehensive</b> Test methodology (also known as <i>white box</i> testing) that assumes <b>explicit and substantial</b> knowledge of the internal structure and implementation detail of the assessment object. This type of testing is conducted using a functional specification, <b>extensive</b> system architectural information (e.g., high-level design, <b>low-level design</b> ) <b>and implementation representation (e.g., source code, schematics)</b> for mechanisms and a high-level process description and <b>detailed</b> description of integration into the operational environment for activities. Comprehensive testing provides a level of understanding of the security safeguards necessary for determining whether the safeguards are implemented and free of obvious errors and whether there are <b>further</b> increased grounds for confidence that the safeguards are implemented correctly and operating as intended <b>on an ongoing and consistent basis, and that there is support for continuous improvement in the effectiveness of the safeguards.</b>	
	<b>Coverage</b>	Addresses the scope or breadth of the testing process and includes the types of assessment objects to be tested; the number of objects to be tested by type; and specific objects to be tested.

<sup>13</sup> Testing is typically used to determine if mechanisms or activities meet a set of predefined specifications. Testing can also be performed to determine characteristics of a security or privacy control that are not commonly associated with predefined specifications, with an example of such testing being penetration testing.

		<b>Basic</b>	Testing that uses a representative sample of assessment objects by type and number within type, to provide a level of coverage necessary for determining whether the security safeguards are implemented and free of obvious errors.
		<b>Focused</b>	Testing that uses a representative sample of assessment objects by type and number within type, <b>and other specific assessment objects deemed particularly important to achieving the assessment objective</b> to provide a level of coverage necessary for determining whether the security safeguards are implemented and free of obvious errors <b>and whether there are increased grounds for confidence that the safeguards are implemented correctly and operating as intended.</b>
		<b>Comprehensive</b>	Testing that uses a <b>sufficiently large</b> sample of assessment objects by type and number within type, and other specific assessment objects deemed particularly important to achieving the assessment objective to provide a level of coverage necessary for determining whether the security safeguards are implemented and free of obvious errors and whether there are <b>further</b> increased grounds for confidence that the safeguards are implemented correctly and operating as intended <b>on an ongoing and consistent basis, and that there is support for continuous improvement in the effectiveness of the safeguards.</b>
	<p><b>DISCUSSION</b></p> <p>Typical assessor actions may include, for example: testing access control, identification and authentication, and audit mechanisms; testing security configuration settings; testing physical access control devices; conducting penetration testing of key system components; testing system backup operations; testing incident response capability; and exercising vulnerability scanning capability.</p>		

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**U.S. Department of Commerce  
National Oceanic and Atmospheric Administration (NOAA)  
Office of the Chief Information Officer (OCIO)  
Information Technology Security Program (ITSP)**



**Privacy Threshold Analysis  
for the  
NOAA High Availability Enterprise Services (HAES)  
(NOAA0700)**

# U.S. Department of Commerce Privacy Threshold Analysis

## NOAA High Availability Enterprise Services

**Unique Project Identifier: NOAA0700 HAES**

**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 on information 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:**

HAES (NOAA0700) will modularize disparate system functionalities into a centralized “discrete” set of enterprise services that will be consolidated as needed to quickly enable new/improved functionality. HAES establishes standard middleware architecture that enables superior interoperability, improved manageability, and reduce platform costs.

HAES will provide a collection of services grouped into 3 subsystems. HAES will provide:

1. Centralized/Unified Enterprise service model
2. Program Management :
  - Mission service management through collaboration and transparency with IT infrastructure configuration/improvement and qualitative/quantitative performance metrics to ensure availability and continuity of services.
  - IT governance and transparency through comprehensive service cost, quality, and risk information to provide balance in IT investment (portfolio) aligned to mission requirements.
3. Security governance and management through assisting identities and security access to the IT services to mitigate mission risks, meeting compliance, and audit requirements:
  - Ensure all systems are secured using best practices standards.
  - Monitoring and Logging.
  - Ensure security compliance and enforcement.
  - Ensure reporting is complete & on time.
  - Coordination with Cybersecurity on initiatives & tickets.
4. Communications and Collaboration - All enterprise service points of contact, escalation, and infrastructure services information/plans are communicated/shared and transparent with mission customers and leadership.

## SYSTEM ENVIRONMENT

HAES (NOAA0700) is a General Support System (GSS) with a boundary that comprises the following subsystems:

1. **Identity, Credential, and Access Management (ICAM)** strategy and management approach ensures that NOAA ICAM solutions exhibit a balance between usability and security. As such, Homeland Security Presidential Directive (HSPD) 12 PKI infrastructure was built for all Line Offices and system owners to implement 2-Factor Authentication (2FA) on their Microsoft domains. The ICAM team employed a waterfall approach to build a cornerstone solution, by unifying the identity stores and correlating all enrollment processes in NOAA and DOD. ICAM provides Identify Management Services and Systems (IDMS) and Single Sign-On (SSO) solutions to Line Offices and System Owners. The ICAM system operates a set of servers to manage and serve information that assists in the implementation of the HSPD-12 mandates for NOAA.

ICAM system uses the following connections:

1. LDAPS connection to DOD Global Directory Service (GDS) for obtaining NOAA user's CAC information e.g. EDIPI, certificate, UPN and CN.
2. Database connection to DOD DEERS for certificate information.
3. LDAPS connection to NOAA NEMS for user profiles.
4. Database connection to NOAA Staff Directory (NSD) for Federal employee status/manager.

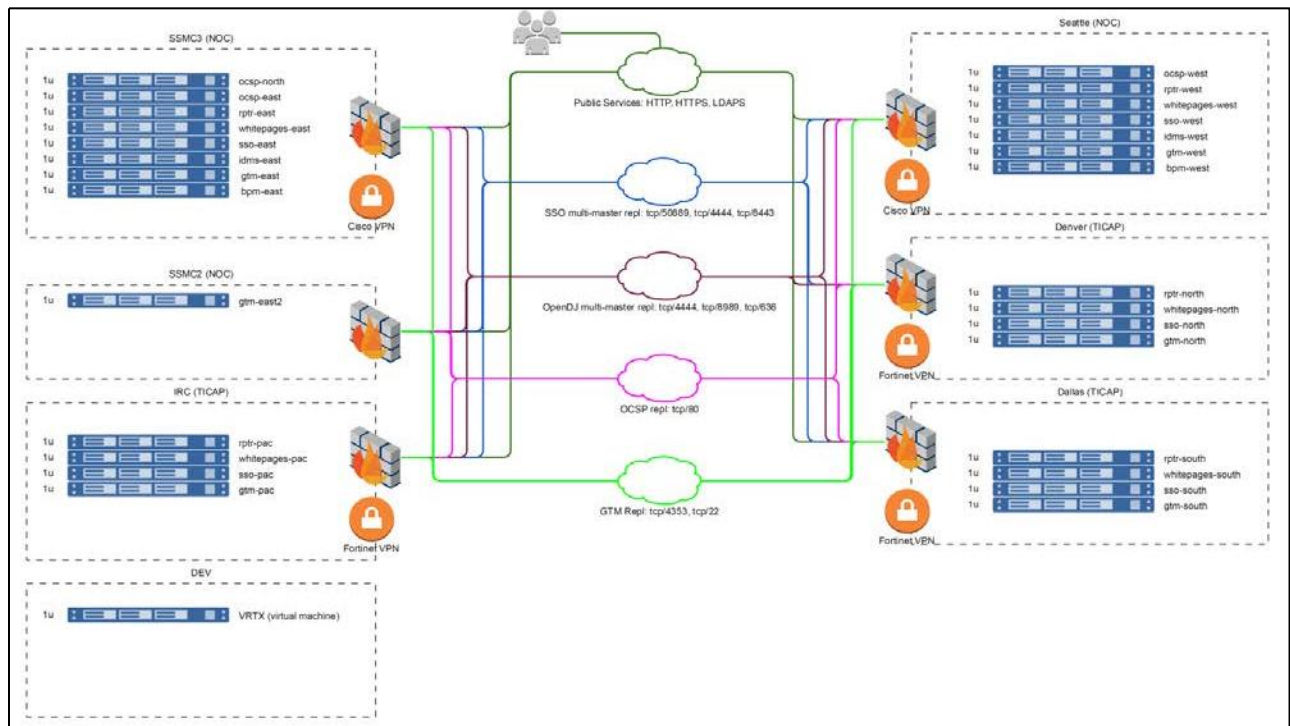
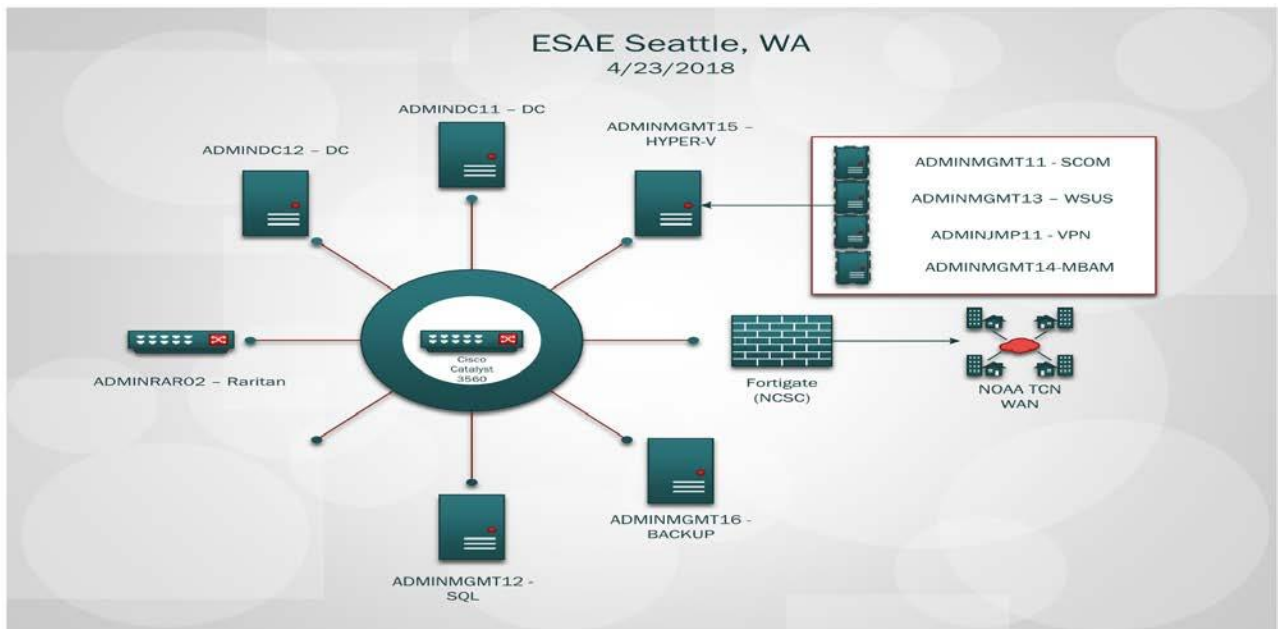


Figure 1: ICAM System Boundary Diagram

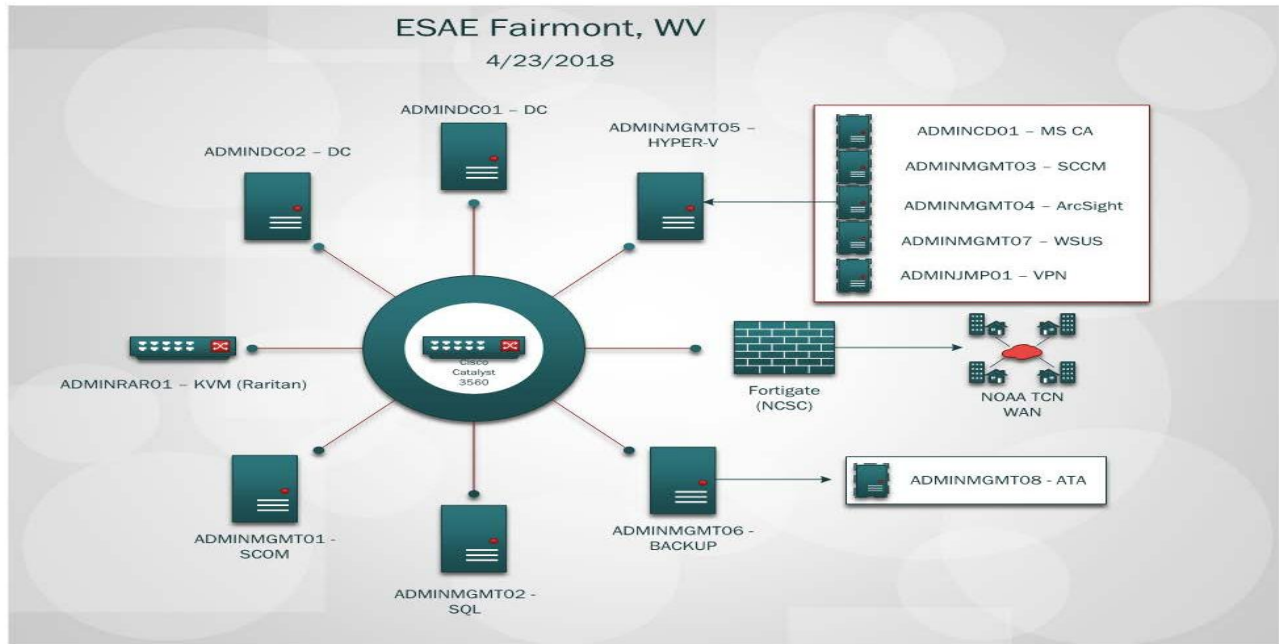
2. **Enhanced Security Administrative Environment (ESAE)** is designed to enhance security of the NOAA Active Directory production environment by limiting the exposure of privileged administrative credentials. NOAA believes this implementation will improve the likelihood of avoiding significant financial, reputation, and operational impacts of potential future security breaches. The business impact from a successful malicious compromise of an organization's information systems can vary greatly from organization to organization and may encompass a wide spectrum of negative outcomes. Some of the impacts that have been experienced by organizations suffering from modern cyber-attacks include:

- Loss of reputation
- Significant cost of recovery and remediation
- Reduction in revenue
- Loss of competitive advantage
- Unauthorized reproduction of proprietary designs or other intellectual Property

ESAE is designed to thwart cyber-attackers business impact by mitigating credential theft techniques as well as other several other known attack techniques. NOAA believes this will improve the likelihood of avoiding significant financial, reputation, and operational impacts of potential future security breaches.



**Figure 2: ESAE Seattle, WA Diagram**



**Figure 3: ESAE Fairmont System Diagram**

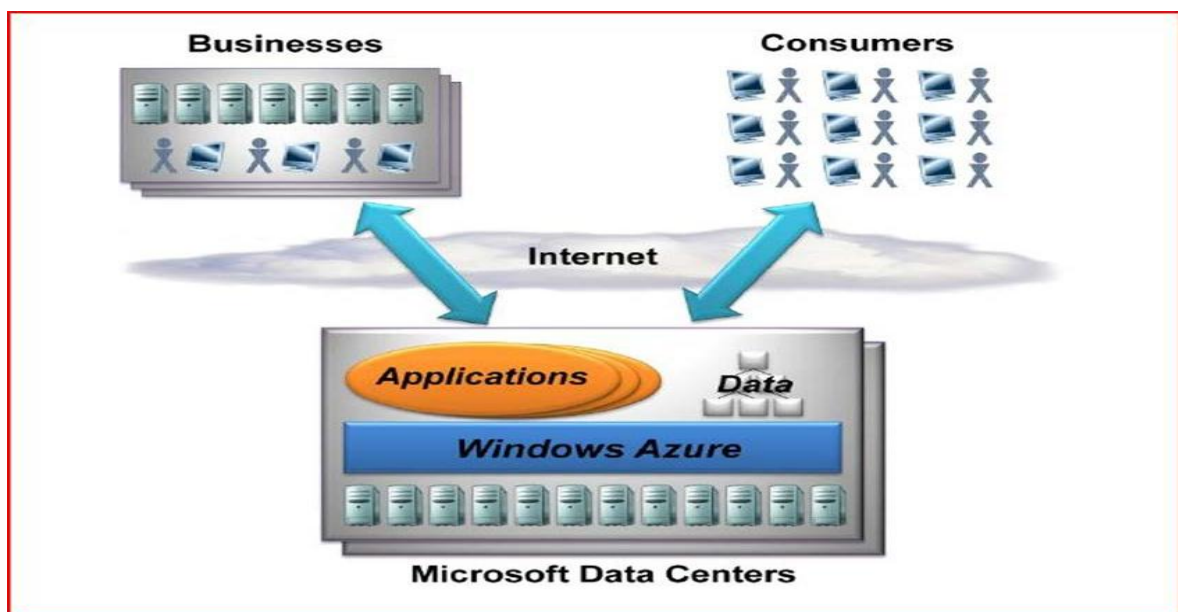
- Microsoft Azure for Government** is an open and flexible cloud platform that will enable HAES to quickly build, test, deploy, and manage their applications, services, and product development across a network of Microsoft-managed datacenters within the United States which in turn will help make HAES's data available to NOAA in a rapid and scalable manner. The Microsoft Azure platform exports savings to HAES by delivering the software, platform, and IT infrastructure resources where and when it is needed via the Internet. The Microsoft Azure for Government service allows the government to use cloud platforms to tap into HAES's data by consolidating HAES'S datasets and making them available on the Azure for Government platform. Thus, HAES customers can help to speed the rate of innovation and create new insights that will positively affect NOAA through mission-critical applications. The Microsoft Azure Government platform offers the same functionality in an environment dedicated to Government customers.

HAES can leverage the Microsoft Azure for Government service in a variety of ways. Microsoft Azure is used for building, deploying, and managing applications and services through a network of Microsoft-managed data centers. It provides both Platform as a Service (PaaS) and Infrastructure as a Service (IaaS) services and supports many different programming languages, tools and frameworks, including both Microsoft-specific and third-party software and systems. The advantages for NOAA in using Microsoft Azure include the ability to build large scalable applications serving large populations of users by scaling up or scaling down in relatively short periods of time.

Microsoft Azure authorizes connections from the information system to other information systems outside of the authorization boundary through the use of vendor agreements, Memoranda of Understanding (MOUs), Interconnection Security Agreements (ISAs) Terms of Conditions (T&C), and/or Service Level Agreements (SLAs). Microsoft has developed the

necessary vendor agreements, MOUs, ISAs, T&C, and SLAs that document connections outside of the Federal authorization boundary. Microsoft Azure follows FedRAMP guidance regarding Government agencies in that Interconnection Security Agreements (ISAs) are not designed for use between a CSP and Federal Agency. An Agency ATO memo should be the governing document for Agency and Azure interaction and security requirement communications. The only interconnections are between internal Microsoft services and Major Applications. Azure also uses the above documents to maintain interconnection agreements with these internal groups.

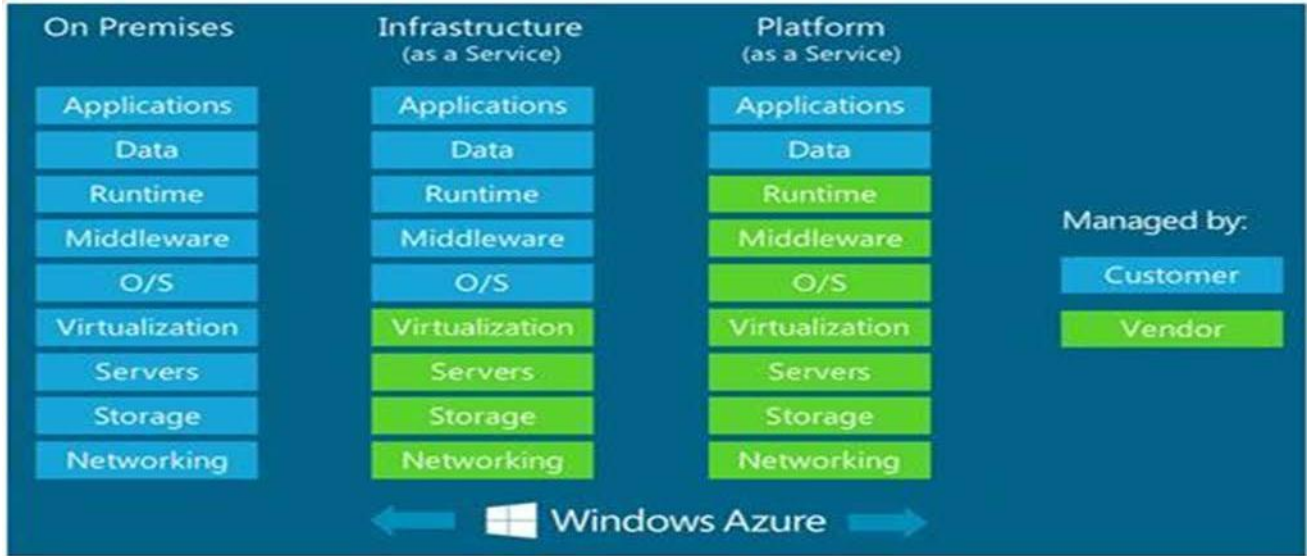
At this time, Microsoft Azure does not have any dependencies on information systems external to Microsoft that require ISAs. As a large ISP provider, Microsoft peers with a large amount (over 2,000) of ISPs.



**Figure 4: Hosted Microsoft Azure for Government Tenant Breakdown**

Microsoft Azure provides a multi-tenant public cloud service platform that will offer HAES the functionality to support capacities such as Platform as a Service (PaaS), and Infrastructure as a Service (IaaS) cloud service models. Software as a Service (SaaS) is also supported by Microsoft Azure if HAES needs to manage its own email platform servers within Microsoft Azure. Microsoft is responsible for Microsoft Azure and the physical security of its datacenters through the use of security protections such as locked badge entry doors, fences, and guards. In addition, Microsoft Azure provides strong levels of cloud security at the software layer that meets the security, privacy, and compliance needs of HAES. HAES must comply with various regulatory or business agreement requirements; therefore HAES will be utilizing various tools for additional security requirements for file integrity monitoring and log file monitoring.



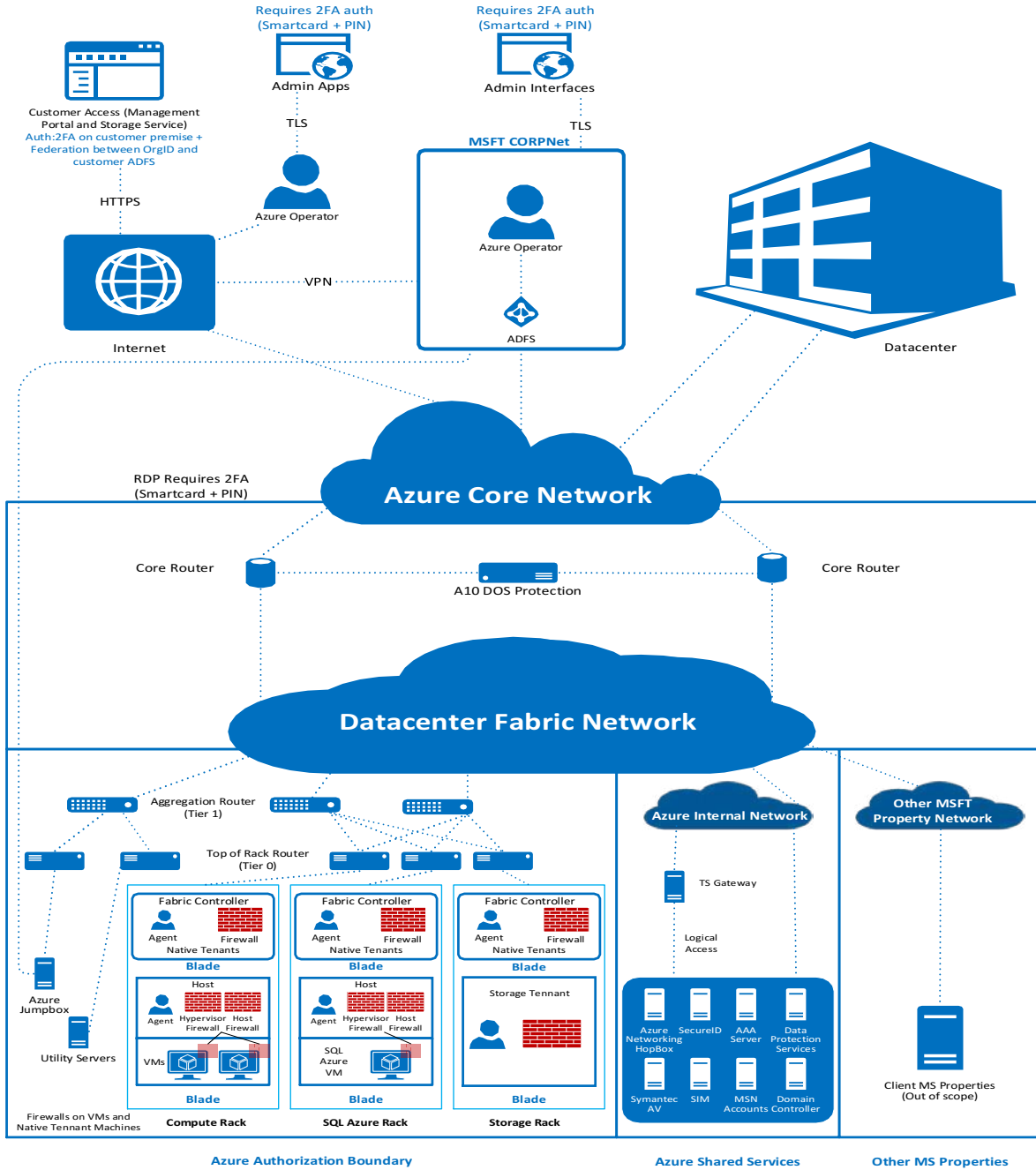


**Figure 5: Shared Microsoft and Customer Responsibility**

Additional customer responsibilities include managing their applications, data content, virtual machines, access credentials, and compliance with regulatory requirements or business agreements applicable to their particular industry and locale. The Microsoft Azure Customer Responsibility Matrix documents the customer responsibilities at the NIST SP 800-53 Revision 4 control level.

To achieve FedRAMP certification and compliance, Microsoft must pass a rigorous and in-depth comprehensive system-wide testing of its security controls based upon the requirements and security controls that are documented in NIST SP 800-53 Rev. 4, Security and Privacy Controls for Federal Information Systems and Organizations publication, revised January 2015. Security controls are implemented based upon the impact level rating needed to meet the security objectives of confidentiality, integrity, and availability. Microsoft Azure for Government Cloud has been categorized as a High security control baseline system based upon the FIPS 199 document which HAES will leverage as a part of its environment.

Microsoft Azure is the customer’s responsibility as documented in the Microsoft Azure Customer Responsibility Matrix. HAES will ensure that its security policies, procedures, applications, and controls are assessed separately and authorized in agreement with the requirements documented in NIST 800-37, Rev. 1, Guide for Applying the Risk Management Framework to Federal Information Systems.



**Figure 6: Microsoft Azure for Government Overview**

The E-Government Act of 2002 defines “information system” by reference to the definition section of Title 44 of the United States Code. The following is a summary of the definition: “Information system” means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information. See: 44. U.S.C. § 3502(8).

**Questionnaire:**

1. What is the status of this information system?

- This is a new information system. *Continue to answer questions and complete certification.*
- This is an existing information system with changes that create new privacy risks. *Complete chart below, continue to answer questions, and complete certification.*

<b>Changes That Create New Privacy Risks (CTCNPR)</b>			
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.

**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

I certify the criteria implied by one or more of the questions above **apply** to the NOAA0700 HAES system 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 NOAA0700 HAES system and as a consequence of this non-applicability, a PIA for this IT system is not necessary.

Name of Information System Security Officer (ISSO): Kevin Mitchell

Signature of ISSO or SO: MITCHELL.KEVIN.A.139  
8622886 Digitally signed by  
MITCHELL.KEVIN.A.1398622886  
Date: 2018.06.11 15:06:37 -04'00' Date: \_\_\_\_\_

Name of Information Technology Security Officer (ITSO): Jean Apedo

Signature of ITSO: APEDO.JEAN.11880  
76064 Digitally signed by  
APEDO.JEAN.1188076064  
Date: 2018.06.12 08:26:35 -04'00' Date: \_\_\_\_\_

Name of Authorizing Official (AO): Doug Perry

Signature of AO: PERRY.DOUGLAS.  
A.1365847270 Digitally signed by  
PERRY.DOUGLAS.A.1365847270  
Date: 2018.06.15 16:17:22 -04'00' Date: \_\_\_\_\_

Name of Bureau Chief Privacy Officer (BCPO):

Signature of BCPO: \_\_\_\_\_ Date: \_\_\_\_\_

DOC-NOAA-2018-001270	Final Review	Tom DePersia	Bigfish II Sportfishing Charters
DOC-NOAA-2018-001413	Final Review	Erin Cosgrove	Delaware Riverkeeper Network
DOC-NOAA-2018-001401	Final Review	Peter M. Frost	Western Environmental Law Center
DOC-NOAA-2018-001420	Final Review	Vivian Wang	National Resources Defense Council
DOC-NOAA-2018-000881	Initial Review	Jeffrey Leary	Miami Dade Citizen's for Property Rights
DOC-NOAA-2018-001322	Final Review	Liz Charboneau	American Bridge 21st Century
DOC-NOAA-2018-000183	Final Review	Sean Sherman	Public Citizen, Inc

### Custom Report - 06/15/2018 05:11:43

06/15/2018	NOAA FOIA Office Amanda J. Patterson	Yes	06/15/2018	TBD
06/15/2018	NOAA FOIA Office Amanda J. Patterson	Yes	06/15/2018	TBD
06/11/2018	NOAA FOIA Office Shawn L. Martin	Yes	06/11/2018	TBD
06/11/2018	NOAA FOIA Office Cheyenne Johnson	Yes	06/11/2018	TBD
06/06/2018	Steven Goodman Kelly Mariskanish	Yes	06/06/2018	TBD
06/05/2018	NOAA FOIA Office James LeDuc	Yes	06/05/2018	TBD
05/31/2018	NOAA FOIA Office Michael P. Hassett	Yes	05/31/2018	TBD

Open Fee-related reason  
Open Full grant  
Open Full grant  
Open Request withdrawn  
Open Partial grant/partial denial  
Open Partial grant/partial denial  
Open Partial grant/partial denial



DOC-NOAA-2018-000511 Request Rose Santos  
DOC-NOAA-2018-000622 Request Patricia Mann  
DOC-NOAA-2018-000580 Referral Allan Blutstein  
DOC-NOAA-2016-000423 Request Ryan P. Mulvey  
DOC-NOAA-2018-000459 Request Margaret Townsend  
DOC-NOAA-2018-000449 Request Omar Purcell  
DOC-NOAA-2018-000428 Request Ryan P. Mulvey  
DOC-NOAA-2018-000422 Request Philip N. Brown  
DOC-NOAA-2017-000304 Request Bryn Blomberg  
DOC-NOAA-2017-000298 Request Charles Mouton  
DOC-NOAA-2017-000268 Request Brian D. Israel  
DOC-NOAA-2018-000318 Request Sarah N. Emerson  
DOC-NOAA-2018-000303 Request Ronald B. Hardwig  
DOC-NOAA-2018-000273 Request Andrew G. Ogden  
DOC-NOAA-2018-000784 Request Sean Ahern  
DOC-NOAA-2017-000170 Request Kara McKenna  
DOC-NOAA-2018-000798 Request Jonathan Clark  
DOC-NOAA-2018-000204 Request Nicole Mason  
DOC-NOAA-2018-000202 Request Kaitlyn Shannon  
DOC-NOAA-2018-000183 Request Sean Sherman  
DOC-NOAA-2018-000816 Request Susan Carroll  
DOC-NOAA-2018-000802 Request Patrick Martin  
DOC-NOAA-2018-000126 Request HASSELMAN, JAN  
DOC-NOAA-2018-000070 Request Cathy Readinger  
DOC-NOAA-2017-001954 Request Alex Veeneman  
DOC-NOAA-2017-001992 Request Margaret Townsend  
DOC-NOAA-2014-001694 Request Lawrence A. Kogan  
DOC-NOAA-2017-001974 Request Ryan P. Mulvey  
DOC-NOAA-2016-001786 Request Ana Gutierrez  
DOC-NOAA-2017-002002 Request Daniel Bladele  
DOC-NOAA-2016-001763 Request Thomas Knudson  
DOC-NOAA-2017-001798 Request Brett Sommermeyer  
DOC-NOAA-2017-001796 Request Margaret Townsend  
DOC-NOAA-2017-001975 Request Margaret Townsend  
DOC-NOAA-2017-001782 Request Christine M. Walker  
DOC-NOAA-2017-001756 Request Jeff Tollefson  
DOC-NOAA-2017-001741 Request Vivian Wang  
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-2017-001676 Request Vincent C. Catania  
DOC-NOAA-2017-001678 Request James Zeiler  
DOC-NOAA-2017-001606 Request Molly Masterton  
DOC-NOAA-2017-001569 Request Sarah N. Emerson  
DOC-NOAA-2017-001523 Request Brian L. Kahn  
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-2017-001565 Request Charles Seife  
DOC-NOAA-2017-001391 Request Elizabeth A. Mitchell  
DOC-NOAA-2018-001528 Request Megan E. Boyd  
DOC-NOAA-2018-001525 Request Matthew Chapman  
DOC-NOAA-2018-001520 Request Jackson Wallace  
DOC-NOAA-2018-001518 Request Michael L. Johnson  
DOC-NOAA-2018-001510 Request Jordan Waltz  
DOC-NOAA-2018-001509 Request Rachel D'Oro  
DOC-NOAA-2017-001316 Request Chris Saeger  
DOC-NOAA-2018-001495 Request Jeff Ruch  
DOC-NOAA-2018-001489 Request David Moser  
DOC-NOAA-2018-001524 Request Dr. Laurice Dee  
DOC-NOAA-2018-001494 Request Sheila Sannadan  
DOC-NOAA-2018-001530 Request Richard N. Sieving  
DOC-NOAA-2018-001465 Request Jeremy Wu  
DOC-NOAA-2018-001463 Request Elizabeth Murdock  
DOC-NOAA-2018-001458 Request Daniel Hubbell  
DOC-NOAA-2018-001453 Request Marie Lefton  
DOC-NOAA-2018-001451 Request Jeff Ruch  
DOC-NOAA-2018-001448 Request Anne McNamara  
DOC-NOAA-2018-001447 Request Philip Kiley  
DOC-NOAA-2018-001446 Request Richard Hirn  
DOC-NOAA-2018-001441 Request Gordon Levack  
DOC-NOAA-2018-001440 Request Spencer N. Thal  
DOC-NOAA-2018-001433 Referral Margaret E. Townsend  
DOC-NOAA-2018-001424 Request Michael G. Squires  
DOC-NOAA-2018-001427 Request Spencer Nathan Thal  
DOC-NOAA-2018-001413 Request Erin Cosgrove  
DOC-NOAA-2018-001411 Request Jeremy D. Mckay  
DOC-NOAA-2018-001393 Request Ivy N. Fredrickson  
DOC-NOAA-2018-001392 Request Abigail Smith  
DOC-NOAA-2018-001391 Request Michael L. Johnson  
DOC-NOAA-2018-001417 Request Harley Racer  
DOC-NOAA-2017-001220 Request Nathan Eagle  
DOC-NOAA-2017-001219 Request Nathan Eagle  
DOC-NOAA-2017-001217 Request Nathan Eagle  
DOC-NOAA-2018-001388 Request Michael L. Johnson  
DOC-NOAA-2018-001386 Request Jared Cox  
DOC-NOAA-2018-001372 Request Margaret Townsend  
DOC-NOAA-2018-001367 Request Celeste Manapsal  
DOC-NOAA-2017-001190 Request ERIC R. BOLINDER  
DOC-NOAA-2018-001329 Request Ben Dobson  
DOC-NOAA-2018-001322 Request Liz Charboneau  
DOC-NOAA-2018-001338 Request Jake Strahan  
DOC-NOAA-2018-001401 Request Peter M. Frost  
DOC-NOAA-2018-001299 Request Benita Whitfield  
DOC-NOAA-2018-001419 Request Daniel Bladele  
DOC-NOAA-2018-001418 Request Karsten Shein  
DOC-NOAA-2018-001291 Request Heather Coleman  
DOC-NOAA-2018-001289 Request Sumona Majumdar  
DOC-NOAA-2018-001336 Request Fred Millar  
DOC-NOAA-2018-001420 Referral Vivian Wang

DOC-NOAA-2017-001094 Request Brett E. Hardy  
DOC-NOAA-2017-001093 Request Brett E. Hardy  
DOC-NOAA-2017-001092 Request Brett E. Hardy  
DOC-NOAA-2018-001280 Request John R. Leek  
DOC-NOAA-2018-001341 Request Jesse Coleman  
DOC-NOAA-2018-001294 Request Nathaniel Benforado  
DOC-NOAA-2018-001270 Request Tom DePersia  
DOC-NOAA-2018-001266 Request Todd B. Kimberlain  
DOC-NOAA-2018-001263 Request Rose Santos  
DOC-NOAA-2018-001421 Request Krystle Stump  
DOC-NOAA-2018-001330 Request T. Geoffrey Heekin  
DOC-NOAA-2018-001422 Request David Abell  
DOC-NOAA-2017-001059 Request Richard Hirn  
DOC-NOAA-2018-001214 Request Jason Bien  
DOC-NOAA-2018-001197 Request John R. Leek  
DOC-NOAA-2017-000994 Request Mariel Combs  
DOC-NOAA-2018-001189 Request Joseph M. Stuckey  
DOC-NOAA-2018-001252 Request John Greenewald, Jr.  
DOC-NOAA-2018-001166 Request Joseph P. Green  
DOC-NOAA-2018-001163 Request Michael L. Johnson  
DOC-NOAA-2018-001143 Request Margaret Townsend  
DOC-NOAA-2018-001106 Request Hallie G. Templeton  
DOC-NOAA-2017-001009 Request Edward Duhe  
DOC-NOAA-2018-001090 Request Oryx Gazella  
DOC-NOAA-2018-001254 Request Georgia Hancock  
DOC-NOAA-2018-001058 Request Ryan P. Mulvey  
DOC-NOAA-2018-001037 Request Jane Davenport  
DOC-NOAA-2018-001022 Request Michael L. Johnson  
DOC-NOAA-2014-000714 Request Lawrence Kogan  
DOC-NOAA-2018-001005 Request Anne Philbrick  
DOC-NOAA-2018-001271 Request Kimberly Pels  
DOC-NOAA-2018-000948 Request Hallie G. Templeton  
DOC-NOAA-2018-000947 Request Hallie G. Templeton  
DOC-NOAA-2017-000790 Request Brian Gaffney  
DOC-NOAA-2018-000951 Request Beryl C. Lipton  
DOC-NOAA-2018-000918 Request Hallie G. Templeton  
DOC-NOAA-2017-000768 Request Julio C. Gomez  
DOC-NOAA-2018-000892 Request Florian C. Rabitz  
DOC-NOAA-2018-000881 Request Jeffrey Leary  
DOC-NOAA-2018-000855 Request Rose Santos  
DOC-NOAA-2018-000836 Request Christopher W. Moores  
DOC-NOAA-2018-000803 Request Rose Santos  
DOC-NOAA-2018-000763 Request Adam Carlesco  
DOC-NOAA-2018-000760 Request John B. Mena  
DOC-NOAA-2018-000755 Request John B. Mena  
DOC-NOAA-2018-000727 Request Tia Justice  
DOC-NOAA-2017-000572 Request Karen MacDonald  
DOC-NOAA-2018-000765 Request Naja Girard  
DOC-NOAA-2018-000671 Request Margaret Townsend  
DOC-NOAA-2018-000670 Request Rose Santos  
DOC-NOAA-2018-000647 Request Harold Henderson  
DOC-NOAA-2018-000604 Request Mary McCullough

DOC-NOAA-2018-000587 Request Hallie G. Templeton  
DOC-NOAA-2018-000585 Request Andrew Hitchings  
DOC-NOAA-2018-000561 Request Stephanie Kuzydym  
DOC-NOAA-2018-000638 Request Nicole Mason  
DOC-NOAA-2017-000414 Request Arnold & Porter Kaye Scholer LLP  
DOC-NOAA-2018-000554 Request Terra Mowatt  
DOC-NOAA-2018-000781 Request Russ Kick

FOIA GROUP INC	12/30/2017	01/02/2018	Dalton Cummings
Ferguson Case Orr Paterson LLP	12/28/2017	12/28/2017	Karen Robin
America Rising Squared	12/22/2017	12/22/2017	NWS
Cause of Action	12/21/2015	12/21/2015	Samuel B. Dixon
	12/18/2017	12/18/2017	Ana Liza Malabanan
NOAA	12/14/2017	12/14/2017	Lawanda Fisher
Cause of Action Institute	12/11/2017	12/11/2017	Mark Graff
	12/08/2017	12/08/2017	Kehaupuaokal Kamaka
Western Resources Legal Center	11/30/2016	11/30/2016	Cheyenne Johnson
Mahtook & Lafleur	11/30/2016	11/30/2016	Dalton Cummings
ARNOLD & PORTER LLP	11/28/2016	11/28/2016	NOS
VICE	11/21/2017	11/21/2017	Robin Schnug
	11/17/2017	11/17/2017	Lawanda Fisher
Turtle Island Restoration Network	11/14/2017	11/14/2017	NOS
Manson Construction Co.	11/10/2017	11/13/2017	AGO
Cause of Action	11/09/2016	11/09/2016	Samuel B. Dixon
Ursinus College	11/04/2017	11/06/2017	NOS
	11/01/2017	11/01/2017	OGC
Beveridge & Diamond	11/01/2017	11/01/2017	NOS
Public Citizen, Inc	10/25/2017	10/25/2017	Michael P. Hassett
Houston Chronicle	10/25/2017	10/25/2017	NWS
NBC News	10/24/2017	10/24/2017	Lola Stith
Earthjustice	10/18/2017	10/18/2017	Ana Liza Malabanan
	10/03/2017	10/03/2017	Kelly Mariskanish
Kettle Magazine, London	09/28/2017	09/28/2017	OC
	09/26/2017	09/26/2017	Ana Liza Malabanan
Institute for Trade, Standards and Sustainable Development	09/22/2014	09/22/2014	Annie Thomson
Cause of Action Institute	09/21/2017	09/21/2017	Kelly Mariskanish
	09/20/2016	09/20/2016	Mark Graff
	09/15/2017	09/15/2017	LA
Center for Investigative Reporting	09/14/2016	09/15/2016	Jennifer Pralgo
	08/31/2017	08/31/2017	Kelly Mariskanish
Center for Biological Diversity	08/31/2017	08/31/2017	Annie Thomson
	08/31/2017	08/31/2017	Annie Thomson
Fowler White Burnett	08/29/2017	08/29/2017	Nkolika Ndubisi
Nature	08/24/2017	08/24/2017	USEC
Natural Resources Defense Council	08/22/2017	08/22/2017	Cheyenne Johnson
	08/22/2017	08/22/2017	USEC
ProPublica	08/21/2017	08/21/2017	USEC
	08/21/2017	08/21/2017	USEC
	08/09/2017	08/09/2017	NOS
Citizens for Responsible Zoning and Landowner Rights	08/07/2017	08/07/2017	NOS
Natural Resources Defense Council	07/26/2017	07/26/2017	Michael P. Hassett
VICE	07/19/2017	07/19/2017	NOS
Climate Central	07/14/2017	07/14/2017	OC
	06/27/2017	06/27/2017	Cheyenne Johnson
Cause of Action Institute	06/27/2016	06/27/2016	Amanda J. Patterson
Moseley Prichard Parrish Knight & Jones	06/23/2017	06/23/2017	David Landsman
	06/22/2017	06/23/2017	Cheyenne Johnson
Ocean Conservancy	06/19/2017	06/19/2017	Kelly Mariskanish

	06/19/2017	06/19/2017	OC
Association for Professional Observers	06/16/2017	06/16/2017	Arlyn E. Penaranda
Georgia State University College of Law	06/13/2018	06/13/2018	NOAA
Chapman Appraisals LLC	06/13/2018	06/13/2018	NOAA
	06/12/2018	06/12/2018	NOAA
	06/11/2018	06/11/2018	NOAA
	06/07/2018	06/07/2018	NMFS
The Associated Press	06/07/2018	06/07/2018	NOAA
Western Values Project	06/07/2017	06/07/2017	Samuel B. Dixon
PEER	06/06/2018	06/06/2018	NMFS
	06/05/2018	06/05/2018	NMFS
	06/04/2018	06/04/2018	Cheyenne Johnson
Adams Broadwell Joseph & Cardozo	06/01/2018	06/01/2018	NMFS
THE SIEVI G LAW FIRM, A.P.C.	06/01/2018	06/01/2018	NMFS
Sherry Chen Legal Defense Fund	05/31/2018	05/31/2018	NOAA
Natural Resources Defense Council	05/30/2018	05/30/2018	Arlyn E. Penaranda
Environmental Investigation Agency	05/30/2018	05/30/2018	Cheyenne Johnson
	05/29/2018	05/29/2018	OGC
PEER	05/29/2018	05/29/2018	NWS
Salish Sea Foundation	05/27/2018	05/29/2018	Ana Liza Malabanan
	05/27/2018	05/29/2018	USEC
National Weather Service Employees Organization	05/27/2018	05/29/2018	OCFO
	05/24/2018	05/24/2018	Tawand Hodge Tonic
Vanguard Law	05/24/2018	05/24/2018	Kelvin James
CENTER FOR BIOLOGICAL DIVERSITY	05/23/2018	05/23/2018	Cheyenne Johnson
Arizona Republic	05/22/2018	05/22/2018	Tawand Hodge Tonic
VANGUARD LAW	05/22/2018	05/22/2018	Kelvin James
Delaware Riverkeeper Network	05/21/2018	05/21/2018	Amanda J. Patterson
Environmental and Animal Defense	05/21/2018	05/21/2018	James A. Bruschi
Ocean Conservancy	05/16/2018	05/16/2018	Mark Graff
Bloomberg Environment	05/16/2018	05/16/2018	Mark Graff
	05/16/2018	05/16/2018	OGC
LURIE FRIEDMAN LLP	05/16/2018	05/16/2018	Annie Thomson
Honolulu Civil Beat	05/16/2017	05/17/2017	Kehaupuaokal Kamaka
Honolulu Civil Beat	05/16/2017	05/17/2017	Kehaupuaokal Kamaka
Honolulu Civil Beat	05/16/2017	05/17/2017	Kehaupuaokal Kamaka
	05/15/2018	05/15/2018	Arlyn E. Penaranda
	05/15/2018	05/15/2018	Cheyenne Johnson
	05/14/2018	05/14/2018	Cheyenne Johnson
Credence Management Solutions, LLC	05/14/2018	05/14/2018	AGO
Cause of Action Institute	05/09/2017	05/09/2017	Amanda J. Patterson
NBC Connecticut	05/04/2018	05/04/2018	Melissa R. Kang
American Bridge 21st Century	05/03/2018	05/03/2018	James LeDuc
Whale Safe USA	05/03/2018	05/03/2018	Amanda J. Patterson
Western Environmental Law Center	05/01/2018	05/01/2018	Shawn L. Martin
ERT, Inc.	05/01/2018	05/01/2018	AGO
	04/27/2018	04/27/2018	LA
	04/27/2018	04/27/2018	Maria S. Williams
Oxfam America	04/27/2018	04/27/2018	Annie Thomson
Earth Island Institute	04/26/2018	04/26/2018	Tawand Hodge Tonic
	04/26/2018	04/26/2018	NOS
National Resources Defense Council	04/26/2018	04/26/2018	Cheyenne Johnson

Earthjustice	04/26/2017	04/26/2017	Sophia Howard
Earthjustice	04/26/2017	04/26/2017	Sophia Howard
Earthjustice	04/26/2017	04/26/2017	Sophia Howard
San Diego Council of Divers	04/25/2018	04/25/2018	Robin Schnug
	04/24/2018	04/24/2018	Nicole Skerritt
SOUTHERN ENVIRONMENTAL LAW CENTER	04/24/2018	04/24/2018	Amanda J. Patterson
Bigfish II Sportfishing Charters	04/23/2018	04/23/2018	Amanda J. Patterson
	04/23/2018	04/23/2018	Karen Robin
FOIA GROUP INC	04/21/2018	04/23/2018	Dalton Cummings
	04/20/2018	04/20/2018	LA
HEEKIN LITIGATION GROUP	04/19/2018	04/19/2018	Kelly Mariskanish
Sierra Club	04/18/2018	04/18/2018	Kelly Mariskanish
National Weather Service Employees	04/18/2017	04/18/2017	Denise Hamilton
	04/12/2018	04/12/2018	Trenika Tapscott
San Diego Council of Divers	04/10/2018	04/10/2018	Cheyenne Johnson
Oceana	04/10/2017	04/11/2017	Kehaupuaokal Kamaka
Boston University	04/09/2018	04/09/2018	Lola Stith
The Black Vault	04/09/2018	04/09/2018	Lola Stith
DoC/NOAA/NESDIS	04/05/2018	04/05/2018	Maria S. Williams
	04/05/2018	04/05/2018	OGC
	04/04/2018	04/04/2018	USEC
Friends of the Earth	04/03/2018	04/03/2018	Trenika Tapscott
LISKOW & LEWIS	03/31/2017	03/31/2017	NOS
None	03/30/2018	03/30/2018	Maria S. Williams
Animal Welfare Institute	03/29/2018	03/29/2018	Kelly Mariskanish
Cause of Action Institute	03/28/2018	03/28/2018	OGC
Defenders of Wildlife	03/27/2018	03/27/2018	Cheyenne Johnson
	03/27/2018	03/27/2018	OGC
ITSSD	03/26/2014	03/26/2014	Annie Thomson
	03/25/2018	03/26/2018	Kelvin James
Jones Walker LLP	03/19/2018	03/19/2018	NOS
Friends of the Earth	03/15/2018	03/15/2018	Clete Otoshi
Friends of the Earth	03/15/2018	03/15/2018	Clete Otoshi
Law Office of Brian Gaffney	03/14/2017	03/14/2017	NWS
MuckRock	03/13/2018	03/13/2018	OC
Friends of the Earth	03/12/2018	03/12/2018	Clete Otoshi
GOMEZ LLC Attorney At Law	03/10/2017	03/10/2017	Melissa R. Kang
Kaunas University of Technology	03/06/2018	03/06/2018	OGC
Miami Dade Citizen's for Property Rights	02/27/2018	02/27/2018	Kelly Mariskanish
FOIA GROUP INC	02/27/2018	02/27/2018	Shem Yusuf
Cook Brown LLP	02/23/2018	02/23/2018	Dalton Cummings
FOIA GROUP INC	02/21/2018	02/21/2018	Dalton Cummings
Public Employees for Environmental Responsibility (PEER)	02/14/2018	02/14/2018	Arlyn E. Penaranda
National Weather Service	02/14/2018	02/14/2018	Karen Robin
National Weather Service	02/14/2018	02/14/2018	Karen Robin
Logansport Historical Preservation Committee	02/11/2018	02/12/2018	NWS
	02/07/2017	02/07/2017	Nkolika Ndubisi
Key West The Newspaper [The Blue Paper]	02/01/2018	02/01/2018	OCAO
	02/01/2018	02/01/2018	Annie Thomson
FOIA GROUP INC	01/31/2018	01/31/2018	Dalton Cummings
Thompson Hine LLP	01/29/2018	01/29/2018	Lola Stith
	01/20/2018	01/22/2018	Dalton Cummings

Friends of the Earth  
SOMACH SIMMONS & DUNN  
KHOU-TV  
  
Arnold & Porter Kaye Scholer LLP

01/17/2018	01/17/2018	Amanda J. Patterson
01/16/2018	01/16/2018	Shawn L. Martin
01/12/2018	01/12/2018	NWS
01/11/2018	01/11/2018	Annie Thomson
01/09/2017	01/09/2017	NOS
01/08/2018	01/08/2018	Karen Robin
01/05/2018	01/05/2018	Lola Stith



## Custom Report - 06/15/2018 04:45:01

Dalton Cummings	Yes	02/08/2018	TBD	Research Records
Karen Robin	Yes	02/27/2018	TBD	Assignment Determination
NWS	Yes	01/24/2018	TBD	Research Records
Samuel B. Dixon	Yes	02/04/2016	TBD	Research Records
Ana Liza Malabanan	Yes	09/20/2018	TBD	Evaluation of Records
Lawanda Fisher	Yes	02/01/2018	TBD	Research Records
Mark Graff	Yes	02/01/2018	TBD	Final Preparation of Response
Kehaupuaokal Kamaka	Yes	01/16/2018	TBD	Research Records
Cheyenne Johnson	Yes	01/13/2017	TBD	Evaluation of Records
Dalton Cummings	Yes	01/13/2017	TBD	Assignment Determination
NOS	Yes	01/10/2017	TBD	Assignment Determination
Robin Schnug	Yes	01/09/2018	TBD	Assignment Determination
Lawanda Fisher	Yes	12/20/2017	TBD	Research Records
NOS	Yes	12/14/2017	TBD	Assignment Determination
AGO	Yes	03/19/2018	TBD	Assignment Determination
Samuel B. Dixon	Yes	01/05/2017	TBD	Research Records
NOS	Yes	03/21/2018	TBD	Research Records
OGC	Yes	12/01/2017	TBD	Assignment Determination
NOS	Yes	02/08/2018	TBD	Evaluation of Records
Michael P. Hassett	Yes	12/13/2017	TBD	Final Preparation of Response
NWS	Yes	03/26/2018	TBD	Assignment Determination
Lola Stith	Yes	03/21/2018	TBD	Assignment Determination
Ana Liza Malabanan	Yes	05/18/2018	TBD	Research Records
Kelly Mariskanish	Yes	12/14/2017	TBD	Evaluation of Records
OC	Yes	11/08/2017	TBD	Evaluation of Records
Ana Liza Malabanan	Yes	09/14/2018	TBD	Assignment Determination
Annie Thomson	Yes	10/22/2014	TBD	Assignment Determination
Kelly Mariskanish	Yes	11/21/2017	TBD	Evaluation of Records
Mark Graff	No	TBD	TBD	Assignment Determination
LA	Yes	03/27/2018	TBD	Assignment Determination
Jennifer Pralgo	Yes	10/27/2016	TBD	Final Preparation of Response
Kelly Mariskanish	Yes	10/25/2017	TBD	Research Records
Annie Thomson	Yes	10/25/2017	TBD	Assignment Determination
Annie Thomson	Yes	10/30/2017	TBD	Research Records
Nkolika Ndubisi	Yes	09/27/2017	TBD	Research Records
USEC	Yes	09/22/2017	TBD	Assignment Determination
Cheyenne Johnson	Yes	10/06/2017	TBD	Evaluation of Records
USEC	Yes	09/20/2017	TBD	Assignment Determination
USEC	Yes	09/20/2017	TBD	Assignment Determination
USEC	Yes	09/19/2017	TBD	Assignment Determination
NOS	Yes	09/19/2017	TBD	Assignment Determination
NOS	Yes	10/02/2017	TBD	Assignment Determination
Michael P. Hassett	Yes	09/21/2017	TBD	Evaluation of Records
NOS	Yes	09/05/2017	TBD	Evaluation of Records
OC	Yes	08/16/2017	TBD	Assignment Determination
Cheyenne Johnson	Yes	07/28/2017	TBD	Evaluation of Records
Amanda J. Patterson	Yes	08/19/2016	TBD	Assignment Determination
David Landsman	Yes	03/20/2018	TBD	Evaluation of Records
Cheyenne Johnson	Yes	08/10/2017	TBD	Research Records
Kelly Mariskanish	Yes	08/11/2017	TBD	Research Records

OC	Yes	08/30/2017	TBD	Research Records
Arlyn E. Penaranda	Yes	08/01/2017	TBD	Research Records
NOAA	No	TBD	TBD	Submitted
NOAA	No	TBD	TBD	Submitted
NOAA	No	TBD	TBD	Submitted
NOAA	No	TBD	TBD	Submitted
NMFS	Yes	07/16/2018	TBD	Assignment Determination
NOAA	No	TBD	TBD	Initial Evaluation
Samuel B. Dixon	Yes	07/21/2017	TBD	Research Records
NMFS	Yes	07/16/2018	TBD	Assignment Determination
NMFS	Yes	07/16/2018	TBD	Assignment Determination
Cheyenne Johnson	Yes	07/12/2018	TBD	Assignment Determination
NMFS	Yes	07/13/2018	TBD	Assignment Determination
NMFS	Yes	07/13/2018	TBD	Assignment Determination
NOAA	No	TBD	TBD	Assignment Determination
Arlyn E. Penaranda	Yes	07/12/2018	TBD	Assignment Determination
Cheyenne Johnson	Yes	07/12/2018	TBD	Assignment Determination
OGC	Yes	07/12/2018	TBD	Assignment Determination
NWS	Yes	07/12/2018	TBD	Assignment Determination
Ana Liza Malabanan	Yes	07/12/2018	TBD	Assignment Determination
USEC	Yes	07/12/2018	TBD	Assignment Determination
OCFO	Yes	07/12/2018	TBD	Assignment Determination
Tawand Hodge Tonic	Yes	07/12/2018	TBD	Assignment Determination
Kelvin James	Yes	07/12/2018	TBD	Assignment Determination
Cheyenne Johnson	Yes	06/21/2018	TBD	Assignment Determination
Tawand Hodge Tonic	Yes	07/12/2018	TBD	Assignment Determination
Kelvin James	Yes	06/21/2018	TBD	Assignment Determination
Amanda J. Patterson	Yes	06/19/2018	TBD	Final Preparation of Response
James A. Bruschi	Yes	06/19/2018	TBD	Assignment Determination
Mark Graff	Yes	06/19/2018	TBD	Assignment Determination
Mark Graff	Yes	06/19/2018	TBD	Assignment Determination
OGC	Yes	06/19/2018	TBD	Assignment Determination
Annie Thomson	Yes	06/27/2018	TBD	Assignment Determination
Kehaupuaokal Kamaka	Yes	08/16/2017	TBD	Research Records
Kehaupuaokal Kamaka	Yes	06/20/2017	TBD	Final Preparation of Response
Kehaupuaokal Kamaka	Yes	06/20/2017	TBD	Research Records
Arlyn E. Penaranda	Yes	06/28/2018	TBD	Assignment Determination
Cheyenne Johnson	Yes	06/28/2018	TBD	Assignment Determination
Cheyenne Johnson	Yes	06/28/2018	TBD	Assignment Determination
AGO	Yes	06/13/2018	TBD	Assignment Determination
Amanda J. Patterson	Yes	06/22/2017	TBD	Assignment Determination
Melissa R. Kang	Yes	06/06/2018	TBD	Final Preparation of Response
James LeDuc	Yes	06/06/2018	TBD	Final Preparation of Response
Amanda J. Patterson	Yes	06/06/2018	TBD	Assignment Determination
Shawn L. Martin	Yes	07/03/2018	TBD	Final Preparation of Response
AGO	Yes	05/30/2018	TBD	Assignment Determination
LA	Yes	06/27/2018	TBD	Assignment Determination
Maria S. Williams	Yes	06/27/2018	TBD	Assignment Determination
Annie Thomson	Yes	05/30/2018	TBD	Assignment Determination
Tawand Hodge Tonic	Yes	05/30/2018	TBD	Evaluation of Records
NOS	Yes	06/06/2018	TBD	Assignment Determination
Cheyenne Johnson	Yes	06/20/2018	TBD	Final Preparation of Response

Sophia Howard	Yes	07/03/2017	TBD	Assignment Determination
Sophia Howard	Yes	07/03/2017	TBD	Assignment Determination
Sophia Howard	Yes	07/03/2017	TBD	Research Records
Robin Schnug	Yes	05/23/2018	TBD	Assignment Determination
Nicole Skerritt	Yes	06/12/2018	TBD	Assignment Determination
Amanda J. Patterson	Yes	06/13/2018	TBD	Research Records
Amanda J. Patterson	Yes	05/21/2018	TBD	Final Preparation of Response
Karen Robin	Yes	05/30/2018	TBD	Assignment Determination
Dalton Cummings	Yes	05/21/2018	TBD	Assignment Determination
LA	Yes	06/20/2018	TBD	Assignment Determination
Kelly Mariskanish	Yes	06/04/2018	TBD	Assignment Determination
Kelly Mariskanish	Yes	06/20/2018	TBD	Assignment Determination
Denise Hamilton	Yes	05/19/2017	TBD	Research Records
Trenika Tapscott	Yes	05/10/2018	TBD	Assignment Determination
Cheyenne Johnson	Yes	06/15/2018	TBD	Research Records
Kehaupuaokal Kamaka	Yes	05/09/2017	TBD	Assignment Determination
Lola Stith	No	TBD	TBD	Assignment Determination
Lola Stith	Yes	05/21/2018	TBD	Assignment Determination
Maria S. Williams	Yes	05/17/2018	TBD	Assignment Determination
OGC	Yes	05/14/2018	TBD	Assignment Determination
USEC	Yes	05/29/2018	TBD	Assignment Determination
Trenika Tapscott	Yes	05/29/2018	TBD	Assignment Determination
NOS	Yes	05/23/2017	TBD	Research Records
Maria S. Williams	Yes	05/02/2018	TBD	Evaluation of Records
Kelly Mariskanish	Yes	06/04/2018	TBD	Assignment Determination
OGC	Yes	04/25/2018	TBD	Evaluation of Records
Cheyenne Johnson	Yes	07/13/2018	TBD	Research Records
OGC	Yes	04/25/2018	TBD	Assignment Determination
Annie Thomson	Yes	05/13/2014	TBD	Assignment Determination
Kelvin James	Yes	05/31/2018	TBD	Assignment Determination
NOS	Yes	05/21/2018	TBD	Assignment Determination
Clete Otoshi	Yes	04/26/2018	TBD	Evaluation of Records
Clete Otoshi	Yes	04/12/2018	TBD	Assignment Determination
NWS	Yes	04/17/2017	TBD	Research Records
OC	Yes	04/16/2018	TBD	Assignment Determination
Clete Otoshi	Yes	04/26/2018	TBD	Evaluation of Records
Melissa R. Kang	Yes	04/12/2017	TBD	Research Records
OGC	Yes	04/09/2018	TBD	Assignment Determination
Kelly Mariskanish	Yes	04/02/2018	TBD	Final Preparation of Response
Shem Yusuf	Yes	03/27/2018	TBD	Assignment Determination
Dalton Cummings	Yes	03/27/2018	TBD	Assignment Determination
Dalton Cummings	Yes	03/26/2018	TBD	Assignment Determination
Arlyn E. Penaranda	Yes	03/29/2018	TBD	Evaluation of Records
Karen Robin	Yes	04/12/2018	TBD	Assignment Determination
Karen Robin	Yes	04/12/2018	TBD	Assignment Determination
NWS	Yes	03/14/2018	TBD	Assignment Determination
Nkolika Ndubisi	Yes	03/10/2017	TBD	Final Preparation of Response
OCAO	Yes	03/29/2018	TBD	Assignment Determination
Annie Thomson	Yes	03/14/2018	TBD	Assignment Determination
Dalton Cummings	Yes	03/13/2018	TBD	Assignment Determination
Lola Stith	No	TBD	TBD	Assignment Determination
Dalton Cummings	Yes	02/22/2018	TBD	Assignment Determination

Amanda J. Patterson	Yes	03/07/2018	TBD	Research Records
Shawn L. Martin	Yes	06/22/2018	TBD	Assignment Determination
NWS	Yes	02/14/2018	TBD	Assignment Determination
Annie Thomson	Yes	02/26/2018	TBD	Evaluation of Records
NOS	Yes	03/07/2017	TBD	Research Records
Karen Robin	Yes	02/06/2018	TBD	Assignment Determination
Lola Stith	Yes	03/19/2018	TBD	Assignment Determination

Partial grant/partial denial

Partial grant/partial denial

Partial grant/partial denial

Full grant

Full grant  
Partial grant/partial denial

Full grant

Request withdrawn

Fee-related reason

Partial grant/partial denial





[Reference FGI 17- 55437] relevant to DOCDG133W10CQ0049 Orders 8,12,14,15,18-23,25 we seek the following All pay records from January 1, 2015, to the date of production for the EMPLOYEE: a. All annual gross income from Please accept this email as a request pursuant to the Freedom of Information Act for access to any email sent by k All records of communications between (i) Eileen Sobock, Assistant Administrator for Fisheries; (ii) Samuel Rauch, The Center requests from National Marine Fisheries Service ("NMFS"): all records generated in connection with the I would like a copy of final findings or response made by the inquiry officials at NMFS for OIG complaint number 17 1. All weekly reports, charts, and transmittal e-mails that identify "high visibility" or otherwise "sensitive" FOIA reque I request the following information through the Freedom of Information Act pertaining to my work as a NMFS fisher This request generally concerns records related to the NMFS document entitled &quot; Technical Guidance for As: We are representing Harvest Pipeline Company in connection with an incident which occurred on 5 September 20 1. All information (including work plans, quality assurance plans, validated and unvalidated data, results, correspon Please provide all records generated in connection with the deployment of US Navy dolphins to locate endangered The final report for Case Number 17-1346

TIRN requests from the National Oceanic and Atmospheric Administration (NOAA), the Office of National Marine S Chenier Ronquille Barrier Island Restoration Project (BA-76); Solicitation/Contract # WC133F-15-RB-0008/WC133 CoA Institute hereby requests access to the following records for the time period of January 1, 2014, to the present I'm an academic researcher who's interested in learning more about the history of the the Marine Debris Program's 1. Official record from The Office of Special Counsel indicating that I was in violation of the Hatch Act in Aug 2016 : 1. The most recent index for the administrative record of the Portland Harbor natural resource damage assessmen Any and all records concerning the effect of Executive Order 13771, entitled "Reducing Regulation and Controlling Copies of all weather and forecast communication with the U.S. Army Corps of Engineers regarding Addicks/Barke Pursuant to the federal Freedom of Information Act, 5 U.S.C. &sect; 552, a copy of the agency's FOIA log for the p 1) All records reflecting or relating to inter-agency analysis, discussion or correspondence regarding the boundarie: I am requesting the following: 1) Copy of Cathy Readinger's personnel file from October 27, 1982 to present in its e Per the Act, I am requesting copies of correspondence or memorandums dated from January 20, 2017 to the date 1. All records generated in connection with Endangered Species Act, 16 U.S.C. &sect;&sect; 1531- 1544 ("ESA"), & This new FOIA Request seeks disclosure of as yet publicly disclosed documents substantiating the IQA conformar With the foregoing as background, and pursuant to the FOIA, 5 U.S.C. &sect; 552, CoA Institute hereby requests a Daily water conditions for Corona del Mar for the week of June 26, 2016.

A copy of correspondence from Congresswoman Diane Black or her staff and the response to the correspondence Copies of all emails pertaining to observer health and safety written or received by National Marine Fisheries Servic I am writing on behalf of Sea Shepherd Legal ("SSL") with a request for records maintained by the National Marine All records mentioning, including and/or referencing timing for release of 4th National Climate Assessment, whethe 1. All records mentioning, including, and/or referencing the decision to terminate, or otherwise not renew, the Fede My request is for any and all documents, including internal emails, that discuss NOAA's decision to remove the ma I would like copies of all emails including the word CLIMATE or the word CHARTER or the phrase &quot;ADVISOR Please produce records1 of the following types in the possession, custody, or control of the National Oceanic and / A copy of each email that includes the word CLIMATE or the word CHARTER or the phrase &quot;ADVISORY CO I request access to and copies of all email correspondence to and from Acting NOAA Administrator (and Under Sec A copy of each email that includes the word CLIMATE or the word CHARTER or the phrase &quot;ADVISORY CO 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 coi Please find attached a FOIA request from the Natural Resources Defense Council (NRDC) for records regarding th Please provide all records generated in connection to complaints made to the Monterey Bay National Marine Sanct I request any records and email communications relating to drafting the press release on the 2017 edition of NOAA The Center requests the following records from the U.S. Department of Commerce ("DOC") from April 1, 2017 to tl 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

I therefore request the following documents: Any e-mails, memos, presentations, or other documents that a) are de  
On 28 June 2017, via email, the requester clarified the search scope of the request to: "I would like both foreign of  
I am seeking the most current Marine Mammal Inventory Report for all beluga whales held by all aquariums subjec  
Hi! Would you please send me the financial assistance awards (or details of) NA86RP0593, NA04OAR4600006, N  
I am requesting a copy of the marine mammal inventory report (MMIR/NIMM), I want this copy to include all marine  
I request a copy of the report "Hawaii Fishing Vessel Monitoring System: Report of the Pilot Project" to include "Ap  
I would like to request a digital or DVD hard copy of a VHS or VHS-c tape from Terry L. Kennemore. This tape has  
Dear FOIA Officer: This is a request under the Freedom of Information Act. I request that a copy of the following dc  
SCOPE REVISION 6/20 - To exclude the following information: out-of-office replies, duplicates of the same emails  
1. Northeast Fisheries Science Center (NEFSC) reviews of the North Atlantic Right Whale Endangered Species Ac  
All correspondence, emails, memos, notes, reports, or other documents pertaining to the Caltrans Lagunitas Bridg  
Two Bottlenose dolphins have died at Dolphinaris Arizona in Scottsdale, Arizona. Bodie: 23 September 2017 Alia: ;  
On behalf of California Unions for Reliable Energy ("CURE") and pursuant to the Freedom of Informatio  
1. Any and all records including communications, authorizations, restrictions or agreements between NMFS and St  
According to the public announcement in <https://research.noaa.gov/article/ArtMID/587/ArticleID/999/Army-Corps-h>  
FOIA Request for Records concerning law enforcement actions relating to the import of shark fins into or transit of  
This is a request (complete request attached as supporting file) on behalf of the Environmental Investigation Agenc  
This request is for the National Marine Fisheries Service. I am an attorney doing volunteer work for Conservation L  
1. All records that document, reference, or mention any kind of contact or communication between National Ocean  
Under the Washington Public Records Act, &sect;42.56 et seq., I am requesting an opportunity to inspect or obtain  
Please provide all email sent by Benjamin Friedman Deputy Under Secretary of Commerce for Oceans and Atmos  
A copy of the NOAA spend plan submitted to Congress for fiscal year 2018 and a copy of the Report on National W  
Location and status of harbor seal Bo ... has number 67 in marine mammal inventory base  
1. All documents that relate to the observer program including, without limitation, any documents that relate to the ;  
REFERRAL FROM USDA: The Center requests from the U.S. Department of Agriculture ("USDA"): from January 1  
I'm requesting a copy of the Marine Mammal Inventory. According to NOAA's website it is "An inventory of all  
1. All documents that relate to the observer program including, without limitation, any documents that relate to the a  
Any and all requests for technical assistance for projects or initiatives that would impact the Atlantic sturgeon in the  
Environmental and Animal Defense, (hereinafter "eaDefense") requests all "agency records" of the National Ocean  
Please see attached request. We request the records that have been or will be released in response to Cause of A  
Please see attached request for all records responsive to Cause of Action Institute's December 11, 2017, FOIA rec  
I request copies of Respondent Exhibits (listed below) from: UNITED STATES DEPARTMENT OF COMMERCE N  
All documents relating to any application for funding from or through the National Science Foundation submitted fr  
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  
Federal Register/Vol. 63, No. 47/Wednesday, March 11, 1998/Rules and Regulations covers an entry from NOAA |  
I am submitting this FOIA request for the following documents: (1) A copy of the permit under which Lolita, the kille  
The Center requests from the National Oceanic and Atmospheric Administration ("NOAA"), National Marine Fisher  
On behalf of Credence Management Solutions, LLC, I am requesting the following documents in relation to task on  
Pursuant to the Freedom of Information Act, 5 U.S.C. &sect; 552 ("FOIA"), CoA Institute hereby requests access to  
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  
I am requesting access to records and information on the entanglement of Northern Right Whales, Humpback Wh  
On August 5, 2011, NOAA's then-;Northwest Region released the "Upper Willamette River Conservation and  
Solicitation Number: EA133C-13-RQ-0099  
A copy of correspondence from Congresswoman Diane Black or her staff and the response to the correspondence  
I respectfully request access to and copies of any and all documents, letters and communications, in any form, tha  
Please find attached a formal FOIA request from Oxfam America requesting disclosure of records that affect the p  
1. We request all permits issued by NMFS in existence for living dolphin species in captivity (with the exception of c  
Please furnish all documents from year 2010- present in NOAA's possession, relating to: 1. NOAA's adoption of the  
REFERRAL FROM BOEM: FOIA Request for Records Concerning the Executive Order (Apr. 28, 2017) and Secret

We request copies of all memoranda, studies, reports, data, correspondence, comments, conversation records, file  
We request copies of all memoranda, studies, reports, data, correspondence, comments, conversation records, file  
We request copies of all memoranda, studies, reports, data, correspondence, comments, conversation records, file  
The Pacific Scientific Review Group was scheduled to meet in San Diego in March of 2018 to review data for SAR:  
All communications, including emails and attachments, including or mentioning "Vincent DeVito"; or "DeVito"; All cc  
1. All documents concerning the proposed incidental take permit for Chesterfield Power Station, Docket Number N  
This is a formal data request for information pertaining to the catches of commercial vessels allowed access to clo:  
I am requesting copies of my own personal CD-326 documents or award justifications while as a federal employee  
Reference FGI 18-56960] relevant to NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION award DOC  
I believe the correspondence are most likely to be held by your Office of Congressional Affairs. I am specifically loc  
1. Copies of any and contracts, agreements or other paperwork relating to Rick Johnston's ("Johnston";  
Louisiana Offshore Oil Port. Requesting the following documentation relating to the Louisiana Offshore Oil Port bet  
1. A copy of any and all reports on the testing of the radiosonde autolauncher manufactured by the Vaisala Corpora:  
For educational purposes, I am requesting information regarding the historical data and analysis of ground level ult  
I submitted an Incidental Harassment Authorization request to Office of Protected Resources on 7/16/17 concernin  
REVISED SCOPE: PART 1: You request the following information for the HI SSL Fishery from 2014 to 2017 (Prior  
I would like to have data on the final budgets of NOAA (National Oceanic and Atmospheric Administration) since it  
I respectfully request a copy of records, electronic or otherwise, of the following: 1) FOIA Case Log for calendar ye:  
Request the deleted Emails and the computer IP address that deleted the Emails from: Primary account: Joseph  
I request copies of Agency (NOAA) Exhibits (listed below) from: UNITED STATES DEPARTMENT OF COMMERC  
CBD is willing to narrow the scope of their request to exclude housekeeping emails (cc's, forwards, out-of-office re:  
Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Friends of the Earth requests all records  
1. Any and all records, photographs, correspondence, documents, including email communication, pertaining to the  
Please provide a copy of the remote sensing space system license granted to SpaceX for the Iridium-5 mission wh  
Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, et seq., and the regulations of the Depa  
Pursuant to the FOIA, 5 U.S.C. § 552, CoA Institute hereby requests access to the following records. The time peri  
FOIA request for records relating to the decision by the National Marine Fisheries Service to list the oceanic whiteti  
I request a copy of Exhibit 31 from UNITED STATES DEPARTMENT OF COMMERCE NATIONAL OCEANIC AND  
Enactment by the USEPA of a series of national greenhouse gas (GHG) emission regulations based primarily upc  
Looking for any information documents about harassment of NMFS observers working aboard foreign fish process  
8TH District Local Notice to Mariners —Weekly Supplement Notice Numbers 20-93, 21-93 and 22-93  
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  
...all records from January 1, 2015 to the present discussing, documenting, memorializing, or otherwise concerning  
This is a request under the Freedom of Information Act. I hereby request the following records: For the 16-month, §  
Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Friends of the Earth requests all records |  
Copies of all reports submitted to the Secretary of Commerce pursuant to 15 U.S.C. § 330a, concerning "weat  
Dear Sir or Madam, Under the Freedom of Information Act, I seek to obtain any documents which the National Oce  
1.) Any and all communications regarding an Endangered Species Act Section 7 consultation carried out between I  
[FGI 53604] Relevant to DOCAB133F14CQ0017 and DOCAB133F14CQ0018, we seek contract with SOW/PWS fr  
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  
A summary of all incidents of violence, threats, or harassment against NOAA employees that occurred in calendar  
All non-personal identifying information concerning the person selected for position Management and Program Anz  
All non-personal identifying information concerning the person selected for position number NWS-ER-2017-0083 Ic  
This is a request for all documentation (up to and including studies, research, and notations) concerning the affects  
Please provide the following from NOAA Office of Response and Restoration, regarding the Carla Maersk/Conti Pe  
Please provide a copy of the full report on the investigation by the National Oceanic and Atmospheric Administratio  
All records mentioning, including, and/or referencing the Seventh Climate Action Report ("CAR-7"), which is bifurca  
[FGI 18-56059] Relevant to Contract No. DOCEA133C17BA0062, National Oceanic And Atmospheric Administratio  
1) the agreement between American Export Lines, Inc. (my client's merger predecessor) and Isbrandtsen Compan  
Any and all records, files, notes, personnel actions, contracts regarding my contract and temporary employment at

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:  
January 12, 2018 Pursuant to the Freedom of Information Act, KHOU-TV respectfully requests: Copies of any and  
AJJ time and attendance records and computer records retrieved and submitted to the Office of Audits and Investig  
REQUEST UPDATED 3/27 - The requester has approved that the \$18,212 refund for FOIA #2017-000320 be rolled  
CLARIFIED REQUEST SCOPE 1/23/18: A FOIA request for job announcement number (Financial Management S  
This is a request under the Freedom of Information Act. I hereby request the following records: your agency's FOIA

); (1) specified task orders with current SOW/PWS, labor rates and all modifications  
all sources including, but not limited to, regular pay, overtime, bonuses, cash, profit sharing, commissio  
Kathleen Hibbard from June 14, 2017, through June 27, 2017 that mentions or refers to the Climate Scie  
, Deputy Assistant Administrator for Regulatory Programs; (iii) Brian Pawlak, Director of the Office of Ma  
e denial of the Pacific bluefin tuna listing petition under the Endangered Species Act, 16 U.S.C. &sect;&#s  
'-0561. The investigation was handled by Kirk Essmyer. The focus of the OIG complaint was Jeff Radon  
ists. The time period for this item of the request is December 2015 to the present. 2. All memoranda, gu  
ies observer in the Pacific Islands Regional Observer Program from 2006 through my last trip and subse  
essing the Effects of Anthropogenic Sound on Marine Mammal Hearing: Underwater Acoustic Threshold  
16 involving the Harvest BOA Pipeline System in Plaquemine Parish, Louisiana. Pursuant to the Freedor  
idence, reports and presentations) related to the &quot;Avian Injury Study egg injection studies conducte  
vaquita porpoises near the Gulf of California. For this request, the term "all records" refers to, but is not

anctuaries ("ONMS"), the Flower Garden Banks National Marine Sanctuary (FGBNMS) and any other si  
F-16-CN-0007. Copies of the daily production reports (4267s), daily QC reports, all pay estimates (ENG  
:4 1. All records or communications (including emails, text messages, and voicemails) referring or relat  
; current definition of &quot;marine debris.&quot; I write to request any and all records relating to the dev  
2. Official record of my ethical violation in having a NOAA logo on my personal website under coaching &#s  
it. 2. All external correspondence (including letters, emails, and memoranda) created or received betwee  
Regulatory Costs" and associated guidance from the Office of Management and Budget (OMB Guidanc  
r reservoir releases from Aug. 23 through Sept 8.  
ast 12 months.

s of the Corps' CWA &sect; 404 jurisdiction in Puget Sound's tidally influenced waters. 2) All records refl  
ntirety, including documents that are retained in separate employee files; 2) Copy of Cathy Readinger's  
of this request originating from the Office of the Administrator or the Office of Communications when it c  
Section 7 consultation conducted concerning the International Maritime Organization's ("IMO") June 1, 2  
ice of NOAA and NOAA third-party contractor peer reviews of ten NOAA-developed climate assessment  
ccess to all communications—including, but not limited to, e-mail, instant messages, Google Hangouts

. Please search for documents from January 2011 through present. A copy of all correspondence from 1  
ce National Observer Program managers for the time period September 1, 2015 to September 14, 2016  
Fisheries Service ("NMFS") regarding the mass stranding ("Stranding") of nearly 100 false killer whales  
r it will be issued in final form by the statutory deadline, obstacles for completing by the deadline, and wl  
ral Advisory Committee Act charter for the "Advisory Committee for the Sustained National ClimateASSE  
genta line from its navigational chart

RY COMMITTEE&quot;. I limit this search to an electronic search of emails in the email accounts of the /  
Atmospheric Administration ("NOAA"), that are, include, or reflect decisions, directions, or communicatio  
MMITTEE&quot;. 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&quot;. I limit this search to an electronic search of emails in the email accounts of the Acting  
iF), for copies of all internal and external communications concerning and regarding proposed wave or v  
ntain the &quot;key words&quot; Lake Michigan, Lake Michigan National Marine Sanctuary, Lake Michig  
re Secretary of Commerce's decision determining that the state of New Jersey was in compliance with r  
tuary about wildlife being harassed or disturbed by drones or unmanned aerial vehicles. This request is l  
v's Annual Greenhouse Gas Index found here: <http://www.noaa.gov/news/noaa-s-greenhouse-gas-index>  
re date of this search: 1. All records mentioning, including, and/or referencing the draft and/or final biolo  
June 23, 2016 announcement attached as Exhibit A, and (2) NOAA 's underlying decision to partially rei  
/ 22, 2018 responses to the NPFCA's requests for additional information. On behalf of SIGCo, we reques  
the issuance of incidental harassment authorizations for oil and gas seismic exploration in the Atlantic (  
; mail records, or other documents, which were generated, received, kept, and/or considered by NMFS /

ated from 1/1/2015 onward b) originate with, or are sent to or from personnel in the following offices: Cor  
servers (on US vessels) and US observers. For all observers I would like to know the regional observer  
t to the reporting requirements of NOAA. Specifically, I am looking for reports from the Georgia Aquarium  
A06OAR4600190. I am a real estate appraiser and am researching a sale comparable (sold in 2012) bu  
e mammals (cetaceans & pinnipeds), also all dispositions (living, dead, released, etc.) and all faciliti  
pendix A – Chronology of VMS Activities.” The report was published by the National Marine Fisheries Se  
footage of a violent incident between two killer whales, Kandu and Corky, at SeaWorld San Diego on Au  
ocuments [or documents containing the following information] be provided to me: — Copies of any and a  
and duplicate attachments disseminated to large volumes of recipients. I request access to and copie  
t Section 7 Consultations done for the Greater Atlantic Regional Fisheries Office (GARFO), and before i  
e Replacement Project (located in western Marin County, California), generated or received by NOAA si  
22 May 2018 I would like to request a statement that shows the cause of Alia's recent death. I would also  
n Act (“FOIA”), we request that the National Oceanic and Atmospheric Administration (“NOAA”) related to h  
ydrologist-named-new-director-of-NOAAs-Great-Lakes-Environmental-Research-Laboratory-, the positio  
shark fins through the United States. (1) NOAA reports documenting the inspection of shipments of sha  
y under the Freedom of Information Act, 5 U.S.C. § 552, as amended (“FOIA”) for records from 1 /  
aw Foundation. I am seeking a list of Notices of Intent (NOIs) and/or lawsuits filed against the National M  
ic & Atmospheric Administration (NOAA) officials and Mr. Barry Myers, or any representatives of AccuW  
copies of public records that contain Pacific Herring stock population numbers between the years 1700  
phere to Craig McLean Acting Chief Scientist from January 1, 2018 to May 15, 2018.  
/eather Service Staffing in Alaska that the Department was required to submit to Congress within 60 foll

assessment of the effectiveness of the observer program in reducing bycatch; 2. All documents that rela  
l, 2016 to the date of this search all records of communications by USDA Director of Pest Management,  
marine mammals held in permanent captivity under NOAA Fisheries' jurisdiction. The Marine Mammal I  
ssessment of the effectiveness of the observer program in reducing bycatch; 2. All documents that relat  
Delaware River; Any and all requests for informal consultation for projects or initiatives that would impa  
ic and Atmospheric Administration (“NOAA” or “NOAA Fisheries”) associated with: I. A recovery pl  
ction Institute's FOIA request with tracking number DOC-NOAA-2018-000428.  
quest to the National Oceanic and Atmospheric Administration (NOAA) concerning records related to NC  
ATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION DOCKET NUMBER NE980310FM/V (F  
om January 1, 20 12 through present by or on behalf of Northeastern University; Northeastern University  
PRFMC). Specifically, I'm requesting: 1) Documents sufficient to show the amount of time spent by WPI  
ry Management Council (WPRFMC). Specifically, I'm requesting: 1) Documents sufficient to identify the  
RFMC). Specifically, I'm requesting: 1) The WPRFMC formal books of accounts over the 5 years prece  
relative to Vessel Tracking Systems. The entry includes a passage: “On October 29, 1996, NMFS  
r whale, is currently being held at the Miami Seaquarium, and (2) Any and all correspondence between I  
ies Service (“NMFS”): the request, draft request, and records generated in connection to a request from  
der number DOCST133016NC1161, held by contractor Actionet with a period of performance of 09/14/2  
all communications—including, but not limited to, e-mail, instant messaging, Google hangouts or Goo  
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.  
ales and Sea Turtles off the New England coast over the last 5 years. As you know all of these records a  
Recovery Plan for Chinook Salmon and Steelhead”; in Oregon. The Recovery Plan at page 11-&shy;-9

3. Please search for documents from January 2011 through present. A copy of all correspondence from 1  
t contain or pertain to the following information for each of the advertised jobs NSDIS-NCDC- 2011-000!  
ublic pertaining to the Paris Agreement, the UNFCCC, the IPCC and the Kyoto Protocol from January 20  
rcas). 2. Any necropsy reports received for any captive dolphins (except for orcas) that died between J.  
e new gas science module [ALOHA RAILCAR] into the ALOHA program for railcar dispersion of chlorine  
arial Order (May 1, 2017) on “America-First Offshore Energy Strategy” Please produce records1 of the f

es, electronic mail records, or other documents, which were generated, received, kept, and/or considere  
es, electronic mail records, or other documents, which were generated, received, kept, and/or considere  
es, electronic mail records, or other documents, which were generated, received, kept, and/or considere  
S 2018. The meeting was supposed to be open to the public. I am told this happened, though the notice  
ommunications, including emails and attachments, including or mentioning "David Bernhardt" or "Bernha  
OAA-NMFS-2017-0051, including the associated Draft Habitat Conservation Plan and Draft Environmer  
sed areas during 2017 and 2018 with EFPs issued by GARFO. The information I am requesting is: A. Th  
in the Department of Commerce from 2004-2017. Also, and as a separate matter, I am requesting a co  
DG133012CQ0004 (WCOSS - DOC NOAA NCEP WEATHER AND CLIMATE OPERATIONAL SUPEF  
aking for correspondence regarding policy, legislation, or regulations, recommendations for executive bra  
) proposal and/or agreement with You to allow Johnston to perform any work on or around the Property  
ween 2008 to present: 1. All Clean Water Act and Clean Air Act permitting files, including permit applica  
ation conducted by the National Weather Service. We understand that such testing has been conducted  
raviolet radiation from the sun. Specifically, I am seeking information on UVA, UVB, and UVC wavelengt  
ig pinnipeds in La Jolla California which should have been reviewed within 45 days and assigned a publi  
rity): ☐ All video and photographs of injured or dead sea turtles and marine mammals ☐ All phc  
was created in 1970. This data is in order to finish a data analysis for a statistics project at Boston Unive  
ar 2017 (if your agency operates off of a fiscal year, that is also ok) 2) FOIA Appeals Log for calendar ye  
i.P.Green@noaa.gov secondary emails: Phil.Green@noaa.gov, Phil.Greene@noaa.gov, J.Philip.Green@  
E NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION DOCKET NUMBER NE980310FM/  
plies, scheduler invitations, personal emails, and similar non-substantive discussions). In order to avoid  
pertaining to any applications or proposals for certain finfish aquaculture projects submitted pursuant to  
a National Oceanic and Atmospheric Administration's approval of Louisiana's State and Local Coastal R  
ich placed 10 Iridium satellites into orbit. The launch mission which occurred on March 30th, 2018 at 10  
rtment of Commerce, 15 C.F.R., Part 4; the regulations of the Department of the Interior, 43 C.F.R., Par  
od for all items of this request is July 1, 2017 to the present. 1. All communications between NOAA and  
p shark as a threatened species pursuant to the Endangered Species Act. We request that you provide  
O ATMOSPHERIC ADMINISTRATION DOCKET NUMBER NE980310FM/V (F/V Independence) IN THE  
on reviews of third-party (including NOAA) prepared scientific assessments.  
ors within the 200 mile zone between 1980 and 1991. Specifically Anne Hartmann, Anne Hartmann Bur

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, Cer  
y: (1) weather modification within the Weather Service Organization Workforce Analysis; (2) the reason f  
5-day period from Tuesday, November 8, 2016 through Tuesday, March 13, 2018: (SUMMARY) Any anc  
pertaining to Rose Canyon Fisheries, from January 1, 2016 to present. REQUESTER AGREED TO NAI  
her modification" as defined by federal law 15 U.S.C. &sect;330, from 1971 (the date this federal law wa  
anic and Atmospheric Administration may be holding in regards to diplomatic negotiations and technica  
the National Marine Fisheries Service and the United States Army Corps of Engineers for a proposed sh  
or each

-15CQ-0020 for the repair of the vessel known as the National Oceanic and Atmospheric Administration  
FRASTRUCTURE AS A SERVICE ACQUISITION we seek the (1) Contract sections A-M (including SO  
year 2017. The summary should include the date, location, and nature of the incident or threat together  
alyst GS-0343-13/14 (MAP), position number NWS-ER-2017-0074 located at NOAA-NWS-Office of Faci  
ocated at NOAA-OPPSD. I request full disclosure of the selectee's 1. Age at time of selection 2. Declare  
s and effects of wind turbines and commercial/industrial wind farms on radar used by NOAA/NWS for an  
ridot ship collision on 3/9/2015 in the Houston Ship Channel: 1 - Fate and transport forecast for both the  
n, launched on or about July 2016, after allegations were made of a hostile work environment by staff in  
ted into both the Seventh U.S. National Communication ("NC-7") and the Third U.S. Biennial Report ("B  
on ("NOAA") Blanket Purchase Agreement ("BPA") for Life Science And Technical Support Services, iss  
y, Inc. (the "AEL/ICI Agreement, together with any related agreements), dated on or around November 2  
NOAA's CPO, NOS and other departments within NOAA. Location: Silver Spring, Maryland. (1)Sole So

pertaining to Manna Fish Farms or its Chief Executive Officer, Donna Lanzetta, from January 1, 2016 to  
s of records. In this request, we use the terms &quot;National Oceanic and Atmospheric Administration F  
all email between August 23 to August 30 sent or received by Weather Prediction Center director David  
gations Unit pertaining to the Office of Inspector General complaint filed by Katy Stewart referencing Nic  
d into the cost of this FOIA (#2017-000414). As such, this FOIA has been narrowed to the production of  
pecialist SO-CFO-2017-0020/SO-CFO-2017-0021) for which I interviewed for on 8 September 2017 at 1  
 request log covering 2017, which includes a field showing the subject of each request and a field for th



ions and expense accounts, identifying said sources other than regular income. b. The annual deductions: nce Special Report (CSSR).

agement and Budget; (iv) Alan Risenhoover, Director of the Office of Sustainable Fisheries; or (v) John sect; 1531-1544 ("ESA"). See Attachment A (12 Month Decision Not To List Pacific Bluefin Tuna).

iski. The final response or findings was sent to OCAO.

idelines, procedures, processing metrics, or communications concerning any type of "sensitive review," æquent decertification or ineligibility as an observer in this program: 1) All my sea time with dates of emb; lds for Onset of Permanent and Temporary Threshold Shifts" (&quot;Technical Guidance&quot;). ' n of Information Act, we request you provide us with a true and correct copy of the official records o f the æd in 2006 and 2007 Hudson River PCBs Superfund Site Natural Resource Damages Trustees (&quot;T limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agenc

ubagencies or divisions under the supervision and administration of NOAA, all "records" as defined in th 93), and the BD & AD hydrographic/land surveys (.xyz format) for the above referenced project.

ing to a NOAA Town Hall meeting held on or about September 15, 2015, in Providence, Rhode Island, ar /elopment of the regulatory definition of &quot;marine debris&quot; for purposes of the Marine Debris Re services versus &quot;as seen at&quot; section for where I have been a speaker 3. Official record of my æn January 1, 2007, and June 1, 2009, to or from the Yakama Nation, or its designated representatives æ æ) on: 1) the rulemaking entitled Designation of Critical Habitat for Threatened Indo-Pacific Reef-buildin

ecting or relating to intra-agency analysis, discussion or internal correspondence regarding the boundari time and attendance records for the 24-month period preceding March 8, 2016; 3) Copy of Cathy Readi came to requests from members of the media. This information is being requested in light of recent repo 013 amendment of traffic separation schemes ("TSS"), and associated federal rulemaking process, in th ts that NOAA knew or had reason to know the EPA Administrator would use as the scientific foundation, or Google Chat messages, text messages, SMS messages, Blackberry messages, Skype messages, M

the majority staff of the House Budget Committee from January 1, 2017 through present. I believe the cc (including attachments).

(Pseudorca crassidens) at Hog Key, on Florida's southwestern coast, on or about January 14, 2017. U whether the recent decision to terminate the 'Advisory Committee for Sustained National Climate Assessn æssment" (hereafter "Committee") including, but not limited to: a. Who participated in this decision-makin

Acting Administrator Ben Friedman, and those of his Senior Advisor, Special Assistant, Chief of Staff, De ns—internal or external to Commerce—concerning President Trump's Executive Order titled "Implemen 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 ( vind energy projects offshore California between January 1, 2010, to date. This request includes, but is r jan NMS, Wisconsin, or any combination of those words related to the creation of an National Marine Sæ egard to management of its recreational summer flounder fishery under the Atlantic Coastal Fisheries C limited to the time-frame between January 1, 2016 and the time this request is processed. For this reque :-up-40-percent-since-1990 I would prefer to receive these in electronic format if possible.

gical evaluation of chlorpyrifos under the Endangered Species Act, 16 U.S.C. &sect;&sect; 1531-1544 (" mburse the expenses of industry-funded at-sea monitoring.

it, pursuant to the Freedom of Information Act, that the National Oceanic and Atmospheric Administration Ocean under the Marine Mammal Protection Act, 16 U.S.C. &sect;&sect; 1361-1389 ("MMPA"), from Jar relating to the reopening of the red snapper season, between the dates of January 20, 2017 and June 18



d by NMFS Southeast Regional Office relating to: 1. The data sources used to estimate the bycatch of s  
d by NMFS relating to: 1. The data sources used to estimate shark bycatch in the Gulf of Mexico reef fis  
d by NMFS relating to: 1. The data sources used to estimate shark bycatch in the HMS pelagic longline  
of the meeting had disappeared. I am requesting a copy of the draft minutes of Pacific Scientific Review  
rdt";. All communications, including emails and attachments, including or mentioning Scott Angelle; Plea  
tal Assessment. 2. All studies, information, data relied upon in creating the Draft Environmental Assess  
re date(s) these vessels were allowed access to the closed areas B. A breakout, by area (i.e, WGOM cl  
py of a document I signed in 2008 with regard to a NOAA ADR mediation between me and Dr. Lixion Av  
RCOMPUTING SYSTEM) we seek the following items: (1) all Task Orders and Delivery Orders issued to  
anch positions or appointments, or support or opposition to federal funding for programs, projects, or cor  
or for the benefit of the subject Property, together with any drafts, exhibits, changes, amendments or ad  
ditions and permits; 2. All air emission or water discharge compliance or monitoring reports; all document  
by the NWS at Sterling, Virginia and possibly at one or more locations in Alaska, and that the report ma  
ths. Most importantly UVC a.k.a. UV-C. Historical data will not need to exceed 50 years if more exists. I  
cation number, or returned for any needed revisions. It was taken up by Jolie Harrison but then stopped.  
tograph of injured or dead seabirds (up to 10 per year/species) ☐ All photographs of each fish spec  
ersity comparing NOAA and NASA's budgets using excel and stata programs as well as by hand analysis;  
ars 2017 (if your agency operates off of a fiscal year, that is also ok) 3) Mandatory Declassification Revi  
@noaa.gov Selective emails were deleted made by another, not by me. Request all deleted emails be re  
V (F/V Independence) IN THE MATTER OF: Lobster's Inc. Lawrence M. Yacubian, Respondents. Agen  
consultations with other agencies, they also were willing to exclude emails that involved third party dom  
the National Sea Grant College Program 2018 Ocean, Coastal and Great Lakes National Aquaculture Ir  
resources Management Act of 1978 and/or Louisiana's Coastal Resources Program. 2. Any and all recor  
:13 a.m. EDT. In addition, please include the application and any or all addendum, correspondences, an  
t 2; and the regulations of the Marine Mammal Commission, 50 C.F.R., Part 520; I am writing on behalf  
the Attorney General of the United States concerning records created or received by NOAA employees  
certain records in your possession, whether received, created, and/or distributed by NMFS, in connectic  
E MATTER OF: Lobster's Inc. Lawrence M. Yacubian, Respondents. Exhibit 31 contains information and

nam, Kyung Yang Ho 6 NBI, Dae Jin Ho No 52, Dae Sung Ho, Korean ships, Soviet processors, Marin

Donna Lanzetta, dated January 15, 2018. This request encompasses any records in the possession of I  
nter for Food Safety, Food and Water Watch, and Recirculating Farms Coalition, dated January 24, 201  
ior adoption of the &quot;Operations and Workforce Analysis (OWA) Project: Charter for All Workstream  
d all talking points and similar memorandums, emails, and transcripts providing advice or direction on ho  
RROW THE SCOPE AS FOLLOWS: -only the final or major substantive revisions to drafts need be proc  
is enacted) to the present.

I deliberations under the United Nations Convention on Biological Diversity insofar that they relate to the  
oreline restoration/expansion of uplands project located at 17575/17505 Old Cutler Road assigned a NI

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

with a summary of what, if any, outcomes stemmed from the incident or threat (e.g., arrest, conviction, c  
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  
ly and all purposes, with a primary interest in weather prediction, storm mapping/tracking over populat  
e potential air plume and contaminated water 2- The human health hazard assessment 3- The environm  
the National Marine Sanctuaries program in the Florida Keys. Please also provide copies of financial au  
R-3"), as mandated to be submitted under the United Nations Framework Convention on Climate Chang  
ued under GSA Schedule No. GS00F217CA, we seek a copy of the BPA Contract, all task orders issue  
25, 1960, which was reviewed by the Federal Maritime Board and the office of the Secretary of Commer  
rce Contract in my name Mary McCullough, Company: Hometown Events and Management. (2) Temp

present.

Fisheries" (NOAA Fisheries) and "National Marine Fisheries Service" (NMFS). All such  
Novak, deputy director Kathy Gilbert, administrative officer Crystal Rickett and secretary Dawn Cyrus in  
ole Mason; 2. The first management inquiry written by Glenn Boledorich for OAR Leadership and submit  
the native MATLAB files used in the publication, L. Jay Field et al., Re-visiting projections of PCBs in Lo  
7:00 PST via telephone in Seattle, WA with Angela Hunter. Request the following: Hiring decision doc  
e final disposition. Further, I request that this document be sent in any digital formats in which it exists (s

s from pay, identifying the nature of said deductions. c. Bonuses: All records necessary to reflect any bo

1 Bullard, Regional Administrator for the Greater Atlantic Region, and any person associated with the fol

or handling of "high visibility" FOIA requests, including politically-sensitive requests or those submitted b  
arkation and disembarkation, number of sea days, and names of vessels; 2) All performance evaluation  
1. Information not cited in the final version of the Technical Guidance or released to the public that NMF  
e United States Department of Commerce, National Oceanic and Atmospheric Administration, concerni  
'trustees&quot;), as well as all information generated by the Trustees as part of the 2008, 2009 and any f  
y correspondence as well as correspondence with entities or individuals outside the federal government

is request, including without limitation all inter and intra-agency communications and data, used, consult

rd publicized on NOAA's website on or about September 3, 2015 (attached as Exhibit 1 to this FOIA req  
e search, Prevention, and Reduction Act. I have already reviewed the records in the relevant regulatory d  
' ethical violation in sending sensitive information about a pending investigation to those that needed to k  
and consultants (including Ridolfi Environmental), where the correspondence refers to Portland Harbor, I  
g Corals, including the timing and content of any such designation. 2) the rulemaking entitled Designat

ies of the Corps' CWA &sect; 404 jurisdiction in Puget Sound's tidally influenced waters. 3) Any records  
inger's time and attendance records from March 8, 2016 through June 27, 2017; 4) Listing of administra  
rts surrounding concerns on relationships between other federal agencies and journalists, particularly th  
re Santa Barbara Channel ("SBC") and approach to the ports of Long Beach and Los Angeles; 2. All rec  
in part, of the Clean Air Act endangerment analysis the EPA had been required to undertake in respons  
icrosoft Exchange Server messages, handwritten notes, or correspondence through any other medium-

correspondence are most likely to be held by your Office of Congressional Affairs, Office of Legislative Af

unless otherwise stated below, and for purposes of this request, SSL seeks only those records produced  
nent' will impact the date for issuance of the final 4th National Climate Assessment.

ig process, both within and outside the agency and the U.S. Department of Commerce; b. What factors

eputy Chief of Staff and Policy Director. I limit this search to the dates July 1, 2017 to the present.

ting an America-First Offshore Energy Strategy" (April 28, 2017) ("Executive Order") (Exh. A) as it pertai  
Chief of Staff and Policy Director. I limit this search to the dates July 1, 2017 to the present.

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

not exclusive of, any policy-development discussions for these types of energy projects, and/or discussi  
nctuary in Lake Michigan. The period for the requested emails is January 1, 2017 through July 31, 2017  
operative Management Act. 1. Decision memoranda, letters, emails, situation summaries, discussion c  
st, the term "all records" refers to, but is not limited to, any and all complaints submitted to the Monterey

'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



sharks in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic shark fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and shark bottom longline fisheries. 2. Logbook data related to shark bycatch, by species, in the HMS Sigsbee / Group for 2018, or if none some document describing how SARS 2018 data is going to be reviewed and use limit your search the following people: Neil Jacobs Tim Gallaudet Sam Rauch Craig Mclean Paul Dormant, Docket Number NOAA-NMFS-2017-0051. 3. All documents concerning Atlantic sturgeon impacts (closed area, Cashes Ledge closure area etc.) of the following data: 1. The number of trips made 2. The number of fish.

3. Date; (2) all invoices submitted to the government or paid under the contract; (3) Any and all NOAA Letters to Companies. I am not seeking individual casework, although I am interested in any correspondence regarding the same. 2. Copies of any Documents which reflect or depict the amount of money paid to You by the Government related to the discharge of any oil or hazardous substance, or any other pollutant; 3. All records reflecting the location of any records related to the discharge of any oil or hazardous substance, or any other pollutant. 2. Documents reflecting the location of any records related to the discharge of any oil or hazardous substance, or any other pollutant. Furthermore, if information exists, I am requesting information on programs/operations in place to combat the discharge of any oil or hazardous substance, or any other pollutant. I am requesting electronic copies of all correspondence in or out of that Office concerning my numberless requests for information discarded dead (up to 10 per year/species) (Prioritizing images of sea turtles and marine mammals). (I was able to get all of the NASA budget data I needed through the websites) I have tried digging through the MDR Log for calendar year 2017 (if your agency operates off of a fiscal year, that is also ok) At the time of the deletion, I covered along with the computer IP address that deleted the email. The primary email address is: Josephy.C@noaa.gov Exhibit #3 – Enforcement Action Report. Agency Exhibit #11 – Offense Investigation Report (OIR) by the Agency. I am requesting restricted responsiveness to emails to and from noaa.gov email addresses (The Center requests for information initiative (Sea Grant). This request pertains specifically to all applications or proposals for marine aquaculture, photographs, correspondence, documents, including email communication, related to every periodic report and any other records pertaining to the remote sensing space system license referenced above.

of the Animal Welfare Institute (“AWI”) to request from the National Oceanic and Atmospheric Administration through Google Chat, Google Hangouts, Skype, or any other similar electronic messaging system. 9. 2. A copy of the 90-day finding, the proposed rule, and the final rule. Pursuant to 5 U.S.C. 552, I request data relevant to the “USCG Research & Development Center and Eight Coast Guard District BOA

Resources Company, Thorne Tasker, Alaska Joint Venture Fisheries, groundfish fishery 1980-1990.

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 Councils or Core Teams; a copy of which is attached.

9. I am requesting you to handle the media, media interviews, and statements. ---- (SPECIFICALLY) Please include in your response only communications at the Section Chief level or above need be produced -no cc's, bcc's, non-sent

10. I am requesting the following themes: climate engineering, geoengineering, negative emissions technology, carbon dioxide capture, and MFS tracking number SER-2017-18430 or including the following individuals: -Ingrid Gilbert -Megan Cloutier

11. Specifically, I request that you provide any and all documents maintained by the NOAA which related to Con

12. (ongoing investigation). A summary of all incidents of violence, threats, or harassment against professional fishermen. 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 (if any) and un-populated areas including hazards, injuries, and any/all cases where turbines/wind farms have had a significant mental impact analysis report Thank you

13. I am requesting you to provide any and all documents maintained by the NOAA which related to Con

14. I am requesting you to provide any and all documents maintained by the NOAA which related to Con (UNFCCC) Articles 4 and 12, including but not limited to: a. All records mentioning, including, and/or referring to the same, and thereunder, all modifications issued thereto, and all communications between the Contracting Officer and the Contractor, as referenced in Decision B-148413, April 23, 1962, 41 Comp. Gen. 689.

15. I am requesting you to provide any and all documents maintained by the NOAA which related to Con (3) Copy of IBS

usages refer to the United States Department of Commerce, National Oceanic and Atmospheric Admin  
cluding the keyword(s): • rain • flood • Houston • Hurricane • Harvey • tropical storm • inches • disaster (C  
tted to the Office of Audits and Investigations Unit regarding the Office of Inspector General complaint fil  
wer Hudson River fish using model emulation, Science of the Total Environment 557-558:489-501 (July  
ments, interview notes and associated correspondence Rating sheets listing all applicants identified as  
such as PDF and Excel). Under the terms of the E-FOIA Amendments of 1996, Section 5, if a document





“press call” “press event” “press strategy” “presser”  
observers in US fisheries observer programs that occurred in calendar year 2013, 2014, 2015, and 2016 from 2012. If the 2018 reports are not yet available, please provide the 2017 reports.  
In that 2012 sale. More background than is probably necessary, the property I am appraising is nearby

sale by Alaska Native hunters after the animal strayed into the Kuskokwim River in July 2017 near the monument (01/01/14 – 12/31/16) Papahānaumokuākea Marine National Monument Expansion (01/01/14 - 12/31/16) RFO emails, meeting minutes, memos, or other documents regarding these NEFSC comments and comments received on or after October 2013.

September 23rd of September 2017. Bodie was born on the 7th of June in 2010 at Six Flags Discovery Kingdom in the District (District), since the date of our last request on March 30, 2017. The Project includes agreements between NMFS and The Research Group, LLC (a research firm working with the Oregon Department of Fish and Wildlife) regarding the vacancy announced? If it was, please provide information about the vacancy announcement, including the import of shark fins into or transit of shark fins through the United States, from January 1, 2010, through the development and submission of AGDC’s petition dated 20 February 2018 for incidental take reduction. Please include the identity of the plaintiff(s) for each suit. (I am primarily interested in the past ten years, but would also be interested in suits filed on or after February 5, 2018.

Commercial fisheries, fishery catch and stock records, as well as any studies that contain biological data related

to which we were unable to obtain a random sample of partial-coverage trawl deliveries due to tendering activity. 5. Diazinon; 6. Informal and/or formal consultation; 7. Section 7 and/or §7; 8. Section 9 and/or §9 9. Certain, national defense purpose.

We were unable to obtain a random sample of partial-coverage trawl deliveries due to tendering activity. Requests for formal consultation for projects or initiatives that would impact the Atlantic sturgeon in the District of Columbia and the Bearded Seal (*Erignathus barbatus nauticus*). The request in (I) includes, but is not limited to, the following:

Attachment #23 – Report of Dr. Peter H. Dana dated 3 May 2001. Thank you for your assistance.

University’s Urban Coastal Sustainability Initiative; c. Northeastern University’s Coastal Sustainability Initiative. Please provide letters, testimony, or presentations for federal or state legislators, the President, or state governors for information limited to whether the individual is a contractor, volunteer, or federal employee and whether the individual has any record(s) provided in electronic format; if the information cannot be exported in an Excel or comma-delimited format, please provide the information in a separate document. Please provide information on all permit holders in the individual DAS and combination DAS permit categories, as well as scallop limited access

pesticides containing Chlorpyrifos, Diazinon, and Malathion. See generally, NOAA Fisheries, Biological Opinion for the proposed action (CST133016NC1161) Thank you

the time period of April 17, 2017 through April 24, 2017:  John F. Quinn  E.F. “Terry” Stockwell III

upper Willamette Basin. Oregon Department of Fish and Wildlife, Portland, OR.; First, please provide us

with a list of all correspondence, including letters, testimony, or presentations for federal or state legislators, the President, or state governors for information limited to whether the individual is a contractor, volunteer, or federal employee and whether the individual has any record(s) provided in electronic format; if the information cannot be exported in an Excel or comma-delimited format, please provide the information in a separate document. Please provide information on all permit holders in the individual DAS and combination DAS permit categories, as well as scallop limited access

following records associated with permits: (1) The permit application submitted by the entity

communications—internal or external to Interior—concerning President Trump’s Executive Order titled “Implementing



istration, National Marine Fisheries Service, and their employees, agents, attorneys, and consultants. In  
Copies of any and all email between August 23 to August 30 sent or received by Storm Prediction Center  
led by Katy Stewart referencing Nicole Mason and all documents attached to the management inquil); 3.  
2016), and as time permits, John Kern and Jay Field will organize and provide computer code to read th  
Not qualified, Qualified, and Best Qualified Resumes of all applicants  
exists in electronic format, it must be released in that format upon request. The requested documents v

declared; n

Morgan Lynne Miller filed with NMFS detail  
al tools and modeli  
bill which occur red on 5 September 2 01 6 . This request i  
dated and unvalidated  
presentations, consultation

governm  
er records generated during, or retrospectivel

ver, this request is limited to external correspondence that refers or pertains to environ  
n. (3) the critical habitat desi

Council's contracted Information Technology Company regarding the date of

1, 2013 amendm  
t GHG Endangerm  
ouncil ("Gulf Council") who attended the Gulf

system. I am spe

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

leted, including: i. NOAA's

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

/

nd

ason; 2. Communications pertai  
bed by drones or unmanned aeria

ial biological evaluation of diaz

emails, damage assess

ding under the red snapper rebuilding plan; 3. how or whether

"media event" "media call" "  
16, separated by: 1. Year; 2. Whether the complaint was i

and has potential for wetland and stream mitigation. However, traditional

ommunities of Bethel an  
- 12/31/16) Pacific Remote Islands Marine National Mo  
cerns. This request covers

Vallejo, CA. All c  
cludes construction of an ocean water desalination facili  
rtment of Fish & Wildlife) related to its rec  
ng  
h and inc  
egulations for construction of the A  
I be pleased to receive any inform

to Pacific Herring po

; 4. All comm  
nter for Biolog

4. All com  
elaware River; NMFS/NOAA responses to reques  
ving agen

stitute; d. "coastal sustainability"; e. "climate change"  
r the 10 years prec  
Jal serv  
nited format, please let  
:cess permit holde

ini

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

; with a copy of the referenced fisheries management and evaluation plan for winter steelhead in sport fi

system. I am spe  
ographer), NESDIS-2016-0018 (Oceanographer), NSDIS-NCEI-2017-0004 (Supervisory, Physical Scier

menting an Am

of sharks, by species, in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Second Updates to the National Bycatch Report. 2. Logbook data used to estimate shark bycatch, by species, in the HMS  
fishes were not transcribed then f

value 4. The number of Haddock discarded on each trip 5. The

Program Schedule; (6) Weekly, Monthly, Quarterly and Annual Program Management/Status Reports; (7)

erty. 3. Your entire file with respect to any goods, services, or items which Johnston  
the Nation

price; estimated cost of installation per unit; and estimated cost of

as Amy Sloan or J

ities, including

ities) but have been unable to find data

gov, and J.Philip.Green@noaa.gov

Agency Exhibit #13 – Offense Investigation Report (OIR) by Omer Hanson. Agency Exhi

re been received pursuant to the Sea Grant by NOAA or any of its Interstate M

Coastal Resources Management Act of 1978 an

Improved Coral World (V.I.), Inc. Nearshore Dolphin Exhibit Enclosure in Water Bay along St. Thomas. Sp  
§ 3106 or submission

re this process, we exclude from th

Thank you for your assistance.

subject

acceptable, interagency

(BECCS) or related concepts. In particular, this relates

coastal fisheries or officers -Any other National Marine Fisheri

, change orders and any

ould include incidents against observers aboard NO

the hiring list from OPM, and how

including studies, res

greenhouse gas emission inventories, climate action plans

AA.GOV]

reason for my removal from support position. Any and all records or reports fr

this request, we refer to the "Sacramen  
director Russell Schneide  
. The cover letter by OAR Leadership to Mack Cato included  
the data files and produce relevant inputs/assumptions/informati

will be made avail



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

series in the upper Willamette River basin. Second, please provide us with any NOAA documents, ana

ntist), and NSDIS-NCEI-2017-0009 (Supervisory, Physical Scientist):  Referred candidate lists, numeric

southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line). 3. Observer data regarding species, in the Gulf of Mexico reef fish fishery (bottom longline and vertical line) and the Southeastern Atlantic snapper-grouper fishery.

specific



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

trie □ John Pappalardo □ Douglas Grout □ Peter T. Kendall □ Mark Godfory □ Thomas A. Nies □ Chris

lyses, or correspondence to evaluate a fisheries management and evaluation plan for winter steelhead i

cal scores, and rankings supplied to the selection official(s); □ List of all candidates who were interviewe

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

in sport fisheries in the upper Willamette River bas

ed for the position;  Decision(s) of the selecting official(s) and/or committee;  Qualifications of the suc

line) and the Southeastern Atlantic snapper-grouper fishery (bottom longline and vertical line) and any a  
atch Report and the First and Second Updates to the National Bycatch Report. 3. Observer data used to  
napper-grouper permit in the Gulf of Mexico and Southeastern Atlantic. 6. The number of vessels that ha



s it applies to authorizations for the taking of marine mammals inc

oelke □ Jamie Cournane □ Rachel Feeney □ Lou Goodreau □ Demet Haksever □ Fiona Hogan □ Jon:

successful candidate; □ Identification of the selection official(s), any members of a selection or interview co

associated observer reports or characterizations of the f  
o estimate shark bycatch, by species, in the Gulf of Mexico ree  
ave both an incidental permit to land sharks and a directed reef fish







athon Peros □ Naresh Pradhan □ Rob



**U.S. Department of Commerce  
National Oceanic and Atmospheric Administration (NOAA)  
Office of the Chief Information Officer (OCIO)  
Information Technology Security Program (ITSP)**



**Privacy Threshold Analysis  
for the  
NOAA High Availability Enterprise Services (HAES)  
(NOAA0700)**

## **U.S. Department of Commerce Privacy Threshold Analysis**

### **NOAA High Availability Enterprise Services**

**Unique Project Identifier: NOAA0700 HAES**

**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 on information 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:**

HAES (NOAA0700) will modularize disparate system functionalities into a centralized “discrete” set of enterprise services that will be consolidated as needed to quickly enable new/improved functionality. HAES establishes standard middleware architecture that enables superior interoperability, improved manageability, and reduce platform costs.

HAES will provide a collection of services grouped into 3 subsystems. HAES will provide:

1. Centralized/Unified Enterprise service model
2. Program Management :
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  - Ensure security compliance and enforcement.
  - Ensure reporting is complete & on time.
  - Coordination with Cybersecurity on initiatives & tickets.
4. Communications and Collaboration - All enterprise service points of contact, escalation, and infrastructure services information/plans are communicated/shared and transparent with mission customers and leadership.

## SYSTEM ENVIRONMENT

HAES (NOAA0700) is a General Support System (GSS) with a boundary that comprises the following subsystems:

1. **Identity, Credential, and Access Management (ICAM)** strategy and management approach ensures that NOAA ICAM solutions exhibit a balance between usability and security. As such, Homeland Security Presidential Directive (HSPD) 12 PKI infrastructure was built for all Line Offices and system owners to implement 2-Factor Authentication (2FA) on their Microsoft domains. The ICAM team employed a waterfall approach to build a cornerstone solution, by unifying the identity stores and correlating all enrollment processes in NOAA and DOD. ICAM provides Identify Management Services and Systems (IDMS) and Single Sign-On (SSO) solutions to Line Offices and System Owners. The ICAM system operates a set of servers to manage and serve information that assists in the implementation of the HSPD-12 mandates for NOAA.

ICAM system uses the following connections:

1. LDAPS connection to DOD Global Directory Service (GDS) for obtaining NOAA user's CAC information e.g. EDIPI, certificate, UPN and CN.
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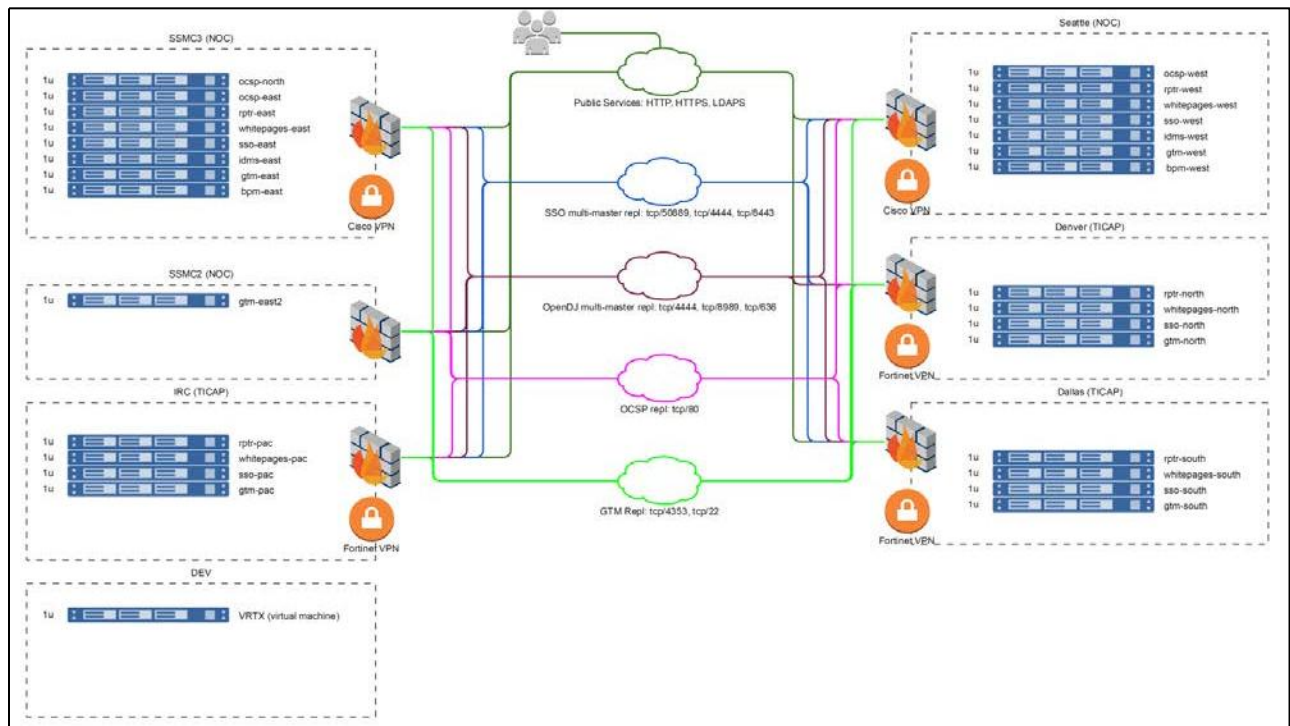
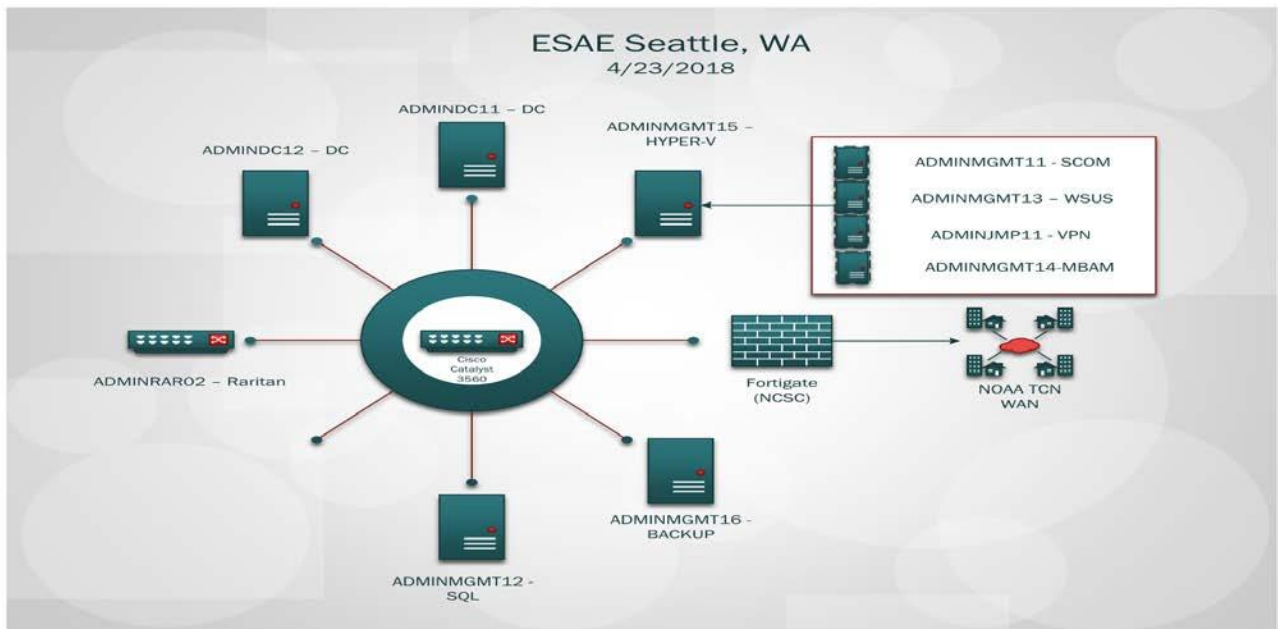


Figure 1: ICAM System Boundary Diagram

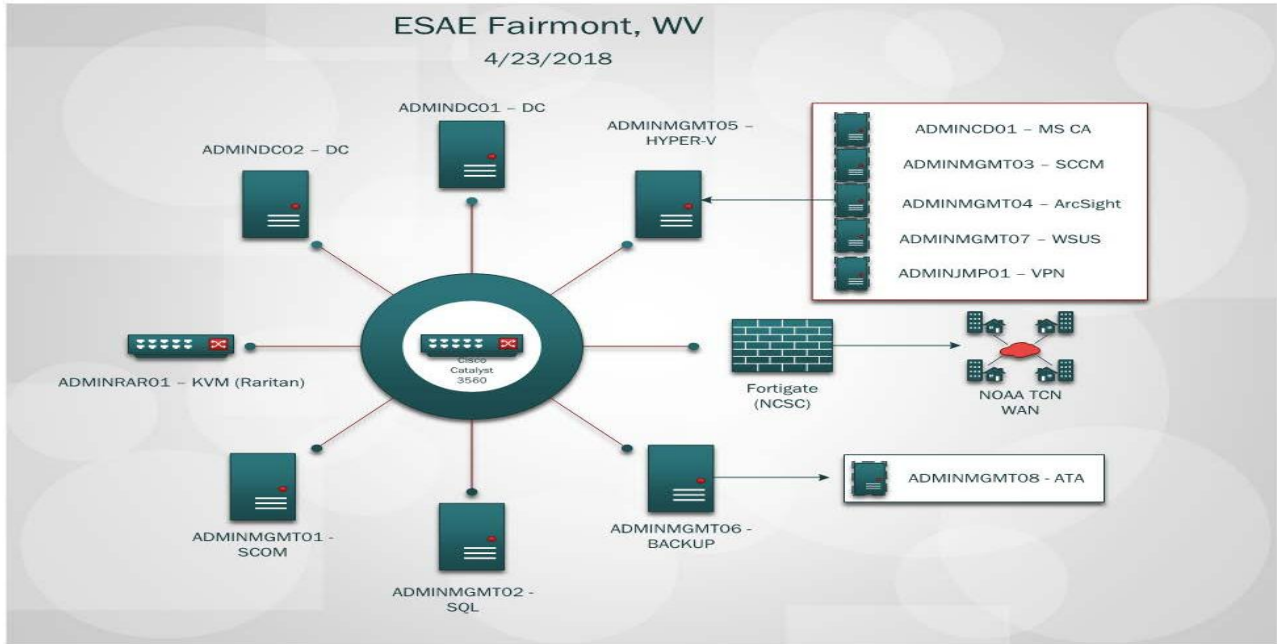
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ESAE is designed to thwart cyber-attackers business impact by mitigating credential theft techniques as well as other several other known attack techniques. NOAA believes this will improve the likelihood of avoiding significant financial, reputation, and operational impacts of potential future security breaches.



**Figure 2: ESAE Seattle, WA Diagram**



**Figure 3: ESAE Fairmont System Diagram**

- Microsoft Azure for Government** is an open and flexible cloud platform that will enable HAES to quickly build, test, deploy, and manage their applications, services, and product development across a network of Microsoft-managed datacenters within the United States which in turn will help make HAES's data available to NOAA in a rapid and scalable manner. The Microsoft Azure platform exports savings to HAES by delivering the software, platform, and IT infrastructure resources where and when it is needed via the Internet. The Microsoft Azure for Government service allows the government to use cloud platforms to tap into HAES's data by consolidating HAES'S datasets and making them available on the Azure for Government platform. Thus, HAES customers can help to speed the rate of innovation and create new insights that will positively affect NOAA through mission-critical applications. The Microsoft Azure Government platform offers the same functionality in an environment dedicated to Government customers.

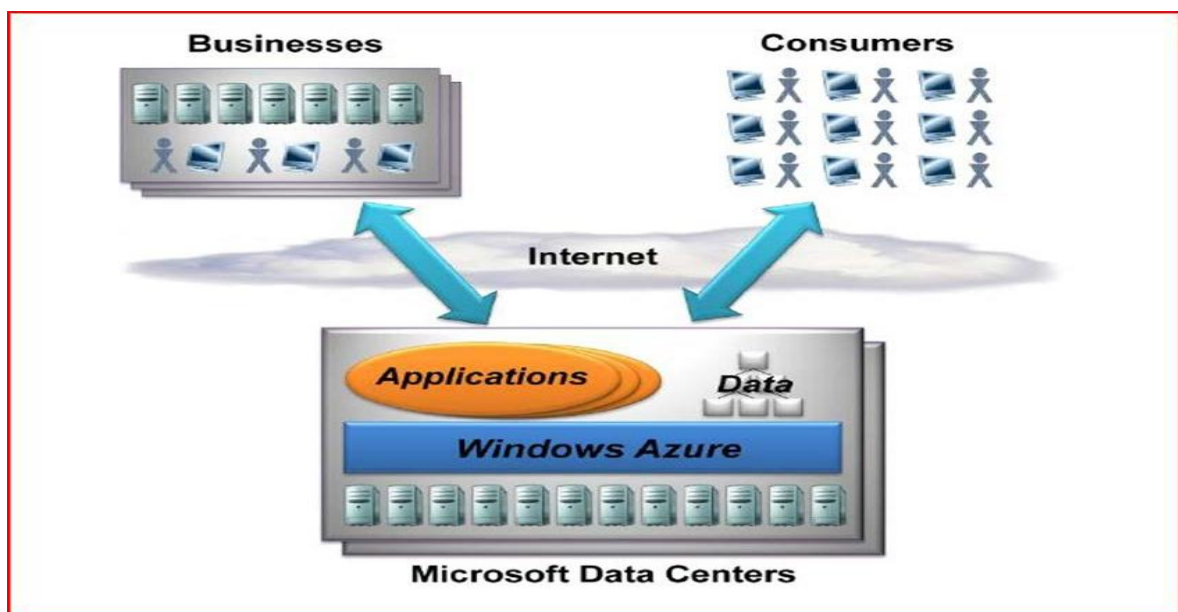
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Microsoft Azure authorizes connections from the information system to other information systems outside of the authorization boundary through the use of vendor agreements, Memoranda of Understanding (MOUs), Interconnection Security Agreements (ISAs) Terms of Conditions (T&C), and/or Service Level Agreements (SLAs). Microsoft has developed the



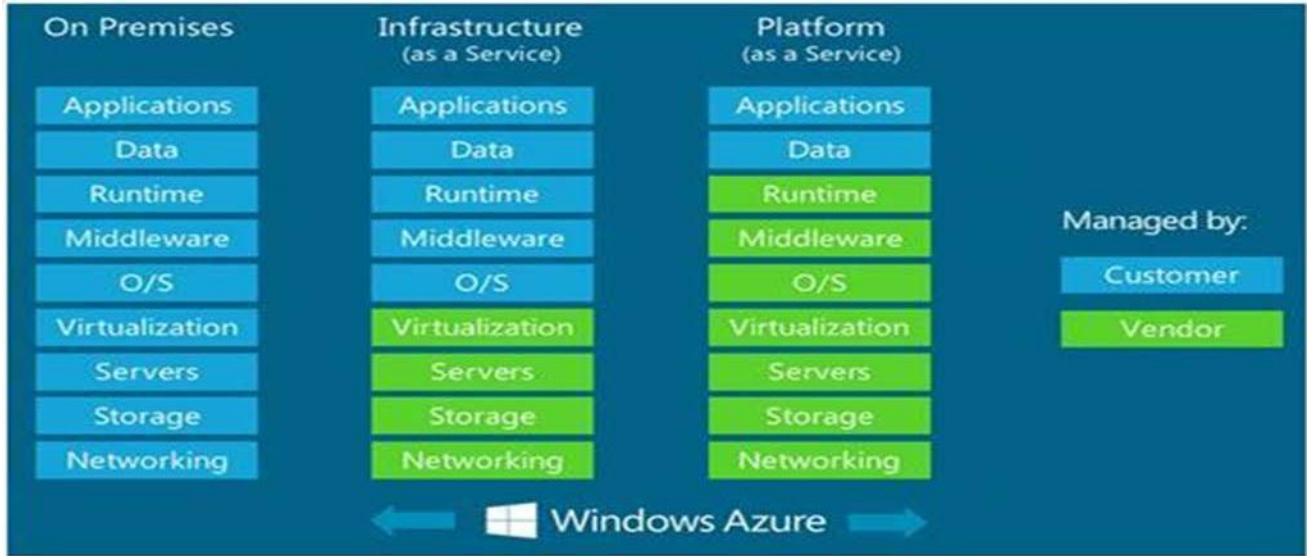
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At this time, Microsoft Azure does not have any dependencies on information systems external to Microsoft that require ISAs. As a large ISP provider, Microsoft peers with a large amount (over 2,000) of ISPs.



**Figure 4: Hosted Microsoft Azure for Government Tenant Breakdown**

Microsoft Azure provides a multi-tenant public cloud service platform that will offer HAES the functionality to support capacities such as Platform as a Service (PaaS), and Infrastructure as a Service (IaaS) cloud service models. Software as a Service (SaaS) is also supported by Microsoft Azure if HAES needs to manage its own email platform servers within Microsoft Azure. Microsoft is responsible for Microsoft Azure and the physical security of its datacenters through the use of security protections such as locked badge entry doors, fences, and guards. In addition, Microsoft Azure provides strong levels of cloud security at the software layer that meets the security, privacy, and compliance needs of HAES. HAES must comply with various regulatory or business agreement requirements; therefore HAES will be utilizing various tools for additional security requirements for file integrity monitoring and log file monitoring.

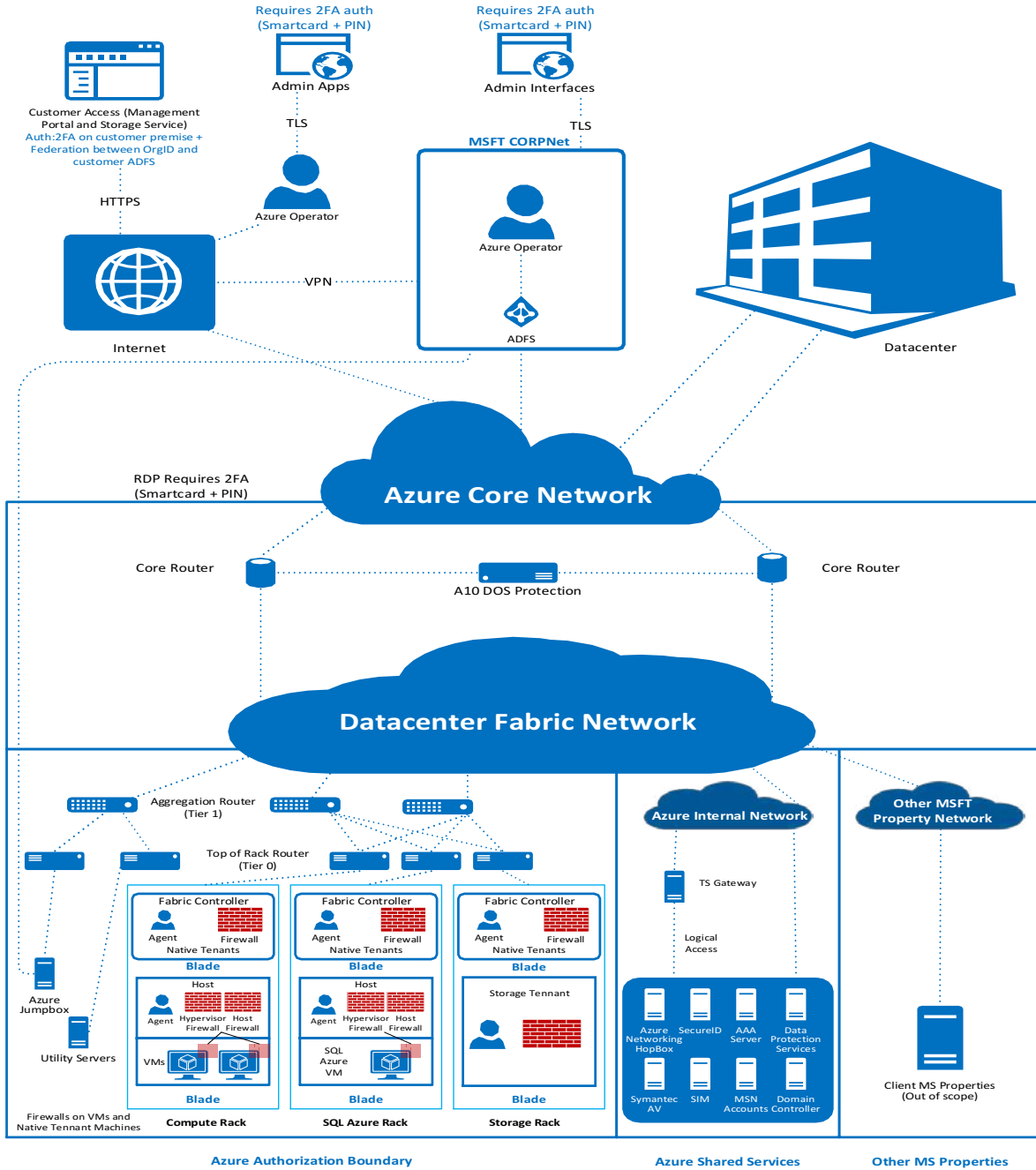


**Figure 5: Shared Microsoft and Customer Responsibility**

Additional customer responsibilities include managing their applications, data content, virtual machines, access credentials, and compliance with regulatory requirements or business agreements applicable to their particular industry and locale. The Microsoft Azure Customer Responsibility Matrix documents the customer responsibilities at the NIST SP 800-53 Revision 4 control level.

To achieve FedRAMP certification and compliance, Microsoft must pass a rigorous and in-depth comprehensive system-wide testing of its security controls based upon the requirements and security controls that are documented in NIST SP 800-53 Rev. 4, Security and Privacy Controls for Federal Information Systems and Organizations publication, revised January 2015. Security controls are implemented based upon the impact level rating needed to meet the security objectives of confidentiality, integrity, and availability. Microsoft Azure for Government Cloud has been categorized as a High security control baseline system based upon the FIPS 199 document which HAES will leverage as a part of its environment.

Microsoft Azure is the customer’s responsibility as documented in the Microsoft Azure Customer Responsibility Matrix. HAES will ensure that its security policies, procedures, applications, and controls are assessed separately and authorized in agreement with the requirements documented in NIST 800-37, Rev. 1, Guide for Applying the Risk Management Framework to Federal Information Systems.



**Figure 6: Microsoft Azure for Government Overview**

The E-Government Act of 2002 defines “information system” by reference to the definition section of Title 44 of the United States Code. The following is a summary of the definition: “Information system” means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information. See: 44. U.S.C. § 3502(8).

**Questionnaire:**

1. What is the status of this information system?

- This is a new information system. *Continue to answer questions and complete certification.*
- This is an existing information system with changes that create new privacy risks. *Complete chart below, continue to answer questions, and complete certification.*

<b>Changes That Create New Privacy Risks (CTCNPR)</b>			
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.

**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

I certify the criteria implied by one or more of the questions above **apply** to the NOAA0700 HAES system 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 NOAA0700 HAES system and as a consequence of this non-applicability, a PIA for this IT system is not necessary.

Name of Information System Security Officer (ISSO): Kevin Mitchell

Signature of ISSO or SO: MITCHELL.KEVIN.A.139  
8622886 Digitally signed by MITCHELL.KEVIN.A.1398622886 Date: 2018.06.11 15:06:37 -04'00' Date: \_\_\_\_\_

Name of Information Technology Security Officer (ITSO): Jean Apedo

Signature of ITSO: APEDO.JEAN.11880  
76064 Digitally signed by APEDO.JEAN.1188076064 Date: 2018.06.12 08:26:35 -04'00' Date: \_\_\_\_\_

Name of Authorizing Official (AO): Doug Perry

Signature of AO: PERRY.DOUGLAS.A.1365847270  
A.1365847270 Digitally signed by PERRY.DOUGLAS.A.1365847270 Date: 2018.06.15 16:17:22 -04'00' Date: \_\_\_\_\_

Name of Bureau Chief Privacy Officer (BCPO):

Signature of BCPO: GRAFF.MARK.HYRUM  
.1514447892 Digitally signed by GRAFF.MARK.HYRUM.1514447892 DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=GRAFF.MARK.HYRUM.1514447892 Date: 2018.06.18 07:09:09 -04'00' Date: \_\_\_\_\_

**U.S. Department of Commerce  
National Oceanic and Atmospheric Administration (NOAA)  
Office of the Chief Information Officer (OCIO)  
Information Technology Security Program (ITSP)**



**Privacy Threshold Analysis  
for the  
NOAA High Availability Enterprise Services (HAES)  
(NOAA0700)**

## **U.S. Department of Commerce Privacy Threshold Analysis**

### **NOAA High Availability Enterprise Services**

**Unique Project Identifier: NOAA0700 HAES**

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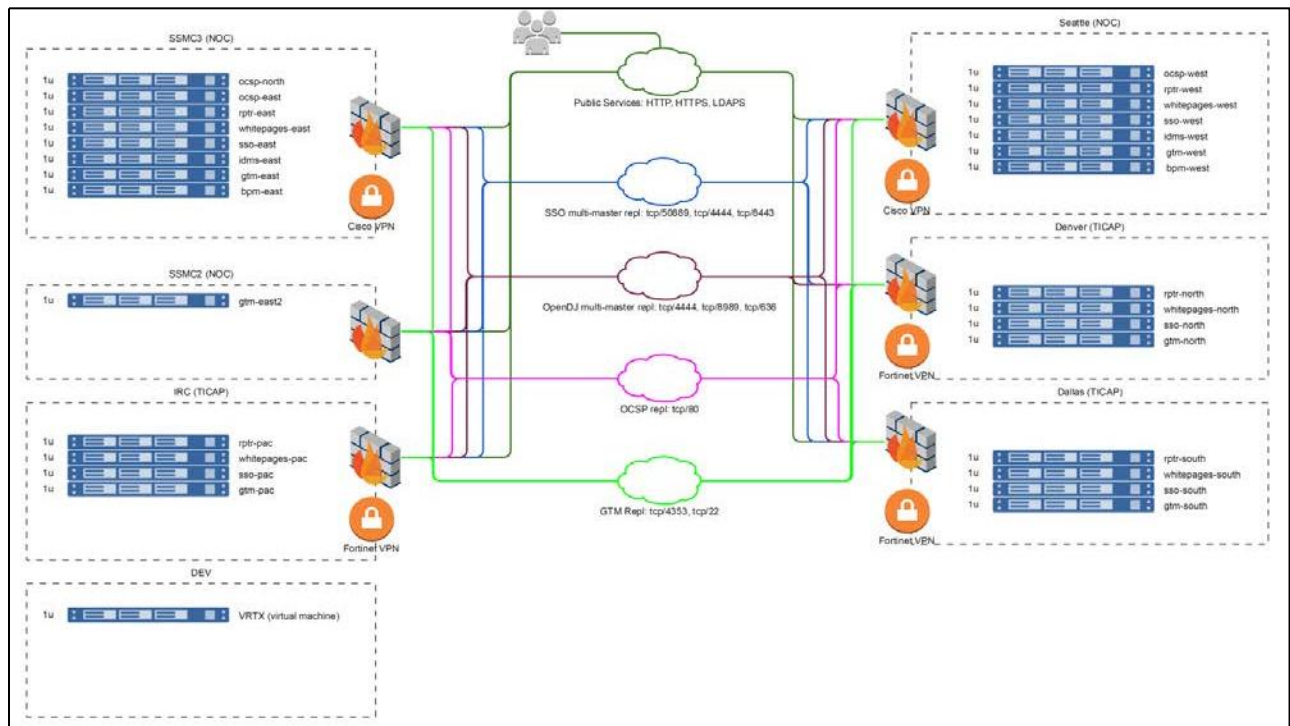
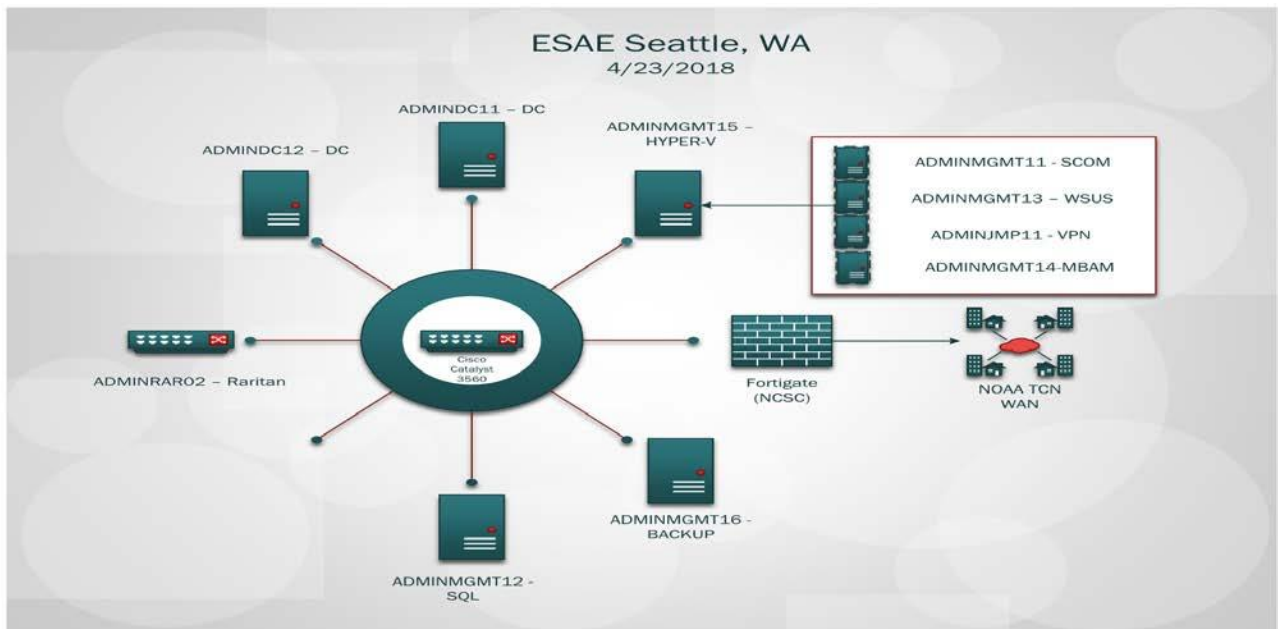


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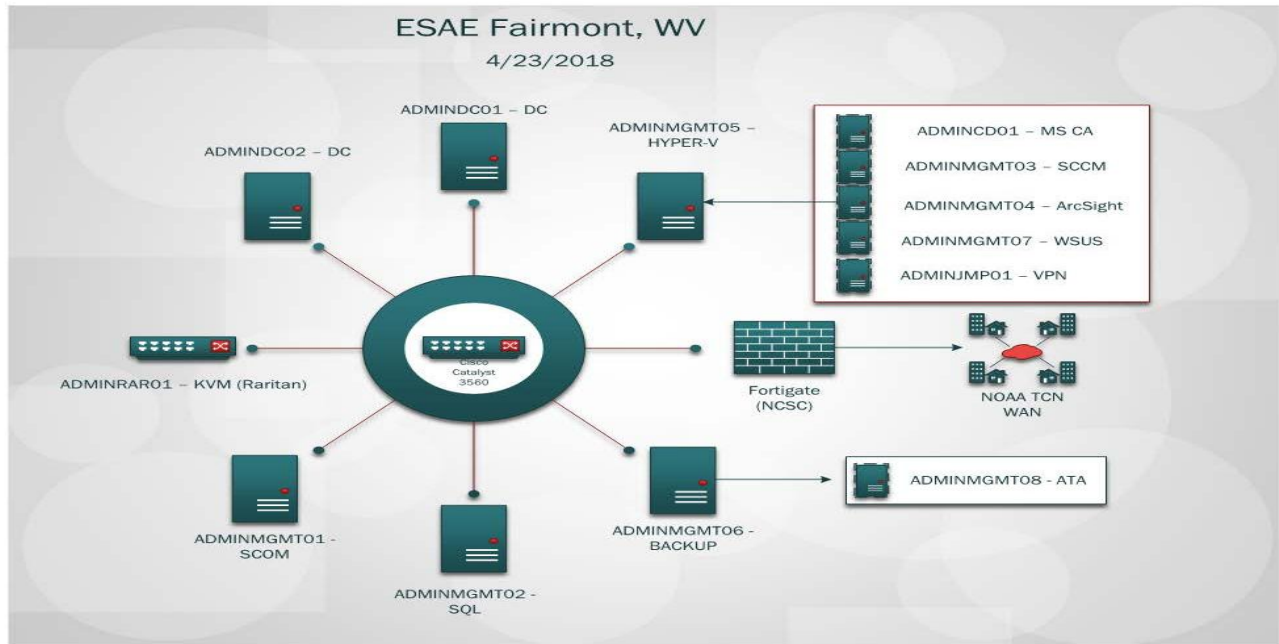
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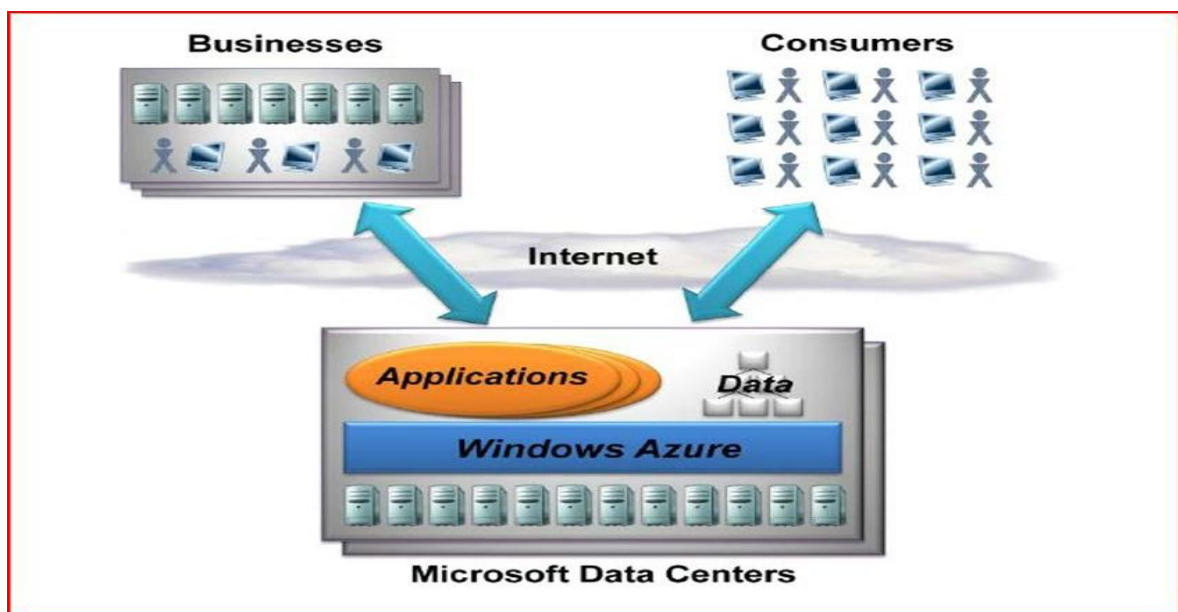
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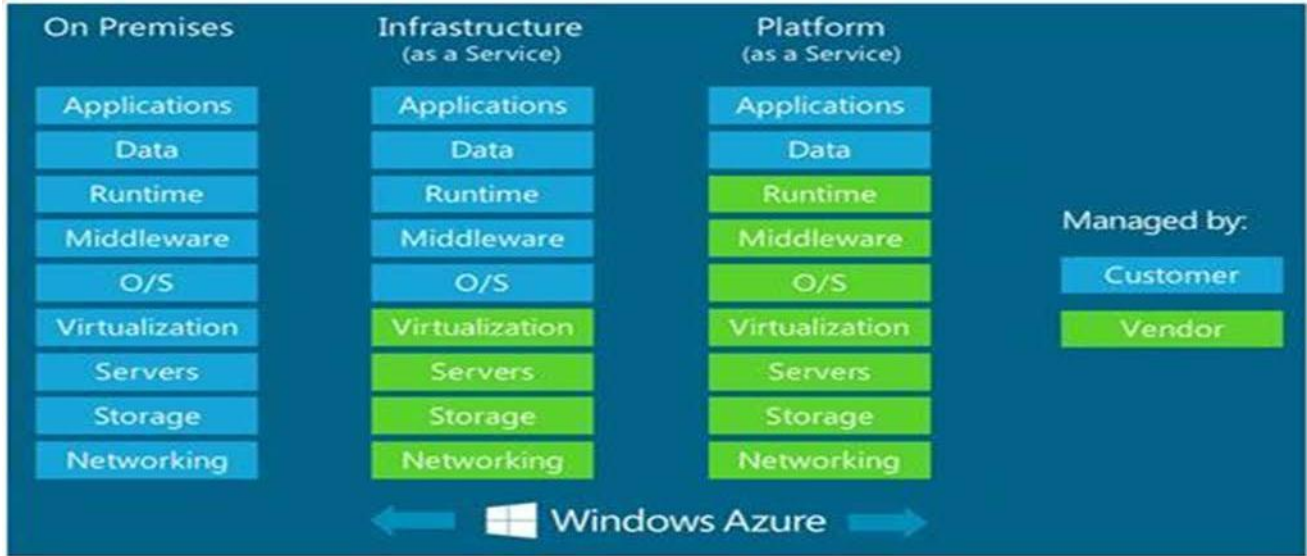
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At this time, Microsoft Azure does not have any dependencies on information systems external to Microsoft that require ISAs. As a large ISP provider, Microsoft peers with a large amount (over 2,000) of ISPs.



**Figure 4: Hosted Microsoft Azure for Government Tenant Breakdown**

Microsoft Azure provides a multi-tenant public cloud service platform that will offer HAES the functionality to support capacities such as Platform as a Service (PaaS), and Infrastructure as a Service (IaaS) cloud service models. Software as a Service (SaaS) is also supported by Microsoft Azure if HAES needs to manage its own email platform servers within Microsoft Azure. Microsoft is responsible for Microsoft Azure and the physical security of its datacenters through the use of security protections such as locked badge entry doors, fences, and guards. In addition, Microsoft Azure provides strong levels of cloud security at the software layer that meets the security, privacy, and compliance needs of HAES. HAES must comply with various regulatory or business agreement requirements; therefore HAES will be utilizing various tools for additional security requirements for file integrity monitoring and log file monitoring.

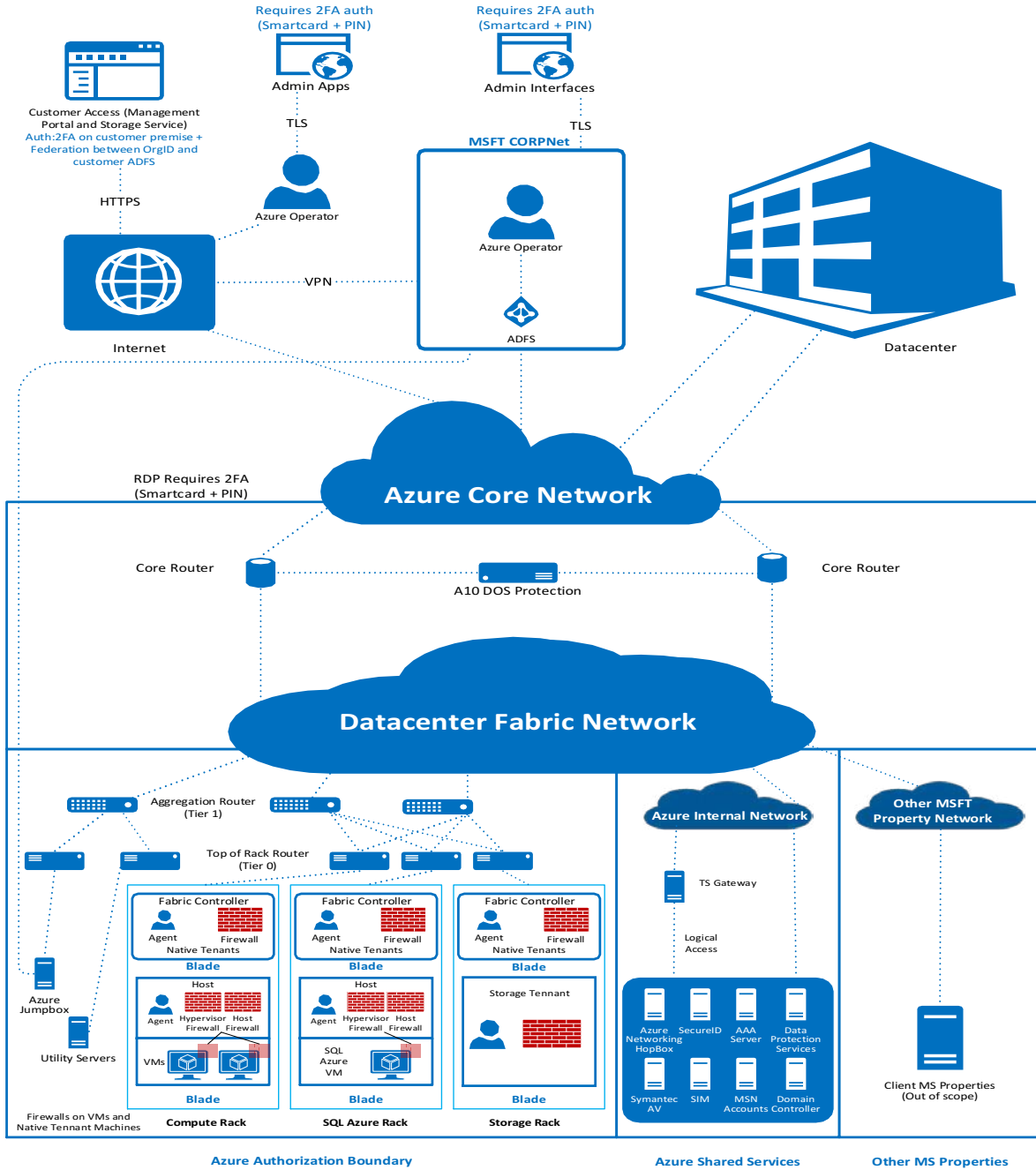


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- Yes. *Please describe the activities which may raise privacy concerns.*
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3. Does the IT system collect, maintain, or disseminate business identifiable information (BII)?

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.)*

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- Other business entities

No, this IT system does not collect any BII.

**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...”

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- 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

I certify the criteria implied by one or more of the questions above **apply** to the NOAA0700 HAES system 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 NOAA0700 HAES system and as a consequence of this non-applicability, a PIA for this IT system is not necessary.

Name of Information System Security Officer (ISSO): Kevin Mitchell

Signature of ISSO or SO: MITCHELL.KEVIN.A.139  
8622886 Digitally signed by MITCHELL.KEVIN.A.1398622886 Date: 2018.06.11 15:06:37 -04'00' Date: \_\_\_\_\_

Name of Information Technology Security Officer (ITSO): Jean Apedo

Signature of ITSO: APEDO.JEAN.11880  
76064 Digitally signed by APEDO.JEAN.1188076064 Date: 2018.06.12 08:26:35 -04'00' Date: \_\_\_\_\_

Name of Authorizing Official (AO): Doug Perry

Signature of AO: PERRY.DOUGLAS.A.1365847270  
A.1365847270 Digitally signed by PERRY.DOUGLAS.A.1365847270 Date: 2018.06.15 16:17:22 -04'00' Date: \_\_\_\_\_

Name of Bureau Chief Privacy Officer (BCPO):

Signature of BCPO: \_\_\_\_\_ Date: \_\_\_\_\_

## Karen Robin - NOAA Federal

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**From:** Karen Robin - NOAA Federal  
**Sent:** Wednesday, June 20, 2018 4:46 PM  
**To:** Mark Graff - NOAA Federal  
**Subject:** 000454 DOCUMENTS  
**Attachments:** loanes\_DOC-OS-2018-000454\_DOC-taskmemo-NOAAresponse.docx; Requested Records.docx; DOC-OS-2018-000454 request from sender.pdf; DOC-OS-2018-000454 clarification of request from sender.pdf

Karen Robin, writer-editor  
Workforce Management Office  
Silver Spring, MD • **NOTE!! new phone number: 301-628-1855**

**From:** [Ellen Ioanes](#)  
**To:** [Khalid, Sulma \(Contractor\)](#)  
**Subject:** Re: DOC-OS-2018-000454 clarification  
**Date:** Wednesday, December 20, 2017 10:29:42 AM

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Hi, Sulma,

I must have hit send before I was actually finished! I would like to receive information about all sexual assault settlements.

Thanks, and have a great day,  
Ellen

Ellen Ioanes  
FOIA Intern | [The Daily Dot](#)  
p 336-425-8861 f [EllenIoanes](#) t [@girlstothefront](#)

On Wed, Dec 20, 2017 at 8:06 AM, Khalid, Sulma (Contractor) <[SKhalid@doc.gov](mailto:SKhalid@doc.gov)> wrote:

Good Morning Ellen,

I received your email, however, it did not contain any clarification of your FOIA request.

Thanks,

Sum=lma

**From:** Ellen Ioanes [mailto:[eioanes@dailydot.com](mailto:eioanes@dailydot.com)]  
**Sent:** Tuesday, December 19, 2017 10:06 PM  
**To:** Khalid, Sulma (Contractor) <[SKhalid@doc.gov](mailto:SKhalid@doc.gov)>  
**Subject:** DOC-OS-2018-000454 clarification

Hi there,

I am responding to your email regarding my FOIA request DOC-OS-2018-000454.

Ellen Ioanes

FOIA Intern | [The Daily Dot](#)

p [336-425-8861](tel:336-425-8861) f [EllenIoanes](#) t [@girlstothefront](#)

# The Daily Dot

December 15, 2017

**TO:** Michael Toland, Ph.D.  
Departmental Freedom of Information Officer  
Office of Privacy and Open Government  
14th and Constitution Avenue NW  
Mail Stop 52010FB  
Washington, DC 20230

**FROM:** Ellen Ioanes, FOIA Intern  
The Daily Dot  
85 Broad Street  
New York, NY 10004  
336-425-8861

**RE:** **Request Under Freedom of Information Act (Expedited Processing & Fee Waiver Requested)**

Dear FOIA officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq.<sup>1</sup> and the implementing regulations of the U.S. Department of State, 15 C.F.R. part 4<sup>2</sup>, The Daily Dot makes the following request for records.

Since allegations about producer Harvey Weinstein's sexual predation against numerous women broke in October 2017, reports of inappropriate or criminal behavior have featured prominently in the news cycle.<sup>3</sup> The have touched many industries, from Hollywood, to media, to music, art, the foodservice industry and, of course, politics.

Senate candidate Roy Moore of Alabama allegedly tried to date and/or have sexual relations with teenage girls as young as 14 when he was a lawyer in his 30s.<sup>4</sup> As of election day in Alabama, at least nine women had accused Moore of some type of sexual misconduct.<sup>5</sup>

Minnesota Senator Al Franken recently announced his resignation after being accused by at least seven women of inappropriate sexual behavior, including forcible kissing and groping.<sup>6</sup> Franken announced his resignation on December 7, 2017.

Other politicians accused of sexual misconduct include President George H.W. Bush, President Donald Trump, Rep. Ruben Kihuen, Rep. John Moore, Rep. Trent Franks, Rep. John Conyers and Rep. Blake Farenthold have all been accused of some form of sexual harassment or misconduct. Conyers and Franks have resigned.

Conyers and Farenthold have used a taxpayer-funded account to pay out settlements to accusers, with little

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<sup>1</sup><https://www.gpo.gov/fdsys/granule/USCODE-2011-title5/USCODE-2011-title5-partI-chap5-subchapII-sec552/content-detail.html>

<sup>2</sup>[https://www.ecfr.gov/cgi-bin/text-idx?SID=ce4e6cc59c9c12e772269b3638192b46&mc=true&node=se15.1.4\\_13&rgn=div8](https://www.ecfr.gov/cgi-bin/text-idx?SID=ce4e6cc59c9c12e772269b3638192b46&mc=true&node=se15.1.4_13&rgn=div8)

<sup>3</sup> Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, December 12, 2017, <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinstein-s-accusers-tell-their-stories>

<sup>4</sup> Alice Crites, Stephanie McCrummen and Beth Reinhard, *Woman says Roy Moore initiated sexual encounter when she was 14, he was 32*, December 12, 2017, [https://www.washingtonpost.com/investigations/woman-says-roy-moore-initiated-sexual-encounter-when-she-was-14-he-was-32/2017/11/09/1f495878-c293-11e7-afe9-4f60b5a6c4a0\\_story.html?utm\\_term=.a1e328ae5c76](https://www.washingtonpost.com/investigations/woman-says-roy-moore-initiated-sexual-encounter-when-she-was-14-he-was-32/2017/11/09/1f495878-c293-11e7-afe9-4f60b5a6c4a0_story.html?utm_term=.a1e328ae5c76)

<sup>5</sup> Elizabeth Ponsot, *These nine women have accused Roy Moore of sexual misconduct*, December 12, 2017, <https://qz.com/1147348/these-nine-women-have-accused-roy-moore-of-sexual-misconduct/>

<sup>6</sup> Heather Caygle, *Another woman says Franken tried to forcibly kiss her*, December 12, 2017, <https://www.politico.com/story/2017/12/06/al-franken-accusation-sexual-harassment-2006-281049>

transparency.<sup>7</sup> Conyers apparently paid out \$27,000 of taxpayer money in 2014 as severance when a woman in his office was allegedly fired for rejecting his advances.<sup>8</sup> Representative Blake Farenthold apparently used the fund to pay out \$84,000 to his former communications director, whom he allegedly fired after she complained about the inappropriate work environment Farenthold created, including sexually suggestive conversations and gender discrimination.<sup>9</sup>

More such allegations are likely coming, against powerful figures from all industries, including politics and government.

### **Requested Records**

The Daily Dot requests that the Commerce Department produce the following within twenty business days and further seeks expedited review of this request for the reasons identified below:

1. Line item budgets detailing any payouts for settlements of any kind.
2. Any communication (email, text message, memo or phone call readout, and attachments thereof) from the Chief Financial Officer and Assistant Secretary for Administration regarding the payment of such settlements.
3. Any communication (email, text message, memo or phone call readout, and attachments thereof) from the Office of the Inspector General regarding the payment of such settlements.
4. Any communication (email, text message, memo or phone call readout, and attachments thereof) from the Office of the General Counsel regarding the payment of such settlements.
5. Any communication or instruction to staff regarding the pursuit or request of such payments.
6. Any record of payment for such settlements.

The search for responsive records should include individuals and locations where records are likely to exist, including but not limited to the Office of Secretary Wilbur Ross, the Office of the Chief Information Officer, the Office of the Assistant Secretary, the office of the Chief Financial Officer, the Office of the Inspector General, and the Office of the General Counsel.

The Commerce Department should limit its search to responsive records created between January 1, 1997, and the date the search begins.

The Daily Dot seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “records,” “communications,” and “documents” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. No category of material should be omitted from search, collection, and production.

You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts. Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.<sup>10</sup> It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; The Daily Dot has a right to records contained in those files even if material has not yet been moved to official systems or if officials

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<sup>7</sup> Rachel Bade and Kyle Cheney, *GOP lawmakers slam secret sexual harassment settlements*, December 13, 2017, <https://www.politico.com/story/2017/11/29/congress-sexual-harassment-settlements-republicans-react-268432>

<sup>8</sup> Emily Stewart, *Report: Rep. John Conyers settled a \$27,000 sexual misconduct complaint in 2015*, December 13, 2017, <https://www.vox.com/policy-and-politics/2017/11/21/16684606/john-conyers-settlement-buzzfeed>

<sup>9</sup> Rachel Bade, *Lawmaker behind secret \$84K sexual harassment settlement unmasked*, December 13, 2017, <https://www.politico.com/story/2017/12/01/blake-farenthold-taxpayer-funds-sexual-harassment-274458>

<sup>10</sup> *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); *cf. Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016)

have, through negligence or willfulness, failed to meet their obligations.<sup>11</sup> Custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered the Commerce Department’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.<sup>12</sup> Furthermore, agencies that have adopted the NARA Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but the Commerce Department’s archiving tools would capture that email under Capstone.

Accordingly, The Daily Dot insists that the Commerce Department use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched.

If any potentially responsive records have been destroyed and/or transferred to other agencies or offices, such as the National Archives and Records Agency (NARA), then I request copies of the destruction or transfer slips as well as any other documentation relating to, mentioning or describing said transfer or destruction, to include but not be limited to confirmation that the Commerce Department has no other copies of said records.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”<sup>13</sup>

If it is your position that any portion of the requested records is exempt from disclosure, The Daily Dot requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). As you are aware, a Vaughn index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”<sup>14</sup> Moreover, the Vaughn index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”<sup>15</sup> Further, “the withholding agency must supply ‘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.’”<sup>16</sup>

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable nonexempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.<sup>17</sup> Claims of non-segregability must be made with the same degree of detail as required for claims of exemptions in a Vaughn index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

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<sup>11</sup> *Id.* at 8 (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted))

<sup>12</sup> Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>

<sup>13</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185)

<sup>14</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979)

<sup>15</sup> *See King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original)

<sup>16</sup> *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977))

<sup>17</sup> *See Mead Data Central*, 566 F.2d at 261

In addition to the records requested above, The Daily Dot also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If the Commerce Department uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

You should institute a preservation hold on information responsive to this request. The Daily Dot intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, the Commerce Department is on notice that litigation is reasonably foreseeable.

Where possible, please provide responsive material in electronic format by email (eioanes@thedailydot.com) or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to: Ellen Ioanes, 460 West 149th Street, Apt. 55, New York, NY 10031.

Finally, The Daily Dot requests rolling production of these records as they are located and reviewed.

Please be aware that under 5 U.S.C. § 552(a)(6)(A), a FOIA request is considered constructively denied after twenty business days and is subject to an appeal on that basis.

### **Fee Waiver**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii), The Daily Dot requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way.

Moreover, The Daily Dot is an online news organization and therefore I am entitled to a fee waiver on the grounds that disclosure of the information sought 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.

Regardless, *The Daily Dot* is willing to pay fees for this request up to \$25 without prior approval. If you estimate that the fees will exceed this limit, please notify me first.

### **Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1), The Daily Dot requests that the Commerce Department expedite the processing of this request. Requests shall receive expedited processing when a requester demonstrates 1) “An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information” ; or 2) “A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.”<sup>18</sup>

First, The Daily Dot is an organization “primarily engaged in disseminating information.”<sup>19</sup> (finding that The Daily Dot is a “representative of the news media” because it “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into distinct work, and distributes that work to an audience.”)

Second, these records are urgently needed to inform the public about actual or alleged government activity. Specifically, The Daily Dot contends there exists an urgency to inform the public about the the manner in which their tax dollars are being spent, particularly given the fact that multiple legislators have used public dollars to pay out sexual harassment settlements.

Moreover, the subject of this request is of widespread and exceptional media interest, as demonstrated by the numerous links to mainstream media coverage included in this request. The Courts have found that the issue of news coverage is especially critical in determining whether a “compelling need” exists for expedited FOIA

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<sup>18</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II)

<sup>19</sup> *See Am. Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D. Cir. 2004)

processing.<sup>20</sup> The Court have asserted that the “ultimate conclusion” with regards to expedited processing relies on important underlying facts, such as “the credibility of a claimant’s allegations regarding government activity, the existence of a threat to physical safety, or *whether an issue is the subject of news coverage*.”<sup>21</sup>

The Courts have found a “compelling need” to exist when the subject matter of a request is “central to a pressing issue of the day”<sup>22</sup> Moreover, the Courts have stated that “matters of wider public concern” are indicated by “a flurry of articles and television coverage, which has continued at least until last month.”<sup>23</sup>

In conclusion, The Daily Dot believes this matter lies at the very heart of the “urgency to inform the public concerning actual or alleged Federal Government activity” standard.<sup>24</sup>

Further, any delay in the release of these records would hamper The Daily Dot’s ability to inform the public about this urgent issue.

### **Certification**

The above information is true and correct to the best of my knowledge.

### **Further Correspondence**

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, The Daily Dot welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, The Daily Dot and the State Department can decrease the likelihood of costly and time-consuming litigation in the future.

You may contact me by email (eioanes@thedailydot.com) or by phone (336-425-8861).

Sincerely,

Ellen Ioanes  
FOIA Intern  
The Daily Dot

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<sup>20</sup> See *Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 306 (D.C. Cir. 2001) (Al-Fayed)

<sup>21</sup> *Id.* at 308. (emphasis added)

<sup>22</sup> See: *Wadelton v. Department of State*, 13-0412 ESH, 2013 WL 1760853 (D.D. Cir. 2013) (Wadelton)

<sup>23</sup> See *Edmonds v. FBI*, CIV.A. 02-1294 (ESH), 2002 WL 32539613 (D.D.C. Dec. 3, 2002)

<sup>24</sup> U.S.C. § 552(a)(6)(E)(v)(II); See also *Al-Fayed* at 306





April 24, 2018

MEMORANDUM FOR: Vernon E. Curry, CEN  
Pam Moulder, ESA  
Jennifer Kuo, BIS  
Josephine Arnold, MBDA  
Wayne Strickland, NTIS  
**Mark Graff, NOAA**  
Ricou Heaton, PTO  
Stephen Kong, EDA  
Victor Powers, ITA  
Catherine Fletcher, NIST  
Stacy Cheney, NTIA  
Dondi Staunton, BEA  
Joselyn Bingham, OCIO

FROM: Michael J. Toland, Ph.D.  
Deputy Chief Freedom of Information Act (FOIA) Officer

SUBJECT: FOIA Request Ellen Ioanes – Amended Tasker  
DOC-OS-2018-000454

The U.S. Department of Commerce’s FOIA Office, Office of Privacy and Open Government, received a request seeking information pertaining to sexual harassment policies, procedures, payouts, and settlements at the Department of Commerce. Please utilize the following search terms, and search the following e-mail addresses.

The following search terms may be helpful: "Sexual harassment," "sexual misconduct," "inappropriate sexual conduct," "sexual assault," or "harassment settlements"; “sexual harassment payout”; “Sexual Harassment Policy”; “sexual harassment procedures”; “ sexual harassment policy”; “sexual harassment training”; “sexual harassment memoranda”; “sexual misconduct policy”

1. Instructions to all staff coming from the level of Undersecretary and above, from all of the 13 Business Operating Units, specifically e-mail communications, established policies and procedures and training materials and memoranda (regarding the search terms above). Please search records of the following persons (and those who held the positions previously):
  - a. BEA/ESA
    - i. Brian C. Moyer: B.Moyer@bea.gov
    - ii. Karen Dunn Kelley: kkelley@doc.gov
  - b. BIS:
    - i. Mira Ricardel: Mira.Ricardel@bis.doc.gov
    - ii. Daniel O. Hill: Daniel.hill@bis.doc.gov
    - iii. Alexander Zemek: Alexander.zemek@bis.doc.gov
  - c. CEN:
    - i. Enrique Lamas: Enrique.lamas@census.gov
  - d. EDA
    - i. Henry Childs: HChilds@eda.gov
  - e. ITA
    - i. Gilbert Kaplan: gilbert.kaplan@trade.gov
  - f. MBDA
    - i. Edith McCloud: emccloud@mbda.gov
  - g. NIST

- i. Walter G. Copan: walter.copan@nist.gov
- h. NOAA
  - i. Stuart Levenbach: stuart.levenbach@noaa.gov
- i. NTIS
  - i. Avi Bender: avi.bender@ntis.gov
  - ii. Gregory Capella: gcapella@ntis.gov
- j. NTIA
  - i. David J. Redl: dredl@ntia.doc.gov
- k. USPTO
  - i. Andrei Iancu: Andrei.iancu@uspto.gov

**Date Range: January 1, 1997-December 15, 2017**

Search Terms:

"Sexual harassment," "sexual misconduct," "inappropriate sexual conduct," "sexual assault," or "harassment settlements"; "sexual harassment payout"

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 January 1, 1997-December 15, 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 May 8, 2018
  - **If you are unable to meet this suspense date, please e-mail me at [skhalid@doc.gov](mailto:skhalid@doc.gov) and let me know.**
    - 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.
    - Sulma Khalid 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](mailto: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-2018-000454**

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

\_\_\_\_\_  
Agency

## 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.

**Requested Records – Sexual assault settlements**

The Daily Dot requests that the Commerce Department produce the following:

1. Line item budgets detailing any payouts for **any/all sexual assault** settlements of any kind.
2. Any communication (email, text message, memo or phone call readout, and attachments thereof) from the Chief Financial Officer and Assistant Secretary for Administration regarding the payment of such settlements.
3. Any communication (email, text message, memo or phone call readout, and attachments thereof) from the Office of the Inspector General regarding the payment of such settlements.
4. Any communication (email, text message, memo or phone call readout, and attachments thereof) from the Office of the General Counsel regarding the payment of such settlements.
5. Any communication or instruction to staff regarding the pursuit or request of such payments.
6. Any record of payment for such settlements.

Limit your search to responsive records created **January 1, 1997 – December 15, 2017**.

Records dated before or after those dates are not responsive, and should not be included.

**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.,

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v.

U.S. DEPARTMENT OF COMMERCE,

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Civil Docket No. 15-cv-2088 (CRC)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

FACTUAL BACKGROUND ..... 1

    I.    The Hiatus Paper ..... 1

    II.   The FOIA Request and NOAA’s Response..... 3

STANDARD OF REVIEW ..... 5

ARGUMENT ..... 5

    I.    NOAA’s Search Was Reasonable, Adequate, and Satisfies Its Obligation Under the  
          FOIA ..... 5

        A.  The Standard for an Adequate Search ..... 5

        B.  NOAA Conducted an Adequate Search..... 7

    II.   NOAA Properly Withheld Information Under Exemption 5..... 8

        1.  Drafts of the Hiatus Paper ..... 11

        2.  Communications Among NOAA Personnel ..... 12

        3.  Peer Review Material..... 15

    III.  NOAA Properly Withheld Information Under Exemption 6..... 20

    IV.  NOAA Has Produced All Reasonably Segregable Information ..... 22

CONCLUSION ..... 22

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<i>Abteu v. U.S. Dep't of Homeland Sec.</i> , 808 F.3d 895 (D.C. Cir. 2015) .....	13
* <i>Ancient Coin Collectors Guild v. U.S. Dep't of State</i> , 641 F.3d 504 (D.C. Cir. 2011) .....	6, 7, 15
* <i>Chambers v. Dep't of the Interior</i> , 568 F.3d 998 (D.C. Cir. 2009) .....	7
<i>Chem. Mfrs. Asso. v. Consumer Prod. Safety Com.</i> , 600 F. Supp. 114 (D.D.C. 1984) .....	10
* <i>Coastal States Gas Corp. v. U.S. Dep't of Energy</i> , 617 F.2d 854 (D.C. Cir. 1980) .....	14-15, 17
<i>Defenders of Wildlife v. U.S. Dep't of Interior</i> , 314 F. Supp. 2d 1 (D.D.C. 2004) .....	6
* <i>DiBacco v. U.S. Army</i> , 795 F.3d 178 (D.C. Cir. 2015) .....	6
<i>Dudman Commc'ns Corp. v. Dep't of Air Force</i> , 815 F.2d 1565 (D.C. Cir. 1987) .....	11
<i>Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.</i> , 384 F. Supp. 2d 100 (D.D.C. 2005) .....	7, 18
<i>EPA v. Mink</i> , 410 U.S. 73 (1973), <i>abrogated on other grounds</i> , Pub. L. No. 93-502, 88 Stat. 1561 (1974) .....	9
<i>Exxon Corp. v. Dep't of Energy</i> , 585 F. Supp. 690 (D.D.C. 1983) .....	11
* <i>Formaldehyde Inst. v. HHS</i> , 889 F.2d 1118 (D.C. Cir. 1989) .....	16, 18, 19
<i>Hooker v. HHS</i> , 887 F. Supp. 2d 40 (D.D.C. 2012), <i>aff'd</i> , No. 13-5280, 2014 WL 3014213 (D.C. Cir. May 13, 2014) .....	18
<i>In re Apollo Group, Inc. Sec. Litig.</i> , 251 F.R.D. 12 (D.D.C. 2008) .....	11
<i>In re Sealed Case</i> , 121 F.3d 729 (D.C. Cir. 1997) .....	9

*Iturralde v. Comptroller of the Currency*,  
315 F.3d 311 (D.C. Cir. 2003) ..... 6

*Jordan v. U.S. Dep’t of Justice*,  
591 F.2d 753 (D.C. Cir. 1978) ..... 9

*Judicial Watch, Inc. v. Dep’t of State*,  
875 F. Supp. 2d 37 (D.D.C. 2012) ..... 21

*Judicial Watch, Inc. v. U.S. Dep’t of the Treasury*,  
796 F. Supp. 2d 13 (D.D.C. 2011) ..... 14

*\*Judicial Watch, Inc. v. U.S. Dep’t of Transp.*,  
950 F. Supp. 2d 213 (D.D.C. 2013) ..... 17, 18

*Kurdyukov v. U.S. Coast Guard*,  
578 F. Supp. 2d 114 (D.D.C. 2008) ..... 22

*Lardner v. U.S. Dep’t of Justice*,  
No. 03-0180, 2005 WL 758267 (D.D.C. Mar. 31, 2015) ..... 17

*Larson v. Dep’t of State*,  
565 F.3d 857 (D.C. Cir. 2009) ..... 6

*Lead Indus. Ass’n v. OSHA*,  
610 F.2d 70 (2d Cir. 1979) ..... 11

*Lowy v. IRS*,  
No. C 10-767, 2011 WL 1211479 (N.D. Cal. Mar. 30, 2011) ..... 21

*Marzen v. HHS*,  
825 F.2d 1148 (7th Cir. 1987) ..... 12

*McCready v. Nicholson*,  
465 F.3d 1 (D.C. Cir. 2006) ..... 6, 7

*Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*,  
566 F.2d 242 (D.C. Cir. 1977) ..... 22

*Meeropol v. Meese*,  
790 F.2d 942 (D.C. Cir. 1986) ..... 6

*Moore v. Bush*,  
601 F. Supp. 2d 6 (D.D.C. 2009) ..... 5, 21

*Nat’l Inst. of Military Justice v. U.S. Dep’t of Defense*,  
512 F.3d 677 (D.C. Cir. 2008) ..... 17, 18

*Nat’l Sec. Archive Fund, Inc. v. CIA*,  
402 F. Supp. 2d 211 (D.D.C. 2005) ..... 23

*NLRB v. Sears, Roebuck & Co.* ,  
 421 U.S. 132 (1975) ..... 9, 10, 14

\**Oglesby v. U.S. Dep’t of Army*,  
 920 F.2d 57 (D.C. Cir. 1990) ..... 6, 8

*People for the Am. Way Found. v. Nat’l Park Serv.*,  
 503 F. Supp. 2d 284 (D.D.C. 2007) ..... 11

\**Perry v. Block*,  
 684 F.2d 121 (D.C. Cir. 1982) ..... 6, 7

*Petroleum Info. Corp. v. U.S. Dep’t of Interior*,  
 976 F.2d 1429 ..... 17

\**Quarles v. Dep’t of Navy*,  
 893 F.2d 390 (D.C. Cir. 1990) ..... 12, 13, 14

*Reed v. NLRB*,  
 927 F.2d 1249 (D.C. Cir. 1991) ..... 20

*Riccardi v. U.S. Dep’t of Justice*,  
 32 F. Supp. 3d 59 (D.D.C. 2014) ..... 6

*Rockwell Int’l Corp. v. U.S. Dep’t of Justice*,  
 235 F.3d 598 (D.C. Cir. 2001) ..... 9

*Rosenberg v. U.S. Dep’t of Immigration & Customs Enf’t* ,  
 13 F. Supp. 3d 92 (D.D.C. 2014) ..... 7

\**Russell v. Dep’t of Air Force*,  
 682 F.2d 1045 (D.C. Cir. 1982) ..... 9, 15

*Ryan v. Dep’t of Defense*,  
 617 F.2d 781 (D.C. Cir. 1980) ..... 19

*Sheffield v. Holder*,  
 951 F. Supp. 2d 98 (D.D.C. 2013) ..... 7

*Shurtleff v. EPA*,  
 991 F. Supp. 2d 1 (D.D.C. 2013) ..... 21

*Smith v. Dep’t of Labor*,  
 798 F. Supp. 2d 274 (D.D.C. 2011) ..... 21

*Steinberg v. U.S. Dep’t of Justice*,  
 23 F.3d 548 (D.C. Cir. 1994) ..... 5, 6, 7

*U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*,  
 510 U.S. 487 (1994) ..... 21

*U.S. Dep’t of Interior v. Klamath Water Users Protective Ass’n*,  
532 U.S. 1 (2001) ..... 15, 18

*U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*,  
489 U.S. 749 (1989) ..... 20

*U.S. Dep’t of the Air Force v. Rose*,  
425 U.S. 352 (1976) ..... 20

*United Am. Fin. v. Potter*,  
667 F. Supp. 2d 49 (D.D.C. 2009) ..... 21

*\*Valencia-Lucena v. U.S. Coast Guard, FOIA/PA Records Mgmt.*,  
180 F.3d 321 (D.C. Cir. 1999) ..... 9

*ViroPharma Inc. v. HHS*,  
839 F. Supp. 2d 184 (D.D.C. 2012) ..... 11

*Weisberg v. U.S. Dep’t of Justice*,  
745 F.2d 1476 (D.C. Cir. 1984) ..... 6, 7

*Wilbur v. CIA*,  
355 F.3d 675 (D.C. Cir. 2004) ..... 7

*Wolf v. CIA*,  
473 F.3d 370 (D.C. Cir. 2007) ..... 10

**Statutes**

5 U.S.C. § 552 ..... 5, 9, 20, 22

## **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.<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> 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.<sup>3</sup> “[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

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<sup>3</sup> 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.<sup>4</sup>

## **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

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<sup>4</sup> 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.<sup>5</sup>

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,

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<sup>5</sup> 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.”).<sup>6</sup>

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

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<sup>6</sup> *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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**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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**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**



**TABLE OF CONTENTS**

INTRODUCTION ..... 1

FACTUAL BACKGROUND ..... 1

    I.    The Hiatus Paper ..... 1

    II.   The FOIA Request and NOAA’s Response..... 3

STANDARD OF REVIEW ..... 5

ARGUMENT ..... 5

    I.    NOAA’s Search Was Reasonable, Adequate, and Satisfies Its Obligation Under the  
          FOIA ..... 5

        A.  The Standard for an Adequate Search ..... 5

        B.  NOAA Conducted an Adequate Search..... 7

    II.   NOAA Properly Withheld Information Under Exemption 5..... 8

        1.  Drafts of the Hiatus Paper ..... 11

        2.  Communications Among NOAA Personnel ..... 12

        3.  Peer Review Material..... 15

    III.  NOAA Properly Withheld Information Under Exemption 6..... 20

    IV.  NOAA Has Produced All Reasonably Segregable Information ..... 22

CONCLUSION ..... 22

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<i>Abteu v. U.S. Dep't of Homeland Sec.</i> , 808 F.3d 895 (D.C. Cir. 2015) .....	13
* <i>Ancient Coin Collectors Guild v. U.S. Dep't of State</i> , 641 F.3d 504 (D.C. Cir. 2011) .....	6, 7, 15
* <i>Chambers v. Dep't of the Interior</i> , 568 F.3d 998 (D.C. Cir. 2009) .....	7
<i>Chem. Mfrs. Asso. v. Consumer Prod. Safety Com.</i> , 600 F. Supp. 114 (D.D.C. 1984) .....	10
* <i>Coastal States Gas Corp. v. U.S. Dep't of Energy</i> , 617 F.2d 854 (D.C. Cir. 1980) .....	14-15, 17
<i>Defenders of Wildlife v. U.S. Dep't of Interior</i> , 314 F. Supp. 2d 1 (D.D.C. 2004) .....	6
* <i>DiBacco v. U.S. Army</i> , 795 F.3d 178 (D.C. Cir. 2015) .....	6
<i>Dudman Commc'ns Corp. v. Dep't of Air Force</i> , 815 F.2d 1565 (D.C. Cir. 1987) .....	11
<i>Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.</i> , 384 F. Supp. 2d 100 (D.D.C. 2005) .....	7, 18
<i>EPA v. Mink</i> , 410 U.S. 73 (1973), <i>abrogated on other grounds</i> , Pub. L. No. 93-502, 88 Stat. 1561 (1974) .....	9
<i>Exxon Corp. v. Dep't of Energy</i> , 585 F. Supp. 690 (D.D.C. 1983) .....	11
* <i>Formaldehyde Inst. v. HHS</i> , 889 F.2d 1118 (D.C. Cir. 1989) .....	16, 18, 19
<i>Hooker v. HHS</i> , 887 F. Supp. 2d 40 (D.D.C. 2012), <i>aff'd</i> , No. 13-5280, 2014 WL 3014213 (D.C. Cir. May 13, 2014) .....	18
<i>In re Apollo Group, Inc. Sec. Litig.</i> , 251 F.R.D. 12 (D.D.C. 2008) .....	11
<i>In re Sealed Case</i> , 121 F.3d 729 (D.C. Cir. 1997) .....	9

*Iturralde v. Comptroller of the Currency*,  
315 F.3d 311 (D.C. Cir. 2003) ..... 6

*Jordan v. U.S. Dep’t of Justice*,  
591 F.2d 753 (D.C. Cir. 1978) ..... 9

*Judicial Watch, Inc. v. Dep’t of State*,  
875 F. Supp. 2d 37 (D.D.C. 2012) ..... 21

*Judicial Watch, Inc. v. U.S. Dep’t of the Treasury*,  
796 F. Supp. 2d 13 (D.D.C. 2011) ..... 14

*\*Judicial Watch, Inc. v. U.S. Dep’t of Transp.*,  
950 F. Supp. 2d 213 (D.D.C. 2013) ..... 17, 18

*Kurdyukov v. U.S. Coast Guard*,  
578 F. Supp. 2d 114 (D.D.C. 2008) ..... 22

*Lardner v. U.S. Dep’t of Justice*,  
No. 03-0180, 2005 WL 758267 (D.D.C. Mar. 31, 2015) ..... 17

*Larson v. Dep’t of State*,  
565 F.3d 857 (D.C. Cir. 2009) ..... 6

*Lead Indus. Ass’n v. OSHA*,  
610 F.2d 70 (2d Cir. 1979) ..... 11

*Lowy v. IRS*,  
No. C 10-767, 2011 WL 1211479 (N.D. Cal. Mar. 30, 2011) ..... 21

*Marzen v. HHS*,  
825 F.2d 1148 (7th Cir. 1987) ..... 12

*McCready v. Nicholson*,  
465 F.3d 1 (D.C. Cir. 2006) ..... 6, 7

*Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*,  
566 F.2d 242 (D.C. Cir. 1977) ..... 22

*Meeropol v. Meese*,  
790 F.2d 942 (D.C. Cir. 1986) ..... 6

*Moore v. Bush*,  
601 F. Supp. 2d 6 (D.D.C. 2009) ..... 5, 21

*Nat’l Inst. of Military Justice v. U.S. Dep’t of Defense*,  
512 F.3d 677 (D.C. Cir. 2008) ..... 17, 18

*Nat’l Sec. Archive Fund, Inc. v. CIA*,  
402 F. Supp. 2d 211 (D.D.C. 2005) ..... 23

*NLRB v. Sears, Roebuck & Co.* ,  
 421 U.S. 132 (1975) ..... 9, 10, 14

\**Oglesby v. U.S. Dep’t of Army*,  
 920 F.2d 57 (D.C. Cir. 1990) ..... 6, 8

*People for the Am. Way Found. v. Nat’l Park Serv.*,  
 503 F. Supp. 2d 284 (D.D.C. 2007) ..... 11

\**Perry v. Block*,  
 684 F.2d 121 (D.C. Cir. 1982) ..... 6, 7

*Petroleum Info. Corp. v. U.S. Dep’t of Interior*,  
 976 F.2d 1429 ..... 17

\**Quarles v. Dep’t of Navy*,  
 893 F.2d 390 (D.C. Cir. 1990) ..... 12, 13, 14

*Reed v. NLRB*,  
 927 F.2d 1249 (D.C. Cir. 1991) ..... 20

*Riccardi v. U.S. Dep’t of Justice*,  
 32 F. Supp. 3d 59 (D.D.C. 2014) ..... 6

*Rockwell Int’l Corp. v. U.S. Dep’t of Justice*,  
 235 F.3d 598 (D.C. Cir. 2001) ..... 9

*Rosenberg v. U.S. Dep’t of Immigration & Customs Enf’t* ,  
 13 F. Supp. 3d 92 (D.D.C. 2014) ..... 7

\**Russell v. Dep’t of Air Force*,  
 682 F.2d 1045 (D.C. Cir. 1982) ..... 9, 15

*Ryan v. Dep’t of Defense*,  
 617 F.2d 781 (D.C. Cir. 1980) ..... 19

*Sheffield v. Holder*,  
 951 F. Supp. 2d 98 (D.D.C. 2013) ..... 7

*Shurtleff v. EPA*,  
 991 F. Supp. 2d 1 (D.D.C. 2013) ..... 21

*Smith v. Dep’t of Labor*,  
 798 F. Supp. 2d 274 (D.D.C. 2011) ..... 21

*Steinberg v. U.S. Dep’t of Justice*,  
 23 F.3d 548 (D.C. Cir. 1994) ..... 5, 6, 7

*U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*,  
 510 U.S. 487 (1994) ..... 21

*U.S. Dep’t of Interior v. Klamath Water Users Protective Ass’n*,  
532 U.S. 1 (2001) ..... 15, 18

*U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*,  
489 U.S. 749 (1989) ..... 20

*U.S. Dep’t of the Air Force v. Rose*,  
425 U.S. 352 (1976) ..... 20

*United Am. Fin. v. Potter*,  
667 F. Supp. 2d 49 (D.D.C. 2009) ..... 21

*\*Valencia-Lucena v. U.S. Coast Guard, FOIA/PA Records Mgmt.*,  
180 F.3d 321 (D.C. Cir. 1999) ..... 9

*ViroPharma Inc. v. HHS*,  
839 F. Supp. 2d 184 (D.D.C. 2012) ..... 11

*Weisberg v. U.S. Dep’t of Justice*,  
745 F.2d 1476 (D.C. Cir. 1984) ..... 6, 7

*Wilbur v. CIA*,  
355 F.3d 675 (D.C. Cir. 2004) ..... 7

*Wolf v. CIA*,  
473 F.3d 370 (D.C. Cir. 2007) ..... 10

**Statutes**

5 U.S.C. § 552 ..... 5, 9, 20, 22

## **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.<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> 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.<sup>3</sup> “[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

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<sup>3</sup> 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.<sup>4</sup>

## 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

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<sup>4</sup> 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.<sup>5</sup>

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,

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<sup>5</sup> 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.”).<sup>6</sup>

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

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<sup>6</sup> *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,

BENJAMIN C. MIZER  
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO  
Deputy Director, Federal Programs Branch

/s/ Kevin M. Snell  
KEVIN M. SNELL  
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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  
Judicial Watch, Inc.  
425 Third Street SW, Suite 800  
Washington, DC 20024  
(202) 646-5172  
Lburke@judicialwatch.org

*Attorney for Plaintiff*

*/s/ Kevin M. Snell*



August 31, 2017

VIA ELECTRONIC MAIL

FOIA Officer  
National Oceanic and Atmospheric Administration  
Public Reference Facility (SOU1000)  
1315 East-West Highway, Room 9719 (SSMC3)  
Silver Spring, MD 20910  
[FOIA@noaa.gov](mailto:FOIA@noaa.gov)

Re: Freedom of Information Act Request: National Climate Assessment and Disbanded Advisory Committee

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

REQUESTED RECORDS

The Center requests the following records from the National Oceanic Atmospheric Administration (“NOAA”):

1. All records mentioning, including, and/or referencing the decision to terminate, or otherwise not renew, the Federal Advisory Committee Act charter for the “Advisory Committee for the Sustained National Climate Assessment” (hereafter “Committee”) including, but not limited to:
  - a. Who participated in this decision-making process, both within and outside the agency and the U.S. Department of Commerce;
  - b. What factors were considered in making this decision; and
  - c. How the Committee’s unfinished work will now be completed, including:

- i. NOAA’s formal request for the Committee to prepare, by the Spring of 2018, a set of “Recommendations on a Sustained National Climate Assessment,” as detailed in Attachment A (Advisory Committee for the Sustained National 1 Climate Assessment); and
- ii. The Committee’s other work in support of the preparation of the final Fourth National Climate Assessment, pursuant to 15 U.S.C. § 2936, in light of its charge “to advise on the engagement of stakeholders, and on sustained assessment activities and the quadrennial National Climate Assessment report” – particularly in light of the central role the Committee’s predecessor advisory committee, the “National Climate Assessment & Development Advisory Committee,” played in preparing the Third National Climate Assessment in 2014.

For this request, the term “all 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). We ask that you please provide all records in an electronic format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or Excel spreadsheet, or; (2) for files that are in .PDF format, without 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.

#### 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  
[mtownsend@biologicaldiversity.org](mailto:mtownsend@biologicaldiversity.org)

If you find that this request is unclear, or if the responsive records are voluminous, please call me at (971) 717-6409 to discuss the scope of this request.

### REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 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 Department of Commerce FOIA regulations that govern NOAA at 15 C.F.R. § 4.11(l) establish the same standard.

Thus, NOAA 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 NOAA. This request asks for: (1) all records mentioning, including, and/or referencing the decision to terminate, or

otherwise not renew, the Federal Advisory Committee Act charter for the Committee including, but not limited to: (a) who participated in this decision-making process, both within and outside the agency and the U.S. Department of Commerce; (b) what factors were considered in making this decision; and (c) how the Committee's unfinished work will now be completed, including: (i) NOAA's formal request for the Committee to prepare, by the Spring of 2018, a set of "Recommendations on a Sustained National Climate Assessment," as detailed in Attachment A; and (ii) the Committee's other work in support of the preparation of the final Fourth National Climate Assessment, pursuant to 15 U.S.C. § 2936, in light of its charge "to advise on the engagement of stakeholders, and on sustained assessment activities and the quadrennial National Climate Assessment report" – particularly in light of the central role the Committee's predecessor advisory committee, the "National Climate Assessment & Development Advisory Committee," played in preparing the Third National Climate Assessment in 2014.

This FOIA will provide the Center and the public with crucial insight into why NOAA and/or other government officials decided to terminate this Advisory Committee despite its ongoing work. It is clear that disbanding a federal advisory committee is a specific and identifiable activity of the government, in this case the executive branch agency, NOAA. *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 how NOAA and/or other government agencies arrived at the decision to cease the Committee. Given the statutory mandate to prepare a new Climate Assessment, the public has a strong interest in finding out why this Committee was terminated, and how NOAA is going to continue to support its Climate Assessment work without the Committee. Once the information is made available, the Center will analyze it and present it to its 1.3 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 NOAA operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of National Climate Assessment and Disbanded Advisory Committee

The requested records will contribute to public understanding of NOAA's decision to disband the Committee is consistent with its mission to "to understand and predict changes in climate, weather, oceans and coasts; to share that knowledge and information with others; to conserve and manage coastal and marine ecosystems and resources; and to understand and predict changes



in climate, weather, oceans and coasts.”<sup>1</sup> As explained above, the records will contribute to public understanding of this topic.

Activities of NOAA generally, and specifically its decision to disband the Committee concerning climate assessment 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 why the Committee was terminated and how the climate assessment work will proceed. *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 the Committee’s termination 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... ”<sup>2</sup>

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of NOAA’s decision to disband the Committee, and how the agency’s climate assessment work will continue given the statutory deadline to complete a new Climate Assessment. 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

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<sup>1</sup> National Oceanic Atmospheric Administration, *Our Mission and Vision: Science, Service and Stewardship*, <http://www.noaa.gov/our-mission-and-vision> (last visited Aug. 28, 2017).

<sup>2</sup> 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.

disclosure of the requested records to the public will educate the public about the decision making process regarding terminating the Committee.

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 the dissolution of the Committee on climate assessment 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 the decision to terminate the committee, and how NOAA will fulfill its statutory mandates regarding the next Climate Assessment

The records are also certain to shed light on NOAA's compliance with its own mission.<sup>3</sup> 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 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 Trump administration's priorities concerning climate science, utilizing information obtained by the Center from federal agencies including NOAA. In 2016, more than 2 million people visited the Center's extensive website,

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<sup>3</sup> See *supra* note at 1.

viewing a total of more than 5.2 million pages. The Center sends out more than 277 email newsletters and action alerts per year to more than 1.3 million members and supporters. Three times a year, the Center sends printed newsletters to more than 58,016 members. More than 233,000 people have “liked” the Center on Facebook, and there are regular postings regarding environmental health and climate change. The Center also regularly tweets to more than 52,200 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of NOAA’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 1.3 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 NOAA 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](mailto: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  
[foia@biologicaldiversity.org](mailto:foia@biologicaldiversity.org)

Attachment:

Attachment A (Advisory Committee for the Sustained National 1 Climate Assessment)

## **Attachment A**

1                                   Advisory Committee for the Sustained National Climate Assessment

2  
3                                   Strategy for Preparing a Special Report:  
4                                   Recommendations on a Sustained National Climate Assessment

5  
6 **Purpose of this Document:** The National Oceanic and Atmospheric Administration (NOAA), on  
7 behalf of the Subcommittee on Global Change Research (SGCR), submitted the following  
8 request to the Advisory Committee:

9                    “In order for the USG to implement a vision for Sustained Assessment in time for the 5th  
10                    (and future) National Climate Assessment, NOAA requests, on behalf of the USGCRP and  
11                    its member agencies, that the Advisory Committee for the Sustained National Climate  
12                    Assessment develop a set of recommendations for a Sustained Assessment process by  
13                    Spring 2018. We also request a progress or interim report by September 30, 2017. The  
14                    recommendations should be feasible, realistic in terms of budget implications, and  
15                    grounded in the Congressional mandate for a quadrennial assessment.”

16  
17 This document spells out the strategy the Advisory Committee will adopt to fulfill this request in  
18 a timely fashion. The document describes (1) four topics the Advisory Committee will address  
19 and (2) the main elements of the process it will follow. This strategy was developed with input  
20 from SGCR members, program managers of the USGCRP, staff of the National Assessment  
21 Coordination Office, and members of the Advisory Committee. The Advisory Committee may  
22 revise the list of topics and process based on new information it collects.

23  
24 **Context of Prior Recommendations, Subsequent Experience, and Changing Societal Needs:** In  
25 2013, the predecessor to this Advisory Committee, the National Climate Assessment  
26 Development and Advisory Committee (NCADAC), released a report that identified four “critical  
27 elements” of a sustained national climate assessment (SNCA) process  
28 (<https://tinyurl.com/lfd5fdd>). Since the release of the report, the USGCRP has completed the  
29 Third National Climate Assessment (NCA3), several special reports, and other products. The  
30 program and member agencies continue to engage with users of climate and global change  
31 information. And they have developed new activities and programs that are relevant to the  
32 SNCA. Beyond the activities of the USG, others such as states, cities, private sector firms, and  
33 non-governmental organizations (NGOs) have initiated their own activities and prepared SNCA-  
34 relevant products. The National Academy of Sciences and other advisory bodies have prepared  
35 subsequent recommendations, and the research literature on sustained assessment has  
36 expanded. The Advisory Committee will build on the 2013 NCADAC report and consider these  
37 subsequent developments as it prepares its recommendations.

38  
39 **Topics to be Addressed:** The recommendations will address four topics identified through  
40 interactions with USGCRP and input from Advisory Committee members. These topics are  
41 overlapping, and the Advisory Committee will need include recommendations for coordinating  
42 related objectives or issues.

45 *Topic 1: Core Products and Activities of the Sustained Assessment Process*

46 The Advisory Committee will develop recommendations on a “core set” of NCA products  
47 and activities to serve as the foundation for the SNCA. Example products could include  
48 time-stamped observational data sets, projections of future conditions, indicators,  
49 periodic “state of science of US climate conditions”, quadrennial reports, and technical  
50 guidelines. Example activities or programs could include regional science organizations,  
51 networks of sustained assessment participants, and an advisory committee of users and  
52 producers of SNCA products. The Advisory Committee envisions developing  
53 recommendations to address several specific topics or issues, for example:

- 54 • Alternative criteria for determining what is “core”;
- 55 • Efficient use of core products in producing quadrennial reports and other  
56 mandated products;
- 57 • Responsibilities of USGCRP and other actors for products that are “core” for  
58 different users (e.g., for analysis of vulnerabilities and adaptation strategies at  
59 state/municipal levels);
- 60 • The hand-off from the core set of products and activities to derived products for  
61 specific objectives such as evaluation of risks or identification of solutions.

62

63 *Topic 2: Products Derived from the Core Set of SNCA Resources*

64 For this topic, the Advisory Committee will develop recommendations on how to foster  
65 a “virtuous cycle” that facilitates use of the core set of SNCA resources by stakeholders  
66 to develop products to meet their needs, and a feedback of information into the process  
67 that helps to evaluate existing products and contribute knowledge to new ones. The  
68 Climate Resilience Toolkit (CRT—<https://toolkit.climate.gov/content/home>) includes  
69 examples of such products that provide maps, scenarios, guidelines, and other  
70 information at local to regional scales. Specific issues likely to be addressed include:

- 71 • Developing a clear structure for how core NCA products (CRT, Global Change  
72 Information System, etc.) interact and feedback into future NCA activities;
- 73 • Developing clear mechanisms of engagement for non-federal participants  
74 (Partnership, program, and infrastructure models);
- 75 • Engagement of professional associations (e.g., American Society of Civil  
76 Engineers) and others to develop recommendations for evaluation processes for  
77 current and future products.

78

79 *Topic 3: Modes of Engagement with the NCA Process*

80 Many constituent partnerships, including end users and capacity-building boundary  
81 entities, have been formed during the NCA process. To promote engagement and  
82 dialogue, the USGCRP sustains the NCANet, a network of some 200 entities that  
83 participate in the assessment process. Maintaining and strengthening existing  
84 partnerships, and developing new forms of engagement, is challenging for the USGCRP,  
85 Agencies, and programs in the context of the legal constraints and capacity limitations.  
86 In developing recommendations on this topic, the Advisory Committee will consider

87 what has been learned since the NCADAC 2013 report about engagement in the NCA  
88 process. Recommendations may be provided for several specific topics:

- 89 • Characterize modes of and mechanisms for existing engagement of end users  
90 and boundary entities (including private sector climate service providers);
- 91 • Identify agency-specific and external engagement processes and processes that  
92 may be modified for the NCA context to strengthen existing partnerships;
- 93 • Strategize how climate assessment gaps can be addressed through establishing  
94 and supporting new engagement partnerships;
- 95 • Outline recommendations for an engagement infrastructure that both ensures  
96 bottom-up partnerships for assessment with end users and boundary entities  
97 and for tailoring scientific assessment for decision relevance and knowledge co-  
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- 99 • Enable successful evaluation of partnership support and progress during the  
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108 improvement of the SNCA process and provision of decision-support products. The  
109 Advisory Committee will develop recommendations for expanding opportunities to  
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124 provide interim findings (in summary form), request feedback from the SGCR, issue a  
125 draft report for public comment, and publish a final report with recommendations.





August 31, 2017

VIA ELECTRONIC MAIL

FOIA Officer  
National Oceanic and Atmospheric Administration  
Public Reference Facility (SOU1000)  
1315 East-West Highway, Room 9719 (SSMC3)  
Silver Spring, MD 20910  
[FOIA@noaa.gov](mailto:FOIA@noaa.gov)

Re: Freedom of Information Act Request: National Climate Assessment and Disbanded Advisory Committee

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

REQUESTED RECORDS

The Center requests the following records from the National Oceanic Atmospheric Administration (“NOAA”):

1. All records mentioning, including, and/or referencing the decision to terminate, or otherwise not renew, the Federal Advisory Committee Act charter for the “Advisory Committee for the Sustained National Climate Assessment” (hereafter “Committee”) including, but not limited to:
  - a. Who participated in this decision-making process, both within and outside the agency and the U.S. Department of Commerce;
  - b. What factors were considered in making this decision; and
  - c. How the Committee’s unfinished work will now be completed, including:

- i. NOAA's formal request for the Committee to prepare, by the Spring of 2018, a set of "Recommendations on a Sustained National Climate Assessment," as detailed in Attachment A (Advisory Committee for the Sustained National Climate Assessment); and
- ii. The Committee's other work in support of the preparation of the final Fourth National Climate Assessment, pursuant to 15 U.S.C. § 2936, in light of its charge "to advise on the engagement of stakeholders, and on sustained assessment activities and the quadrennial National Climate Assessment report" – particularly in light of the central role the Committee's predecessor advisory committee, the "National Climate Assessment & Development Advisory Committee," played in preparing the Third National Climate Assessment in 2014.

For this request, the term "all 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). We ask that you please provide all records in an electronic format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or Excel spreadsheet, or; (2) for files that are in .PDF format, without 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.

#### 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  
[mtownsend@biologicaldiversity.org](mailto:mtownsend@biologicaldiversity.org)

If you find that this request is unclear, or if the responsive records are voluminous, please call me at (971) 717-6409 to discuss the scope of this request.

### REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 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 Department of Commerce FOIA regulations that govern NOAA at 15 C.F.R. § 4.11(l) establish the same standard.

Thus, NOAA 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 NOAA. This request asks for: (1) all records mentioning, including, and/or referencing the decision to terminate, or

otherwise not renew, the Federal Advisory Committee Act charter for the Committee including, but not limited to: (a) who participated in this decision-making process, both within and outside the agency and the U.S. Department of Commerce; (b) what factors were considered in making this decision; and (c) how the Committee's unfinished work will now be completed, including: (i) NOAA's formal request for the Committee to prepare, by the Spring of 2018, a set of "Recommendations on a Sustained National Climate Assessment," as detailed in Attachment A; and (ii) the Committee's other work in support of the preparation of the final Fourth National Climate Assessment, pursuant to 15 U.S.C. § 2936, in light of its charge "to advise on the engagement of stakeholders, and on sustained assessment activities and the quadrennial National Climate Assessment report" – particularly in light of the central role the Committee's predecessor advisory committee, the "National Climate Assessment & Development Advisory Committee," played in preparing the Third National Climate Assessment in 2014.

This FOIA will provide the Center and the public with crucial insight into why NOAA and/or other government officials decided to terminate this Advisory Committee despite its ongoing work. It is clear that disbanding a federal advisory committee is a specific and identifiable activity of the government, in this case the executive branch agency, NOAA. *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 how NOAA and/or other government agencies arrived at the decision to cease the Committee. Given the statutory mandate to prepare a new Climate Assessment, the public has a strong interest in finding out why this Committee was terminated, and how NOAA is going to continue to support its Climate Assessment work without the Committee. Once the information is made available, the Center will analyze it and present it to its 1.3 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 NOAA operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of National Climate Assessment and Disbanded Advisory Committee

The requested records will contribute to public understanding of NOAA's decision to disband the Committee is consistent with its mission to "to understand and predict changes in climate, weather, oceans and coasts; to share that knowledge and information with others; to conserve and manage coastal and marine ecosystems and resources; and to understand and predict changes

in climate, weather, oceans and coasts.”<sup>1</sup> As explained above, the records will contribute to public understanding of this topic.

Activities of NOAA generally, and specifically its decision to disband the Committee concerning climate assessment 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 why the Committee was terminated and how the climate assessment work will proceed. *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 the Committee’s termination 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... ”<sup>2</sup>

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of NOAA’s decision to disband the Committee, and how the agency’s climate assessment work will continue given the statutory deadline to complete a new Climate Assessment. 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

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<sup>1</sup> National Oceanic Atmospheric Administration, *Our Mission and Vision: Science, Service and Stewardship*, <http://www.noaa.gov/our-mission-and-vision> (last visited Aug. 28, 2017).

<sup>2</sup> 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.

disclosure of the requested records to the public will educate the public about the decision making process regarding terminating the Committee.

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 the dissolution of the Committee on climate assessment 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 the decision to terminate the committee, and how NOAA will fulfill its statutory mandates regarding the next Climate Assessment

The records are also certain to shed light on NOAA's compliance with its own mission.<sup>3</sup> 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 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 Trump administration's priorities concerning climate science, utilizing information obtained by the Center from federal agencies including NOAA. In 2016, more than 2 million people visited the Center's extensive website,

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<sup>3</sup> See *supra* note at 1.

viewing a total of more than 5.2 million pages. The Center sends out more than 277 email newsletters and action alerts per year to more than 1.3 million members and supporters. Three times a year, the Center sends printed newsletters to more than 58,016 members. More than 233,000 people have “liked” the Center on Facebook, and there are regular postings regarding environmental health and climate change. The Center also regularly tweets to more than 52,200 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of NOAA’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 1.3 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 NOAA 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](mailto: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  
[foia@biologicaldiversity.org](mailto:foia@biologicaldiversity.org)



Attachment:

Attachment A (Advisory Committee for the Sustained National 1 Climate Assessment)

## **Attachment A**



45 *Topic 1: Core Products and Activities of the Sustained Assessment Process*

46 The Advisory Committee will develop recommendations on a “core set” of NCA products  
47 and activities to serve as the foundation for the SNCA. Example products could include  
48 time-stamped observational data sets, projections of future conditions, indicators,  
49 periodic “state of science of US climate conditions”, quadrennial reports, and technical  
50 guidelines. Example activities or programs could include regional science organizations,  
51 networks of sustained assessment participants, and an advisory committee of users and  
52 producers of SNCA products. The Advisory Committee envisions developing  
53 recommendations to address several specific topics or issues, for example:

- 54 • Alternative criteria for determining what is “core”;
- 55 • Efficient use of core products in producing quadrennial reports and other  
56 mandated products;
- 57 • Responsibilities of USGCRP and other actors for products that are “core” for  
58 different users (e.g., for analysis of vulnerabilities and adaptation strategies at  
59 state/municipal levels);
- 60 • The hand-off from the core set of products and activities to derived products for  
61 specific objectives such as evaluation of risks or identification of solutions.

62

63 *Topic 2: Products Derived from the Core Set of SNCA Resources*

64 For this topic, the Advisory Committee will develop recommendations on how to foster  
65 a “virtuous cycle” that facilitates use of the core set of SNCA resources by stakeholders  
66 to develop products to meet their needs, and a feedback of information into the process  
67 that helps to evaluate existing products and contribute knowledge to new ones. The  
68 Climate Resilience Toolkit (CRT—<https://toolkit.climate.gov/content/home>) includes  
69 examples of such products that provide maps, scenarios, guidelines, and other  
70 information at local to regional scales. Specific issues likely to be addressed include:

- 71 • Developing a clear structure for how core NCA products (CRT, Global Change  
72 Information System, etc.) interact and feedback into future NCA activities;
- 73 • Developing clear mechanisms of engagement for non-federal participants  
74 (Partnership, program, and infrastructure models);
- 75 • Engagement of professional associations (e.g., American Society of Civil  
76 Engineers) and others to develop recommendations for evaluation processes for  
77 current and future products.

78

79 *Topic 3: Modes of Engagement with the NCA Process*

80 Many constituent partnerships, including end users and capacity-building boundary  
81 entities, have been formed during the NCA process. To promote engagement and  
82 dialogue, the USGCRP sustains the NCANet, a network of some 200 entities that  
83 participate in the assessment process. Maintaining and strengthening existing  
84 partnerships, and developing new forms of engagement, is challenging for the USGCRP,  
85 Agencies, and programs in the context of the legal constraints and capacity limitations.  
86 In developing recommendations on this topic, the Advisory Committee will consider

87 what has been learned since the NCADAC 2013 report about engagement in the NCA  
88 process. Recommendations may be provided for several specific topics:

- 89 • Characterize modes of and mechanisms for existing engagement of end users  
90 and boundary entities (including private sector climate service providers);
- 91 • Identify agency-specific and external engagement processes and processes that  
92 may be modified for the NCA context to strengthen existing partnerships;
- 93 • Strategize how climate assessment gaps can be addressed through establishing  
94 and supporting new engagement partnerships;
- 95 • Outline recommendations for an engagement infrastructure that both ensures  
96 bottom-up partnerships for assessment with end users and boundary entities  
97 and for tailoring scientific assessment for decision relevance and knowledge co-  
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122 process that meets the requirements of the Federal Advisory Committee Act. It will  
123 solicit public input, consult subject matter experts, review prior recommendations,  
124 provide interim findings (in summary form), request feedback from the SGCR, issue a  
125 draft report for public comment, and publish a final report with recommendations.

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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12 ECOLOGICAL RIGHTS FOUNDATION, ) CASE NO. 18-cv-888 JSC

13 Plaintiff, )

14 v. )

15 NATIONAL MARINE FISHERIES SERVICE, )

16 Defendant. )

**DEFENDANT’S REPLY IN SUPPORT OF  
CROSS MOTION FOR SUMMARY  
JUDGMENT**

Date: July 19, 2018  
Time: 2:00 p.m.  
Place: Courtroom F, 15<sup>th</sup> Fl.

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF AUTHORITIES.....ii

I. INTRODUCTION .....1

II. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT .....2

    A. NOAA Conducted a Search Reasonably Calculated to Uncover Responsive  
    Records .....2

    B. Plaintiff’s Request for Discovery Should Be Denied .....5

    C. NOAA Properly Withheld Material Pursuant to Exemption 5 .....7

    D. NMFS Has Met FOIA’s Segregability Requirement .....11

    E. Neither Declaratory Nor Injunctive Relief Is Warranted.....11

        1. NOAA’s Complied With Obligations at the Administrative Stage .....11

        2. Plaintiff’s Claims Are Moot.....13

            (i) Withholding under Exemption 6 and 7(C).....13

            (ii) Determination on Administrative Appeal .....14

        3. No Injunctive Relief is Warranted .....15

III. CONCLUSION .....15

Cases

1

2

3 *Bayala v. U.S. Dep’t of Homeland Security,*  
72 F. Supp. 3d 260 (D.D.C. 2014) ..... 12

4 *Biodiversity Legal Found. v. Badgley,*  
309 F.3d 1166 (9th Cir. 2002) ..... 14

5

6 *California v. Campbell,*  
138 F.3d 772 (9th Cir. 1998) ..... 5

7 *Elec. Privacy Info. Ctr. v. DHS,*  
384 F. Supp. 2d 100 (D.D.C. 2005) ..... 7

8

9 *Flowers v. Internal Revenue Serv.,*  
307 F. Supp. 2d 60 (D.D.C. 2004) ..... 7

10 *Ground Saucer Watch v. CIA,*  
692 F.2d 770 (D.C. Cir. 1981) ..... 2

11

12 *Gula, v.Meese,*  
699 F. Supp. 956 (D.D.C. 1988) ..... 10

13 *Hongsermeier v. CIR,*  
621 F.3d 890 (9th Cir. 2010) ..... 7

14

15 *Huene v. U.S. Dep’t of the Treas., No. 2:11-cv-01209 JAM KJN PS,*  
2012 WL 1681940 (E.D. Cal. May 14, 2012) ..... 6

16 *Jarvik v. CIA,*  
741 F. Supp. 2d 106 (D.D.C. 2010) ..... 6

17

18 *Judicial Watch v. U.S. Dep’t of Justice,*  
185 F. Supp. 2d 54 (D.D.C. 2002) ..... 6

19 *Judicial Watch, Inc. v. Clinton,*  
880 F. Supp. 1 (D.D.C. 1995) ..... 11

20

21 *Lawyer’s Comm. for Civil Rights of San Francisco Bay Area v. U.S. Dep’t of Treasury,*  
534 F. Supp. 2d 1126 (N.D. Cal. 2008) ..... 6

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693 F.2d 907 (9th Cir. 1982) ..... 15

23

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867 F.2d 520 (9th Cir. 1989) ..... 5

25 *Maynard v. CIA,*  
986 F.2d 547 (1st Cir.1993) ..... 2

26

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656 F.2d 7 ..... 6

28 *Mobil Oil Corp. v. U.S. E.P.A.,*  
879 F.2d 698 (9th Cir. 1989) ..... 12



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*Morley v. CIA*,  
508 F.3d 1108 (D.C. Cir. 2007) ..... 3

*Nat'l Wildlife Fed'n v. U.S. Forest Serv.*,  
861 F.2d 1114 (9th Cir. 1988) ..... 7, 8

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71 F.3d 885 (D.C. Cir. 1995) ..... 1

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920 F.2d 57 (D.C. Cir. 1990) ..... 1, 5

*Olagues v. Russoniello*,  
770 F.2d 791 (9th Cir. 1985) ..... 12

*Our Children's Earth Foundation v. National Marine Fisheries Service*,  
85 F. Supp. 3d 1075 (N.D. Cal. 2015) ..... 14

*Our Children's Earth Foundation v. National Marine Fisheries Service*,  
Case Nos. 14-4365 SC, 14-1130 SC, 2015 WL 4452136, (N.D. Cal. July 20, 2015) ..... 14

*SafeCard Servs. Inc. v. SEC*,  
926 F.2d 1197 (D.C. Cir. 1991) ..... 2

*Thomas v. Dep't of Health & Human Servs.*,  
587 F. Supp. 2d 114 (D.D.C. 2008) ..... 6

*Tracy v. Department of Justice*,  
117 F.Supp.3d 1 (D.D.C. July 31, 2015) ..... 13

*United States v. State of Wash.*,  
759 F.2d 1353 (9th Cir. 1985) ..... 12

*Voinche v. FBI*,  
999 F.2d 962 (5th Cir. 1993) ..... 13

*Washington v. U.S. Dep't of Justice*,  
467 F. Supp. 2d 40 (D.D.C. 2006) ..... 6

*Washington v. Federal Election Commission ("CREW")*,  
711 F.3d 180 ..... 9, 10, 13

*Wilbur v. CIA*,  
355 F.3d 675 (D.C. Cir. 2004) ..... 2

*Wilson v. DEA*,  
414 F. Supp. 2d 5 (D.D.C. 2006) ..... 2

*Young v. CIA*,  
972 F.2d 536 (4th Cir. 1992) ..... 10

*Zemanksy v. EPA*,  
767 F.2d 569 (9th Cir. 1985) ..... 1

Statutes

1 5 U.S.C. § 552(a)(4)(B) ..... 10  
2 5 U.S.C. § 552(a)(6)(A)(i) ..... 9  
3 5 U.S.C. § 552(b)(5) ..... 10  
4 5 U.S.C. § 552(b)(6) ..... 10

5 Rules

6 Federal Rule of Civil Procedure 56(d) ..... 5

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1 **I. INTRODUCTION**

2 This lawsuit relates to a FOIA request submitted by plaintiff, Ecological Rights Foundation  
3 (plaintiff or “EcoRights”) to NMFS dated December 6, 2016. The agency completed its document  
4 release in response to plaintiff’s FOIA request and issued its final response on February 13, 2017,  
5 releasing 239 documents in their entirety, and 54 documents in part.

6 NMFS conducted searches that could be reasonably expected to discover records subject to  
7 plaintiff’s request. Based on various emails of a NMFS Fishery Biologist and a letter NMFS sent to the  
8 Federal Energy Regulatory Commission (“FERC”), plaintiff speculates that NMFS’ Office of Law  
9 Enforcement (“OLE”) conducted an investigation and generated as yet uncovered records. The emails  
10 and letter do not evidence an OLE investigation; rather, they refer to actions and duties of other entities  
11 – California Department of Fish and Wildlife and FERC. Having no grounds upon which to challenge  
12 either the reasonableness of the agency’s search or good faith declarations, plaintiff asks to undertake  
13 discovery, but fails to specify what facts could be elicited from such discovery.

14 Plaintiff has challenged the agency’s withholdings under FOIA Exemption 5 for material  
15 protected by the attorney client and deliberative process privileges on ten documents. The agency has  
16 agreed to release an unredacted version of two of the records previously at issue. Only eight documents  
17 remain in dispute. The agency has explained, through its submissions, including a Second Declaration  
18 of NOAA FOIA Officer Mark Graff (“Second Graff Decl.”) and revised Vaugh index filed concurrently  
19 with this Reply Brief, the basis for the attorney-client and deliberative process privileges claimed.

20 The remainder of plaintiff’s claims assert purported technical violations of FOIA that are either  
21 moot or lack any legal support. One, plaintiff complains of an inconsistency in the agency’s redaction  
22 of OLE Agent Donald Tanner’s name and email information across three records in the agency FOIA  
23 release. The two records that contained redactions Exemptions 6 and 7(C) were re-released without  
24 withholdings, and any claim regarding those exemptions is now moot. Two, plaintiff complains that the  
25 agency’s February 13, 2017 final response letter was deficient because it did not breakdown by page  
26 count (as opposed to document count), the number of withholdings and only listed the exemption  
27 categories (e.g., attorney-client, deliberative process, privacy) claimed, without providing information  
28 about the basis for the withholdings. Plaintiff does not cite a single case in support of its position.

1 Finally, although plaintiff's lawsuit seeks the Court's determination on the same issues raised in  
2 plaintiff's administrative appeal, in moving for summary judgment, plaintiff complained that it had not  
3 received the agency's appeal determination. It is undisputed that the appeal determination has been  
4 provided. Any claim seeking the determination is now moot. Plaintiff has failed to establish any pattern  
5 and practice of delayed determinations on plaintiff's administrative appeals that would warrant  
6 declaratory or injunctive relief. Accordingly, the Court should grant summary judgment in favor of  
7 defendant and deny plaintiff's summary judgment motion.

## 8 **II. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT**

### 9 **A. NOAA Conducted a Search Reasonably Calculated to Uncover Responsive Records**

10 NMFS has met its burden to demonstrate the adequacy of its search with "reasonably detailed,  
11 nonconclusory affidavits submitted in good faith." *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985).  
12 An agency's search for records is considered "adequate" if it was conducted "using methods which can  
13 be reasonably expected to produce the information requested." *Nation Magazine v. U.S. Customs Serv.*,  
14 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir.  
15 1990)). "[T]he issue to be resolved is not whether there might exist any other documents possibly  
16 responsive to the request, but whether the search for those documents was adequate." *Zemansky*, 767  
17 F.2d at 571 (emphasis original); *SafeCard Servs. Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (the  
18 agency need only show that "the search was reasonably calculated to discover the requested documents,  
19 not whether it actually uncovered every document extant."). "Agency affidavits enjoy a presumption of  
20 good faith, which will withstand purely speculative claims about the existence and discoverability of  
21 other documents." *Ground Saucer Watch v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981).

22 The declarations provided by NOAA FOIA Officer Mark Graff, OLE Deputy Director Robert L.  
23 Gregory ("Gregory Decl."), and OLE Agent Tanner ("Tanner Decl."), establish that the agency's search  
24 targeted the offices where responsive documents are likely to be located, the NOAA Fisheries West  
25 Coast Region offices and OLE. See ECF No. 26, Declaration of Mark Graff in Support of Defendant's  
26 Cross Motion for Summary Judgment ("Graff Decl.") ¶¶ 5-8, 13-15; Second Graff Decl. ¶ 4; Gregory  
27 Decl. ¶¶ 11-17; Tanner Decl. ¶¶ 8-11. Both hard copy and electronic files were searched, and the search  
28 terms used were identified. See *id.* Second Graff Decl. ¶ 4; Gregory Decl. ¶ 13; Tanner Decl. ¶ 8.

1 Plaintiff does not contend insufficiency in the search terms used or that relevant offices or personnel  
2 were omitted from the search.

3         Once an agency makes a showing that it conducted a search in good faith that was reasonably  
4 calculated to uncover all relevant documents, the agency's position can only be rebutted by showing that  
5 the agency's search was not made in good faith. *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir.1993).  
6 The plaintiff bears an "evidentiary burden" to "present evidence rebutting the agency's initial showing  
7 of a good faith search." *See Wilson v. DEA*, 414 F. Supp. 2d 5, 12 (D.D.C. 2006). An agency's "failure  
8 to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does  
9 not undermine the determination that the agency conducted an adequate search for requested records."  
10 *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) (per curiam).

11         Plaintiff has failed to meet its burden. The primary search deficiency alleged is the absence of  
12 investigative records in the agency's FOIA release. Citing various emails of NMFS Fishery Biologist,  
13 Larry Thompson, and a letter from NMFS to FERC, plaintiff argues that based on the content of these  
14 emails, OLE should have conducted an investigation.<sup>1</sup> *See* ECF No. 12-1, Linn Decl. Exs. G-H; ECF  
15 No. 30-1, Reply Linn Decl. Exs. 2-5. But nothing in these emails suggest the agency's search failed to  
16 capture responsive records. The records cited by plaintiff do not refer to the existence of an  
17 investigation or creation of records by Agent Tanner. None of the documents submitted with the  
18 Plaintiff's Opposition and Reply suggest the existence of as yet uncovered OLE records: the emails  
19 indicate that in 2015, FERC's Office of Compliance was contacted about fish strandings, California  
20 Department of Fish and Wildlife ("CDFW") "technically have the lead" on fish rescues, and the decision  
21 on any actions were up to CDFW.<sup>2</sup> *See* Reply Linn Decl. Exs. 2-4. The letter cited by plaintiff indicates

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23         <sup>1</sup> Though plaintiff expresses its belief that OLE should have undertaken investigations, this issue  
is beyond the scope of the FOIA and not the proper subject of a FOIA lawsuit. Pl. Opp. & Reply at n. 1.

24         <sup>2</sup> Plaintiff inaccurately states that defendant did not address an October 21, 2015 email from  
25 Larry Thompson, *see* Linn Decl. Ex. G, in its Cross-Motion for Summary Judgment. Plaintiff believes  
26 that documents included in NMFS' release, such as the October 21, 2015 email, indicate Tanner is  
involved in investigations related to flow fluctuations and poaching at the Yuba River based solely on  
27 plaintiff's position that OLE should have initiated an investigation into the issues discussed in the  
records. *See* Def.'s Cross-Mot. for Summ. J. at 17. This amounts to no more than "[m]ere speculation  
28 that as yet uncovered documents might exist," which is not enough to "undermine the determination  
that the agency conducted an adequate search for the requested records." *Morley v. CIA*, 508 F.3d  
1108, 1120 (D.C. Cir. 2007) (citation omitted). In the Opposition and Reply, plaintiff introduces  
additional records about the same incident discussed in the October 21, 2015 email, and suggests that

1 that NMFS discussed fish strandings with FERC and refers to a process involving FERC, not an OLE  
2 investigation. *See id.* Ex. 5. Tanner has further explained that although he received emails from  
3 Thompson regarding the FERC project, Thompson did not make a referral to OLE to investigate take  
4 allegations, and Tanner did not collect any records related to this incident. Tanner Decl. ¶ 7.

5 Defendant previously addressed a September 24, 2014 email authored by Thompson that  
6 plaintiff referenced in its Motion for Summary Judgment: the email indicates nothing more than a plan  
7 by Thompson to visit the lower Yuba River and to discuss stranding hazards with Tanner because  
8 Tanner “may attend the future FERC public meeting on the subject.” Linn Decl. Ex. H. The email did  
9 not contain any substantive discussion of any “take,” reference to an investigation, suggestion of any  
10 steps that Tanner may have taken after the visit, or suggestion that Tanner created any investigative  
11 documents yet to be produced. *See id.* Tanner has explained that Thompson never made a referral to  
12 OLE for the initiation of an investigation, and Tanner did not create any records related to his site visit.  
13 Tanner Decl. ¶¶ 5-7. Tanner did not see any evidence of “take” at the site visit. *See id.*

14 Plaintiff further contends that Agent Tanner indicated in a February 13, 2014 email that he was  
15 tracking fish strandings, but these reports were not located the agency’s search. *See* Linn Decl. Exs. A-  
16 B; Pl. Opp. & Reply at 9. Plaintiff mischaracterizes Tanner’s statement. The email shows that  
17 Thompson forwarded to Tanner, among others, a letter about salmon strandings that NMFS filed in  
18 proceedings on a FERC project and stated that he would keep the email recipients “abreast of the FERC  
19 response.” Tanner responded: “Thanks Larry. I’m keeping track of your reports.” *See* Linn Decl. Exs.  
20 A-C. Tanner did not indicate that he was independently tracking fish strandings or creating any reports.

21 Next, plaintiff challenges the adequacy of NOAA’s search on the ground that OLE, “and  
22 particularly Agent Tanner,” did not search paper files. Pl. Opp. & Reply at 8-9. This ignores the facts  
23 provided by Graff. He explained that Tanner’s paper files were searched. *See* Graff Decl. ¶ 13. With  
24 this Reply, defendant has provided the declaration of OLE Deputy Director Robert Gregory to further

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plaintiff made defendant aware of these emails prior to Defendant’s Cross-Motion for Summary  
Judgment. *See* Pl. Opp. and Reply at 9-10. Plaintiff fails to mention that plaintiff had these records  
before it filed plaintiff’s Motion for Summary Judgment, but did not identify or address them in its  
Motion. *See* Reply Linn Decl. Ex. 1. As explained above, these emails further demonstrate the  
speculative nature of plaintiff’s argument.

1 describe the OLE searches conducted as part of DOC's inquiry in response to plaintiff's appeal.

2 Gregory has explained that in April 2017, OLE was tasked in undertaking additional searches, and that  
3 search included both electronic and paper records. *See* Gregory Decl. ¶ 13.

4 Finally, plaintiff questions the search cut-off dates used in the searches that followed plaintiff's  
5 administrative appeal. In his Second Declaration, Graff has explained that the cut-off date used in the  
6 additional search conducted by NOAA Fisheries' West Coast Region offices was the date the search was  
7 executed. Second Graff Decl. ¶ 4. Gregory has similarly explained that the end date used by OLE was  
8 the date the search was executed. Gregory Decl. ¶ 13.

9 Here, NMFS has demonstrated through the Graff, Gregory, and Tanner declarations that it  
10 conducted a reasonable search for relevant documents, and thus, has demonstrated that it is entitled to  
11 summary judgment on this issue. Plaintiff attempts to challenge the sufficiency of the agency's search  
12 based on its interpretation of emails, that on their face, do not indicate that an OLE investigation was  
13 conducted. Plaintiff's arguments rely on nothing more than their belief that more action should have  
14 been taken by OLE, ignores the facts provided by the agency's declarations, and as such, do not  
15 overcome the presumption of the agency's good faith search.

16 **B. Plaintiff's Request for Discovery Should Be Denied**

17 Plaintiff also requests under Federal Rule of Civil Procedure 56(d), that the Court permit  
18 discovery related to defendant's searches. To obtain discovery under Rule 56(d), plaintiff must  
19 demonstrate: (1) that it has set forth in affidavit form the specific facts it hopes to elicit from further  
20 discovery; (2) that the facts sought exist; and (3) that these sought-after facts are "essential" to resist  
21 defendant's summary judgment motion. *See California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998).  
22 A Rule 56(d) motion must show how additional discovery would preclude summary judgment and why  
23 a party cannot immediately provide "specific facts" demonstrating a genuine issue of material fact. *See*  
24 *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 523-24 (9th Cir. 1989). Plaintiff has not made such a  
25 showing. No declaration has been provided setting forth specific "essential" facts to be elicited from  
26 discovery. The Reply Linn Declaration does not describe what discovery plaintiff proposes to  
27 undertake, or any facts that plaintiff believes would be obtained from that discovery.

1 None of plaintiff's actions or contentions demonstrate grounds for discovery. Plaintiff takes two  
2 inconsistent positions. It contends that the Reply Linn Declaration presents all the "requisite evidence"  
3 allegedly demonstrating that "overlooked" material was not produced. At the same time, plaintiff also  
4 contends that it does not have "essential" evidence on the agency's search and could not have obtained  
5 needed evidence earlier because NMFS did not provide the appeal description and full description of its  
6 search until May 25, 2018, with its summary judgment motion. *See* Pl. Opp. & Reply at 6. Plaintiff's  
7 own declarations contradict this assertion. Defendant provided plaintiff's counsel a detailed summary of  
8 the agency's search prior to May 25, 2018 and prior to the initial case management conference. *See*  
9 Reply Linn Decl. Ex. 1 (confirming plaintiff's receipt of defendant's receipt of NMFS' search terms and  
10 parameters); ECF No. 20, May 10, 2018 Joint Case Management Statement at 5. Here, plaintiff was  
11 informed that defendant was willing to provide an appeal determination, that the determination would  
12 address the plaintiff's concerns regarding the agency's search, and that defendant proposed the parties  
13 meet and confer after plaintiff had the opportunity to review the appeal determination. ECF No. 27,  
14 Declaration of Jennifer S Wang In Support of Defendant's Cross-Motion for Summary Judgment and  
15 Opposition to Plaintiff's Motion for Summary Judgment ("Wang Decl.") ¶¶ 2-4. Plaintiff ignored these  
16 opportunities and opted to pursue an early summary judgment motion prior to the completion of the  
17 parties' Rule 26(f) conference and the initial case management conference. *See id.*

18 "Discovery is not favored in lawsuits under the FOIA." *Judicial Watch v. U.S. Dep't of Justice*,  
19 185 F. Supp. 2d 54, 65 (D.D.C. 2002). Courts have uniformly acknowledged that discovery is "an  
20 extraordinary procedure in a FOIA action." *Thomas v. Dep't of Health & Human Servs.*, 587 F. Supp.  
21 2d 114, 115 (D.D.C. 2008); *see also Lawyer's Comm. for Civil Rights of San Francisco Bay Area v. U.S.*  
22 *Dep't of Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) (observing that discovery is "sparingly  
23 granted" in FOIA cases); *Huene v. U.S. Dep't of the Treas.*, No. 2:11-cv-01209 JAM KJN PS, 2012 WL  
24 1681940, at \*3 (E.D. Cal. May 14, 2012). Discovery is typically only permitted in extreme cases, such  
25 as whether there has been a showing of bad faith, which is not the case here. A showing of bad faith is  
26 "when there is evidence of wrongdoing such as illegal destruction of documents or a material conflict in  
27 agency affidavits." *Citizen for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, 467 F.  
28 Supp. 2d 40, 56 (D.D.C. 2006). Discovery is not warranted "when it appears that discovery would only



1 . . . afford [the plaintiff] an opportunity to pursue a bare hope of falling upon something that might  
2 impugn the affidavits.” *Flowers v. Internal Revenue Serv.*, 307 F. Supp. 2d 60, 68 (D.D.C. 2004) (citing  
3 *Military Audit Project v. Casey*, 656 F.2d 7y24, 751-52 (D.C. Cir. 1981). Courts generally do not grant  
4 discovery even if an agency’s affidavits regarding its search are deficient. Instead, courts direct the  
5 agency to supplement its affidavits. *Jarvik v. CIA*, 741 F. Supp. 2d 106, 122 (D.D.C. 2010) (citing  
6 *Judicial Watch*, 185 F. Supp. 2d at 65).

7 The Court should not permit discovery. Plaintiff has neither established the insufficiency of the  
8 agency’s declarations, nor met Rule 56(d) requirements by setting forth specific facts to be elicited from  
9 further discovery and explaining how the sought-after facts are “essential” to resist summary judgment.

### 10 **C. NOAA Properly Withheld Material Pursuant to Exemption 5**

11 Upon additional review, NOAA is releasing two of the ten documents at issue, Documents 5250-  
12 1 and 20774-2. These two documents were drafts of the May 12, 2014 concurrence letter issued by  
13 NMFS addressing the U.S. Army Corps of Engineers’ (“Corps”) maintenance and operation of  
14 Engelbright Dam on the Yuba River in California. *See* Second Graff Decl. ¶ 8.

15 NOAA has met its burden to establish exemptions for the eight documents that remain at issue,  
16 and plaintiff has not offered any legitimate basis to challenge the decision to withhold the information.  
17 Documents 5079-1, Document 5276-1: The only withholding that plaintiff appears to challenge on  
18 these documents, which are solicitations for legal opinion from NOAA Office of General Counsel  
19 (“GC”), is the redaction on the first page. One, plaintiff speculates that the information redacted on the  
20 first page is the same as that which appears, and was not redacted, on the second page. There is no basis  
21 for plaintiff’s speculation. Two, plaintiff theorizes that the redacted information consists of facts that  
22 are public knowledge, but does not explain why, if true, the material is not subject to Exemption 5. The  
23 attorney-client privilege applies to facts divulged by a client to his or her attorney. *See Elec. Privacy*  
24 *Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005).

25  
26 Document 5200: NOAA has explained that the redacted material on this email consists of discussion  
27 between NOAA staff and a NOAA attorney regarding Biological Assessments received from the Corps  
28

1 protected by the attorney-client and deliberative process privileges. These Biological Assessments were  
2 part of an Endangered Species Act (“ESA”) consultation process that was the subject of then-pending  
3 litigation. The redacted material constitutes a discussion between a client and his attorney regarding the  
4 legal completeness and sufficiency of the Biological Assessments and reflects the attorney’s thought  
5 process on that subject. *See* Second Graff Decl. ¶ 12. The revised Vaughn index further discloses the  
6 context in which this email was prepared and the role of this document in the agency’s deliberations as  
7 to future action by the agency: it discusses impressions regarding NMFS’s ability to move forward  
8 towards ESA Section 7 consultation. *See id.* Ex. 6. This type of internal analysis is exempt from  
9 disclosure. *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118–19 (9th Cir. 1988) (“we  
10 believe a better analytical tool than merely determining whether the material itself was essentially  
11 deliberative or factual should be used: we should focus on whether the document in question is a part of  
12 the deliberative process” and explaining that the deliberative process privilege has been held to cover all  
13 “recommendations, draft documents, proposals, suggestions and other subjective documents which  
14 reflect the personal opinions of the writer rather than the policy of the agency”).

15 Document 5215: As described in the revised Vaughn index, the redacted material on this email reflects  
16 a confidential exchange between a NOAA scientist and a NOAA attorney regarding agency compliance  
17 with requirements of a court order issued in then-pending litigation about the subject ESA Section 7  
18 consultation. *See* Second Graff Decl. Ex. 6. The material is also deliberative and pre-decisional as it  
19 identifies proposed future steps for consultation and a need for executive policy decision-making. *See*  
20 *Nat’l Wildlife Fed’n*, 861 F.2d at 1122 (documents properly withheld as deliberative where they  
21 represent “the mental processes of the agency in considering alternative courses of action prior to  
22 settling on a final plan”).

23 Document 5224: The material redacted from this email consists of a confidential communication by the  
24 NMFS Sacramento River Basin Chief to his attorney requesting legal advice on an aspect of the ESA  
25 Section 7 consultation process with the Corps. *See* Second Graff Decl. Ex. 6. The redacted material  
26 was also withheld under the deliberative process privilege because it is pre-decisional, rendered before  
27 the agency’s final letter of concurrence was issued, reflects the Section Chief’s view of a legal issue  
28 raised in the consultation process, and solicits legal advice regarding that view. *Id.* This is precisely the

1 type of material protected by the deliberative process privilege. *See Nat'l Wildlife Fed'n*, 861 F.2d at  
2 1118-19; *Columbia Snake River Irrigators Ass'n v. Lohn*, C07-1388MJP, 2008 WL 750574, at \*3 (W.D.  
3 Wash. March 19, 2008) (“recommendations, draft documents, proposals, suggestions and other  
4 subjective documents which reflect the personal opinions of the written rather than the policy of the  
5 agency . . . are deliberative and are properly withheld under exemption five.”).

6 Document 5247: NOAA has explained the applicability of the attorney-client privilege to this email.

7 The redacted material comprises a request by NOAA staff to a NOAA attorney for legal advice on how  
8 to respond to Environmental Advocates, plaintiff’s counsel, during the course of an ESA consultation  
9 and litigation related to that consultation. *See Second Graff Decl. Ex. 6.*

10 Document 5247-2. This is a draft response to a letter received from Environmental Advocates and was  
11 attached to the above-described attorney-client communication, which sought legal advice on the  
12 response.<sup>3</sup> The portions withheld represent deliberations that were pre-decisional in nature as the parties  
13 were considering how to respond to Environmental Advocates, how to handle certain issues discussed in  
14 Environmental Advocates’ letter, and what changes to make to the draft response. *See Second Graff*  
15 *Decl. Ex. 6.* FOIA protects not just records, but the agency’s deliberative process. The exchange of  
16 drafts is itself part of that process, and thus exempt from disclosure. *National Wildlife Fed’n*, 861 F.2d  
17 at 1118. Moreover, in formulating a response to Environmental Advocates’ letter and evaluating how to  
18 handle certain issues raised in the letter, NMFS “exercise[d] policy implicating judgment,” and the  
19 document it created is deliberative and properly withheld under exemption five. *Columbia Snake River*  
20 *Irrigators Ass’n*, 2008 WL 750574, at \*3.

21 Document 30833: NOAA has explained that this document was prepared by a NOAA attorney, at the  
22 request of NOAA program managers for the legal analysis captured in the document, and is therefore  
23 protected attorney-client communication. The revised Vaughn index further explains that the legal  
24 issues addressed are the subject of recurring litigation, and therefore also properly withheld as attorney  
25 work product.<sup>4</sup> *See Graff Decl. Ex. 6.* The redacted portions of the document reflect a draft legal  
26

27 <sup>3</sup> Because this document is part of an attorney-client communication, the revised Vaughn index  
28 reflects an additional basis for withholding the document under the attorney-client privilege. *See Graff*  
*Decl. Ex. 6.*

<sup>4</sup> The revised Vaughn reflects that an additional basis for withholding Document 30833 is the  
DEFENDANT’S REPLY ISO CROSS-MSJ

1 analysis and draft proposed consultation approach that could be applied on a national- or project-level  
2 basis and which, if implemented, would likely be the subject of legal challenges. *See* Second Graff  
3 Decl. Ex. 6; *Am. Civil Liberties Union of N. California v. United States Dep't of Justice*, 880 F.3d 473,  
4 487 (9th Cir. 2018) (attorney work product protection under exemption 5 applies to records prepared in  
5 anticipation of recurring legal issues). The revised Vaughn also discloses that the document was created  
6 as part of an ongoing discussion regarding development of agency legal and policy positions, but the  
7 legal analysis reflected in the document was never finalized or adopted by the agency as official legal  
8 guidance. This type of internal analysis and review is exempt from disclosure. *Nat'l Wildlife Fed'n*,  
9 861 F.2d at 1118.

10 Plaintiff argues that because the agency did not assert deliberative process privilege over this  
11 document during the administrative stage, the Court must ignore the assertion of the privilege in  
12 litigation. Plaintiff misstates the law. The authority plaintiff cites, *Nat'l Wildlife Fed'n v. NMFS*, 481  
13 F.3d 1224, 1237 n. 9 (9th Cir. 2007), does not discuss either FOIA or the deliberative process privilege.  
14 “[A]n agency does not waive FOIA exemptions by not raising them during the administrative process . .  
15 . . [W]aiver is inappropriate because FOIA provides for de novo judicial review, 5 U.S.C. §  
16 552(a)(4)(B); agencies do not litigate FOIA requests and therefore do not create a record suitable for  
17 review.” *Young v. CIA*, 972 F.2d 536, 538–39 (4th Cir. 1992) (“It is unremarkable that the CIA, when it  
18 filed its declarations and Vaughn Indices, changed its position as to a few of the many documents  
19 originally at issue two years before in the administrative proceeding.”); *Gula v. Meese*, 699 F. Supp. 956,  
20 959 n. 2 (D.D.C. 1988); (“[T]he defendant in a FOIA case may assert new exemptions at the federal  
21 district court level . . . not previously asserted at the administrative level, even if the circumstances have  
22 not changed in the interim.”).

23 Plaintiff’s contention that the agency failed to maintain the confidentiality of attorney-client  
24 communications is unsubstantiated. Graff has confirmed that all documents with attorney-client  
25 privilege material were confidential, and that the agency maintained that confidentiality. *See id.* ¶ 10.  
26  
27

28 \_\_\_\_\_  
attorney work production protection. *See id.*

1 Plaintiff generally asserts, with respect to all of the documents at issue, that the agency has failed  
 2 to establish a foreseeable harm if the redacted information were released. Plaintiff does not cite any  
 3 authority that suggests that such particularized explanation of the harm that would result from a client's  
 4 solicitation of legal advice from his attorney in a Vaughn index is required to establish the exemption.  
 5 With respect to all attorney-client communications, the fundamental harm is that disclosure breaks the  
 6 privilege. *See also* Second Graff Decl. ¶ 7 (release of the material withheld under the attorney-client  
 7 privilege would discourage NOAA staff from seeking legal advice from NOAA attorneys about the legal  
 8 implications of and legal sufficiency of agency actions and discourage a frank and open dialogue  
 9 regarding implementation of policy and legal interpretations, with the result that NOAA GC's ability to  
 10 advocate and offer advice to their client will be limited).

11 Graff has previously explained that further disclosure of the records at issue would adversely  
 12 affect the candor of future agency deliberations. *See* Graff Decl. ¶¶ 30, 36. In his second declaration,  
 13 Graff has further explained that the agency evaluated each of the withholdings at issue to consider  
 14 whether a foreseeable harm would result from disclosure of the redacted information. *See* Second Graff  
 15 Decl. ¶¶ 6-7. The revised Vaughn index provides further details, with respect to each of the remaining  
 16 disputed assertions of the deliberative process privilege, the foreseeable harm that would result from  
 17 discovery of the redacted information. *See* Second Graff Decl. Ex. 6.

#### 18 **D. NMFS Has Met FOIA's Segregability Requirement**

19 The only alleged failures by NMFS to segregate non-exempt material relate to the two draft  
 20 concurrence letters (documents 5250-1 and 20774-2). Pl. Opp. & Reply at 24. As discussed above,  
 21 defendant will release unredacted versions of these documents.

#### 22 **E. Neither Declaratory Nor Injunctive Relief Is Warranted**

23 None of plaintiff's requests for declaratory or injunctive relief should be granted. Plaintiff has  
 24 failed to demonstrate that either is warranted or appropriate in this case.

#### 25 **1. NOAA's Complied With Obligations at the Administrative Stage**

26 During the administrative stage under FOIA, an agency need only "indicate the scope of the  
 27 documents it intends to produce and the exemptions it will claim." *Citizens for Responsibility and*  
 28 *Ethics in Washington v. Federal Election Commission* ("CREW"), 711 F.3d 180, 187 n. 4 (D.C. Cir.

1 203). A FOIA response must identify “reasons” for a determination. *See* 5 U.S.C. § 552(a)(6)(A)(i).  
2 “The administrative process need not explore all issues or arguments.” *See id.*

3 Here, NOAA satisfied its statutory obligations at the administrative stage by identifying the  
4 number of documents<sup>5</sup> collected for processing, the number produced with and without redactions, and  
5 the specific exemptions being claimed for the withholdings in its February 13, 2017 letter: 5 U.S.C. §  
6 552(b)(5) attorney client work product, 5 U.S.C. § 552(b)(5) attorney client privilege, 5 U.S.C. §  
7 552(b)(5) deliberative process, and 5 U.S.C. § 552(b)(6) individuals’ right to privacy. *See Bayala v.*  
8 *U.S. Dep’t of Homeland Security*, 72 F. Supp. 3d 260, 265-66 (D.D.C. 2014) *rev’d on other grounds*,  
9 827 F.3d 31 (D.C Cir. 2016) (enumeration of applicable FOIA exemptions by reference to statutory  
10 citation in letter sufficient to meet obligation that the agency provide “the reasons” for its  
11 determinations). At the administrative stage, NMFS properly identified the exemptions it was claiming  
12 with respect to the redacted documents at issue. The agency’s omission of a missing reference to (b)(5)  
13 on a single redaction box on a one page email in NMFS’s release, does not constitute a failure by the  
14 agency of complying with FOIA obligations. *See* ECF No. 12-15, Hudak Decl. Ex. 5 at 15. This is  
15 particularly so, when, as discussed above, the agency has met its obligations by listing the relevant  
16 FOIA exemptions in its February 13, 2017 letter and when the agency may assert new exemptions at the  
17 district court level, not previously asserted at the administrative level. *See Young*, 972 F.2d at 538–39  
18 (agency does not waive FOIA exemptions by not raising them during the administrative process); *Gula*,  
19 699 F. Supp. at 959 n. 2 (agency may assert new FOIA exemptions at the district court that were not  
20 previously asserted at the administrative level).

21 At the administrative stage, an “agency is not required to produce a document like a Vaughn  
22 index, which district courts typically rely on in adjudicating summary judgment motions in FOIA case.”  
23 *CREW*, 711 F.3d at 187 n. 4. Plaintiff admits that “[t]he law is clear that a *Vaughn* index is not  
24 required” at the administrative stage, *see* Pl. Opp. & Reply at 14. Although plaintiff asserts that it is not  
25 asking the Court to issue an order requiring that NMFS issue a Vaughn index at the administrative stage,  
26

27  
28 <sup>5</sup> In Defendant’s Cross Motion for Summary Judgment, mistakenly stated that the February 13,  
2017 letter identified the number of pages collected for processing. This error is immaterial as FOIA  
does not require that an agency provide total number of pages collected for processing.

1 the information that it contends the agency must provide at the administrative stage, is, in substance, that  
2 which would be included in a Vaughn index at summary judgment: an explanation for withholding  
3 information, an explanation for what foreseeable harm to a protected interest would result from  
4 disclosures. *See* Pl. Opp. and Reply at 10-11.

5 Plaintiff identifies the following alleged failings of the agency's February 13, 2017 final  
6 response: of the 54 documents produced with redactions, one redaction box on a single one-page email  
7 did not contain an exemption basis; two redaction boxes simply listed (b)(5), and the response letter  
8 failed to identify the number of pages (as opposed to the number of documents) collected for processing;  
9 the number of pages in the 54 documents that contained redaction; how many were withheld under the  
10 attorney-client privilege; how many were withheld under the deliberative process privilege; and how  
11 many were withheld under Exemption 6. Plaintiff does not cite a single case that supports its  
12 contentions. Moreover, through the agency's document release, the agency provided plaintiff most of  
13 the above-listed information: the number of pages in the 54 documents that contained redaction, and on  
14 all but three documents, the number of withholdings under the various exemptions claimed. Plaintiff  
15 was informed that the agency located 309 responsive records, and the disposition of those records.  
16 Declaratory judgment is not warranted because, as discussed above, plaintiff misstates the law and the  
17 agency's obligations at the administrative stage.

## 18 **2. Plaintiff's Claims Are Moot**

### 19 **(i) Withholding under Exemption 6 and 7(C)**

20 The issue of whether Tanner's name and contact information was properly withheld on two  
21 emails under Exemption 6 and 7(C) is moot. The agency has provided an unredacted version of the  
22 emails. Graff Decl. Ex. 2. NOAA has determined that this withholding is no longer necessary. *Id.* ¶ 17.  
23 This is not a concession by the agency on the propriety of the withholding. FOIA "exemptions are  
24 permissive, and an agency may voluntarily release information that it would be permitted to withhold  
25 under the FOIA exemptions." *Mobil Oil Corp. v. U.S. E.P.A.*, 879 F.2d 698, 700 (9th Cir. 1989).

26 Plaintiff has failed to explain any grounds to justify declaratory relief on an issue that is now  
27 moot. The limitations upon issuance of a declaratory judgment reflect concerns similar to those  
28 underlying the case and controversy limitation of Article III. *See United States v. State of Wash.*, 759

1 F.2d 1353, 1357 (9th Cir. 1985). “Declaratory relief should be denied when it will neither serve a useful  
2 purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford  
3 relief from the uncertainty and controversy faced by the parties.” *Id.*; see *Olagues v. Russoniello*, 770  
4 F.2d 791, 803 (9th Cir. 1985) (“allegations of a subjective ‘chill’ are not an adequate substitute for a  
5 claim of a specific present objective harm or a threat of specific future harm” sufficient to establish  
6 standing). As plaintiff acknowledges, the information at issue – Agent Tanner’s name and email address  
7 –was redacted on the two subject emails, but released on another version of one of the subject emails.  
8 See Linn Decl. at 3, Exs. A-D; Second Graff Decl. ¶ 5. It is undisputed that plaintiff has had Tanner’s  
9 information since the agency’s February 2017 response to the Request. It is also undisputed that the  
10 agency has now released the two subject emails without any redaction. Graff Decl. Ex. 2. Accordingly,  
11 there is no existing controversy for this Court to decide.

#### 12 (ii) Determination on Administrative Appeal

13 Any FOIA claim premised on DOC’s failure to provide the final appeal determination is moot;  
14 the agency has provided its determination, and indeed, had offered to provide the response without the  
15 need for the present Motion. Wang Decl. ¶ 5, Ex. 1. When a government agency fails to meet the  
16 timelines set in the FOIA, filing suit provides a remedy by compelling the agency to act. But once an  
17 agency has responded to the request the issue of timeliness becomes moot. See *Voinche v. FBI*, 999  
18 F.2d 962, 963 (5th Cir. 1993); *Tracy v. Department of Justice*, 117 F.Supp.3d 1, 5 (D.D.C. July 31,  
19 2015). Mere delay in issuing a final determination on plaintiff’s appeal does not warrant declaratory  
20 judgment. “Even if the agency does not adhere to FOIA’s explicit timelines,” the consequence for a  
21 delay is simply that the agency cannot use the administrative exhaustion requirement to prevent parties  
22 from filing a case in court. *CREW*, 711 F.3d at 189.

23 No exception to the mootness doctrine applies here. While an agency’s pattern and practice of  
24 delayed responses to FOIA requests by the same plaintiff may provide an exception to the mootness  
25 doctrine, plaintiff have failed to demonstrate that such a pattern exists here. *Cf. Biodiversity Legal*  
26 *Found. v. Badgley*, 309 F.3d 1166, 1174 (9th Cir. 2002) (explaining that exception to mootness doctrine  
27 requires that the challenged action will affect the plaintiff in the future). Here, plaintiff alleges a single  
28 instance where DOC delayed issuance of its response to plaintiff’s administrative appeal. Beyond



1 speculative a statement that plaintiff will “almost certainly” submit FOIA requests to NMFS in the  
 2 future, Reply Linn Decl. ¶ 10, plaintiff does not provide any evidence that EcoRights will submit a  
 3 FOIA request to NOAA, that EcoRights will administratively appeal NOAA’s response, *and* that  
 4 NOAA’s final determination on that appeal will be delayed. Instead, plaintiff appears to suggest that it  
 5 need not demonstrate a pattern and practice relevant to EcoRights’ FOIA requests, and the specific  
 6 FOIA violations alleged in this lawsuit, because of a 2015 order of injunctive relief against NMFS.  
 7 There is no legal basis for plaintiff’s argument. The 2015 order related to a different plaintiff, different  
 8 FOIA requests, and a different FOIA violation – the agency’s failure to respond to multiple FOIA  
 9 requests submitted by Our Children’s Earth Foundation – not at issue here. *Our Children’s Earth*  
 10 *Foundation v. National Marine Fisheries Service* 85 F. Supp. 3d 1075 (N.D. Cal. 2015) (*OCE I*) and  
 11 *Our Children’s Earth Foundation v. National Marine Fisheries Service*, Case Nos. 14-4365 SC, 14-  
 12 1130 SC, 2015 WL 4452136, (N.D. Cal. July 20, 2015) (*OCE II*). Plaintiff cites no caselaw supporting  
 13 this position, that going forward, *any* plaintiff in a FOIA lawsuit against NMFS, may obtain declaratory  
 14 relief without the need to show a pattern and practice, regardless of the FOIA violation alleged.

### 15 3. No Injunctive Relief is Warranted

16 In deciding whether to grant an injunction, the court should consider the effect on the public of  
 17 disclosure or nondisclosure, the good faith of any intent to comply expressed by the agency, and the  
 18 character of past violations. *Long v. IRS*, 693 F.2d 907, 909 (9th Cir. 1982). Here, plaintiff alleges one  
 19 instance where DOC delayed issuance of its response to plaintiff’s administrative appeal. NMFS  
 20 showed good faith in responding to plaintiff’s FOIA request, promptly releasing its final response. DOC  
 21 promptly reviewed the issues raised in plaintiff’s appeal and requested further searches be conducted.

### 22 III. CONCLUSION

23 For the foregoing reasons, defendant respectfully responds that the Court enter judgment in  
 24 favor of NMFS and deny plaintiff’s motion for summary judgment.

25 DATED: June 22, 2018

Respectfully submitted,  
 ALEX G. TSE  
 Acting United States Attorney

27 /s/  
 JENNIFER S WANG  
 Assistant United States Attorney

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

OCEAN CONSERVANCY  
1300 19th Street, NW, Eighth Floor  
Washington, DC 20036

Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE  
U.S. Department of Commerce  
Room 14555  
1315 East-West Highway  
Silver Spring, Montgomery County, MD 20910

NATIONAL OCEANIC AND ATMOSPHERIC  
ADMINISTRATION  
U.S. Department of Commerce  
Room 5128  
1401 Constitution Avenue, NW  
Washington, DC 20230

Defendants.

No. \_\_\_\_\_

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

**INTRODUCTION**

1. Plaintiff Ocean Conservancy brings this case to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by the National Marine Fisheries Service and National Oceanic and Atmospheric Administration (collectively, Defendants). The violations arise out of Defendants' continuing failure to respond to Ocean Conservancy's FOIA request.

2. In June 2017, Defendants issued a Temporary Rule reopening the Gulf of Mexico private angler red snapper fishing season and extending the fishing season from 3 to 42 days. 82 Fed. Reg. 27,777 (June 19, 2017). Defendants admitted that the action would cause the private recreational fishing sector to substantially exceed the annual catch limit set for that sector and delay rebuilding for the overfished population of red snapper, *id.* at 27,779, in violation of a

number of statutes.

3. Ocean Conservancy filed a FOIA request with the National Marine Fisheries Service (Fisheries Service), an agency of the National Oceanic and Atmospheric Administration (NOAA), on June 19, 2017, seeking pertinent records to enable Ocean Conservancy to analyze the basis for and impact of the Temporary Rule and disseminate the information to the public. The records sought in the FOIA request are essential to Ocean Conservancy's advocacy and public education missions to support protecting the red snapper population. Defendants failed to provide Ocean Conservancy a determination on its FOIA request within the time required under FOIA and have not to date provided Ocean Conservancy a determination on its request.

4. Although Defendants have provided Ocean Conservancy a small, partial release of responsive records, Defendants continue to unlawfully withhold the information sought by Ocean Conservancy. Defendants have provided Ocean Conservancy no information on additional responsive records in their possession. By failing to provide the requested records, Defendants are actively impeding Ocean Conservancy's access to government information and blocking its ability to carry out its organizational missions.

5. Having constructively exhausted its administrative remedies with Defendants, Ocean Conservancy now turns to this Court to enforce FOIA's guarantee of public access to agency records and to remedy Defendants' withholding of that access. Accordingly, Ocean Conservancy asks this Court to declare that Defendants have violated FOIA by failing to make a determination on Ocean Conservancy's FOIA request and by withholding the requested records, to order Defendants to immediately provide Ocean Conservancy with a legally compliant response to its outstanding record request, to order Defendants to promptly provide Ocean Conservancy 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, on information and belief, the requested agency records are situated in this District. Venue also properly vests in this District pursuant to 28 U.S.C. § 1391(b) and (e)(i) because: (1) the principal office of each Defendant is located in this District and (2) a substantial part of the events and omissions which gave rise to this action occurred 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 OCEAN CONSERVANCY is a nonprofit, science-based conservation organization dedicated to healthy oceans and the wildlife and communities that depend on them. Since 1972, Ocean Conservancy has sought to improve the health of our nation's marine wildlife and fish. To that end, and as part of its organizational goals, Ocean Conservancy seeks to prevent degradation of marine habitats and end overfishing (i.e., catching more fish than the remaining population can replace). Ocean Conservancy has over 125,000 members and supporters worldwide, including over 14,000 in the five Gulf of Mexico states. The organization publishes numerous reports, articles, newsletters, and other analyses on ocean and fishery sustainability topics each year. The organization is routinely called upon to brief and educate federal and state policymakers, and Ocean Conservancy staff are frequently quoted in the media

and invited to present and speak at various conferences and events. Ocean Conservancy's headquarters are located in Washington, DC. It also has offices in Alaska, California, Washington, Oregon, Florida, and Texas.

10. In the 1990s, Ocean Conservancy became involved in the conservation and management of the red snapper fishery. For the past three decades, Ocean Conservancy has worked to promote a healthy red snapper fishery for the benefit of the Gulf of Mexico's ecosystem and coastal communities. Ocean Conservancy staff have regularly attended meetings of the Gulf of Mexico Fishery Management Council and have been involved in public awareness events concerning fisheries for decades.

11. In 2005, Ocean Conservancy successfully challenged the Fisheries Service's rebuilding plan for red snapper. *Coastal Conservation Ass'n v. Gutierrez*, 512 F. Supp. 2d 896 (S.D. Tex. 2007). In 2015, Ocean Conservancy filed *amicus curiae* briefs in support of the federal government in two lawsuits challenging the Fisheries Service's red snapper management.

12. Defendant NATIONAL MARINE FISHERIES SERVICE is an agency of the U.S. Department of Commerce that has been delegated the responsibility to manage the Gulf of Mexico red snapper fishery under the authority of the Magnuson-Stevens Fishery Conservation and Management Act. 16 U.S.C. §§ 1801 *et seq.* The Fisheries Service has authority to issue regulations governing the red snapper fishery seasons and other management measures. The principal office of the Fisheries Service is located in Silver Spring, Montgomery County, Maryland. The Fisheries Service is in possession and control of the records that Ocean Conservancy seeks, and therefore it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

13. Defendant NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION is an agency of the U.S. Department of Commerce with supervisory responsibility for the

Fisheries Service. The principal office of NOAA is located in Silver Spring, Montgomery County, Maryland. NOAA administers and oversees FOIA requests made to the Fisheries Service. NOAA's FOIA office is located in Silver Spring, Montgomery County, Maryland. NOAA is in possession and control of the records that Ocean Conservancy seeks, and therefore is subject to FOIA pursuant to 5 U.S.C. § 552(f).

### STATUTORY BACKGROUND

14. 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).

15. 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 business days from the date of its receipt and to immediately notify the requester of its determination and the reasons therefore. *Id.* § 552(a)(6)(A)(i). This provision 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).

16. 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).

17. 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).

18. 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).

19. 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).

20. 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**

21. On June 19, 2017, Defendants issued a Temporary Rule reopening the Gulf of Mexico private angler red snapper fishing season and extending that fishing season from 3 to 42 days. 82 Fed. Reg. 27,777 (June 19, 2017).

22. The same day, June 19, 2017, Ocean Conservancy submitted a FOIA request to the Fisheries Service seeking records related to the reopening of the private angler red snapper

fishing season. The request sought all documents relating to the reopening of the red snapper season within the date range of January 20, 2017, through June 19, 2017.

23. Ocean Conservancy's FOIA request furthers the organization's objectives to end overfishing and inform its members and the public about conservation and management of the red snapper fishery to benefit the Gulf of Mexico's ecosystem and coastal communities.

24. On June 20, 2017, Ocean Conservancy received a form email from Defendants acknowledging receipt of the request and assigning the request a tracking number, DOC-NOAA-2017-001394. The acknowledgement did not indicate the scope of the documents Defendants would produce, nor did it indicate any planned withholdings or exemptions.

25. The due date for Defendants to issue a determination on Ocean Conservancy's FOIA request was July 18, 2017, under 5 U.S.C. § 552(a)(6)(A)(i).

26. On July 6, 2017, NOAA notified Ocean Conservancy that the agency had granted Ocean Conservancy's fee waiver request. *See id.* 552(a)(4)(A)(i); 15 C.F.R. § 4.11(l).

27. On July 11, 2017, Ocean Conservancy clarified the scope of its request on a phone call with the Fisheries Service's Southeast Region FOIA Coordinator.

28. On July 17, 2017—the day before FOIA required the Fisheries Service to respond to Ocean Conservancy's request—the Fisheries Service requested to extend the due date from July 18, 2017, to August 11, 2017—more than the ten working days allowed for unusual circumstances under 5 U.S.C. § 552(a)(6)(B)(i) and 15 C.F.R. § 4.6(b), (d). Ocean Conservancy agreed to the request.

29. On July 17, 2017, Ocean Conservancy and another organization filed a federal lawsuit challenging Defendants' unilateral decision to extend the private angler red snapper fishing season in the Gulf of Mexico. *Ocean Conservancy v. Ross*, No. 1:17-cv-01408-ABJ



(D.D.C. filed July 17, 2017).

30. On July 25, 2017, NOAA's FOIA Officer emailed Ocean Conservancy requesting additional information in order to make a determination on Ocean Conservancy's eligibility for a waiver of fees. Although NOAA already had granted Ocean Conservancy's fee waiver request, NOAA's FOIA Officer asserted Ocean Conservancy might use the requested records in its lawsuit, which, according to the FOIA Officer, may constitute a "commercial interest" in the records that Ocean Conservancy had not previously disclosed. The FOIA Officer requested additional information on Ocean Conservancy's purported commercial interests in the records.

31. Ocean Conservancy responded via email on July 26, 2017, reiterating that it is a nonprofit organization that has no commercial interest in the requested records.

32. Defendants did not acknowledge or respond to Ocean Conservancy's July 26, 2017 email.

33. On August 2, 2017, Ocean Conservancy sent NOAA an email to inquire about the agency's determination whether Ocean Conservancy has a "commercial interest" in the requested records.

34. On August 3, 2017, Ocean Conservancy received an email from NOAA alleging that Ocean Conservancy had substantively failed to answer the underlying question regarding its commercial interest.

35. Ocean Conservancy emailed NOAA that same day—August 3, 2017—recounting and further explaining the ways in which it would use the records.

36. NOAA did not provide any response.

37. Ocean Conservancy sent NOAA an email on August 28, 2017, to inquire as to the status of the request. NOAA responded that same day via email granting a full fee waiver for the

second time.

38. On August 31, 2017, NOAA telephoned Ocean Conservancy asking to further postpone the agency's response to Ocean Conservancy's FOIA request. Ocean Conservancy declined NOAA's request during that call.

39. On September 12, 2017, Ocean Conservancy received an email from the Fisheries Service stating the Fisheries Service's Southeast Regional Office would be closed due to Hurricane Irma. The email did not provide a timetable for responding to Ocean Conservancy's FOIA request.

40. On September 12, 2017, Ocean Conservancy sent NOAA an email narrowing the date range of its FOIA request to March 13, 2017, through June 19, 2017, to lessen the burden of its request on the agency. NOAA did not acknowledge that email or enter it into the agency's FOIA correspondence log.

41. On September 18, 2017, Ocean Conservancy received an email from the Fisheries Service stating that the Southeast Regional Office reopened on September 15, 2017. The Fisheries Service also stated that the server housing the agency's FOIA application and responsive records was not yet operating, but was anticipated to be running by the end of the day on September 18, 2017. The Fisheries Service stated that it had on September 5, 2017, provided the NOAA Office of General Counsel, Southeast Region with an interim records response for that office's legal review and clearance. The email did not provide any further timetable for responding to Ocean Conservancy's FOIA request, any statement on the scope of records that the agency had sent to the General Counsel or that the agency would produce, or any statement on the agency's planned withholdings or exemptions.

42. On October 12, 2017, having not received any interim records response, Ocean

Conservancy sent an email to NOAA requesting an update on the status of its FOIA request.

43. On October 17, 2017, Ocean Conservancy received an email from the Fisheries Service stating that “a records response has been provided to [the Fisheries Service] and NOAA FOIA for release approval.”

44. On November 14, 2017, Ocean Conservancy sent NOAA an email requesting that Defendants commit to providing the requested documents by a date certain.

45. Later that day, November 14, 2017, NOAA informed Ocean Conservancy it would provide a partial, interim release of 38 documents “shortly.”

46. On November 28, 2017, Ocean Conservancy received an “interim response” from Defendants transmitting 38 documents. The majority of the 38 documents consist of correspondence discussing how to set up an email account to accept public comments on the Temporary Rule. The response did not indicate how many or the scope of any other records Defendants were processing or would produce. Nor did the response provide any information on what documents Defendants planned to withhold or the reasons for any withholding.

47. On December 15, 2017, NOAA informed Ocean Conservancy that additional records were undergoing legal review and clearance and a response to the request would be provided “shortly.” This correspondence did not convey the number or scope of the records under review, or any statement on the agency’s planned withholdings or exemptions.

48. On January 5, 2018, Ocean Conservancy sent NOAA an email requesting an update on the status of its FOIA request.

49. Ocean Conservancy has received no further correspondence from the Fisheries Service or NOAA to date.

50. Ocean Conservancy has not received all the responsive records or the reasonably

segregable portion of non-exempt responsive records to date.

51. The due date for Defendants' FOIA determination remains August 11, 2017.

52. While Defendants acknowledged receipt of the FOIA request and granted the fee waiver twice, Defendants have failed to substantively respond to Ocean Conservancy's FOIA request. None of Defendants' responses indicated the scope of the documents they would produce. Nor did any response include information on planned withholdings or exemptions. Defendants thus never provided Ocean Conservancy with the determination required by FOIA and the governing regulations—more than seven months after acknowledging receipt of the request, more than six months after initially granting the fee waiver, more than six months after the statutory due date for issuing a determination, and more than five months after the agreed-upon extended due date for issuing a determination.

#### **CLAIMS FOR RELIEF**

##### **Count I – Failure to Make a Determination on a FOIA Request, 5 U.S.C. § 552(a)(6), (7)**

53. The allegations made in all preceding paragraphs are realleged and incorporated by this reference.

54. 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.

55. Defendants were required to provide a determination within 20 working days on Ocean Conservancy's FOIA request, dated June 19, 2017. *Id.* § 552(a)(6).

56. Defendants were required to provide “an estimated date on which the agency [would] complete action on the request.” *Id.* § 552(a)(7)(B); *accord id.* § 552(a)(6)(B)(i).

57. Ocean Conservancy agreed to extend Defendants' deadline to respond to Ocean Conservancy's FOIA request from July 18, 2017, to August 11, 2017. Even so, Defendants have

not issued a determination on Ocean Conservancy's FOIA request, more than six months after the statutory deadline and more than five months after the agreed-upon extended deadline.

58. Ocean Conservancy has constructively and fully exhausted all administrative remedies required by FOIA. *Id.* § 552(a)(6)(A), (C).

59. Defendants violated FOIA by failing to make the required determination within 20 working days in response to Ocean Conservancy's June 19, 2017 FOIA request. *Id.* § 552(a)(6).

60. Defendants violated FOIA by failing to provide an estimated date by which they would complete action on Ocean Conservancy's June 19, 2017 FOIA request. *Id.* § 552(a)(6)(B)(i), (7)(B).

**Count II – Failure to Respond to a FOIA Request, 5 U.S.C. § 552(a)(3), (b)**

61. The allegations made in all preceding paragraphs are realleged and incorporated by this reference.

62. FOIA requires Defendants 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).

63. Defendants have provided Ocean Conservancy only a subset of the requested records. Defendants have not claimed that any of the records they have not yet provided are exempt from disclosure. Therefore, the interim response does not constitute the reasonably segregable portion of the requested records not subject to a FOIA exemption.

64. Defendants have acknowledged they are in possession of additional responsive records they have not provided to Ocean Conservancy to date.

65. Defendants have not provided Ocean Conservancy all the requested records. Defendants have not provided Ocean Conservancy the reasonably segregable portion of the requested records not subject to a FOIA exemption.

66. Defendants have violated FOIA by failing to promptly provide the responsive records or the reasonably segregable portion of lawfully exempt responsive records to Ocean Conservancy. *Id.*

### **REQUEST FOR RELIEF**

WHEREFORE, Ocean Conservancy prays that this Court:

1. Declare that Defendants failed to make a timely determination on Ocean Conservancy's records request in violation of FOIA, 5 U.S.C. § 552(a)(6), (7);
2. Declare that Defendants failed to promptly provide records in response to Ocean Conservancy's information request in violation of 5 U.S.C. § 552(a)(3), (b);
3. Order Defendants to provide a determination on Ocean Conservancy's FOIA request, as required by FOIA;
4. Order Defendants to conduct searches that are reasonably calculated to locate all records responsive to Ocean Conservancy's FOIA request, as required by FOIA;
5. Order Defendants to provide Ocean Conservancy all responsive records or the reasonably segregable portions of lawfully exempt records, as required by FOIA, within 20 days of this Court's order;
6. Maintain jurisdiction over this action until Defendants are in compliance with FOIA and every order of this Court;
7. Award Ocean Conservancy 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 23rd day of January, 2018.

/s/ Khushi Desai

Khushi Desai (MD Bar 17444)

EARTHJUSTICE

1625 Mass. Ave., NW, Ste. 702

Washington, DC 20036

202-667-4500 Telephone

202-667-2356 Fax

kdesai@earthjustice.org

Christopher D. Eaton (*pro hac vice* pending)

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Brettny Hardy (*pro hac vice* pending)

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bhardy@earthjustice.org

*Attorneys for Plaintiff Ocean Conservancy*

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

OCEAN CONSERVANCY,

Plaintiff,

v.

NATIONAL MARINE FISHERIES  
SERVICE, et al.

Defendants.

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
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Civil No. 18-cv-00208-TDC

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**NOTICE OF STIPULATED DISMISSAL**

The parties, by and through their undersigned counsel, hereby agree to dismiss this case pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The parties further stipulate and agree that each party shall bear its own costs and attorney's fees.

Respectfully submitted,

/s/

\_\_\_\_\_  
Khushi Desai (MD Bar 17444)  
EARTHJUSTICE  
1625 Mass. Ave., NW, Ste. 702  
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202-667-4500 Telephone  
202-667-2356 Fax  
kdesai@earthjustice.org

/s/

\_\_\_\_\_  
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/s/

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*Attorneys for Plaintiff Ocean Conservancy*

Robert K. Hur  
United States Attorney

/s/

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Telephone: 410-209-4800  
Facsimile: 410-962-2310  
evelyn.cusson@usdoj.gov  
*Attorney for Defendants National Marine  
Fisheries Service and National Oceanic and  
Atmospheric Administration*

<b>Tracking Number</b>	<b>Type</b>	<b>Requester</b>	<b>Requester Organization</b>	<b>Submitted</b>
DOC-NOAA-2018-001569	Request	Stephanie Hunter	Crenshaw Ware & Martin	06/21/2018
DOC-NOAA-2018-001566	Request	Margaret Townsend	Center for Biological Diversity	06/20/2018
DOC-NOAA-2018-001563	Request	Ahmad C. Chamseddine	Secrest Wardle	06/20/2018

**Custom Report - 06/26/2018 01:21:12**

<b>Received</b>	<b>Assigned To</b>	<b>Case File Assigned To</b>	<b>Perfected?</b>	<b>Due</b>	<b>Closed Date</b>
06/21/2018	OMAO	OMAO	Yes	07/24/2018	TBD
06/20/2018	Arlyn E. Penaranda	Arlyn E. Penaranda	Yes	07/24/2018	TBD
06/20/2018	Lola Stith	Lola Stith	No	TBD	TBD

<b>Status</b>	<b>Dispositions</b>
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Assignment Determination	
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Assignment Determination	
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Assignment Determination	
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**Detail**

Please accept this letter as a request for records under the provisions of the Federal Freedom of Information Act. The Center requests from the National Oceanic and Atmospheric Administration ("NOAA"), National Marine Fisheries Service, the hourly temperatures from December 21, 2016 through December 22, 2016 for Westland, MI. All zip codes

We are pleased to receive the requested materials in electronic form, if available. I consent to the withholding Service ("NMFS") from January 1, 2018 to the date NMFS conducts this search: The electronic mail

holding of personal privacy information. Please provide the following documents: 1. All warranties received within NMFS mentioning, including, referencing, and/or generated in connection with the U.S. Environm

filed by NOAA from Safe Boats International related to NOAA's 27 Foot Safe Boats vessel, Hull Number: EC-1101. See Attachment A (FWS's October 23, 2017 letter to the Environmental Protection Agency ("EPA") "strawman" on pesticides. See Attachment A (FWS's October 23, 2017



3O00553K404V1745. 2. All operator's manuals received by NOAA from Safe Boats International related (Email).

I to NOAA's 27 Foot Safe Boats v











## Amanda Patterson - NOAA Federal

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**From:** Amanda Patterson - NOAA Federal  
**Sent:** Wednesday, June 27, 2018 3:29 PM  
**To:** Mark Graff - NOAA Federal; Samuel Dixon - NOAA Affiliate  
**Subject:** FOIA 2018-001338 Please Review  
**Attachments:** 2018\_06\_27\_NMFS\_Interim\_Tasker\_2018-001338.pdf; 2018\_06\_27\_IR1\_Full\_Grant\_2018-001338.pdf; LW entanglement summary 2014-2018.xlsx

Hi Mark,

FOIAonline is being unmanageable again and I would like to get the Interim Response out today. I plan to have the letter signed for the Final response tomorrow. We ran into difficulties with GC review on this case which is why it is delayed.. I can't get FOIAonline to open at the moment nor can Sam. Would you please review this attached response package and let Sam and I know if we can send it out via email to Mr. Strahan. I was planning to bcc you and Sam. We can go through the formal steps when FOIAonline is working again. Sorry for the Rush.

Best,  
Amanda J. Patterson  
FOIA Coordinator  
National Marine Fisheries Service  
Greater Atlantic Region  
Gloucester, MA  
978-281-9210





UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
GREATER ATLANTIC REGIONAL FISHERIES OFFICE  
55 Great Republic Drive  
Gloucester, MA 01930-2276

June 27, 2018

Richard Max Strahan  
Whale Safe USA  
POB 382408  
Cambridge MA 02238

Re: FOIA Request DOC-NOAA-2018-001338

Dear Mr. Strahan:

This letter acknowledges receipt of your Freedom of Information Act (FOIA) request.

Your request was received by our office on May 8, 2018. Your request tracking number is DOC-NOAA-2018-001338. You requested:

"I am requesting access to records and information on the entanglement of Northern Right Whales, Humpback Whales and Sea Turtles off the New England coast over the last 5 years. As you know all of these records are in the possession of NOAA and the researchers that its permitted researchers — especially the Center for Coast Studies."

On May 17, 2018 NOAA determined that the cost for searching for responsive documents would exceed \$25. As required by the U.S. Code of Federal Regulations (CFR); 15 CFR Part 4.11(e), we provided you with a fee estimate. The fee estimate is determined by the uniform fee schedule published in 15 CFR Part 4.11(c) (i). You meet the definition of requesters categorized as Other, which entitles you to two free hours of search time.

On June 8, 2018, we held a scope clarification call to determine if the scope of your request could be narrowed so as to reduce the associated fees. Based on our discussion, we understand that you are seeking data contained in the Sea Turtle Disentanglement Network (STDN) Database and Marine Animal Incident Database for the past five years.

This is our first interim response. We expect the next Interim Response by the end of the week. We have located one record responsive to your request. You are granted full access to those records, and a copy is enclosed.

Although we do not consider this to be a denial of your request, you have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 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  
14<sup>th</sup> and Constitution Avenue, N.W.  
Washington, D.C. 20230

An appeal may also be sent by e-mail to [FOIAAppeals@doc.gov](mailto: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](mailto: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 If you have questions regarding your request, please contact Amanda Patterson at [Amanda.Patterson@noaa.gov](mailto:Amanda.Patterson@noaa.gov) or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

PATTERSON.A  
MANDA.JEAN  
.1516638938

Digitally signed by  
PATTERSON.AMAND  
AJEAN.1516638938  
Date: 2018.06.27  
15:25:31 -04'00'

Amanda Patterson, MLS  
FOIA Coordinator, Greater Atlantic Region

June 27, 2018

**TASK MEMORANDUM FOR:** Lead FOIA Coordinator  
**FROM:** NOAA FOIA Office  
**SUBJECT:** FOIA Request No. DOC-NOAA-2018-001338

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 is January 1, 2012 to May 8, 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 **06/06/2018**.

**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 number **One** made on **6/27/2018**

Final Response

The NMFS FOIA office closed this request due to non-payment of fees, or requester's failure to respond to correspondence or,

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Responsive records in our possession can be released in their entirety.

Responsive records 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:

PATTERSON.A. Digitally signed by  
MANDA.JEAN PATTERSON.AMANDA.  
.1516638938 JEAN.1516638938  
Date: 2018.06.27  
14:18:48 -04'00'

Lead Coordinator

Date

OLSEN.SUSAN.A. Digitally signed by  
A.1139741230 OLSEN.SUSAN.A.1139741230  
DN: c=US, o=U.S. Government, ou=DoD,  
ou=PKI, ou=OTHER,  
cn=OLSEN.SUSAN.A.1139741230  
Date: 2018.06.27 15:07:00 -04'00'

RO/LO Senior Official

Date

\*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. See 2018\_06\_27\_Atty\_No\_leg\_obj\_2018-001338

**\* 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.

<b>Species</b>	<b>1st observation date</b>	<b>1st observation location</b>
<b>RIGHT</b>	6/29/2014	180 NM east of Provincetown, MA
<b>RIGHT</b>	9/27/2014	36 NM south of Wasque Point, Chappaquiddick, Nantucket Island, MA
<b>HUMPBACK</b>	6/2/2014	14.5 NM southeast of Chatham, MA
<b>HUMPBACK</b>	6/21/2014	5.85 NM east of Gloucester, MA
<b>HUMPBACK</b>	7/18/2014	Provincetown Harbor, MA
<b>HUMPBACK</b>	9/11/2014	18.23 NM southeast of Southwest Harbor, ME
<b>MINKE</b>	4/7/2014	8.3 NM southeast of Marblehead, MA
<b>MINKE</b>	6/9/2014	5.9 NM east northeast of Race Point, Provincetown, MA
<b>MINKE</b>	7/10/2014	10.22 NM southeast of Southport, ME
<b>FINBACK</b>	6/23/2014	29.94 NM southeast of Chatham, MA
<b>FINBACK</b>	8/20/2014	30.2 NM east of Provincetown, MA
<b>FINBACK</b>	8/23/2014	11 NM southeast of Monomoy Island, MA

1st observed location latitude	1st observed location longitude	1st observed location observer
42.2583	-66.2133	NOAA aerial survey
40.7300	-70.3617	USCG aerial survey
41.5867	-69.6383	Commercial fisherman
42.5950	-70.5417	Private boater
42.0433	-70.1533	Charter vessel
44.0050	-68.1433	Local whale watch
42.3933	-70.7183	NEFSC
42.0983	-70.1217	Commercial fisherman
43.7333	-69.4767	Recreational boater
41.4567	-69.4683	Tuna aerial spotter
42.0933	-69.4417	Tuna aerial spotter
41.4183	-69.8233	Unknown vessel



Name	Outcome	NMFS ID
#1131, Snowball	Entangled	E09-14
	Deceased	E22-14
Spinnaker	Entangled	E04-14
	Entangled	E07-14
	Entangled	E12-14
	Deceased	E19-14
	Disentangled	E03-14
	Deceased	E05-14
	Entangled	E10-14
Entangled	E08-14	
Entangled	E14-14	
Deceased	E15-14	

**Fishery/notes (US - Blue; Canada - Red)**

Unknown line

Unknown line and buoy

Unknown line, buoy and highflyer

Unknown line and buoy

Unknown line

**Lobster** & gillnet

**Lobster**

**Lobster**

Unknown line and buoys

Unknown line

Unknown line

Unknown

<b>Species</b>	<b>1st observation date</b>	<b>1st observation location</b>
Right	9/28/2015	22.2 NM E of Cape Elizabeth, ME
Humpback	4/26/2015	1.1 NM N of Race Point, Provincetown, MA
Humpback	5/14/2015	77.2 NM E of Portsmouth, NH
Humpback	6/20/2015	27.6 NM SE of Chatham, MA
Humpback	7/11/2015	7.2 NM N of Race Point, Provincetown, MA
Humpback	7/25/2015	2.7 NM NE of North Truro, MA
Humpback	8/2/2015	3.5 NM SE of Race Point, Provincetown, MA
Humpback	8/2/2015	4.8 NM NE of Chatham, MA
Humpback	8/2/2015	14.8 NM NNE of Chatham, MA
Humpback	8/14/2015	1.7 NM N of Race Point, Provincetown, MA
Humpback	8/16/2015	6.7 NM NE of Race Point, Provincetown, MA
Humpback	8/29/2015	8.5 NM E of Chatham, MA
Humpback	9/1/2015	6.0 NM NE of Race Point, Provincetown, MA
Humpback	9/7/2015	12.2 NM NW of Race Point, Provincetown, MA
Humpback	9/18/2015	9.4 NM NE of Race Point, Provincetown, MA
Humpback	9/18/2015	6.5 NM NE of Race Point, Provincetown, MA
Humpback	9/19/2015	13.0 NM ESE of Hampton, NH
Humpback	9/24/2015	13.5 NM ESE of Hampton, NH
Humpback	9/25/2015	0.6 NM N of Menemsha, MA
Humpback	11/18/2015	7.7 NM N of Race Point, Provincetown, MA
Humpback	12/4/2015	8.8 NM SW of Race Point, Provincetown, MA
Minke	6/14/2015	21.8 NM SE of Chatham, MA
Minke	7/3/2015	32.6 NM SE of Point Judith, RI
Minke	10/31/2015	2.1 NM S of Boothbay Harbor, ME
Finback	6/6/2015	41.8 NM SSE of Bar Harbor, ME

<b>1st observed location latitude</b>	<b>1st observed location longitude</b>	<b>1st observed location observer</b>
43.5583	-69.6900	Local whale watch
42.0817	-70.2400	Commercial fisherman
43.0250	-68.9600	NEFSC aerial survey
41.5000	-69.3700	CCS
42.1817	-70.2217	CCS
42.0833	-70.0333	Local whale watch
42.0183	-70.1967	CCS
41.7333	-69.8833	Tuna fisherman
41.7400	-69.6283	Tuna fisherman
42.0933	-70.2500	Local whale watch
42.1700	-70.1983	Local whale watch
41.7433	-69.7517	Recreational fisherman
42.1533	-70.1900	Local whale watch
42.2200	-70.4200	Local whale watch
42.1733	-70.0950	CCS
42.1433	-70.1450	CCS
42.8817	-70.5083	Local whale watch
42.8700	-70.5133	Tuna fisherman
41.3650	-70.7633	Recreational boater
42.1850	-70.2900	CCS
41.9383	-70.3517	Tug boat
41.5250	-69.4950	Recreational boater
40.8333	-71.2333	Sport fisherman
43.8150	-69.6417	Recreational boater
43.7233	-67.9117	Local whale watch

Name of animal	Outcome	NMFS ID
	Entangled	E30-15
	Disentangled	E02-15
Spinnaker	Deceased	E04-15
	Gear shed	E08-15
	Disentangled	E12-15
Putter	Gear shed	E15-15
	Monitor	E16-15
	Gear shed	E17-15
	Entangled	E18-15
	Disentangled	E19-15
Cardhu	Gear shed	E20-15
2014 calf of Perseid	Disentangled	E21-15
2015 calf of Owl	Gear shed	E22-15
	Monitor	E23-15
Azrael	Gear shed	E25-15
Diablo	Gear shed	E26-15
Mogul	Gear shed	E27-15
	Entangled	E28-15
2011 calf of Blackhole	Entangled	E29-15
	Gear shed	E32-15
	Disentangled	E33-15
	Entangled	E07-15
	Disentangled	E09-15
	Disentangled	E31-15
	Entangled	E05-15

**Fishery/notes (US - Blue;**

**Canada - Red)**

Unknown line

Unknown line

Lobster gear & unknown

Unknown

Unknown pot/trap; line and  
surface system

Monofilament line

Lobster gear & unk. gillnet

Monofilament line

Line and buoy

Lobster gear

Monofilament line

Recreational lobster gear

Monofilament line

Monofilament line

Monofilament line

Monofilament line

Hook and monofilament line

Anchor system of tuna  
fishing boat

Unknown line

Monofilament line

Unknown fishery

Unknown line and acorn  
buoy

Lobster gear

Lobster gear

Unknown line

	A	B	C	D
1	Species	1st observation date	1st observation location	1st observed location latitude
2	Right	9/22/2016	6.5 NM N of Race Point, Provincetown, MA	42.1700
3	Right	9/23/2016	6.5 NM SE of Seguin Island, ME	43.6550
4	Humpback	1/7/2016	1 NM S of Great Captains Is., Greenwich, CT	40.9600
5	Humpback	4/24/2016	1.0 NM SE of Race Point, Provincetown, MA	42.0467
6	Humpback	5/14/2016	0.5 NM SW of Wood End, Provincetown, MA	42.0167
7	Humpback	5/18/2016	7.58 NM NE of Gloucester, MA	42.6400
8	Humpback	5/26/2016	1.5 NM SE of Race Point, Provincetown, MA	42.0400
9	Humpback	6/16/2016	3.4 NM E of Wellfleet, MA	41.9100
10	Humpback	7/2/2016	9.9 NM N of Race Point, Provincetown, MA	42.2283
11	Humpback	7/5/2016	2.4 NM SE of Chatham, MA	41.6367
12	Humpback	7/26/2016	9.9 NM NE of Race Point, Provincetown, MA	42.2117
13	Humpback	8/8/2016	4.96 NM NE of Race Point, Provincetown, MA	42.1133
14	Humpback	8/14/2016	10.1 NM N of Race Point, Provincetown, MA	42.2300
15	Humpback	8/16/2016	30.0 NM E of Nantucket Island, MA	41.4300
16	Humpback	9/2/2016	14.9 NM SE of Gloucester, MA	42.4033
17	Humpback	9/15/2016	5.9 NM north of Race Point, Provincetown, MA	42.1617
18	Humpback	9/16/2016	3.6 NM NE of Chatham, MA	41.7067
19	Humpback	9/16/2016	6.6 NM N of Race Point, Provincetown, MA	42.1700
20	Humpback	9/17/2016	9.1 NM NE of Race Point, Provincetown, MA	42.1967
21	Humpback	10/8/2016	9.5 NM N of Race Point, Provincetown, MA	42.2200
22	Humpback	10/16/2016	2.1 NM E of Ipswich, MA	42.6883
23	Humpback	10/19/2016	0.5 NM N of Provincetown, MA	42.0850
24	Humpback	12/8/2016	3.8 NM NE of Hull, MA	42.3917
25	Humpback	12/20/2016	1.2 NM S of Race Point, Provincetown, MA	42.0433
26	Minke	5/3/2016	Biddeford, ME	43.4150
27	Minke	8/9/2016	4.4 NM S of Matinicus Island, ME	43.7467
28	Minke	8/15/2016	2.0 NM SE of Seguin Island, ME	43.6850
29	Minke	8/30/2016	3.1 NM SW of Matinicus Island, ME	43.8333
30	Finback	6/18/2016	2.3 NM NE of Truro, MA	42.0500
31	Finback	7/6/2016	32.5 NM E of Truro, MA	42.0417
32	Finback	7/27/2016	17 NM N of Race Point, Provincetown, MA	42.3450
33	Finback	12/14/2016	1.4 NM S of Provincetown, MA	42.0350
34	Sei	5/11/2016	30.2 NM E of Portsmouth, NH	43.0133
35	Unknown	5/9/2016	0.3 NM NE of North Truro, MA	42.0567

	E	F	G	H
1	1st observed location longitude	1st observed location observer	Name/ID of animal	Outcome
2	-70.2200	Recreational boater	#3823	Disentangled- GS
3	-69.6233	Local whale watch	#3694	Deceased
4	-73.6200	Commercial fisherman		Disentangled
5	-70.2383	Local whale watch		Entangled
6	-70.1983	Recreational boater		Disentangled
7	-70.5150	Commercial fisherman	Foggy	Entangled
8	-70.2317	Land based observer		Disentangled
9	-69.8933	CCS	Freckles	Gear shed
10	-70.2450	Local whale watch	2016 calf of Twine	Monitor
11	-69.9033	Commercial fisherman		Monitor
12	-70.1467	Local whale watch	Scratch	Gear shed
13	-70.1583	Charter vessel		Entangled
14	-70.2267	Local whale watch	Storm	Disentangled
15	-69.3850	Local whale watch	A+	Monitor
16	-70.4317	Local whale watch		Entangled
17	-70.2267	Local whale watch	Echo	Gear shed
18	-69.8833	Charter vessel		Disentangled
19	-70.2067	Local whale watch	Tear	Monitor
20	-70.1483	Local whale watch	Crisscross	Monitor
21	-70.2150	Local whale watch	Aswan	Monitor
22	-70.7050	Recreational boater		Deceased
23	-70.1517	Local whale watch	Storm	Disentangled
24	-70.7983	Commercial fisherman		Disentangled
25	-70.2350	CCS		Disentangled
26	-70.3867	Land based observer		Deceased
27	-68.8917	Commercial fisherman		Disentangled
28	-69.7183	USCG vessel		Deceased
29	-69.1833	Commercial fisherman		Deceased
30	-70.0000	Recreational boater	CCS #1308	Monitor
31	-69.3400	Tuna aerial spotter		Entangled
32	-70.1933	CCS		Disentangled
33	-70.1667	Commercial fisherman		Entangled
34	-70.0283	NEFSC		Entangled
35	-70.0750	Land based observer		Entangled



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1	<b>NMFS ID</b>	<b>Fishery/notes (US - Blue; Canada - Red)</b>				
2	E36-16	Lobster gear				
3	E37-16	Snow crab				
4	E01-16	Lobster gear				
5	E04-16	Unknown gear				
6	E08-16	Lobster gear				
7	E09-16	Lobster gear, Unknown line and buoy				
8	E11-16	Unknown trap/pot				
9	E12-16	Unknown line and buoy				
10	E14-16	Recreational fishing lure				
11	E15-16	Unknown gear				
12	E18-16	Unknown line				
13	E20-16	Unknown line and small buoy				
14	E23-16	Lobster gear				
15	E27-16	Monofilament line				
16	E31-16	Unknown line and buoy				
17	E32-16	Unknown line and buoy				
18	E33-16	Lobster gear				
19	E34-16	Monofilament line				
20	E35-16	Monofilament line				
21	E38-16	Monofilament line				
22	E39-16	Lobster gear				
23	E40-16	Lobster gear				
24	E47-16	Lobster gear				
25	E49-16	Lobster gear				
26	E05-16	Lobster gear				
27	E21-16	Lobster gear				
28	E24-16	Unknown line				
29	E29-16	Lobster gear				
30	E13-16	Lobster gear				
31	E16-16	Unknown line				
32	E19-16	Unknown trap/pot				
33	E48-16	Unknown line and buoy				
34	E07-16	Non-fishing gear				
35	E06-16	Unknown gear				



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Species	1st observation date	1st observation location	1st observed location latitude	1st observed longitude	1st observed location observer
Right	1/5/2017	17.6 NM E of Cumberland Island, GA	30.92	-81.0668	Florida FWC aerial survey
Right	4/23/2017	2.9 NM W of Truro, MA	42.0017	-70.145	CCS aerial survey
Right	6/21/2017	Gulf of St. Lawrence, Canada	48.226	-63.0347	NEFSC aerial survey
Right	07/05/2017	East of Miscou Island, New Brunswick	47.5167	-63.7117	NEFSC aerial survey
Right	07/08/2017	East of Miscou Island, NB	47.7167	-64.0167	NEFSC aerial survey
Right	07/09/2017	22.5 NM E of Sainte-Maire Saint-Raphael, New Brunswick, Canada	47.745	-64.0183	Commercial fisherman
Right	7/19/2017	26.5 NM SE of Sainte-Marie Saint-Raphael, New Brunswick, Canada	47.5733	-63.99	NEFSC aerial survey
Right	8/28/2017	37.7 NM SE of Gaspé, Quebec, Canada	48.5013	-63.6753	Canadian DFO aerial survey
Right	9/15/2017	Gulf of St. Lawrence, Canada	48.1503	-36.5009	Unknown
Humpback	1/5/2017	6.2 NM E of Virginia Beach, VA	36.8435	-75.8402	Recreational fisherman
Humpback	7/15/2017	6.3 NM NW of Race Point, Provincetown, MA	42.1538	-70.3183	Local whale watch
Humpback	7/19/2017	3.7 NM NE of Race Point, Provincetown, MA	42.1158	-70.2065	Local whale watch
Humpback	7/20/2017	8.5 NM N of Race Point, Provincetown, MA	42.2039	-70.2495	Local whale watch
Humpback	7/21/2017	2.8 NM E of Nauset Inlet, MA	41.8033	-69.8733	Charter vessel
Humpback	7/26/2017	8.2 NM NW of Race Point, Provincetown, MA	42.1669	-70.3665	Local whale watch
Humpback	08/01/2017	21.9 NM SE of Gloucester, MA	42.3063	-70.3402	Local whale watch
Humpback	8/10/2017	5.2 NM NNE of Race Point, Provincetown, MA	42.0933	-70.1383	Local whale watch
Humpback	8/14/2017	4.7 NM NE of Race Point, Provincetown, MA	42.1113	-70.1644	CCS
Humpback	8/14/2017	4.5 NM NE of Race Point, Provincetown, MA	42.1025	-70.1622	CCS
Humpback	8/18/2017	Southern edge of Stellwagen Bank	Unknown	Unknown	Local whale watch
Humpback	8/19/2017	0.5 miles offshore of Smith Point State Park, Long Island, NY	40.7199	-72.8755	Recreational boater
Humpback	8/28/2017	10.2 NM SE of Frenchboro, ME	44.0607	-68.1333	Commercial fisherman
Humpback	9/12/2017	1.1 NM east of Truro, MA	41.9998	-69.9955	CCS
Humpback	9/18/2017	29.3 NM SE of Jonesport, ME Grand Manan Banks	44.2873	-67.0083	Commercial fisherman
Humpback	09/24/2017	7.7 NM NNW of Race Point, Provincetown, MA	42.1852	-70.3022	Recreational boater
Humpback	10/01/2017	7.4 NM NW of Race Point, Provincetown, MA	42.1617	-70.3433	Local whale watch
Humpback	10/03/2017	6.4 NM NW of Race Point, Provincetown, MA	42.159	-70.309	CCS
Humpback	10/06/2017	Off Cape Cod, MA	41.699	-69.8737	CCS
Humpback	10/10/2017	3.0 NM NE of Gloucester, MA	42.5985	-70.6165	Local whale watch
Humpback	10/14/2017	6.0 NM N of Race Point, Provincetown, MA	42.16	-70.28	Local whale watch
Humpback	10/21/2017	9.1 NM NE of Gloucester, MA	42.625	-70.4685	Recreational boater
Humpback	10/21/2017	1.0 NM SE of Quogue, Long Island, NY	40.7947	-72.5783	Recreational boater
Humpback	11/12/2017	0.1 NM S of Atlantic Beach, NY	40.5825	-73.7393	Recreational boater
Minke	07/06/2017	Manomet Point, MA	42.4757	-70.0356	Commercial fisherman
Minke	08/03/2017	6.8 NM SE of Bar Harbor, ME	44.3033	-68.0883	Local whale watch
Minke	8/11/2017	3.8 NM SE of York, ME	43.0763	-70.583	Commercial fisherman
Minke	8/12/2017	0.9 NM W of West Tremont, ME	44.2433	-68.41	Unknown vessel
Minke	8/28/2017	Off Harpswell, ME	Unknown	Unknown	Unknown
Minke	10/09/2017	5.9 NM E of Portsmouth, NH	43.0786	-70.6165	Commercial fisherman
Minke	10/10/2017	5.0 NM E of Rockland, ME	44.125	-68.99	Commercial fisherman
Finback	07/07/2017	25.0 NM SE of Gloucester, MA	42.4417	-70.135	Local whale watch





<b>Species</b>	<b>1st observation date</b>	<b>1st observation location</b>
RIGHT	5/12/2018	53.7 NM SE of Chatham, MA
HUMPBACK	4/22/2018	7.6 NM SW of Provincetown, MA

<b>1st observed location latitude</b>	<b>1st observed location longitude</b>	<b>1st observed location observer</b>	<b>Name/ID of animal</b>	<b>Outcome</b>
41.4337	-68.7928	NEFSC aerial survey	#4091	Entangled
41.94	-70.28	Local whale watch	Lascaux	Disentangled



**NMFS ID** Fishery/notes (US - Blue; Canada - Red)

E04-18 Unknown line and buoy

E03-18 Unknown line and buoys



## Stacey Nathanson - NOAA Federal

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**From:** Stacey Nathanson - NOAA Federal  
**Sent:** Thursday, June 28, 2018 9:45 AM  
**To:** Mark Graff - NOAA Federal; Bogomolny, Michael (Federal)  
**Cc:** Annie Thomson  
**Subject:** Draft full grant letter for CBD (2017-001975)  
**Attachments:** FAL Template - Full Grant 2nd interim CBD 2018.001975 draft 06.28.18.docx

Good morning!

Please see the full grant letter for our second interim release in the CBD case and let me know if you have any edits as soon as possible. Mark signed the last one so I included his signature block here in this letter for consistency. If someone else can or should sign the letter, please let me know. Once the letter is signed I'll have Annie upload the letter and files to FOIA online and we can release to the plaintiffs. 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](mailto:Stacey.Nathanson@noaa.gov)

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Margaret Townsend  
Center for Biological Diversity  
P.O. Box 11374  
Portland, OR 97211

Re: FOIA Request DOC-NOAA-2017-001975

Dear Ms. Townsend:

This letter is in response to your Freedom of Information Act (FOIA) request, which was received by our office on September 15, 2017. Your request tracking number is DOC-NOAA-2017-001975. You requested:

All records mentioning, including, and/or referencing the decision to terminate, or otherwise not renew, the Federal Advisory Committee Act charter for the “Advisory Committee for the Sustained National Climate Assessment” (hereafter “Committee”) including, but not limited to:

- a. Who participated in this decision-making process, both within and outside the agency and the U.S. Department of Commerce;
- b. What factors were considered in making this decision; and
- c. How the Committee’s unfinished work will now be completed, including:
  - i. NOAA’s formal request for the Committee to prepare, by the Spring of 2018, a set of “Recommendations on a Sustained National Climate Assessment,” as detailed in Attachment A (Advisory Committee for the Sustained National 1 Climate Assessment); and
  - ii. The Committee’s other work in support of the preparation of the final Fourth National Climate Assessment, pursuant to 15 U.S.C. § 2936, in light of its charge “to advise on the engagement of stakeholders, and on sustained assessment activities and the quadrennial National Climate Assessment report” – particularly in light of the central role the Committee’s predecessor advisory committee, the “National Climate Assessment & Development Advisory Committee,” played in preparing the Third National Climate Assessment in 2014.

This is our second interim release. Of the approximately **10,000** records remaining after our first interim response, we have reviewed approximately **6,000** records responsive to your request. **133** of these documents are being released to you in their entirety.

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  
14<sup>th</sup> and Constitution Avenue, N.W.  
Washington, D.C. 20230

An appeal may also be sent by e-mail to [FOIAAppeals@doc.gov](mailto: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

Email: [ogis@nara.gov](mailto: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 Special Assistant United States Attorney Sherri Morgan at [Sherri.Morgan@usdoj.gov](mailto:Sherri.Morgan@usdoj.gov) or 202-252-2538.

Sincerely,

Mark H. Graff

- Make Assignment
- Estimate Costs
- Stop the Clock
- Extend Due Date
- Create Task
- Upload Responsive Records
- Create Correspondence
- Create Comment
- Create Consultation
- Create Referral
- Create Appeal
- Interim Release
- Transfer Request
- Export Request
- Begin Close Out Process
- Generate Invoice
- Print Case File

Tracking Number : DOC-NOAA-2017-001975 Submitted Date : 08/31/2017  
Requester : Margaret Townsend Perfected Date : 09/15/2017  
Organization : N/A Last Assigned Date : 12/12/2017  
Requester Has Account : Yes Fee Limit : \$25.00

- Submission Details
- Case File
- Admin Cost
- Assigned Tasks
- Comments (2)
- Review

### Request Handling

Requester Info Available to the Public:  No  Yes

Request Track:  Simple  Complex  Other

Fee Category:  Other

Fee Waiver Requested:  Yes  No

Fee Waiver Status: Not Billable

Expedited Processing Requested:  Yes  No  N/A

Processing Status:  Pending  Completed

Request Yes Perfected:  Yes  No

Perfected Date: 09/15/2017

Acknowledgement Sent Date:

Unusual Circumstances?:  Yes  No

Collaboration with other departments and line offices:

5 Day Notifications:

Litigation:  Yes  No

### Request Description

Short Description:

1. All records mentioning, including, and/or referencing the decision to terminate, or otherwise not renew, the Federal Advisory Committee Act charter for the "Advisory Committee for the Sustained National Climate Assessment" (hereafter "Committee") including, but not limited to: a. Who participated in this decision-making process, both within and outside the agency and the U.S. Department of Commerce; b. What factors were considered in making this decision; and c. How the Committee's unfinished work will now be completed, including: i. NOAA's formal request for the Committee to prepare, by the Spring of 2018, a set of "Recommendations on a Sustained National Climate Assessment," as detailed in Attachment A (Advisory Committee for the Sustained National Climate Assessment); and ii. The Committee's other work in support of the preparation of the final







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

*Via FOIAonline*

Margaret Townsend  
Center for Biological Diversity  
P.O. Box 11374  
Portland, OR 97211

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- a. Who participated in this decision-making process, both within and outside the agency and the U.S. Department of Commerce;
- b. What factors were considered in making this decision; and
- c. How the Committee’s unfinished work will now be completed, including:
  - i. NOAA’s formal request for the Committee to prepare, by the Spring of 2018, a set of “Recommendations on a Sustained National Climate Assessment,” as detailed in Attachment A (Advisory Committee for the Sustained National 1 Climate Assessment); and
  - ii. The Committee’s other work in support of the preparation of the final Fourth National Climate Assessment, pursuant to 15 U.S.C. § 2936, in light of its charge “to advise on the engagement of stakeholders, and on sustained assessment activities and the quadrennial National Climate Assessment report” – particularly in

light of the central role the Committee's predecessor advisory committee, the "National Climate Assessment & Development Advisory Committee," played in preparing the Third National Climate Assessment in 2014.

This is our second interim release. Of the approximately **10,000** records remaining after our first interim response, we have reviewed approximately **6,000** potentially responsive records to your request. **133** of these documents are being released to you in their entirety.

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Washington, D.C. 20230

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- 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.
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Phone: 301-837-1996  
Fax: 301-837-0348  
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence, please contact Special Assistant United States Attorney Sherri Morgan at [Sherri.Morgan@usdoj.gov](mailto:Sherri.Morgan@usdoj.gov) or 202-252-2538.

Sincerely,

**GRAFF.MARK.HYRUM.**

**1514447892**

Mark H. Graff

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: 2018.06.28 11:21:48 -04'00'



**Cynthia Decker - NOAA Federal**

---

**From:** Cynthia Decker - NOAA Federal  
**Sent:** Monday, June 5, 2017 4:08 PM  
**To:** Laura Newcomb  
**Subject:** While I'm gone

Laura,

Since I will be out for the next week, I wanted to be sure you had enough work to occupy your time. I am expecting you to be pro-active with respect to the writing teams and their needs, setting up meetings, helping them identify SMEs and set up calls with them, locating and distributing document resources. You may have to walk them through the Gap Analysis as well.

We should also be thinking about the next call for new members, if we don't just renew the ones we have (and assuming the charter is renewed).

--

\*\*\*\*\*  
Cynthia J. Decker, Ph.D  
Executive Director  
NOAA Science Advisory Board  
and  
NOAA Scientific Integrity Officer  
SSMC3, Room 11230  
1315 East-West Hwy  
Silver Spring, MD 20910  
Phone 301-734-1156  
Fax 301-713-1459  
Email: [cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)  
\*\*\*\*\*

**Cynthia Decker - NOAA Federal**

---

**From:** Cynthia Decker - NOAA Federal  
**Sent:** Monday, June 5, 2017 4:13 PM  
**To:** Laura Newcomb  
**Subject:** While I'm gone

Laura,

Since I will be out for the next week, I wanted to be sure you had enough work to occupy your time. I am expecting you to be pro-active with respect to the writing teams and their needs, setting up meetings, helping them identify SMEs and set up calls with them, locating and distributing document resources. You may have to walk them through the Gap Analysis as well.

We should also be thinking about the next call for new members, if we don't just renew the ones we have (and assuming the charter is renewed). I think there are spreadsheets you can use as templates in the shared drive. I don't know if Laura Letson has a list of organizations or groups who were solicited for nominations but you might look for that. If not, there is a list we use for the SAB and you can start with that. You could draft the FRN that we would put out for this

--  
\*\*\*\*\*  
Cynthia J. Decker, Ph.D  
Executive Director  
NOAA Science Advisory Board  
and  
NOAA Scientific Integrity Officer  
SSMC3, Room 11230  
1315 East-West Hwy  
Silver Spring, MD 20910  
Phone 301-734-1156  
Fax 301-713-1459  
Email: [cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)  
\*\*\*\*\*

**Cynthia Decker - NOAA Federal**

---

**From:** Cynthia Decker - NOAA Federal  
**Sent:** Monday, June 5, 2017 4:20 PM  
**To:** Stephen Ambrose - NOAA Affiliate; Melissa Burka  
**Cc:** Patricia McBride-Finneran; candice Jongsma  
**Subject:** Time allocation for Liz Akede

Steve and Melissa,

I have recently chatted with both Liz Akede and Candice Jongsma. At the moment, there is not a heavy workload for the SNCA FAC and the SAB but the CI program office could use more help. It seems to me that it would make sense for Liz to spend more time in the next couple of months working with Candice than with me. I assume this is within the scope of what has been described for her but let me know if this needs more discussion. Otherwise, I think Liz is going to shift more of her time to CI work.

Thanks,  
Cynthia

--  
\*\*\*\*\*

Cynthia J. Decker, Ph.D  
Executive Director  
NOAA Science Advisory Board  
and  
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Phone 301-734-1156  
Fax 301-713-1459  
Email: [cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)

\*\*\*\*\*

**Cynthia Decker - NOAA Federal**

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Monday, June 5, 2017 4:17 PM  
**To:** Laura Newcomb  
**Subject:** While I'm gone  
**Attachments:** NGO\_contact\_email\_list\_2012.doc

Laura,

Since I will be out for the next week, I wanted to be sure you had enough work to occupy your time. I am expecting you to be pro-active with respect to the writing teams and their needs, setting up meetings, helping them identify SMEs and set up calls with them, locating and distributing document resources. You may have to walk them through the Gap Analysis as well.

We should also be thinking about the next call for new members, if we don't just renew the ones we have (and assuming the charter is renewed). I think there are spreadsheets you can use as templates in the shared drive. I don't know if Laura Letson has a list of organizations or groups who were solicited for nominations but you might look for that. If not, there is a list we use for the SAB and you can start with that. It is several years old, however, and needs to be updated, not to mention needs to have climate groups added. You could draft the FRN that we would put out for this. There is probably the one used the last time in the folder.

You should also feel free to ask Richard what you can do to help him with anything he is working on. I will be on email occasionally while on leave so let me know if you have any questions.

Thanks,  
Cynthia

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\*\*\*\*\*

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\*\*\*\*\*

**Laura Newcomb - NOAA Affiliate**

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Tuesday, June 6, 2017 9:36 AM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: While I'm gone

Hi Cynthia,

Thank you for your email. I hope you have a nice trip!

I wanted to let you know the RISA staff informed me late last week that Day 2 of their annual meeting (Wed) would be more relevant to sustained assessment, so I will be in the office today Tues and attending the meeting on Wed.

Thanks,  
Laura

On Mon, Jun 5, 2017 at 4:16 PM, Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)> wrote:

Laura,

Since I will be out for the next week, I wanted to be sure you had enough work to occupy your time. I am expecting you to be pro-active with respect to the writing teams and their needs, setting up meetings, helping them identify SMEs and set up calls with them, locating and distributing document resources. You may have to walk them through the Gap Analysis as well.

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You should also feel free to ask Richard what you can do to help him with anything he is working on. I will be on email occasionally while on leave so let me know if you have any questions.

Thanks,  
Cynthia

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\*\*\*\*\*

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and

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\*\*\*\*\*

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Laura Newcomb, PhD  
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## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Tuesday, June 6, 2017 10:46 AM  
**To:** Lucas Joppa; Cynthia Decker - NOAA Federal; Elizabeth Akede - NOAA Affiliate  
**Subject:** Re: Climate Assessment Advisory Report - Topic #2

Hi Lucas,

Poll responses point to Thursdays 9 am - 12 pm PDT or Fridays 12 - 2 pm PDT. When would you like to hold your first group meeting? Is there anything else I can assist you with at this time?

Thanks,  
Laura

On Fri, May 26, 2017 at 12:01 AM, Lucas Joppa <[lujoppa@microsoft.com](mailto:lujoppa@microsoft.com)> wrote:

Hi Paul and Michael,

Many thanks for agreeing to assist with the advisory report our committee has been asked to put together, particularly on Topic 2 (as defined in the 'strategy document' pdf attached). I've attached an example of a report produced by the Climate Partnership Task Force that can serve as a rough guide for the overall type of document the committee will ultimately produce.

I know we are all busy, and will need to hone in on an efficient method for tackling this topic, and producing our initial comments, outlines, and eventual text. While it won't get us all the way there, I'm hoping we can initialize some of our thinking by reconsidering the previous NCA committee report (attached) on sections relevant to our topic and revisit what has happened since that time, and why particular actions may or may not have been taken in response to those recommendations. In order for us to do that efficiently Richard is going to be sending us along the latest version of the gap analysis report early next week for our consideration.

I've asked Laura to help set up some calls for us to get this process kicked off and she will be sending around some scheduling polls in short order. On our first call Laura will also provide some background and details on the sections of the gap analysis most relevant to our topic.

Cheers,

Lucas

[Lucas N, Joppa, Ph.D.](#) | Chief Environmental Scientist | Microsoft | [425-326-8376](#)

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Laura Newcomb, PhD

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## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Tuesday, June 6, 2017 1:57 PM  
**To:** Susan Avery  
**Cc:** Elizabeth Akede - NOAA Affiliate; Cynthia Decker - NOAA Federal  
**Subject:** SNCA FAC Topic 1 group meetings

Dear Susan,

I have created the following [poll](#) to find a time the week of June 18th and July 10th for your group to meet. Would you like me to sent it to the group now, or as a follow up on your email out to the group? For your convenience, group member and email addresses are listed below.

I am working on your request for National Academy Reports that might inform your work and will have that to you by the end of the week if not sooner.

Please let me know if there is anything else I can assist you with at this time.

Thanks,  
Laura

Ann Marie Chischilly <[ann-marie.chischilly@nau.edu](mailto:ann-marie.chischilly@nau.edu)>

Jan Dell <[jan.dell@woodgroup.com](mailto:jan.dell@woodgroup.com)>

Kristen Poppleton <[kristen@climategen.org](mailto:kristen@climategen.org)>

--

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## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Tuesday, June 6, 2017 3:04 PM  
**To:** Cynthia Decker - NOAA Federal; Elizabeth Akede - NOAA Affiliate  
**Subject:** SNCA FAC webpage

Hi Cynthia,

Upon further inspection of our public website today, there are more technical difficulties; all of the links to documents for the May 15 meeting have stopped working, and I am unable to repair them. Would it be appropriate to add a note to the homepage with the following text?

\*\*\*We are experiencing technical difficulties with some of our links. We are working to resolve this issue as soon as possible. In the meantime, if you would like access to a document posted on the website and the link does not work, please email [snca.advisorycommittee@noaa.gov](mailto:snca.advisorycommittee@noaa.gov).\*\*\*

I have also followed up with IT on the status of the fix.

Thanks,  
Laura

--

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## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Wednesday, June 7, 2017 8:49 AM  
**To:** Moss, Richard H; Cynthia Decker - NOAA Federal; Susan Avery; Lucas Joppa; Jessica Whitehead; Maria Carmen Lemos; Elizabeth Akede - NOAA Affiliate  
**Subject:** SNCA FAC Topic leads biweekly meetings

Dear SNCA FAC Topic Leads,

We would like to set up a regularly scheduled time to bring together topic leads for bi-weekly 1 hour long check-in meetings (thank you to Jess for the idea!). This will be a time to update each other on progress, obstacles, as well as a means to manage potential overlap between topics.

While I cringe sending you all yet another survey, that is the best way to gauge availability. Can you fill out this [survey](#) by Friday June 9 to help us narrow down a time?

Thank you!  
Laura

--

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## Elizabeth Akede - NOAA Affiliate

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**From:** Elizabeth Akede - NOAA Affiliate  
**Sent:** Wednesday, June 7, 2017 10:58 AM  
**To:** Maria Carmen Lemos  
**Cc:** Laura Newcomb; Cynthia Decker - NOAA Federal  
**Subject:** Re: Next steps for Evaluation recommendations

Good Morning Maria Carmen,

I wasn't included on the email you sent last Friday to your Topic 4 colleagues and wanted to know if you can forward the document you sent out.

So far I have created the following [poll](#) to find a time on June 12th for a Topic 4 Team telecon and also populated the [Topic 4 folder](#) with the key materials listed on the slides used for the May 15th telecon. I'd like to send out an email to the group to find a time for you all to talk. Are there any additional materials that you'd like for me to include in the folder before i send out the email with the poll and materials information?

Thank you,  
Elizabeth

Contractor – NOAA/OAR/ LCI & SAB

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[elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov) | <http://www.collabralink.com>

On Tue, Jun 6, 2017 at 9:21 AM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

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

**From:** **Cynthia Decker - NOAA Federal** <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>  
**Date:** Mon, Jun 5, 2017 at 12:54 PM  
**Subject:** Re: Next steps for Evaluation recommendations  
**To:** Maria Carmen Lemos <[lemos@umich.edu](mailto:lemos@umich.edu)>  
**Cc:** "Dunlap, Riley" <[riley.dunlap@okstate.edu](mailto:riley.dunlap@okstate.edu)>, "Daniel A. Zarrilli, PE" <[dzarrilli@cityhall.nyc.gov](mailto:dzarrilli@cityhall.nyc.gov)>, "Moss, Richard H" <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>, Laura Newcomb <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>

We will do so. My mistake but Liz is actually the person who will be supporting you in this work.

With respect to your earlier question about whether SMEs could be co-authors, I have to defer an answer on that for the time being. This depends a bit on an internal dialogue in NOAA about FAC subcommittees. I will let you know hat that resolves.

On 6/5/2017 9:24 AM, Maria Carmen Lemos wrote:

Thank you Cynthia. I will take you up on your offer and ask for you and Laura please send Dan and Riley electronic copies of the materials suggested as support in the slides. I believe the only one that is not available is the one I co-authored and I can send it later if needed. Thanks mc

Sent from mobile

On Jun 2, 2017, at 1:27 PM, Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)> wrote:

Maybe setting up some time at the front end with subject matter experts would help. Laura could help facilitate that when she is back next week. It could be with all of you or you could divide and conquer among them if you come up with a set of questions to discuss with them. Please let us know what we can do to help!

On 6/2/2017 12:43 PM, Maria Lemos wrote:

thank you Riley; and I believe we all might be a bit in the same boat since my foray into Evaluation is amateurish at best! At this point what I think may happen is for us to take a look on the resources I have listed in the first slides as well as other literature we might know and flesh out the recommendations a bit. I am still not sure about how the input from outsiders will play a role but doing some initial work may also help us to identify who we should invite to join. have a great time in Norway! best mc

On Fri, Jun 2, 2017 at 12:39 PM, Dunlap, Riley <[riley.dunlap@okstate.edu](mailto:riley.dunlap@okstate.edu)> wrote:

Rushing to get ready to leave for Norway early tomorrow for a week devoted to a couple of research projects for which I'm an advisor, so will be brief.

I'm at a real disadvantage here, as evaluation research is not one of my areas of expertise (but then, neither are the foci of our other sub-groups). I will therefore let you and Dan make your choices, but have to be honest and say that it's going to be difficult for me to do an adequate job on any of them given my lack of engagement with relevant literature or first-hand experience with evaluations. Sorry to have to say this, but it's the truth.

At least I know some folks who might be able to offer insights on 2 and 3, but I obviously won't be able to communicate with them for a while.

---

From: Maria Lemos <[lemos@umich.edu](mailto:lemos@umich.edu)>  
Sent: Friday, June 2, 2017 11:14:49 AM  
To: Dunlap, Riley; Daniel A. Zarrilli, PE  
Cc: Moss, Richard H; Laura Newcomb; Cynthia Decker  
Subject: Next steps for Evaluation recommendations

Dear Riley and Dan;

I had a phone call with Cynthia and Laura this week and got a better idea of the next steps to draft the two-pager focusing on Evaluation for the SNCA report. I have drafted a short document with what I believe is the background information for us to proceed. It would be good for you to take a look and let me know what you think before we have our conference call sometime in the week after next. In the bottom of the document I suggest that each of us picks one recommendation to flesh out as a first step and then work of the final draft together to integrate and make it into a cogent document. Please let me know what you think. with all the best mc

--

Maria Carmen Lemos  
Professor and Associate Dean  
Co-Director, The Great Lakes Integrated Sciences & Assessments (GLISA)  
School of Natural Resources and Environment  
University of Michigan  
440 Church St Ann Arbor, MI 48109  
Phone: [734 764 9315](tel:7347649315)

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Maria Carmen Lemos  
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## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Wednesday, June 7, 2017 1:08 PM  
**To:** Cynthia Decker - NOAA Federal  
**Cc:** Elizabeth Akede - NOAA Affiliate  
**Subject:** response requested: Topic 3 meeting Tuesday

Hi Cynthia,

In case the original email is lost in your full inbox, are you available for a Friday 6/9 3:30 pm ET call with Lucas and Topic 2? If not, we can hold it next Friday 6/16.

Thank you and hope you are having a nice trip!

Laura

--

Laura Newcomb, PhD

Program Analyst

Contractor – NOAA/OAR/LCI - Advisory Committee for the Sustained National Climate Assessment

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## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Thursday, June 8, 2017 10:02 AM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** travel approval for June 14 SAWG meeting  
**Attachments:** Laura Newcomb (LCI) - SCP - Washington, DC (Local) - Jun 14.docx

Hi Cynthia,

Can you electronically sign or email back your approval for travel to USGCRP for the June 14 SAWG meeting?

Thank you!  
Laura

--

Laura Newcomb, PhD  
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## **National Academy Reports on USGCRP**

### [Accomplishments of the US Global Change Research Program \(2017\)](#)

- Chapter 3: Assessments and Stakeholder Engagement
  - o History of assessments and what has been included
- Chapter 4: Building on accomplishments
  - o Ensure continuity of observing systems and coordinate these observations with more diverse platforms and sources
  - o Sustain and expand Earth observations

### [Enhancing Participation in the U.S. Global Change Research Program \(2016\)](#)

- (no information directly applicable to Topic 1)

### [Review of the U.S. Global Change Research Program's Update to the Strategic Plan Document \(2015\)](#)

- Chapter 2 Rec 5 and 6 on prioritization (addressed in Chapter 2)

### [A Review of the Draft 2013 National Climate Assessment](#)

- Response to Question 4 on page 15 identified what is missing from NCA4

### [Review of the Draft Climate Science Special Report](#)

- Summary points page 1-2 may be useful to consider criteria for core elements

## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Thursday, June 8, 2017 4:22 PM  
**To:** Susan Avery  
**Cc:** Cynthia Decker - NOAA Federal; Elizabeth Akede - NOAA Affiliate; Moss, Richard H  
**Subject:** SNCA FAC Topic 1: National Academy reports  
**Attachments:** National Academy Reports on USGCRP.docx

Dear Susan,

Following up from our call last week, I have attached a summary relevant National Academy reports on USGCRP as well as notes on what in these reports would be relevant to your topic.

I also spoke with Amanda Purcell at the National Academies - she expressed that since NCA is Congressionally mandated, the Academy advice usually does not go into detail about what should and should not be included. Amanda thought the Academies review of NCA3 and CSSR would be the most relevant reports for this type of advice (these are also reports you are quite familiar with as you helped write them!).

Please let me know if you would like more information on this topic.

Thank you,  
Laura

--

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**Cynthia Decker - NOAA Federal**

---

**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 9, 2017 8:26 AM  
**To:** Laura Newcomb - NOAA Affiliate  
**Subject:** Re: SNCA FAC webpage

Yes, that's a good idea but if this is not OBE, please get IT working on this ASAP.

Thanks for tracking this.

Cynthia

On Tue, Jun 6, 2017 at 3:03 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Cynthia,

Upon further inspection of our public website today, there are more technical difficulties; all of the links to documents for the May 15 meeting have stopped working, and I am unable to repair them. Would it be appropriate to add a note to the homepage with the following text?

\*\*\*We are experiencing technical difficulties with some of our links. We are working to resolve this issue as soon as possible. In the meantime, if you would like access to a document posted on the website and the link does not work, please email [snca.advisorycommittee@noaa.gov](mailto:snca.advisorycommittee@noaa.gov).\*\*\*

I have also followed up with IT on the status of the fix.

Thanks,  
Laura

--

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\*\*\*\*\*

## Laura Newcomb - NOAA Affiliate

---

**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Friday, June 9, 2017 8:29 AM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: SNCA FAC webpage

Hi Cynthia,

Thank you - IT needed to schedule maintenance on the entire server to try to fix the problem and the earlier they could schedule that was Friday afternoon.

Laura

On Fri, Jun 9, 2017 at 8:25 AM, Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)> wrote:

Yes, that's a good idea but if this is not OBE, please get IT working on this ASAP.

Thanks for tracking this.

Cynthia

On Tue, Jun 6, 2017 at 3:03 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Cynthia,

Upon further inspection of our public website today, there are more technical difficulties; all of the links to documents for the May 15 meeting have stopped working, and I am unable to repair them. Would it be appropriate to add a note to the homepage with the following text?

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I have also followed up with IT on the status of the fix.

Thanks,  
Laura

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## Laura Newcomb - NOAA Affiliate

---

**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Friday, June 9, 2017 8:30 AM  
**To:** Cynthia Decker - NOAA Federal  
**Cc:** Elizabeth Akede - NOAA Affiliate  
**Subject:** Re: response requested: Topic 3 meeting Tuesday

Hi Cynthia,

Lucas has asked to change the meeting to Thursday June 15 12:30 PT - Will you be able to step out of the Forum for this call?

Thanks!  
Laura

On Wed, Jun 7, 2017 at 1:07 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Cynthia,

In case the original email is lost in your full inbox, are you available for a Friday 6/9 3:30 pm ET call with Lucas and Topic 2? If not, we can hold it next Friday 6/16.

Thank you and hope you are having a nice trip!

Laura

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## Cynthia Decker - NOAA Federal

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 9, 2017 8:32 AM  
**To:** Laura Newcomb - NOAA Affiliate  
**Cc:** Elizabeth Akede - NOAA Affiliate  
**Subject:** Re: response requested: Topic 3 meeting Tuesday

Yes, make sure it's on my calendar! Maybe send me a text message reminder. But I will have my NOAA computer with me at the Forum.

On Fri, Jun 9, 2017 at 8:30 AM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Cynthia,

Lucas has asked to change the meeting to Thursday June 15 12:30 PT - Will you be able to step out of the Forum for this call?

Thanks!  
Laura

On Wed, Jun 7, 2017 at 1:07 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Cynthia,

In case the original email is lost in your full inbox, are you available for a Friday 6/9 3:30 pm ET call with Lucas and Topic 2? If not, we can hold it next Friday 6/16.

Thank you and hope you are having a nice trip!  
Laura

--

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## Topic 3: Modes of Engagement with the NCA Process

**Many constituent partnerships, including end users and capacity-building boundary entities, have been formed during the NCA process, and these partnerships should be maintained and strengthened. Additionally, new partnerships with constituents can be formed to continue broadening the impact of NCA processes and products.**

- **Characterize modes of and mechanisms for existing engagement of end users and boundary entities (including private sector climate service providers) with the NCA process.**
- **Identify agency-specific and external engagement processes and processes that may be modified for the NCA context to strengthen existing partnerships.**
- **Strategize how climate assessment gaps can be addressed through establishing and supporting new engagement partnerships.**
- **Outline recommendations for an engagement infrastructure that both ensures bottom-up partnerships for assessment with end users and boundary entities and for tailoring scientific assessment for decision relevance.**
- **Enable successful evaluation of partnership support and progress during the sustained assessment process.**



## Topic 3: Sources of Information

**Key Resources: Provide citation and a brief description of 3-5 reports, journal articles, or other work that provide a starting point for development of recommendations on the issues described on the first slide**

1. Bennett, A., and J. Grannis, 2017. *Lessons in Regional Resilience: Case Studies in Collaboration*. Georgetown Climate Center:  
[http://www.georgetownclimate.org/files/report/GCC-Lessons-in-Regional-Resilience-Synthesis-Jan\\_2017.pdf](http://www.georgetownclimate.org/files/report/GCC-Lessons-in-Regional-Resilience-Synthesis-Jan_2017.pdf)
2. Vogel, J., K.M. Carney, J.B. Smith, C. Herrick, M. Stults, M. O'Grady, A. St. Juliana, H. Hosterman, and L. Giangola, 2016. *Climate Adaptation: The State of Practice in U.S. Communities*. ABT Associates and the Kresge Foundation:  
<http://kresge.org/sites/default/files/library/climate-adaptation-the-state-of-practice-in-us-communities-full-report.pdf>
3. National Academies of Sciences, Engineering, and Medicine. 2016. *Enhancing Participation in the U.S. Global Change Research Program*. Washington, DC: National Academies Press. <https://www.nap.edu/download/21837>

# Topic 3: Subject Matter Experts

**List 3-5 Subject Matter Experts and the knowledge/experience that they could offer to the process of developing recommendations**

Name	Institution/contact info	Expertise/Potential Relevance
Jessica Grannis	Georgetown Climate Center	State and local adaptation planning partnerships
Jacqueline Patterson	NAACP Environmental and Climate Justice Program	Engaging underserved communities on community resilience
Dennis Todey	USDA Midwest Climate Hub	Engagement with agriculture and forestry partners; former SDSU cooperative extension, former president of American Association of State Climatologists
Albert George	Director of Conservation, South Carolina Aquarium	Engagement through non-formal education at moderate size museums and aquaria in small cities
Robin O'Malley	USGS	USGS HQ and CSCs

# Topic 3: Subject Matter Experts

## List 3-5 Subject Matter Experts and the knowledge/experience that they could offer to the process of developing recommendations

Name	Institution/contact info	Expertise/Potential Relevance
Anne Marie Chischilly	Institute for Tribal Environmental Professionals, Northern Arizona University	Tribal needs, partnerships, and engagement modes
Caitlin Simpson or Chelsea Combest-Friedman	NOAA CPO	RISA program/Sustained Engagement Specialists
Susanne Moser	Susanne Moser Consulting	Adaptation partnerships and boundary interactions with state and local governments and groups
Linda Rudolph	US Climate & Health Alliance	Public health view of engagement
Kris Ebi	University of Washington	International examples of end user engagement
Linda Mearns	Weather and Climate Impacts Assessment Science Program (WCIASP), NCAR	End user engagement filling climate assessment gaps

Jessica Whitehead

---

**From:** Jessica Whitehead  
**Sent:** Friday, June 9, 2017 8:31 AM  
**To:** Maxine Burkett; Knowlton, Kim; Jerry Melillo  
**Cc:** Cynthia Decker; Laura Newcomb - NOAA Affiliate; Moss, Richard H; SNCA AdvisoryCommittee - NOAA Service Account  
**Subject:** Re: scheduling SNCAFAC Partnerships (Topic 3) team call  
**Attachments:** SNCA\_Mtg\_May2017\_TopicTemplate-Partnerships\_5-10.pptx

Good morning everyone!

Please hold Tuesday, June 13, at 3:00 pm EDT for our call. Laura, could you please get us a number?

Thank you!

Best,  
Jess

On Tue, Jun 6, 2017 at 11:21 AM, Jessica Whitehead <[j\\_whitehead@ncsu.edu](mailto:j_whitehead@ncsu.edu)> wrote:

Good morning everyone,

My apologies for being out of touch - we have been battling a series of unfortunate ailments in my house the last couple of weeks, but I am finally on the mend and catching up! I would like to try to get our SNCAFAC partnerships team together by phone to discuss how we will reach out to our team's subject matter experts, draft an interview script for those contacts, and plan how to synthesize our responses into recommendations for our input draft. My apologies for the short notice but I would like to see if we can get together by phone some time this week or next. Please respond by Wednesday COB - though if you will notice one of the potential dates is tomorrow afternoon, so earlier responses are appreciated in case we can take advantage of this time:

Here is a link to the poll: <https://doodle.com/poll/zd85meuksnunw279>

Thank you everyone! As a reminder, I've attached the slides we sent to Richard, which were used for the draft strategy recommendations document, because they included more detail on resources and SMEs than we were able to accommodate in the draft document.

Best,  
Jess

--

Jessica C. Whitehead, Ph.D.  
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**Cynthia Decker - NOAA Federal**

---

**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 9, 2017 9:11 AM  
**To:** Moss, Richard H  
**Cc:** Laura Newcomb - NOAA Affiliate; Elizabeth Akede  
**Subject:** Conflict for SNCA FAC Admin call on 6/23

Richard,

I am trying to update my calendar and see that we have the SNCA FAC administrative call scheduled on the afternoon of Friday, June 23. This is normally my alternate Friday off. I know Liz and Laura asked me about this when it was scheduled so we went ahead and put it on this date. Unfortunately, I now have a family obligation that weekend and will be flying out of town early Friday morning. I believe I can be on this call but it will be from the road and I am not certain there will be cell coverage the entire way. Is it too late to find an alternate date for this call? I don't recall if there was another date that would also work. I am so sorry about this. It is entirely my fault. I was receiving some pressure from my family about visiting an elderly relative and agreed to this without noting the call on the calendar.

If we cannot reschedule, I will find a place from which I can reliably call.

So sorry for the complication,  
Cynthia

--

\*\*\*\*\*

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and  
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\*\*\*\*\*

**Moss, Richard H**

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**From:** Moss, Richard H  
**Sent:** Friday, June 9, 2017 10:16 AM  
**To:** Cynthia Decker - NOAA Federal  
**Cc:** Laura Newcomb - NOAA Affiliate; Elizabeth Akede  
**Subject:** Re: Conflict for SNCA FAC Admin call on 6/23

Hi Cynthia,

No apology needed. On the scale of things, this is a relatively small complication. I'm much more worried about slippage with our information gathering and FRN. I have several questions about work arounds and we should talk when your schedule allows. I have time next week except Monday, when I'm at a world bank meeting. And I could break away from that in the afternoon if needed.

I can certainly accommodate a change in schedule and don't want you to be inconvenienced or to break into valuable family time. We should go ahead and try to find another date, but don't cancel this time until we have identified an alternate. Let's see what sort of response we get to another "doodle" poll.

Richard

--

Richard H Moss  
Senior Scientist  
Joint Global Change Research Institute  
5825 University Research Court, Suite 3500  
College Park, MD 20740  
E-Mail: [rhm@pnnl.gov](mailto:rhm@pnnl.gov)  
Phone: 301-314-6711  
Fax: 301-314-6719

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**From:** Cynthia Decker <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>  
**Date:** Friday, June 9, 2017 at 9:10 AM  
**To:** Richard Moss <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>  
**Cc:** Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>, Elizabeth Akede <[Elizabeth.Akede@noaa.gov](mailto:Elizabeth.Akede@noaa.gov)>  
**Subject:** Conflict for SNCA FAC Admin call on 6/23

Richard,

I am trying to update my calendar and see that we have the SNCA FAC administrative call scheduled on the afternoon of Friday, June 23. This is normally my alternate Friday off. I know Liz and Laura asked me about this when it was scheduled so we went ahead and put it on this date. Unfortunately, I now have a family obligation that weekend and will be flying out of town early Friday morning. I believe I can be on this call but it will be from the road and I am not certain there will be cell coverage the entire way. Is it too late to find an alternate date for this call? I don't recall if there was another date that would also work. I am so sorry about this. It is entirely my fault. I was receiving some pressure from my family about visiting an elderly relative and

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If we cannot reschedule, I will find a place from which I can reliably call.

So sorry for the complication,  
Cynthia

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## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Friday, June 9, 2017 1:39 PM  
**To:** \_SNCA Federal Advisory Committee  
**Subject:** SNCA FAC Re-polling for June Telecon

Dear Advisory Committee Members,

Due to a conflict at the FAC office, we are looking to reschedule the June 23 3 - 5 pm administrative telecon. Could you please fill out the following [poll](#) by 6/14 COB.

We ask you to still keep the hold on your calendars for June 23 3 - 5 pm. If we cannot find another suitable time, we will hold the call as planned.

We thank you all for your flexibility to help us reschedule this meeting!

Best,  
Laura

--

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## Knowlton, Kim

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**From:** Knowlton, Kim  
**Sent:** Monday, June 12, 2017 6:58 AM  
**To:** Jessica Whitehead; Maxine Burkett; Jerry Melillo  
**Cc:** Cynthia Decker; Laura Newcomb - NOAA Affiliate; Moss, Richard H; SNCA AdvisoryCommittee - NOAA Service Account  
**Subject:** RE: scheduling SNCAFAC Partnerships (Topic 3) team call

Thanks, Jess, for setting up the call. I'll have to jump off at 3:30 pm et.

Best,  
-Kim

**From:** Jessica Whitehead [mailto:j\_whitehead@ncsu.edu]  
**Sent:** Friday, June 09, 2017 8:31 AM  
**To:** Maxine Burkett; Knowlton, Kim; Jerry Melillo  
**Cc:** Cynthia Decker; Laura Newcomb - NOAA Affiliate; Moss, Richard H; SNCA AdvisoryCommittee - NOAA Service Account  
**Subject:** Re: scheduling SNCAFAC Partnerships (Topic 3) team call

Good morning everyone!

Please hold Tuesday, June 13, at 3:00 pm EDT for our call. Laura, could you please get us a number?

Thank you!

Best,  
Jess

On Tue, Jun 6, 2017 at 11:21 AM, Jessica Whitehead <[j\\_whitehead@ncsu.edu](mailto:j_whitehead@ncsu.edu)> wrote:  
Good morning everyone,

My apologies for being out of touch - we have been battling a series of unfortunate ailments in my house the last couple of weeks, but I am finally on the mend and catching up! I would like to try to get our SNCAFAC partnerships team together by phone to discuss how we will reach out to our team's subject matter experts, draft an interview script for those contacts, and plan how to synthesize our responses into recommendations for our input draft. My apologies for the short notice but I would like to see if we can get together by phone some time this week or next. Please respond by Wednesday COB - though if you will notice one of the potential dates is tomorrow afternoon, so earlier responses are appreciated in case we can take advantage of this time:

Here is a link to the poll: <https://doodle.com/poll/zd85meuksnunw279>

Thank you everyone! As a reminder, I've attached the slides we sent to Richard, which were used for the draft strategy recommendations document, because they included more detail on resources and SMEs than we were able to accommodate in the draft document.

Best,  
Jess

--

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## Laura Newcomb - NOAA Affiliate

---

**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Monday, June 12, 2017 9:08 AM  
**To:** Cynthia Decker - NOAA Federal; Elizabeth Akede - NOAA Affiliate  
**Subject:** bi weekly topic lead calls

Hi Cynthia,

Fridays 2 -3 pm ET has emerged as a time when all of our topic leads should be available. In order to hold this call on your non-AWS days, we can start this Friday (but you are in the Forums) or June 30. Which would you prefer?

Thanks,  
Laura

--

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**Cynthia Decker - NOAA Federal**

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Monday, June 12, 2017 12:28 PM  
**To:** Laura Newcomb - NOAA Affiliate  
**Cc:** Elizabeth Akede - NOAA Affiliate  
**Subject:** Re: bi weekly topic lead calls

Definitely put it on my non-AWS days. We can start this week. Friday is starting to look like a bad day to attend the Forum! At any rate, these calls/mtgs are more important.

Thanks to both of you for tracking these groups and setting up the meetings. We need to keep them moving forward.

Cynthia

On Mon, Jun 12, 2017 at 9:08 AM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Cynthia,

Fridays 2 -3 pm ET has emerged as a time when all of our topic leads should be available. In order to hold this call on your non-AWS days, we can start this Friday (but you are in the Forums) or June 30. Which would you prefer?

Thanks,  
Laura

--

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\*\*\*\*\*

## Laura Newcomb - NOAA Affiliate

---

**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Monday, June 12, 2017 12:39 PM  
**To:** Cynthia Decker - NOAA Federal; Moss, Richard H; Elizabeth Akede - NOAA Affiliate; Susan Avery; Lucas Joppa; Jessica Whitehead; Maria Carmen Lemos; SNCA AdvisoryCommittee - NOAA Service Account  
**Subject:** SNCA FAC Topic lead calls

Dear Topic Leads,

Thank you for responding to our poll. We will hold these calls topic lead bi-weekly check-in calls on Fridays from 2 -3 pm ET starting this Friday 6/16. You should receive a calendar invite shortly.

We understand not everyone will be able to call in to every meeting and will circulate a summary after the call to help keep everyone on the same page.

Thank you!  
Laura

--

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## Cynthia Decker - NOAA Federal

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Monday, June 12, 2017 12:55 PM  
**To:** Laura Newcomb - NOAA Affiliate  
**Cc:** Elizabeth Akede - NOAA Affiliate; Moss, Richard H  
**Subject:** Re: SNCA FAC draft email to members

This looks good and comprehensive to me. One spelling correction in the last sentence - should be "tapping" not "taping." Otherwise, I am find with sending this out under SNCA Advisory Committee staff signature or if Richard wants to send it out under his.

On Fri, Jun 9, 2017 at 3:51 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Richard and Cynthia,

Below is a draft email for Richard to send out to members as an encouragement for their topic writing work.

-----

Dear Advisory Committee Members,

As we work to set up calls for each topic group to meet, we wanted to remind you of ways to engage with your topic to make these calls and the drafting of a more detailed outline most productive:

- A [timeline](#) with deadlines and telecons can be found on the shared work space
- The shared [work space](#) has a number of useful documents to help you get started. Additionally, the gap analysis is posted here which can be used to gauge progress on existing Sustained Assessment recommendations from the NCADAC report.
- Members are free to call SMEs. A DFO need not be present if **only one** FAC member is on the call. FAC staff ([laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov) and [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov)) can help you set up the call and take notes for you during the call. If you schedule a call, please add it to the [list](#) so the FAC office can keep track of who we are calling.
- Members may work collaboratively over email or in a shared document between calls. Given how busy all of you are, this may be the best way to make progress in a timely manner.

We thank you for your service to the committee. You were all chosen for this committee because of the expertise you bring, and we look forward to tapping into that expertise for our Interim Report.

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Laura Newcomb, PhD  
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## Cynthia Decker - NOAA Federal

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Monday, June 12, 2017 1:00 PM  
**To:** Jessica Whitehead  
**Cc:** Maxine Burkett; Knowlton, Kim; Jerry Melillo; Laura Newcomb - NOAA Affiliate; Moss, Richard H; SNCA AdvisoryCommittee - NOAA Service Account  
**Subject:** Re: scheduling SNCAFAC Partnerships (Topic 3) team call

My apologies to everyone for this. I am on leave and although I don't mind getting on a call while on vacation, I will literally be on an airplane during the original date and time of this call and can't do it. I did not adequately communicate this to staff when the call was being set up. Again, very sorry for the disruption for everyone.

Cynthia

On Mon, Jun 12, 2017 at 12:53 PM, Jessica Whitehead <[j\\_whitehead@ncsu.edu](mailto:j_whitehead@ncsu.edu)> wrote:

Greetings all,

I just wanted to let you know that something has come up with Cynthia's schedule and she will not be able to make our call at 3 pm tomorrow. Without Cynthia we cannot conduct FAC business, so once Laura has some alternative times that will work we will re-poll. My apologies! I wanted to let you all know so you could release that time in your schedules.

Best,  
Jess

On Fri, Jun 9, 2017 at 8:31 AM, Jessica Whitehead <[j\\_whitehead@ncsu.edu](mailto:j_whitehead@ncsu.edu)> wrote:

Good morning everyone!

Please hold Tuesday, June 13, at 3:00 pm EDT for our call. Laura, could you please get us a number?

Thank you!

Best,  
Jess

On Tue, Jun 6, 2017 at 11:21 AM, Jessica Whitehead <[j\\_whitehead@ncsu.edu](mailto:j_whitehead@ncsu.edu)> wrote:

Good morning everyone,

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try to get our SNCAFAC partnerships team together by phone to discuss how we will reach out to our team's subject matter experts, draft an interview script for those contacts, and plan how to synthesize our responses into recommendations for our input draft. My apologies for the short notice but I would like to see if we can get together by phone some time this week or next. Please respond by Wednesday COB - though if you will notice one of the potential dates is tomorrow afternoon, so earlier responses are appreciated in case we can take advantage of this time:

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Thank you everyone! As a reminder, I've attached the slides we sent to Richard, which were used for the draft strategy recommendations document, because they included more detail on resources and SMEs than we were able to accommodate in the draft document.

Best,  
Jess

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\*\*\*\*\*

## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Monday, June 12, 2017 3:03 PM  
**To:** Moss, Richard H; Cynthia Decker - NOAA Federal; Elizabeth Akede - NOAA Affiliate  
**Subject:** SNCA FAC Digest Week of June 12

Dear Richard and Cynthia,

Below is a summary of SNCA FAC activity for this week:

### Topic Writing teams

- Topic 1: Susan polling members for meeting week of June 19
- Topic 2: Meeting June 15 1 pm
- Topic 3: Re-polling members for June 19th and 20th
- Topic 4: Meeting June 16 12 pm
- Topic lead bi-weekly check-in June 16 2 pm
  - Possible agenda items include: discussion on timeline, format and length of interim report, update on topic progress, use of gap analysis,
- draft language (see below) for Richard to send to Topic teams for encouragement
- After conversation with Richard on Friday, Laura is drafting a more detailed documents analyzing the gap analysis for each topic team

### Summer Group telecons

- Based on poll results so far, 8 members can attend a meeting 6/27 1 - 3 pm ET (in comparison we had 9 confirmed for June 23 time)
- no new update on FRN for July meeting

### Email draft language:

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Dear Advisory Committee Members,

As we work to set up calls for each topic group to meet, we wanted to remind you of ways to engage with your topic to make these calls and the drafting of a more detailed outline most productive:

- A [timeline](#) with deadlines and telecons can be found on the shared work space
- The shared [work space](#) has a number of useful documents to help you get started. Additionally, the gap analysis is posted here which can be used to gauge progress on existing Sustained Assessment recommendations from the NCADAC report.
- Members are free to call SMEs. A DFO need not be present if **only one** FAC member is on the call. FAC staff ([laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov) and [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov)) can help you set up the call and take notes for you during the call. If you schedule a call, please add it to the [list](#) so the FAC office can keep track of who we are calling.
- Members may work collaboratively over email or in a shared document between calls. Given how busy all of you are, this may be the best way to make progress in a timely manner.

We thank you for your service to the committee. You were all chosen for this committee because of the expertise you bring, and we look forward to tapping into that expertise for our Interim Report.

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Laura Newcomb, PhD

Program Analyst

Contractor – NOAA/OAR/LCI - Advisory Committee for the Sustained National Climate Assessment

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## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Tuesday, June 13, 2017 10:36 AM  
**To:** \_SNCA Federal Advisory Committee  
**Subject:** Re: SNCA FAC Re-polling for June Telecon

Just a reminder to fill out the [poll](#) by 6/14 COB. Thank you to those who have already participated!

Laura

On Fri, Jun 9, 2017 at 1:38 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Dear Advisory Committee Members,

Due to a conflict at the FAC office, we are looking to reschedule the June 23 3 - 5 pm administrative telecon. Could you please fill out the following [poll](#) by 6/14 COB.

We ask you to still keep the hold on your calendars for June 23 3 - 5 pm. If we cannot find another suitable time, we will hold the call as planned.

We thank you all for your flexibility to help us reschedule this meeting!

Best,  
Laura

--

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Advisory Committee for the Sustained National Climate Assessment  
Membership

June 2017

Name (term expires)	Position/Affiliation	Brief Biographical Sketch	Sector	End Date of Appointment
Susan Avery (2nd term 2019)	President Emerita, Woods Hole Oceanographic Institution	Dr. Avery's research includes atmospheric circulation and precipitation, the development of new radar techniques and instruments for observing the atmosphere, and the role of climate science in decision support.	Academia	April 15, 2019
Maxine Burkett (1st term 2018)	Professor of Law, University of Hawai'i	Ms. Burkett specializes in climate change law and policy with a specialty in climate ethics and climate equity especially as it pertains to island communities.	Academia	April 15, 2018
Ann Marie Chischilly (1st term 2019)	Executive Director, Northern Arizona University - Institute for Tribal Environmental Professionals	Ms. Chischilly's life and career is dedicated to advocating on behalf of tribes, including her own (Navajo Nation), throughout the United States on the issues of climate change and it's impacts on Tribes and Indigenous peoples.	Academia	April 15, 2019
Jan Dell (2nd term 2019), Vice Chair	Vice President, Clean Energy, Water & Climate, Wood Group	Ms. Dell leads strategic development of projects in the energy-water-climate nexus for global energy and chemical producers.	Industry	April 15, 2019
Riley Dunlap (1st term 2018)	Regents Professor of Sociology and Dresser Professor, Oklahoma State University	Dr. Dunlap's research in environmental sociology has three major foci: (1) environmental concern; (2) the environmental movement; and (3) climate change.	Academia	April 15, 2018
Paul Fleming (2nd term 2019)	Climate Resiliency Group Manager, Seattle Public Utilities	Mr. Fleming works in water resources management, water utility management, climate risk management, use of climate data/projections, climate assessment and adaptation, and decision making under uncertainty.	Government	April 15, 2019
Lucas Joppa (1st term 2019)	Lead Environmental Scientist, Microsoft Research	Dr. Joppa's work focuses on developing the science, policy, and tools and technology necessary to manage environmental systems. His research is targeted towards achieving international biodiversity conservation goals.	Industry	April 15, 2019
Kim Knowlton (1st term 2018)	Senior Scientist, Science Center Deputy Director, Natural Resources Defense Council and Assistant Clinical Professor, Columbia University	Dr. Knowlton's research focuses on impacts of climate change on health relative to heat, air pollution, wildfires, extreme weather events, and infectious diseases; on the health costs of climate change; human vulnerability to climate impacts; and climate-health preparedness and adaptation.	NGO	April 15, 2018
Maria Carmen Lemos (1st term 2019)	Professor of Natural Resources and Environments, University of Michigan School of Natural Resources and Environment	Dr. Lemos researches the human dimensions of global change and social studies of science.	Academia	April 15, 2019
Jerry Melillo (2nd term 2019)	Distinguished Scientist and Director Emeritus, The Ecosystems Center, Marine Biological Laboratory	Dr. Melillo specializes in understanding the impacts of human activities on the biogeochemistry of ecological systems from local to global scales, using a combination of field studies and simulation modeling.	NGO	April 15, 2019
Richard Moss (1st term 2018), Chair	Senior Scientist, Pacific Northwest National Laboratory's Joint Global Change Research Institute at the University of Maryland	Dr. Moss is a research scientist studying interactions of human and natural systems affected by global environmental change.	Academia	April 15, 2018
Kristin Poppleton (1st term 2019)	Director of Education, Climate Generation - a Will Steger Legacy	Ms. Poppleton is a climate change educator whose work focuses on developing, implementing, evaluating and sharing what constitutes effective climate literacy.	NGO	April 15, 2019
Michael Prather (2nd term 2019)	Professor of Earth System Science, University of California, Irvine	Dr. Prather has an extensive background in atmospheric chemistry, bio-geochemical cycles of greenhouse gases and aerosols. He also analyzes emerging issues in science and the environment for statesmanship.	Academia	April 15, 2019



Advisory Committee for the Sustained National Climate Assessment  
Membership

June 2017

Jessica Whitehead (1st term 2018)	Coastal Communities Hazards Adaptation Specialist, North Carolina Sea Grant	Dr. Whitehead's work in coastal climate extension engages local stakeholders to develop solutions in anticipation of vulnerabilities to near-term hazards, and assists local communities in incorporating scenarios of long-term climate and sea level changes in climate adaptation planning.	Academia	April 15, 2018
Daniel Zarrilli (1st term 2019)	Senior Director, Climate Policy and Programs, and Chief Resilience Officer, New York City Office of the Mayor	Mr. Zarrilli is responsible for assessing and responding to the risks of climate change by implementing the resiliency program of OneNYC as well as overseeing the City of New York's involvement with the New York City Panel on Climate Change and the Climate Change Adaptation Task Force.	Government	April 15, 2019

## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Tuesday, June 13, 2017 4:13 PM  
**To:** OAR PCO - NOAA Service Account; Cynthia Decker - NOAA Federal; Elizabeth Akede - NOAA Affiliate  
**Subject:** SNCA FAC Membership list  
**Attachments:** SNCA FAC membership June 2017.xlsx

Dear Julia,

Attached is a list of Advisory Committee for the Sustained National Climate Assessment members, their affiliations, a brief biographical sketch, and the end date of their appointment as you requested.

Cynthia, this was an urgent request from PCO today.

Thanks,  
Laura

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Laura Newcomb, PhD  
Program Analyst  
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## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Wednesday, June 14, 2017 8:55 AM  
**To:** \_SNCA Federal Advisory Committee  
**Subject:** Re: For Review: SNCA FAC March 7-8 Minutes

Dear Advisory Committee Members,

Just a reminder to review and send any comments on the March meeting minutes by COB tomorrow June 15.

Thank you,  
Laura

On Thu, Jun 8, 2017 at 12:09 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Dear Advisory Committee Members,

Please find minutes from the March 7-8 meeting attached for your review.

Action Requested: Please provide any comments or concerns by COB Thursday June 15. If we do not hear from you we assume you have no comments.

These minutes will be on the consent calendar for our July 27 public teleconference.

Please let me know if you have any questions.

Thank you!  
Laura

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Laura Newcomb, PhD  
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## Kristen Rickett

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**From:** Kristen Rickett  
**Sent:** Wednesday, June 14, 2017 12:43 PM  
**To:** Cynthia Decker - NOAA Federal  
**Cc:** elizabeth.akede@noaa.gov; Laura Newcomb - NOAA Affiliate; Brooke Rickett  
**Subject:** RE: Agenda 6.13.17

Good afternoon!  
Thank you very much.  
Kristen

Kristen Rickett  
[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

HB & Company  
Phone: 240.744.7026  
Fax: 240.744.7033  
7315 Wisconsin Avenue  
Suite 400 West  
Bethesda, MD 20814

**From:** Cynthia Decker - NOAA Federal [mailto:cynthia.decker@noaa.gov]  
**Sent:** Wednesday, June 14, 2017 6:25 AM  
**To:** Kristen Rickett <kristenr@hb-co.com>  
**Cc:** elizabeth.akede@noaa.gov; Laura Newcomb - NOAA Affiliate <laura.newcomb@noaa.gov>; Brooke Rickett <brooker@hb-co.com>  
**Subject:** Re: Agenda 6.13.17

Thanks for letting me know. I will get back to you with a decision ASAP.

On Tue, Jun 13, 2017 at 10:42 AM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good morning!

Thank you very much for the update.

If the hotel contract is signed and we cancel, the penalty will be the \$4,000 meeting room rental fee. There will not be a penalty for sleeping rooms because we negotiated a complimentary room block.

Let me know if the team still wants to hold our call today.

Thank you!

Kristen

Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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7315 Wisconsin Avenue

Suite 400 West

Bethesda, MD 20814

[240.744.7026](tel:240.744.7026)

[240.744.7033](tel:240.744.7033) (fax)

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**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>

**Sent:** Tuesday, June 13, 2017 8:45 AM

**To:** Kristen Rickett

**Cc:** [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Laura Newcomb - NOAA Affiliate; Brooke Rickett

**Subject:** Re: Agenda 6.13.17

Kristen,

I will not be on the call. With respect to the hotel contract, I am trying to get assurance the FAC charter will be renewed. What is the penalty if the contract is signed and the meeting is cancelled?

Cynthia

On Mon, Jun 12, 2017 at 3:19 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good afternoon!

Please find attached the agenda for tomorrow's meeting.

Thank you!

Kristen

Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

HB & Company

7315 Wisconsin Avenue

Suite 400 West

Bethesda, MD 20814

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Cynthia J. Decker, Ph.D

Executive Director

NOAA Science Advisory Board

and

NOAA Scientific Integrity Officer

SSMC3, Room 11230

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Silver Spring, MD 20910

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Fax [301-713-1459](tel:301-713-1459)

Email: [cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)

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Cynthia J. Decker, Ph.D

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and

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**Moss, Richard H**

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**From:** Moss, Richard H  
**Sent:** Wednesday, June 14, 2017 12:58 PM  
**To:** snca.fac@noaa.gov  
**Cc:** SNCA AdvisoryCommittee - NOAA Service Account  
**Subject:** Suggestions for making progress on sustained assessment recommendations

Dear Advisory Committee Members,

I hope your summers are off to a good start!

The purpose of this email is to encourage you to remain or become engaged in developing ideas for our recommendations on sustained assessment. As a reminder, during our public teleconference on May 15, we agreed on four topic areas and a general strategy for preparing the recommendations. We are now in an information gathering phase to ensure we base our recommendations on a combination of our own expertise, past recommendations, up-to-date knowledge of current activities, and additional input from subject matter experts (SMEs) who have been working on sustained assessment and thus may have new ideas for the process.

It seems useful to outline things that you can be doing to gather information and develop your initial ideas, so I asked the staff to put together a short list of currently-available resources and activities we can undertake under the Federal Advisory Committee Act. These include:

- As part of our committee website, there is a shared [work space](#) for the report which includes a [timeline](#) with deadlines and telecons
- The work space includes common areas as well as folders for each of the topics and lists the members associated with each one. There are several useful documents to help us get started. These include the NCADAC special report recommendations, recommendations from other groups such as the National Academy, and additional literature identified by the topic groups as part of the preparations for our May public teleconference. Additionally, the gap analysis is posted here which can be used to gauge progress on existing Sustained Assessment recommendations from the NCADAC report. As you identify additional resources (for example relevant journal articles and reports), please upload these to the site and/or send them to FAC staff ([laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov) and [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov)).
- Members are also free to call SMEs to gather information. A DFO need not be present if **only one** FAC member is on the call. FAC staff can help you set up the call and take notes. If you schedule a call, please add it to the [list](#) so the FAC office can keep track of who we are calling.
- Members may work collaboratively over email or in a shared document between calls. Given how busy all of you are, this may be the best way to make progress in a timely manner.

I want to thank Cynthia Decker, our Designated Federal Officer (DFO), who has been supporting the process including participating in calls during a vacation, and Laura Newcomb and Elizabeth Akede, who are working to set up calls for our topic groups and performing additional background research.

Finally, I also want to thank all of you for your service to the committee. You were all selected because of the expertise you bring, and I want to encourage you keep moving forward to supplement your knowledge and begin to develop ideas for the recommendations as described above. Please feel free to get in touch with me by email with questions, comments, and suggestions, copying [SNCA.AdvisoryCommittee@noaa.gov](mailto:SNCA.AdvisoryCommittee@noaa.gov) (an email address that serves as a repository for our official



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communications).

Thanks again.

R

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Richard H Moss  
Senior Scientist  
Joint Global Change Research Institute  
5825 University Research Court, Suite 3500  
College Park, MD 20740  
E-Mail: [rhm@pnnl.gov](mailto:rhm@pnnl.gov)  
Phone: 301-314-6711  
Fax: 301-314-6719

**Elizabeth Akede - NOAA Affiliate**

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**From:** Elizabeth Akede - NOAA Affiliate  
**Sent:** Wednesday, June 14, 2017 2:52 PM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: SNCA FAC Group Travel Request for Sept

Hi Cynthia,

Yes, I did the travel request for the March meeting. I'll update that to create the travel request for September.

Best,  
Liz

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On Wed, Jun 14, 2017 at 2:49 PM, Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)> wrote:

Liz,

We need to start putting together the group travel request for the SNCA FAC meeting in September. I will check to be sure we need one of these but I think we still do. In any case, it is a good way to collect the travel info and budget for the members for the meeting. Do you have a template for this?

Thanks,  
Cynthia

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and  
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\*\*\*\*\*

**Cynthia Decker - NOAA Federal**

---

**From:** Cynthia Decker - NOAA Federal  
**Sent:** Wednesday, June 14, 2017 2:49 PM  
**To:** Elizabeth Akede  
**Subject:** SNCA FAC Group Travel Request for Sept

Liz,

We need to start putting together the group travel request for the SNCA FAC meeting in September. I will check to be sure we need one of these but I think we still do. In any case, it is a good way to collect the travel info and budget for the members for the meeting. Do you have a template for this?

Thanks,  
Cynthia

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**Climate Working Group**  
**Spring Meeting • May 18-19, 2017**  
**Silver Spring, MD**

<b>Thursday, May 18</b>	<b>Day 1: Charting the Course</b>
<p><b>9:00 - 9:30</b></p>	<p><b>Welcome and Introductions (Notetaker: S. Louie)</b>  Paul Knight &amp; Ruby Leung, CWG Co-Chairs  Eugenia Kalnay &amp; Everette Joseph, SAB Liaisons to the CWG  Wayne Higgins, Director, Climate Program Office</p> <p><b>Meeting Logistics</b>  Jennifer Dopkowski</p> <p><b>ACTION: Outcome of meeting is workplan</b>  Introduction of Ben DeAngelo</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Budget - advice here is relevant; this is not a review, but advice on activities and best way to meet those goals is valuable.</li> <li><input type="checkbox"/> Sustaining partnership with climate at NOAA and CWG is crucial; Introduction to SAB playing role in CPO program review, internal to NOAA, as individuals</li> <li><input type="checkbox"/> Important moment for NOAA, Nation and globe; waiting on new NOAA administrator; National Adaptation Forum, which sounds like federal, but it is not. (example given by Wayne after being asked); Paul Fleming is involved in this effort and CWG can play an important role through their advice</li> <li><input type="checkbox"/> Through CWG's workplan, how that advice is to be delivered is timely</li> <li><input type="checkbox"/> Introductions of new CWG members <ul style="list-style-type: none"> <li><input type="checkbox"/> A.R. Ravishankara - Professor at University of Colorado and former NOAA scientist (Atmospheric Chemist); Co-Chair CASC</li> <li><input type="checkbox"/> Joellen Russell; Oceanographer; used to work at GFDL and a postdoc at JISAO and degree from Arizona</li> <li><input type="checkbox"/> Kirstin Dow; Risk and hazards geographer</li> <li><input type="checkbox"/> Wayne's Intro - Introduced the Portfolios in OAR and their roles</li> </ul> </li> </ul>
<p><b>9:30 - 10:00</b></p>	<p><b>Agenda Overview &amp; Topics Intro (Notetaker: S. Louie)</b>  CWG Business, Engagement, Priorities, Etc.</p> <ul style="list-style-type: none"> <li>• Ruby Leung &amp; Paul Knight, CWG Co-Chairs</li> </ul>
<p><b>10:15 - 11:00</b></p>	<p><b>Arctic at NOAA (Notetaker: S. Louie)</b>  Jim Overland &amp; Jennifer Dopkowski</p> <p><b>ACTION: Document Needs of Arctic (NOAA Arctic Research)</b></p>

- Strategy document
- Action plan

**ACTION: Invite Dave Kennedy at next CWG meeting to discuss integration on long-term timescales for permanent risk/vulnerability “on the ground” for communities**

**ACTION: Follow-up Topics for Jeremy: Sea Grant Integration / Climate Model Integration / Human Dimensions --interactions and engagements / CTB in the Arctic**

- 60% of the ice in arctic is lost
- Personally, Jim flying over the arctic 2 years ago is drastically different than 20 years ago
- Arctic is heavily influenced by the air at the midlatitude and thus air temp is key and warming has had major impact
- Even with full mitigation, the arctic ecosystem can never fully recover
- NOAA needs to look at and support adaptation in the arctic
- Priority on arctic monitoring to deliver services in the arctic (autonomous system)
- Plans are on web and can be found by googling noaa, arctic
- Risk/Vulnerability---sea level issues handled by NOS
- Integration being done with Dave Kennedy at the helm--line offices are working separately, but coming together when needed.
- End-to-end analysis, instead of focus on one aspect of the issue
- Tracking the acceleration of the changes is important and understudied

Arctic Program Review

- Arctic Report Card production
- Human dimension - where is the impact on the people reflected in the program?
- What are we willing to do in the next decade? (Ravi)
- Connect NOAA better to what is going on in the USGCRP

11:00 - 12:00

**Modeling & Prediction (Notetaker: S. Louie)**

Jin Huang

- Unified modeling strategy recommendations
- The purpose of the unified modeling strategy is to product more effective model, meet mission requirements and leads to as few models as feasible
- Week 3-4 was just launched Monday, May 15.
- Hurricane forecast product from GFDL as is NMME seasonal forecast and researching decadal prediction; Hybrid model in GFDL is being adopted by NCAR, instead of theirs being brought up to speed; Also does Sea Ice Modeling; Collaboration with GFDL and NWS is increasing
- Can the community collaborate now? Earlier, each community had different frameworks for their models and now they will be working from the same infrastructure
- Support NCEP operations is focus of ESSM ad support the GFDL’s model
- Review of the functions of the office

	<ul style="list-style-type: none"> <li><input type="checkbox"/> Supports modeling infrastructure, even though it is not apparent on its face</li> </ul>
<p><b>1:00 -2:45</b></p>	<p><b>Sustained Climate Assessments (notetaker: N.Christerson)</b></p> <ul style="list-style-type: none"> <li>● D. Barrie (NCA4-CSSR),</li> <li>● D. Barrie (Indicators)</li> <li>● Dave Easterling (NCEI-TSU Production Process; State Reports, etc.)</li> <li>● Cynthia Decker (SNCA FAC Workplan)</li> <li>● Chelsea Combest-Friedman (RISA; Sustained Assessment Specialists, NAF pre-forum)</li> <li>● David Herring (CRT; Crosswalk with NCA; Resilience Ecosystem for all Sustained Assessment Products)</li> </ul> <p>NOTES:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Lessons are being taught from the NCA. Used as a “textbook”...there is no equivalent.</li> <li><input type="checkbox"/> All state land grant institutions use the NCA as a textbook, and teach from it. NCA is being used as textbooks at university as well as by extension people. As authoritative document at the national level. It is actionable information. E.g., used by Land Grant extension folks that work with Ag sector.</li> <li><input type="checkbox"/> May be a way to quantify that number of use by educational institutions, and state wildlife and other state institutions. (Wayne)</li> <li><input type="checkbox"/> Dan.Open question: Is there a better way to structure and accomplish this report? Better interagency process?</li> <li><input type="checkbox"/> Dan. Indicators: Would be good to tighten the connection between the indicators and the quadrennial report.</li> <li><input type="checkbox"/> Ravi. Good to see sustained funding for NCA. It would be good if other agencies stopped riding on NOAA’s coattails. What is that we’re doing assessments for? What is primary goal? Dan: quote from GCRA: mandate from Congress. Need real purpose. Perhaps provide tools that enables other agencies to do their assessment within the NCA framework.</li> <li><input type="checkbox"/> Joellen. Want the best crowd sourced information that can be used. Using it as authority of best practices, information. Dan: make the community feel that they own the process more, own the report more.</li> <li><input type="checkbox"/> Ravi. Need to be aware of the private sector. Worried that continued assessment may drive the research agenda and require more resources.</li> <li><input type="checkbox"/> Kirstin: Adaptation bureau concept (private/ngo).</li> <li><input type="checkbox"/> Ben: Need for greater quantification of impacts rather than anecdotal. This has been discussed a lot but hasn’t been solved yet.</li> <li><input type="checkbox"/> Eugenia. What is relationship w IPCC? Dan: Not much.</li> <li><input type="checkbox"/> Ben: Connection w scenarios – NCA uses some of the IPCC scenarios. Trying to create apples to apples comparison.</li> <li><input type="checkbox"/> Lesley-Ann. NCA4 trying to capture what is of value to the regions. Written at 9th grade level but also includes the deeper information for researchers, etc. There are pieces of the NCA4 process that have been very good (e.g., Canadians want to copy parts of the process) but acknowledge that other areas might be improved.</li> </ul>

	<ul style="list-style-type: none"> <li><input type="checkbox"/> Raghu. Re making the process more bottom-up in the future, how will that work? Dan: Better understand needs from users rather than from the fed agencies (shift the balance).</li>   <li>Dave Easterling. TSU. <ul style="list-style-type: none"> <li><input type="checkbox"/> Cherry picking the models creates inconsistency. The weighting of the models creates is done to make the models consistent.</li> </ul> </li>   <li>Cynthia Decker. Mission/Scope of FAC. <ul style="list-style-type: none"> <li><input type="checkbox"/> “Virtuous cycle” of developing core products.</li> </ul> </li>   <li>RISA. Chelsea Combest-Friedman, Caitlin Simpson. <ul style="list-style-type: none"> <li><input type="checkbox"/> Sustained assessment services</li> <li><input type="checkbox"/> Void and need for a climate service</li> <li><input type="checkbox"/> Big picture view with NOAA being one of 13+ agencies connected to USGCRP</li> <li><input type="checkbox"/> Need to strengthen these kinds of capacities to support the NCA.</li> <li><input type="checkbox"/> Wayne: Issue of building trust at the user level. Start the conversation with talking about the users’ issues and what they’re seeing.</li> <li><input type="checkbox"/> Raghu. Funding? Depends on competition every five year.</li> <li><input type="checkbox"/> Rong. RISA can reach out to a lot more people at universities to build capacity. RISAs involve graduate students. Can also reach undergrads.</li> <li><input type="checkbox"/> Ravi. What are the key lessons learned that resulted in RISA successes and how can those lessons be transferred? Kirstin: Lessons learned are included in the RISA book.</li> <li><input type="checkbox"/> Ravi. PIRCA is an amazing example of climate service.</li> <li><input type="checkbox"/> Phil. NCA great source but NOT a climate service. What does “assessment” really mean? Maybe assessment is stand-in for “climate service.”</li> </ul> </li>   <li>CRT. David Herring. <ul style="list-style-type: none"> <li><input type="checkbox"/> Joellen. Where do the data come from? It would be helpful if it was more transparent on CRT where the graphic information comes from, i.e., what models?</li> <li><input type="checkbox"/> Wayne: Webby Award. CRT part of the pyramid of the assessment. So CRT is important component of NCA.</li> <li><input type="checkbox"/> Eugenia. Can I provide input in terms of case studies? David: Yes. We have pdf templates and two editors that help develop case studies. Eugenia: perhaps the case study link should be on the front page.</li> <li><input type="checkbox"/> Lesley-Ann: How closely are you working with TSU?</li> <li><input type="checkbox"/> David: There’s good overlap and awareness in both camps (TSU and CRT).</li> </ul> </li> </ul>
<b>2:45 - 3:00</b>	<b>Break</b>
<b>3:00 - 4:00</b>	<p><b>Science and Decision Support for Planning and Preparedness (Notetaker: N.Christerson)</b>  Claudia Nierenberg, Nancy Beller-Simms</p> <p>NOTES</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Ravi: Something at Virginia Beach? A: No but there’s a broader Hampton Roads/Newport area. Ravi: Miami Beach? A: Not right now. Ravi: VA Beach has DOD</li> </ul>

	<p>visibility and expensive real estate.</p> <ul style="list-style-type: none"> <li>❑ Ravi: slide on SAB Workplan] Strike “economic” and add “social” (or keep both social and economic)</li> <li>❑ Fuqing. How do we interconnect all the data together -- it looks like CSI is heading that way. Claudia: more we’re putting the relationships in place to connect those data developers. Wayne: Google residency program and google saving NOAA data. Fuqing: Amazon also storing data. Amazon hosts the data so that they can charge to use the data. Amazon makes money.</li> <li>❑ Raghu. “Assessment” - are there complications with users using the VCAPS information? Are there social science pathways coming along with them? Scenarios? Claudia: depends on how sophisticated the user is.</li> <li>❑ Joellen. Where does public end and private begin? Private uses the math that NOAA produces and re-packages it. As forecasts are extended, NOAA is feeding the math beautifully. Private wants the math for free, then repackage it, and resell it with a non-disclosure agreement. How do we ensure public has access to the information that the public taxpayer paid for? Paul Fleming: Wholesale resale model for data. Maintain control of both of those channels. Paul K: but you might be blocking out the competition. We want to share the data in an accessible way so that the public has a way to get to it. Ravi: where are the underserved who cannot afford to pay for it? Rong: Get taxpayer to recognize that private products are NOAA supported (for example). Joellen: Create a CI to be a middleman who can manage attribution.</li> </ul>
<p><b>4:00 - 4:45</b></p>	<p><b>TPOS 2020 (Notetaker: J. Dopkowski)</b>  David Legler, Billy Kessler</p> <ul style="list-style-type: none"> <li>❑ Presentation based on TPOS 2020 first report</li> <li>❑ Eugenia: fixed mooring in tropics show strong waves; has to be revisited the way moored buoys are designed.</li> <li>❑ <b><a href="https://tpos2020.org/first-report">tpos2020.org/first-report</a></b></li> <li>❑ Second TPOS-2020 Resource Forum <ul style="list-style-type: none"> <li>❑ Craig McLean, chair</li> <li>❑ Just concluded in HI</li> </ul> </li> <li>❑ TRF-2 Outcomes <ul style="list-style-type: none"> <li>❑ Established a transition and implementation task team (joint with JCOMM) as a focal point for these issues</li> </ul> </li> <li>❑ Raghu: TAO has had funding trouble; justification critical for ENSO; how are you going to fund geochemical additions?</li> <li>❑ David: already sponsoring some efforts in pacific; servicing ships and on buoys;</li> <li>❑ Billy: we have proposed based on time and space scales and appropriate sampling regime; studies underway for biogeochemical species; most of sampling to date has been opportunistic; hoping to change that</li> <li>❑ Joellen: only 3 areas of world ocean are not following climate increases; need to understand ocean’s role in climate and given scales are so important; you said it was difficult to engage modelers; have you looked at an OSSI to see if it would work well? You ought to have some hard numbers here.</li> <li>❑ Billy: we have not done those experiments; focus on next report on biogeochemistry;</li> </ul>



	<p>already gearing up for second report; want to talk offline; have biogeochemistry task team</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Joellen can't get any further in pacific in enso; we need you to solve this;</li> <li><input type="checkbox"/> Wayne: issues in tying this effort to operations particularly at NCEP; comment on opportunities to connect and what advice to ask to provide us</li> <li><input type="checkbox"/> Billy: have put a large effort into engaging with NCEP; we have created a friendly relationship and there is interest, there has not been the practical engagement in that; more working with GFDL and Australia; yes, it's a problem. We get expressions of interest and it's hard</li> <li><input type="checkbox"/> Billy: success with University of MD but we need more than conversations</li> <li><input type="checkbox"/> Paul: TPOS needs advocates; perhaps we could be part of the voice and seeing this sustained rather than a 2-3 year project</li> <li><input type="checkbox"/> Billy: need an assimilation system to get full value; need the integration</li> <li><input type="checkbox"/> Eugenia: Look at paper in Nature from March 2017 <ul style="list-style-type: none"> <li><input type="checkbox"/> If you keep the shape of the argos (rectangular),</li> <li><input type="checkbox"/> Eugenia to send to Billy</li> </ul> </li> </ul>
<p><b>4:45 - 5:00</b></p>	<p><b>Daily Wrap-up (Notetaker: J. Dopkowski)</b>  <b>ACTION: Outcome of meeting is development of a CWG workplan</b>  <b>ACTION: Document Needs of Arctic (NOAA Arctic Research)</b></p> <ul style="list-style-type: none"> <li>● Strategy document</li> <li>● Action plan</li> </ul> <p><b>ACTION: Invite Dave Kennedy at next CWG meeting to discuss integration on long-term timescales for permanent risk/vulnerability "on the ground" for communities</b></p> <p><b>ACTION: Follow-up Topics for Jeremy (Arctic): Sea Grant Integration / Climate Model Integration / Human Dimensions --interactions and engagements / CTB in the Arctic</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Action: Share CPO strategic plan with CWG (caveat needs to be updated)</li> </ul>
<p><b>Friday May 19</b></p>	<p><b>DAY 2: Lighting the Way Forward</b>  <b>NOAA SSMC3- 2500</b></p>
<p><b>8:30 - 8:45</b></p>	<p><b>Day One Review: Progress from Day One and Moving Forward (Notetaker: J. Dopkowski)</b>  Paul Knight &amp; Ruby Leung, Wayne Higgins</p>
<p><b>8:45 - 9:30</b></p>	<p><b>CWG Discussion (Interactive - ALL participants) (Notetaker: S. Bailey)</b>  Participants will clarify what they heard yesterday and discuss progress</p> <p>List of actions and next steps on all topics from yesterday's meetings.  <a href="http://cpo.noaa.gov/sites/cpo/News/2014/CPO%20Strategic%20Plan.pdf">http://cpo.noaa.gov/sites/cpo/News/2014/CPO%20Strategic%20Plan.pdf</a>  <a href="http://cpo.noaa.gov/sites/cpo/2016CPOAnnualReport_web.pdf">http://cpo.noaa.gov/sites/cpo/2016CPOAnnualReport_web.pdf</a>  NOTES:</p>

- CPO is thinking too small--longer term outlook--more funding needed
- 1) Focus on fewer topics, that set examples in the near term
- Picking shorter amount of topics --criteria for choosing the smaller suite of topics (Wayne requests the CWG to help pick)
- Flooding, Sea Level, Heat (Claudia) Food Water Energy
- Qualitative narratives available
- Investments in infrastructure (Fleming)
- 2) Extremes, heat index and air quality need to be more robust
- Focus on the underserved (Ravi)
- Economic acceleration--then focus on segments of the population (children, seniors, sick)--Joellen
- Observation systems don't reach ecosystems ---develop a big observation plan that serves CSI needs. (Raghu suggestion)
- Partner with private industries and levels of govt to leverage resources (Rong)

Kirstin

- Social Vulnerability Index...need around better vulnerability...regionally available
- NAF influenced by enviro. Justice communities
- Urban heat and rural access issues need to be

People, Business, Environment thriving in the face of climate...(Wayne)

- Need to move towards the NIDIS model to have protected status
- RISA thrives on the capacity to replicate and building on partnerships and other regional models
- Health connections--interagency possibility to serve the underserved that link to observation systems (Raghu)
- Resilience officers are working in the communities
- Weather Bill covers climate in timescale (CPO supports that research)
- Foundation vs. Applied Research ½ and ½ budget
- Weather and climate closely connected--how to articulate relevance of work going on to link to the Weather Bill
- Reporting requirements in the Weather Bill that is in the Climate Community space.
- Basic research links to societal impact need to be made
- Cutting of long-term investments
- Support to continue to do short-term weather and short-term climate competitive research
- Weather Bill-- S2S is called out--CPO's role in the bill
- Arctic/Climate process team idea (Joellen)
- Observation to model is needed. Arctic is being studied only as observation, and it needs to move to saving life and property in the future. (Joellen)
- National Integrated Arctic System idea (Wayne)
- Opportunity to engage the social side of the Arctic could inform the modeling, to make it more immediate on the ground. (Kirstin)
- Priority in S2S in Arctic

**ACTION: Raghu, Rong and Jin will talk offline about the Weather-Climate mix of the drought/flood California example, to talk about the continuing research. Paragraph on this**

	<p><b>point could be crafted.</b></p> <p><b>SUGGESTED ACTION:</b> Recommend that weather- climate timescale research in NOAA should be linked and considered together. Holistic view of the short to longer timescale integration.</p> <p><b>ACTION: TOPIC of CSI is a workplan issue--how it is crafted? Promote.</b></p>
<p><b>9:30 - 10:00</b></p>	<p><b>SAB review of Working Group and Terms of Reference (Notetaker: J. Dopkowski)</b>  Cynthia Decker, Paul Knight, Ruby Leung</p> <ul style="list-style-type: none"> <li>● Working Group (WG) Reviews codified in SAB Con Ops</li> <li>● WG's reviewed every two years at same timeline of SAB charter</li> <li>● Start WG's review this year <ul style="list-style-type: none"> <li>○ Products developed</li> <li>○ TOR</li> <li>○ Whether or not WG's have met</li> </ul> </li> <li>● Purpose of reviews to make sure WG working in concert with what SAB needs and make sure work plan tied to SAB workplan</li> <li>● Also that TOR are in concert with what they said they are going to do</li> <li>● Might be a recommendation that TOR be modified to more accurately reflect work that SAB/NOAA would like the WG to work on</li> <li>● Ravi: seems like a difficult way to get advice - is it required to be done this way</li> <li>● FACA regulations - nothing about how they are supposed to be reviewed</li> <li>● WG's are governed by SAB</li> <li>● Paul: con ops - when have turn over within the group</li> <li>● In 2018 - both Paul and Ruby are eligible and Paul Fleming</li> <li>● FY17: portfolio expertise to match with CPO and where spending the money - CPO to share</li> <li>● Meet this Fall? Virtual in fall, face to face in spring <ul style="list-style-type: none"> <li>○ Virtual meeting in a month to follow up on those items</li> <li>○ Fall virtual or Fall in person</li> <li>○ Get backs</li> <li>○ Make sure that there is cross LO representations</li> <li>○ Marine Resources in AK person - suggested for CWG member <ul style="list-style-type: none"> <li>■ Human dimensions</li> </ul> </li> <li>○ Two fisheries sciences centers in PMEL</li> </ul> </li> <li>● Rong: marine biogeochemical cycle - have not talked about it enough</li> <li>● Lab directors</li> </ul>
<p><b>10:15 - 12:15</b></p>	<p><b>SAB CWG Workplan (Short-Term/6 month) (Notetaker: J. Dopkowski)</b>  Everette Joseph, Eugenia Kalnay, Cynthia Decker, Paul Knight, Ruby Leung</p> <ul style="list-style-type: none"> <li>● Paul Knight:</li> <li>● <ul style="list-style-type: none"> <li>○ <b>Summary: work plan items (August 21 Deadline--Initial Draft June 30)(leads</b></li> </ul> </li> </ul>

are in bold)

- **CSI:** Idea that the CSI is a very important part of the service of the climate program office - exemplary work that needs to continue to be bolstered in its support in resources and direction of ways to expand their outreach (**Kirstin**, Raghu, Ravi, Paul F., Lesley-Ann, Rong)
  - **Basic Research (S2S):** Implementation of the weather act and potential impact on the climate competitive research process - important that this process continue but remember importance of foundational and application work stay in balance - still opportunity for good foundational work ex: arctic atmosphere, oceans applications (Ruby, **Rong**, Raghu, Chris,, Fuqing)
  - **TPOS :** Billy/David - feel there may not be much of an advocacy of sustainability of their plans and assimilating data and making strategic decisions regarding rearrangement of moored array vs. argo (JoEllen, Paul K., **Dean**)
    - Need to promote initiative to sustain it
    - Seasonal and subseasonal forecasts
  - **Arctic:** Promote encourage direct noaa to support a national integrated arctic system that will be able to touch on a host of different things: obs systems, demonstrating whether there is skill in arctic prediction ex: sea ice - can we claim we are moving forward in arctic predictive processes (Phil, Joellen, **Ruby**, Paul K.)
- Raghu: last bullet - Dean Roemmich - specific ask last time?
  - Wayne: link to operations - have had hard time peaking interest of NCEP in what they are doing and also guided by needs of operational community for TPOS
  - Raghu: more interest from S2S group on those observations - Billy/Dave make stronger link to that community - and CSI make stronger link to S2S - weather bill
  - GFDL - John Dunne ESM - like to see make strong link to that - essential - Joellen
  - Encourage them to make other links to s2s and long term predictions as well
  - Wayne: 4th bullet connects to all 3 of earlier work plan items - important for all integrated information systems
  - Raghu: define if it is operational and who handles it before you throw in kitchen sink
  - Satellites, moored and argo have 3 components
  - Ravi: what is the issue here with regards to TPOS -
  - Wayne: David/Billy expressed not a sense of the utility of TPOS - of sustaining operations - trouble with getting resonance with operational community at NOAA - but it is essential to monitoring and prediction
  - Ravi: want to expand it? Expand current obs capabilities to Argo - what you get from argo array is different from moored array so must have an integrated plan with resources - don't get same answer for operations if just use moored array
  - Suggest consulting Dean - TPOS wanting argo
  - TPOS funded 16 additional floats outside of argo -- if keep maintaining need additional funds - would like to say adds to operational not just argo side
  - Sustained observations of argo and TPOS
  - Argo is not considered operational

- Rong Fu: are there any studies that show the difference by adding argo in assimilating ocean - Eugenia sending paper
- Moored buoys alone create rospy waves - good for equator
- But if you have argos no problem
- Raghu: is also partly assimilation issue
- Paul: proposing rearrangement of argo
- Paul: make the point that this makes the array more effective and make the proper investment in TPOS
- Rong: competitive research and CSI - supporting - quality of product CSI providing is important
- Wayne - integration issue
- WH: Build integrated information system for key societal challenges - build on NIDIS
- Joellen: global warming is really ocean warming - ocean component of the monitoring important
- Raghu: observing system as end to end CSI ?
- Wayne: something that we could consider
- Rong: end to end approach - given we are in tight budget environment - pick priorities - perhaps topic that would give you end to end could be one of the criteria for prioritized research short term
- KD: opportunities around CSI - end to end discussion - key issues that are emerging - question of outreach and science translation - adaptation service bureau - need for decision science tools - people deal with uncertainty and how can we assist
- WH: sustained assessment products - one way to organize our regional capacity- CSI - programs linked to resilience tools in sustained assessments
  - Nancy and water
  - Adrienne and fisheries
- Ravi: don't conflate multiple issues into one otherwise going to get lost
  - End to end - keep them bite sized
- Paul: to review
  - CSI gem from above
  - Implementation of the WX act - keeping ball rolling with the S2S capacity esp. Looking to promote this balance that is being done in climate competitive research - sharing applied and foundational research -
  - Nat'l integrated arctic system - obs, advancing the science of arctic science and processes and making sure can offere a sustainable service that will impact the entire climate system
  - TPOS - will need to get Dean's input on how worded - operational and research perspectives - recommend that support continue and as it can be expanded to sustain - work within community to get ARGOS integrated and rearrangement of moored array should proceed and our friends in operations are encouraged to really use this in real time
    - Ravi - tropical obs need to be optimized and enhanced
  - Raghu why is there no comment from anyone on the operational side?
- JR: ARun - not convinced of the necessity - wh - but this is really operations
- JR: hope that they develop and expand likes btwn operational and observed side

links - valuable - short be linking to long term earth system and operational

- Eugenia - what is the problem? Think we need to understand what the problem is - maybe there is assimilation of the moored buoys - we should know the details of what they want to do
- Augmentation and enhancement of tropical observation system specifically the moored array and their configuration
- Paul - in general agreement about 4 areas - now just a matter of crafting the words - not here - can be done virtually and divvy up who would like to take crack at it
- **ACTION ITEM: Jen/Sandra create a shared google doc so CWG can work on work plans**
- Everette: work plan for CWG - seems high level - might also be nuancing the actions
- PR: never done this before - if SAB wants more specifics we can give it to them but hesitant to hang action items that we are just now building
- Everette: for example CSI - recommended
- CD: these sound like recommendations but you're talking about a work plan - ESMWG - specified parameters of that topic and invited people from NOAA and outside speakers to come talk about it. Then have convo and pull together brief report to SAB
- Paul: comparison about other work groups is helpful - we have such a broad commission -
- JR: what are the climate investments - across NOAA ; strategic plan for CPO where alot of NOAA investments reside and how it aligns with the values of NOAA- where are the investments and gaps - international, across NOAA, CPO - how are we and how are we doing
- Ravi: CPO presented areas that CWG worked on
- JR: how do we invest our money in NOAA and what are the priorities?
- WH: NOAA climate board - made up of 5 climate AA's supported
- WH: program review next year
- JR: what is there, what has CWG id'd as areas of interest - but from structural view - how does it fit into larger organizational mission and why important/gaps
- Ravi: to move forward for this year - those 4 topics are ones we are going to work on - something to go forward with
- WH: 4 topics pick on many of the issues that need to be addressed - waiting about the think big part of it
- Rong: climate working group is not just CPO - topic now getting into the weather territory - OAR strategic plan - and looking at broader NOAA climate goals and put these 4 topics in context of this and what has happened
- JR: these are hot topics (tropical, AK) along with human side
- Everette: new administration coming in
- PK: current programs are going to continue - suggesting that focus in on topics that cross over multiple LO's in NOAA; not going to do it the way ecosystems doing it
  - Do we want to do a deep dive on one of these topics
- Eugenia: do whatever can do to help NOAA in this difficult transition - with that goal in mind
- Ravi: help the country - amend that

- Ruby: 4 topics - smaller groups - energy and do deep dive around that topic
- KD: 4 short term and then LT - how are we going to get to Ravi's topic - how can we help NOAA help the country
- PK: 4 topics - next meeting - cross LO - biogeochemistry, international, new technology and climate services within NOAA
- PK: divvy up - people interested in one of these 4 topics - as what we would like to see as our contribution - to NOAA via the SAB
- Everette: iteration with him and Eugenia with WG - larger context might help inform CWG - new leadership and their priorities
- Eugenia: is there anything we can do to help with those 4 areas and the good work on climate
- PR: deep dive on 4 areas -cover many things NOAA cares about
- JR: would love to hear what SAB doing about HPC - support?? Under resourced
- ACTION: get a briefing on HPC - Brian Gross
- CD: separate working group - agenda item for SAB July call - cross working group collaboration
  - **ACTION ITEM: Support cross working group collaboration with HPC -as well as EISWG and DAARWG**
- JR: suggestion to start with 2
- PR - get at least all 4 started
- Ravi - criteria - deadline shorter ex: TPOS
- Rong - 2018 budget
- JR: Arctic and TPOS
- KD: low hanging fruit = CSI that can get lopped
- RL: 4 smaller groups - have to come back to CWG
- PK: promote and encourage as much as we can
- Everette: NOAA is doing great work with respect to climate and what is the benefit of that work to the country- demonstrating the value of that work to the country - lives and property
- WH: valuation - lives and property - jobs - chief economist
- Everette - can occur within those 4 topics
- Eugenia: value for the country - S2S
- KD: value to the country in next year or two and then build beyond that
- RL: s2s thread runs through all 4 of them
- Ravi: what is going to be done? And by when?
- PK: goal by mid/late June - to be able to have a crafted work plan to pass along to Everette and Eugenia
- PK: talk about why 4 areas are important and what that means; highlight what programs are involved; why CWG thinks it's important - quantify the valuation - consensus of the group is ...; and then where CWG would like to see it go; what CWG would see WG contributing to that;
- JR: integration - needs to be talked about as well; and needs and communication - who is going to benefit from this - human side to each of these
- JR: S2S - science community
- Raghu: need some input re: CSI's usefulness - would be nice to know why Billy/David

- think they are not getting operational support - connect with the NOAA people
- JR: wish NWS had weather process team - self organize to make immediate progress in implementation
  - CD: ask for people at NOAA to explain why what Billy/David did not get implemented
  - Lead: Kirstin Ravi, Raghu, KD Paul F - CSI
  - Weather bill -Lead: Rong Raghu, Ruby, Chris , Fuqing
  - TPOS: Joellen, Lead: Dean, Paul K
  - ARctic, Lead: Ruby, Joellen, Phil, Paul K

**SUMMARY OF ACTION ITEMS**

**Day One:**

**ACTION: Outcome of meeting is development of a CWG workplan**

**ACTION: Document Needs of Arctic (NOAA Arctic Research)**

- Strategy document
- Action plan

**ACTION: Invite Dave Kennedy at next CWG meeting to discuss integration on long-term timescales for permanent risk/vulnerability “on the ground” for communities**

**ACTION: Follow-up Topics for Jeremy (Arctic): Sea Grant Integration / Climate Model Integration / Human Dimensions --interactions and engagements / CTB in the Arctic**

- Action: Share CPO strategic plan with CWG (caveat needs to be updated)**

**Day Two:**

**ACTION:** Raghu, Rong and Jin will talk offline about the Weather-Climate mix of the drought/flood California example, to talk about the continuing research. Paragraph on this point could be crafted.

**ACTION: TOPIC of CSI is a workplan issue--how it is crafted? Promote.**

- **Summary: work plan items (August 21 Deadline--Initial Draft June 30)**
  - **CSI:** Idea that the CSI is a very important part of the service of the climate program office - exemplary work that needs to continue to be bolstered in its support in resources and direction of ways to expand their outreach (**Kirstin**, Raghu, Ravi, Paul F., Lesley-Ann, Rong)
  - **Basic Research (S2S):** Implementation of the weather act and potential impact on the climate competitive research process - important that this process continue but remember importance of foundational and application work stay in balance - still opportunity for good foundational work ex: arctic atmosphere, oceans applications (Ruby, **Rong**, Raghu, Chris,, Fuqing)
  - **TPOS :** Billy/David - feel there may not be much of an advocacy of sustainability of their plans and assimilating data and making strategic decisions regarding rearrangement of moored array vs. argo (JoEllen, Paul K., **Dean**)



	<ul style="list-style-type: none"> <li>● Need to promote initiative to sustain it</li> <li>● Seasonal and subseasonal forecasts</li> <li>■ <b>Arctic:</b> Promote encourage direct noaa to support a national integrated arctic system that will be able to touch on a host of different things: obs systems, demonstrating whether there is skill in arctic prediction ex: sea ice - can we claim we are moving forward in arctic predictive processes (Phil, Joellen, <b>Ruby</b>, Paul K.)</li> <li>● <b>ACTION ITEM: Jen/Sandra create a shared google doc so CWG can work on it</b></li> <li>● <b>ACTION ITEM: Support cross working group collaboration with HPC -as well as EISWG and DAARWG</b></li> </ul> <p><b>ACTION ITEM: Get on the SAB agenda for 8/31 meeting re: work plan</b></p> <p><b>ACTION: Workplan Timeline</b></p> <ul style="list-style-type: none"> <li>● Paul Knight to draft strawman for what should entail and share with CWG by Monday, May 22</li> <li>● JD doodle poll sent out for CWG teleconference availability the week of June 28-30</li> <li>● June 30: 1st deadline for draft to Paul, Ruby and CWG in google docs that Jen/Sandra create</li> </ul>
12:15-12:30	Closing Remarks/Adjourn (Notetaker: J. Dopkowski)
12:30 - 1:30	Executive Session: Working Lunch

## Laura Newcomb - NOAA Affiliate

---

**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Wednesday, June 14, 2017 4:46 PM  
**To:** Cynthia Decker - NOAA Federal; Elizabeth Akede - NOAA Affiliate  
**Subject:** SNCA FAC staff meeting agenda  
**Attachments:** SNCAAdvisoryCmte\_JunTelecon\_Agenda\_061417\_draft.docx

Dear Cynthia and Liz,

I have the following items on the agenda for our staff meeting tomorrow:

- update on each topic team
- June telecon date
  - June 27 1 - 3 pm (7 members available)
  - June 23 3 - 6 pm (10 members available)
- June telecon agenda (draft attached)
  - schedule pre-brief with Richard?
- Transition document to incoming administration
- Sept meeting (venue, speaker suggestions)

I have reserved SSMC4 conference room 11338 for both our staff meeting and Topic 2 call as Cynthia (and myself) will already be in SSMC4. Cynthia if you would prefer your office, just let us know!

Please add any additional items to the list.

Laura

--

Laura Newcomb, PhD  
Program Analyst

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## Laura Newcomb - NOAA Affiliate

---

**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Thursday, June 15, 2017 7:22 AM  
**To:** Susan Avery  
**Cc:** Ann-Marie.Chischilly@nau.edu; Dell, Jan (WG); Kristen Iverson Poppleton; elizabeth.akede@noaa.gov; Cynthia Decker - NOAA Federal  
**Subject:** Re: SMCA FAC Topic 1 group meetings

Dear Topic 1 Members,

Thank you for your responses to the poll. We have selected the following date and times:

June 20, 11-12 ET

July 13 , 11-12 ET

Call in information is: 866-916-3537 pc: 687-9456

Laura

On Sun, Jun 11, 2017 at 2:19 PM, Susan Avery <[susan.avery@averyconsulting.net](mailto:susan.avery@averyconsulting.net)> wrote:

Dear Ann, Jan, Kristen:

I am trying to pull together the four of us with help from Laura Newcomb to discuss our work and what needs to be done. Laura has established a [poll](#) and I hope you can fill this out quickly. Also attached is a set of documents including the Gap Analysis, Agency responses, the workplan, and a list of National Academy Reports on the USGRCP. I know that all of our schedules are busy, but let's see if we can get together via phone for a couple of telecons.

Thank you.

*Susan*

Susan K. Avery

President Emerita, Woods Hole Oceanographic Institution

Senior Fellow, Consortium for Ocean Leadership

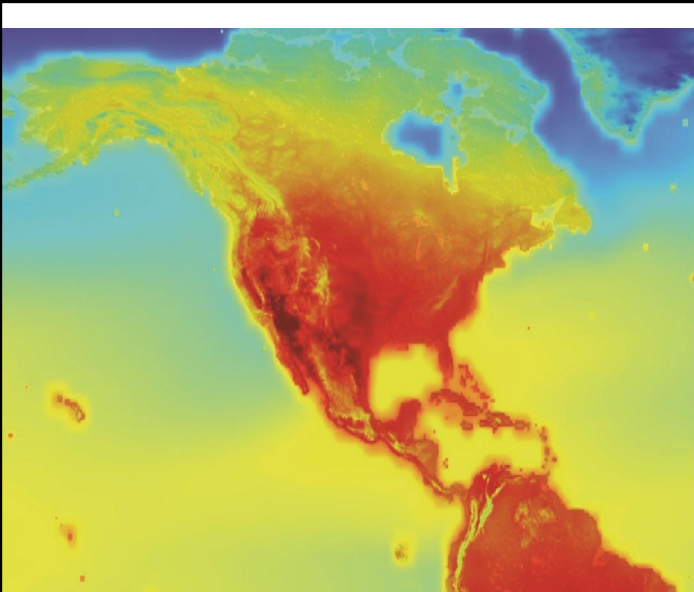
Visiting Distinguished Fellow, UMass Boston

Partner, Avery Consulting, LLC

Phone: [508.560-2459](tel:508.560.2459)

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--  
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**Advisory Committee**  
for the  
**Sustained  
National Climate  
Assessment**

**Gap Analysis Use**

# Gap Analysis Background

Sept. 2016: Advisory Committee members identify the need to better understand the sustained assessment “ecosystem.” A gap analysis was proposed as a way to evaluate the status and effectiveness of USGCRP planned and on-going activities in support of Sustained Assessment.

Wtr. 2017: Staff develops framework for gap analysis.

Mar. 2017: Staff briefs Advisory Committee at in person meeting on gap analysis framework.

Spr. 2017: Staff conducts gap analysis based on advisory committee feedback. Analysis is reviewed by 4 FAC members (Richard Moss, Jan Dell, Jerry Melillo, Paul Fleming) and USGCRP National Coordination Office.

May. 2017: Gap Analysis 1.0 released to FAC for use.

Timeline

# Recommendations on use

The gap analysis can be used as

- 1. a comprehensive picture of progress on sustained assessment in USGCRP\* activities and programs.** The information can serve as a background for the committee to understand how previous recommendations have been addressed.

\*This list includes only NCA activities USGCRP is involved in, the individual agencies may have other projects underway that are not accounted for in this analysis.

- 2. a repository of sustained assessment activities.** This information can be kept up to date over time by committee staff or members.

# Gap Analysis Components

**Highest level overview of major themes and recommendations.** This section gives a very preliminary overview of what aspects of sustained assessment have been addressed and which have not been. It is most useful for thinking of the overall picture.

**1. dashboard**

2. snapshot

3. justification

visual representation



# Gap Analysis Components

**Ranking for each activity and each recommendation.** This level of detail can be used to understand which recommendations have been met by which activities.

1. dashboard

2. snapshot

3. justification

visual representation

# Gap Analysis Components

**Overall justification for each ranking.** Once a specific “box” has been identified in the snapshot, the user can find the matching cell in the justification to learn more information.

1. dashboard

2. snapshot

**3. justification**

visual representation

# Gap Analysis Components

**Diagram depicting connections between NCA4 products and activities.**

This tab may be useful to understand how all of the activities are connected. It may also serve as a tool to determine where there could be additional connections between products/activities.

1. dashboard

2. snapshot

3. justification

visual representation

# How to think about the ranking categories

## Ready

Can elements of this method be copied or borrowed to achieve SA in other products?

Is this an effective way of achieving SA?

## Developing

How can this activity be expanded into “ready”?

What additional steps/knowledge/work is needed to move this along?

## Missing

What are the priorities for improving missing items?

# Topic 1: Relevant Areas

---

Rows: Elements of Sustained Assessment

- 2. Scientific Foundations
- 3.3. Establish a process and provide resources for Foundational elements and topical reports

Columns: USGCRP Activities

- Scientific Foundations
- Engagement
- Tools
- Reports

Visual Representation

## Topic 2: Relevant Areas

---

Row: Elements of Sustained Assessment

- 1.2 Encourage and support communication and engagement networks
- 4.1 Diversify the resource base for assessment
- 3.5 Build and maintain engagement with regional science, assessment, and service institutions

Columns: USGCRP Activities

- Tools (CRT, CDI, GCIS)
- Resilience Dialogues
- PREP

## Topic 3: Relevant Areas

---

Rows: Elements of Sustained Assessment

- 1. Expand Partnerships

Columns: USGCRP Activities

- Engagement

# Topic 4: Relevant Areas

---

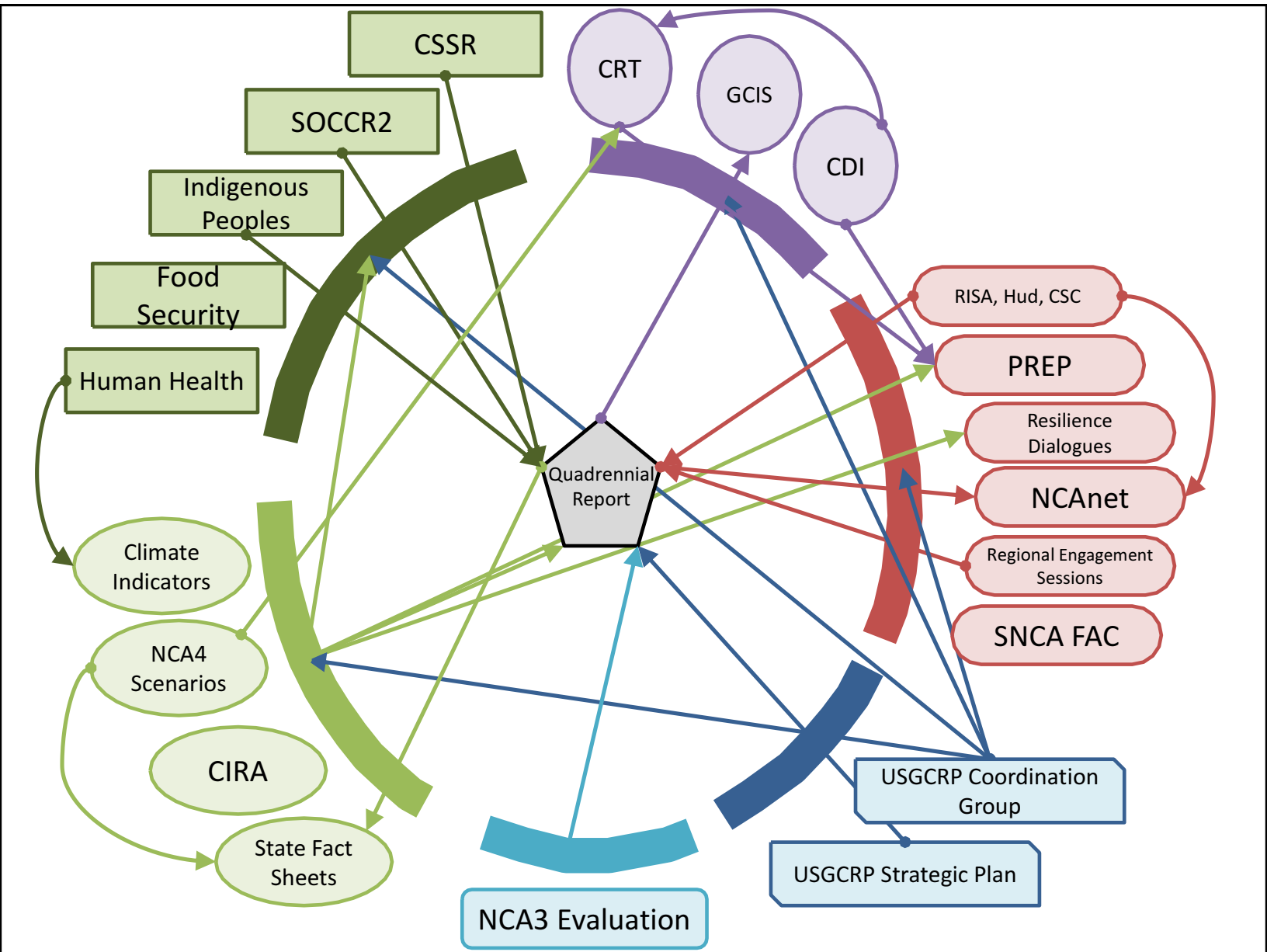
Row: Elements of Sustained Assessment

- 2.7 Assessment evaluation strategy

Column: Evaluation

(USGCRP specifically requested an evaluation category as they hope to add more product/activities to this section in the future.)







## Laura Newcomb - NOAA Affiliate

---

**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Thursday, June 15, 2017 10:56 AM  
**To:** Lucas Joppa  
**Cc:** Fleming, Paul; Michael Prather; Cynthia Decker - NOAA Federal; Moss, Richard H; Elizabeth Akede - NOAA Affiliate  
**Subject:** Re: Climate Assessment Advisory Report - Topic #2  
**Attachments:** GapAnalysis\_Pres\_AllTopic\_05182017.pptx

Hi All,

Following up on Lucas' email, attached is a presentation I will walk through to talk about the relevant parts of the Gap Analysis to your Topic (and provide a quick refresher of the gap analysis).

Talk to everyone soon on the call.

Laura

On Thu, Jun 15, 2017 at 9:48 AM, Lucas Joppa <[lujoppa@microsoft.com](mailto:lujoppa@microsoft.com)> wrote:

Hi all,

A few notes in advance of today's call. It looks like Michael won't be able to join us so I'm hoping we can update him via email after the call. I have pasted the short 'Topic 2 Summary' below this email.

The purpose of this call is two-fold:

- 1) To hear from Laura on the gap analysis as it relates to topic 2
- 2) Begin brainstorming some efficient approaches to producing necessary materials

*Topic 2: Products Derived from the Core Set of SNCA Resources*

For this topic, the Advisory Committee will develop recommendations on how to foster a "virtuous cycle" that facilitates use of the core set of SNCA resources by stakeholders to develop products to meet their needs, and a feedback of information into the process that helps to evaluate existing

products and contribute knowledge to new ones. The Climate Resilience Toolkit (CRT—<https://toolkit.climate.gov/content/home>) includes examples of such products that provide maps, scenarios, guidelines, and other information at local to regional scales. Specific issues likely to be addressed include:

- Developing a clear structure for how core NCA products (CRT, Global Change Information System, etc.) interact and feedback into future NCA activities;
- Developing clear mechanisms of engagement for non-federal participants (Partnership, program, and infrastructure models);
- Engagement of professional associations (e.g., American Society of Civil Engineers) and others to develop recommendations for evaluation processes for current and future products.

[Lucas N, Joppa, Ph.D.](#) | Chief Environmental Scientist | Microsoft | [425-326-8376](tel:425-326-8376)

---

**From:** Lucas Joppa

**Sent:** Wednesday, May 31, 2017 8:23 PM

**To:** 'Fleming, Paul' <[Paul.Fleming@seattle.gov](mailto:Paul.Fleming@seattle.gov)>; Michael Prather <[mprather@uci.edu](mailto:mprather@uci.edu)>

**Cc:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>; Moss, Richard H <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>; Elizabeth Akede - NOAA Affiliate <[elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov)>; Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>

**Subject:** RE: Climate Assessment Advisory Report - Topic #2

Correct!

[Lucas N, Joppa, Ph.D.](#) | Chief Environmental Scientist | Microsoft | [425-326-8376](tel:425-326-8376)

---

**From:** Fleming, Paul [<mailto:Paul.Fleming@seattle.gov>]

**Sent:** Wednesday, May 31, 2017 1:09 PM

**To:** Lucas Joppa <[ljoppa@microsoft.com](mailto:ljoppa@microsoft.com)>; Michael Prather <[mprather@uci.edu](mailto:mprather@uci.edu)>  
**Cc:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>; Moss, Richard H <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>; Elizabeth Akede - NOAA Affiliate <[elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov)>; Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>  
**Subject:** RE: Climate Assessment Advisory Report - Topic #2

Lucas:

Thank you for getting this started. Just to confirm, our topic is something along the lines of “innovating derived products from reports and core products/activities of the sustained assessment process”, correct?

I look forward to the discussion.

-Paul

---

**From:** Lucas Joppa [<mailto:ljoppa@microsoft.com>]  
**Sent:** Thursday, May 25, 2017 9:02 PM  
**To:** Fleming, Paul <[Paul.Fleming@seattle.gov](mailto:Paul.Fleming@seattle.gov)>; Michael Prather <[mprather@uci.edu](mailto:mprather@uci.edu)>  
**Cc:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>; Moss, Richard H <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>; Elizabeth Akede - NOAA Affiliate <[elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov)>; Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>  
**Subject:** Climate Assessment Advisory Report - Topic #2

Hi Paul and Michael,

Many thanks for agreeing to assist with the advisory report our committee has been asked to put together, particularly on Topic 2 (as defined in the ‘strategy document’ pdf attached). I’ve attached an example of a report produced by the Climate Partnership Task Force that can serve as a rough guide for the overall type of document the committee will ultimately produce.

I know we are all busy, and will need to hone in on an efficient method for tackling this topic, and producing our initial comments, outlines, and eventual text. While it won’t get us all the way there,

I'm hoping we can initialize some of our thinking by reconsidering the previous NCA committee report (attached) on sections relevant to our topic and revisit what has happened since that time, and why particular actions may or may not have been taken in response to those recommendations. In order for us to do that efficiently Richard is going to be sending us along the latest version of the gap analysis report early next week for our consideration.

I've asked Laura to help set up some calls for us to get this process kicked off and she will be sending around some scheduling polls in short order. On our first call Laura will also provide some background and details on the sections of the gap analysis most relevant to our topic.

Cheers,

Lucas

[Lucas N, Joppa, Ph.D.](#) | Chief Environmental Scientist | Microsoft | [425-326-8376](tel:425-326-8376)

--

Laura Newcomb, PhD  
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SNCA FAC Draft Agenda Brainstorm  
June 12, 2017

(1) Required

- Interim report on Special Report on Recommendations for Advancing a Sustained Assessment (inform NOAA and USGCRP of initial recommendations and obtain feedback)
- Update on NCA4 process and any requests for feedback from the FAC
- Planning completion of Special Report (make decisions regarding content and process for final recommendations)

(2) Regional targets of opportunity (it would be useful to get input from the NCA staff on results from the regional consultations, including how broadly to define the region – I suggest PacNW, Alaska, Hawaii/Pac Islands but welcome other input)

- Web-based innovations to support global change research and assessment (panel presentations to describe initiatives that facilitate sustained assessment and/or process or topical suggestions for Federal aspects of the SA process, followed by discussion). Speakers could include:
  - **Amazon Web Services (Joe Sundial)**
  - Microsoft
  - Google
  - Other (e.g., foundation?)
  - David Herring (Resilience Toolkit)
  - **Resilience Dialogues/PREP - Sonoma County Water Agency ([Grant Davis](#), [Ann DuBay](#))**
- Sustained assessment in the Pacific Northwest, Alaska, and Hawaii/Pacific Islands (panel presentations from state/local users, as well as several regional information providers, on initiatives and challenges within the region that hold promise for SA, followed by discussion). Speakers could include:
  - **Tribal Nation Climate Adaptation Plans** (from Ann Marie Chischilly)
    - Kelsey Modenke (Quinault Relocation Plan)
    - Denise Pollock (Alaska)
    - Julie Maldenaldo (Isle de Jean Charles)
  - Western Governors Association
  - **[Climate Impacts Group](#) ([Amy Snover](#) and/or [Joe Casola](#))**
  - **[Oregon Climate Assessment](#) ([Phil Mote](#) and/or [Kathie Dello](#))**
  - [California](#) Climate Assessment
  - **[Montana Climate Assessment](#) ([Cathy Whitlock](#))**
  - Sustained Assessment Specialist ([Zena Grecni](#))
- Assessment and International Influences
  - [Chris Field](#) (Stanford/ Carnegie Institute)

\***bolded** speakers have come up from multiple people as strongly recommendations

## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Thursday, June 15, 2017 2:26 PM  
**To:** Kristin Lewis; Cynthia Decker - NOAA Federal; David Reidmiller; Elizabeth Akede - NOAA Affiliate; Julie Morris; Katie Reeves (Contractor); Michael Kuperberg; Moss, Richard H; Laura Newcomb - NOAA Affiliate; Tess Carter Usgrcp; David Dokken  
**Subject:** FAC tag-up this week  
**Attachments:** SNCAAdvisoryCmte\_3rdMtg\_Agenda\_brainstorm.docx

Hello All,

In anticipation of tomorrow's meeting, we in the FAC office have a few items we hope can be discussed.

First, we would like to continue the discussion to select speakers for our September meeting. Attached is a summary of the speaker suggestions taken from the email train two weeks ago. Second, we are writing a transition document to the incoming administration and would like to ask for your input on the contributions of the FAC to USGCRP.

As we must jump onto a call with one of our topic teams immediately after this call, we won't be able to make the trip downtown. We look forward to speaking to you all by phone!

Thank you,  
Laura

--

Laura Newcomb, PhD  
Program Analyst  
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Advisory Committee for the Sustained National Climate Assessment  
Membership

June 2017

Name (term expires)	Position/Affiliation	Brief Biographical Sketch	Sector	End Date of Appointment
Susan Avery (2nd term 2019)	President Emerita, Woods Hole Oceanographic Institution	Dr. Avery's research includes atmospheric circulation and precipitation, the development of new radar techniques and instruments for observing the atmosphere, and the role of climate science in decision support.	Academia	April 15, 2019
Maxine Burkett (1st term 2018)	Professor of Law, University of Hawai'i	Ms. Burkett specializes in climate change law and policy with a specialty in climate ethics and climate equity especially as it pertains to island communities.	Academia	April 15, 2018
Ann Marie Chischilly (1st term 2019)	Executive Director, Northern Arizona University - Institute for Tribal Environmental Professionals	Ms. Chischilly's life and career is dedicated to advocating on behalf of tribes, including her own (Navajo Nation), throughout the United States on the issues of climate change and it's impacts on Tribes and Indigenous peoples.	Academia	April 15, 2019
Jan Dell (2nd term 2019), Vice Chair	Vice President, Clean Energy, Water & Climate, Wood Group	Ms. Dell leads strategic development of projects in the energy-water-climate nexus for global energy and chemical producers.	Industry	April 15, 2019
Riley Dunlap (1st term 2018)	Regents Professor of Sociology and Dresser Professor, Oklahoma State University	Dr. Dunlap's research in environmental sociology has three major foci: (1) environmental concern; (2) the environmental movement; and (3) climate change.	Academia	April 15, 2018
Paul Fleming (2nd term 2019)	Climate Resiliency Group Manager, Seattle Public Utilities	Mr. Fleming works in water resources management, water utility management, climate risk management, use of climate data/projections, climate assessment and adaptation, and decision making under uncertainty.	Government	April 15, 2019
Lucas Joppa (1st term 2019)	Lead Environmental Scientist, Microsoft Research	Dr. Joppa's work focuses on developing the science, policy, and tools and technology necessary to manage environmental systems. His research is targeted towards achieving international biodiversity conservation goals.	Industry	April 15, 2019
Kim Knowlton (1st term 2018)	Senior Scientist, Science Center Deputy Director, Natural Resources Defense Council and Assistant Clinical Professor, Columbia University	Dr. Knowlton's research focuses on impacts of climate change on health relative to heat, air pollution, wildfires, extreme weather events, and infectious diseases; on the health costs of climate change; human vulnerability to climate impacts; and climate-health preparedness and adaptation.	NGO	April 15, 2018
Maria Carmen Lemos (1st term 2019)	Professor of Natural Resources and Environments, University of Michigan School of Natural Resources and Environment	Dr. Lemos researches the human dimensions of global change and social studies of science.	Academia	April 15, 2019
Jerry Melillo (2nd term 2019)	Distinguished Scientist and Director Emeritus, The Ecosystems Center, Marine Biological Laboratory	Dr. Melillo specializes in understanding the impacts of human activities on the biogeochemistry of ecological systems from local to global scales, using a combination of field studies and simulation modeling.	NGO	April 15, 2019
Richard Moss (1st term 2018), Chair	Senior Scientist, Pacific Northwest National Laboratory's Joint Global Change Research Institute at the University of Maryland	Dr. Moss is a research scientist studying interactions of human and natural systems affected by global environmental change.	Academia	April 15, 2018
Kristin Poppleton (1st term 2019)	Director of Education, Climate Generation - a Will Steger Legacy	Ms. Poppleton is a climate change educator whose work focuses on developing, implementing, evaluating and sharing what constitutes effective climate literacy.	NGO	April 15, 2019
Michael Prather (2nd term 2019)	Professor of Earth System Science, University of California, Irvine	Dr. Prather has an extensive background in atmospheric chemistry, bio-geochemical cycles of greenhouse gases and aerosols. He also analyzes emerging issues in science and the environment for statesmanship.	Academia	April 15, 2019

Advisory Committee for the Sustained National Climate Assessment  
Membership

June 2017

Jessica Whitehead (1st term 2018)	Coastal Communities Hazards Adaptation Specialist, North Carolina Sea Grant	Dr. Whitehead's work in coastal climate extension engages local stakeholders to develop solutions in anticipation of vulnerabilities to near-term hazards, and assists local communities in incorporating scenarios of long-term climate and sea level changes in climate adaptation planning.	Academia	April 15, 2018
Daniel Zarrilli (1st term 2019)	Senior Director, Climate Policy and Programs, and Chief Resilience Officer, New York City Office of the Mayor	Mr. Zarrilli is responsible for assessing and responding to the risks of climate change by implementing the resiliency program of OneNYC as well as overseeing the City of New York's involvement with the New York City Panel on Climate Change and the Climate Change Adaptation Task Force.	Government	April 15, 2019

**Cynthia Decker - NOAA Federal**

---

**From:** Cynthia Decker - NOAA Federal  
**Sent:** Thursday, June 15, 2017 4:46 PM  
**To:** Ko Barrett - NOAA Federal  
**Subject:** Re: When are NCA FAC terms up for renewal?  
**Attachments:** SNCA FAC membership June 2017.xlsx

Table with membership and terms attached. Note that five members had the first term end after one year in 2017 and were all renewed for two years. The current charter only allows for renewal of a term for two years. The proposed revision to the charter allows for 1-3 year renewals. There are five members whose terms are up in 2018 and five in 2019. The five whose first terms were renewed are also up in 2019.

Let me know if you need anything else.

Cynthia

On 6/15/2017 3:10 PM, Ko Barrett - NOAA Federal wrote:

Hi Cynthia,

Can you give me a sense about when the first year FAC terms are up? As I recall, they were staggered to provide a sane rotational arrangement.

Will likely need a quick conversation with you next week on this.

Ko  
Ms. Ko Barrett  
Deputy Assistant Administrator for Programs and Administration  
NOAA Office of Oceanic and Atmospheric Research  
301 734-1167  
[ko.barrett@noaa.gov](mailto:ko.barrett@noaa.gov)

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\*\*\*\*\*  
Cynthia J. Decker, Ph.D  
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Email: [cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)

\*\*\*\*\*

**Cynthia Decker - NOAA Federal**

---

**From:** Cynthia Decker - NOAA Federal  
**Sent:** Thursday, June 15, 2017 4:49 PM  
**To:** Mary Whitcomb - NOAA Affiliate; Elizabeth Akede - NOAA Affiliate  
**Subject:** Re: For SAB staff meeting tomorrow

No, I can't do this. I'm in a meeting until mid-afternoon and have only allowed SNCA FAC meetings to be scheduled on top of it because they are time-critical. I could do something after 2 PM.

On 6/15/2017 4:36 PM, Mary Whitcomb - NOAA Affiliate wrote:

Hi. I know you both are busy but I invited you to a SAB staff meeting tomorrow at 10 as both of your calendars looked open.

Attached for your review and discussion at the meeting are:

- July 5 Meeting Timeline
- Comments on SAB Transition document by Denise Reed
- Updated Subcommittee review report form, completed using ESMWG as an example ( did not share with Rebecca Peters yet but I had time to do a first draft)
- July 5 meeting agenda dated May 21 (posted on website)

Here is a link to the SAB actions list

<https://docs.google.com/a/noaa.gov/document/d/1DAnusflyCmACuyli6xbHlriaHOj-REWLwbdPsoZTkW/edit?usp=sharing>

Talk to you tomorrow.

Cheers, Mary Anne

**Mary Anne Whitcomb**

Contractor- NOAA Office of Oceanic and Atmospheric Research and the Science Advisory Board Office

**CollabraLink Technologies, Inc.**

Phone: 240-463-2873

[mary.anne.whitcomb@noaa.gov](mailto:mary.anne.whitcomb@noaa.gov)  
<http://www.collabralink.com>

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\*\*\*\*\*  
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Fax 301-713-1459  
Email: [cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)

\*\*\*\*\*

**Kristen Rickett**

---

**From:** Kristen Rickett  
**Sent:** Thursday, June 15, 2017 4:47 PM  
**To:** Laura Newcomb - NOAA Affiliate  
**Cc:** Cynthia Decker - NOAA Federal; elizabeth.akede@noaa.gov; Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Good afternoon!

I just wanted to check in with you- we are still in good shape with the Crowne Plaza Hotel Seattle Downtown space.

Thank you!

Kristen

Kristen Rickett  
kristenr@hb-co.com

HB & Company  
7315 Wisconsin Avenue  
Suite 400 West  
Bethesda, MD 20814  
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**Sent:** Friday, June 9, 2017 3:28 PM  
**To:** Kristen Rickett  
**Cc:** Cynthia Decker - NOAA Federal; elizabeth.akede@noaa.gov; Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

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Have a great weekend!

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**To:** Cynthia Decker - NOAA Federal; Laura Newcomb - NOAA Affiliate  
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I'm happy to jump on a call tomorrow if you want.

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**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>  
**Sent:** Friday, June 2, 2017 3:36 PM  
**To:** Kristen Rickett; Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov) ;  
Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

We will review, thanks!

One other suggestion, although I do NOT want you to spend a lot of time on this, is the Washington Athletic Club. A colleague of mine in Seattle suggested it. They have both sleeping and meeting rooms although she was not sure how often they contract out for meetings like this. Just a thought.

Have a great weekend,  
Cynthia

On 6/2/2017 3:33 PM, Kristen Rickett wrote:

Good afternoon!

Please find attached the minutes from Tuesday's meeting as well as the site availability matrix. From our initial site search, we received two proposals: Crowne Plaza Hotel Seattle Downtown and Sheraton Seattle. HBC recommends the Crowne Plaza Hotel Seattle Downtown. The Crowne Plaza Hotel Seattle Downtown offered comparable meeting space to our March meeting, per diem room rates, per diem lunch options for the executive lunch, it is walking distance from the Link, they are offering complimentary wifi in the meeting rooms and guest rooms, and they offering a complimentary room block. Sheraton Seattle's meeting space is much smaller and they do not have larger rooms available. Additionally, Sheraton Seattle is not offering wifi in the meeting rooms.

Please let us know your thoughts.

We hope you have a great weekend!

Thanks!

Kris

Kristen Rickett  
[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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\*\*\*\*\*

## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Thursday, June 15, 2017 5:26 PM  
**To:** Moss, Richard H; Cynthia Decker - NOAA Federal; Elizabeth Akede - NOAA Affiliate  
**Subject:** June Admin Telecon  
**Attachments:** SNCAAdvisoryCmte\_JunTelecon\_Agenda\_061417\_draft.docx

Dear Richard,

Would you be available for a call Tuesday June 20th to discuss the agenda for the upcoming administrative call? Other than 11 - 12 pm, we could meet at any time. We have attached a suggested draft agenda and welcome your comments.

Regarding the date, 10 members indicated availability for the June 23 date while 7 indicated availability for June 27 1 - 3pm. I will be tracking down the non-responders to the June 27 date poll to see if that number can possible get higher.

Thank you,  
Laura

--

Laura Newcomb, PhD  
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## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Thursday, June 15, 2017 5:31 PM  
**To:** Cynthia Decker - NOAA Federal; Elizabeth Akede - NOAA Affiliate  
**Subject:** SNCA FAC website update

Hi Cynthia,

I forgot to give you an update on our website during the staff meeting! IT is still unable to understand and fix the current issue. Neither they nor the company that developed the website software can understand why our file directories have disappeared.

IT will be trying another fix this Friday. I plan to check back in with them on Monday. I have expressed how important it is to have this site up and they have been very helpful and responsive to this need.

Thanks,  
Laura

--

Laura Newcomb, PhD  
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## Cynthia Decker - NOAA Federal

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Thursday, June 15, 2017 5:38 PM  
**To:** Kristen Rickett  
**Cc:** Laura Newcomb - NOAA Affiliate; elizabeth.akede@noaa.gov; Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Thanks, Kristen. I am so sorry about this. I am trying to get resolution ASAP. I will give you an answer one way or the other by tomorrow if you can hold off with the hotel that long. If we have to give up the space, we can look places other than downtown. The U District has a number of hotels as well. In a pinch, we might be able to get meeting space at one of the NOAA labs and just use a hotel for sleeping rooms. There are some other options.

Thanks again for your patience with this,  
Cynthia

On Thu, Jun 15, 2017 at 5:08 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good afternoon!

Thank you for the information.

If we have to let this space go but there is a possibility that the meeting could still happen, I will let our representative at Crowne Plaza Hotel Seattle Downtown know that so he can keep us in mind. If the space is no longer available, we can certainly revisit our search but we didn't have a lot of response in the first place. An option would be to expand our search from the downtown Seattle area to possibly someplace closer to the airport.

I'm happy to jump on a call tomorrow if you want.

Thank you!

Kris

Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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Bethesda, MD 20814

[240.744.7026](tel:240.744.7026)

[240.744.7033](tel:240.744.7033) (fax)

---

**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>

**Sent:** Thursday, June 15, 2017 4:50 PM

**To:** Kristen Rickett; Laura Newcomb - NOAA Affiliate

**Cc:** [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett

**Subject:** Re: Meeting Minutes 5.30.17

Kristen,

There is still some doubt surrounding this meeting. I cannot commit at this time. I will see if there is an answer by tomorrow, Friday. What are the options if we have to let this space go?

Cynthia

On 6/15/2017 4:47 PM, Kristen Rickett wrote:

Good afternoon!

I just wanted to check in with you- we are still in good shape with the Crowne Plaza Hotel Seattle Downtown space.

Thank you!

Kristen

Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>  
**Sent:** Friday, June 9, 2017 3:28 PM  
**To:** Kristen Rickett  
**Cc:** Cynthia Decker - NOAA Federal; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Thank you Kristen!

On Fri, Jun 9, 2017 at 3:27 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good afternoon!

I asked our representative if we could have until next Tuesday or Wednesday to make a decision and he said that should be fine but he'll let us know if something changes.

Have a great weekend!

Kristen

Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>

---

**Sent:** Friday, June 9, 2017 1:36 PM

**To:** Kristen Rickett

**Cc:** Cynthia Decker - NOAA Federal; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett

**Subject:** Re: Meeting Minutes 5.30.17

Hi Kristen,

Cynthia is on leave until Tues 6/13 checking email intermittently. By what date do we need to respond? If this is urgent I will text Cynthia if you need this info from us today.

Thanks!

Laura

On Fri, Jun 9, 2017 at 12:11 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good afternoon!

I've heard from our representative at the Crowne Plaza Hotel Seattle Downtown and they've had four other inquiries for our dates. They are encouraging us to make a decision on moving ahead with a contract for this property.

Please let me know if you have any questions. I'm happy to jump on a last minute call to discuss the hotel if needed.

Thanks!

Kris

Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Kristen Rickett

**Sent:** Monday, June 5, 2017 7:04:18 PM

**To:** Cynthia Decker - NOAA Federal  
**Cc:** Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Good evening!

I heard back from Washington Athletic Club and they do not have any availability.

Have you been able to review the site availability matrix for Crowne Plaza Hotel Seattle Downtown?

Thanks!

Kris

Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Kristen Rickett  
**Sent:** Monday, June 5, 2017 5:07:53 PM  
**To:** Cynthia Decker - NOAA Federal  
**Cc:** Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Good afternoon!

I've not heard back from Washington Athletic Club so I reached out again today. They are supposed to have an event manager call me back.

Thanks!

Kris



Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>

**Sent:** Saturday, June 3, 2017 10:15 AM

**To:** Kristen Rickett

**Cc:** Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett

**Subject:** Re: Meeting Minutes 5.30.17

OK thanks. My colleague is a member. I could see if she would be willing to sponsor. But only if we think we could get a good deal from them, better than Crowne Plaza.

On Fri, Jun 2, 2017 at 10:16 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good evening!

Thanks for the info! I reached out to Washington Athletic Club and will let you know what I hear. It appears that you have to be a member (or be sponsored by a member) to stay there or host a meeting.

Have a wonderful weekend!

Kris

Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>

**Sent:** Friday, June 2, 2017 3:36 PM

**To:** Kristen Rickett; Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov) ;  
Brooke Rickett

**Subject:** Re: Meeting Minutes 5.30.17

We will review, thanks!

One other suggestion, although I do NOT want you to spend a lot of time on this, is the Washington Athletic Club. A colleague of mine in Seattle suggested it. They have both sleeping and meeting rooms although she was not sure how often they contract out for meetings like this. Just a thought.

Have a great weekend,  
Cynthia

On 6/2/2017 3:33 PM, Kristen Rickett wrote:

Good afternoon!

Please find attached the minutes from Tuesday's meeting as well as the site availability matrix. From our initial site search, we received two proposals: Crowne Plaza Hotel Seattle Downtown and Sheraton Seattle. HBC recommends the Crowne Plaza Hotel Seattle Downtown. The Crowne Plaza Hotel Seattle Downtown offered comparable meeting space to our March meeting, per diem room rates, per diem lunch options for the executive lunch, it is walking distance from the Link, they are offering complimentary wifi in the meeting rooms and guest rooms, and they offering a complimentary room block. Sheraton Seattle's meeting space is much smaller and they do not have larger rooms available. Additionally, Sheraton

Seattle is not offering wifi in the meeting rooms.

Please let us know your thoughts.

We hope you have a great weekend!

Thanks!

Kris

Kristen Rickett

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**Cynthia Decker - NOAA Federal**

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Thursday, June 15, 2017 5:39 PM  
**To:** Moss, Richard H  
**Cc:** Laura Newcomb - NOAA Affiliate; Elizabeth Akede - NOAA Affiliate  
**Subject:** Re: June Admin Telecon

Richard,

If we can't get a quorum for the new date, we can go back to the 23rd for a meeting and I'll make it work.

Cynthia

On Thu, Jun 15, 2017 at 5:25 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Dear Richard,

Would you be available for a call Tuesday June 20th to discuss the agenda for the upcoming administrative call? Other than 11 - 12 pm, we could meet at any time. We have attached a suggested draft agenda and welcome your comments.

Regarding the date, 10 members indicated availability for the June 23 date while 7 indicated availability for June 27 1 - 3pm. I will be tracking down the non-responders to the June 27 date poll to see if that number can possible get higher.

Thank you,  
Laura

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**Cynthia Decker - NOAA Federal**

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Thursday, June 15, 2017 5:40 PM  
**To:** Laura Newcomb - NOAA Affiliate  
**Cc:** Elizabeth Akede - NOAA Affiliate  
**Subject:** Re: SNCA FAC website update

Wow, so weird. I hope it hasn't been hacked or something.

On Thu, Jun 15, 2017 at 5:30 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Cynthia,

I forgot to give you an update on our website during the staff meeting! IT is still unable to understand and fix the current issue. Neither they nor the company that developed the website software can understand why our file directories have disappeared.

IT will be trying another fix this Friday. I plan to check back in with them on Monday. I have expressed how important it is to have this site up and they have been very helpful and responsive to this need.

Thanks,  
Laura

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\*\*\*\*\*

**Kristen Rickett**

---

**From:** Kristen Rickett  
**Sent:** Thursday, June 15, 2017 5:56 PM  
**To:** Cynthia Decker - NOAA Federal  
**Cc:** Laura Newcomb - NOAA Affiliate; elizabeth.akede@noaa.gov; Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Hi!

As long as there aren't better options for the Crowne Plaza, we can hold them off. We're checking in with Crowne Plaza daily and he promised to let us know if anyone wants to sign a contract.

Thank you so much for your communication!

Kristen

Kristen Rickett  
kristenr@hb-co.com

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**Sent:** Thursday, June 15, 2017 5:37 PM  
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the space is no longer available, we can certainly revisit our search but we didn't have a lot of response in the first place. An option would be to expand our search from the downtown Seattle area to possibly someplace closer to the airport.

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Kristen,

There is still some doubt surrounding this meeting. I cannot commit at this time. I will see if there is an answer by tomorrow, Friday. What are the options if we have to let this space go?

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**Sent:** Friday, June 9, 2017 3:28 PM  
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Have a great weekend!

Kristen

Kristen Rickett  
[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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Suite 400 West  
Bethesda, MD 20814  
[240.744.7026](tel:240.744.7026)  
[240.744.7033](tel:240.744.7033) (fax)

---

**From:** Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>  
**Sent:** Friday, June 9, 2017 1:36 PM  
**To:** Kristen Rickett  
**Cc:** Cynthia Decker - NOAA Federal; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Hi Kristen,

Cynthia is on leave until Tues 6/13 checking email intermittently. By what date do we need to respond? If this is urgent I will text Cynthia if you need this info from us today.

Thanks!  
Laura

On Fri, Jun 9, 2017 at 12:11 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good afternoon!

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and they've had four other inquiries for our dates. They are encouraging us to make a decision on moving ahead with a contract for this property.

Please let me know if you have any questions. I'm happy to jump on a last minute call to discuss the hotel if needed.

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**Sent:** Monday, June 5, 2017 7:04:18 PM

**To:** Cynthia Decker - NOAA Federal

**Cc:** Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett

**Subject:** Re: Meeting Minutes 5.30.17

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**Cc:** Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett

**Subject:** Re: Meeting Minutes 5.30.17

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**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>  
**Sent:** Saturday, June 3, 2017 10:15 AM  
**To:** Kristen Rickett  
**Cc:** Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

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Have a wonderful weekend!  
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**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>  
**Sent:** Friday, June 2, 2017 3:36 PM  
**To:** Kristen Rickett; Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov);

Brooke Rickett

**Subject:** Re: Meeting Minutes 5.30.17

We will review, thanks!

One other suggestion, although I do NOT want you to spend a lot of time on this, is the Washington Athletic Club. A colleague of mine in Seattle suggested it. They have both sleeping and meeting rooms although she was not sure how often they contract out for meetings like this. Just a thought.

Have a great weekend,  
Cynthia

On 6/2/2017 3:33 PM, Kristen Rickett wrote:

Good afternoon!

Please find attached the minutes from Tuesday's meeting as well as the site availability matrix. From our initial site search, we received two proposals: Crowne Plaza Hotel Seattle Downtown and Sheraton Seattle. HBC recommends the Crowne Plaza Hotel Seattle Downtown. The Crowne Plaza Hotel Seattle Downtown offered comparable meeting space to our March meeting, per diem room rates, per diem lunch options for the executive lunch, it is walking distance from the Link, they are offering complimentary wifi in the meeting rooms and guest rooms, and they offering a complimentary room block. Sheraton Seattle's meeting space is much smaller and they do not have larger rooms available. Additionally, Sheraton Seattle is not offering wifi in the meeting rooms.

Please let us know your thoughts.

We hope you have a great weekend!

Thanks!

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\*\*\*\*\*

**Cynthia Decker - NOAA Federal**

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Thursday, June 15, 2017 6:01 PM  
**To:** Kristen Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

OK, well that's good that they don't actually have someone else yet who wants a contract. And I hope he understands we are not trying to jerk him around but that some unexpected circumstances have come up that we are trying to resolve. Thank you for keeping on top of this.

On Thu, Jun 15, 2017 at 5:55 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Hi!

As long as there aren't better options for the Crowne Plaza, we can hold them off. We're checking in with Crowne Plaza daily and he promised to let us know if anyone wants to sign a contract.

Thank you so much for your communication!

Kristen

Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>

**Sent:** Thursday, June 15, 2017 5:37 PM

**To:** Kristen Rickett

**Cc:** Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett

**Subject:** Re: Meeting Minutes 5.30.17

Thanks, Kristen. I am so sorry about this. I am trying to get resolution ASAP. I will give you an answer one way or the other by tomorrow if you can hold off with the hotel that long. If we have to give up the space, we can look places other than downtown. The U District has a number of hotels as well. In a pinch, we might be able to get meeting space at one of the NOAA labs and just use a hotel for sleeping rooms. There are some other options.

Thanks again for your patience with this,  
Cynthia

On Thu, Jun 15, 2017 at 5:08 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good afternoon!

Thank you for the information.

If we have to let this space go but there is a possibility that the meeting could still happen, I will let our representative at Crowne Plaza Hotel Seattle Downtown know that so he can keep us in mind. If the space is no longer available, we can certainly revisit our search but we didn't have a lot of response in the first place. An option would be to expand our search from the downtown Seattle area to possibly someplace closer to the airport.

I'm happy to jump on a call tomorrow if you want.

Thank you!

Kris

Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>

**Sent:** Thursday, June 15, 2017 4:50 PM

**To:** Kristen Rickett; Laura Newcomb - NOAA Affiliate

**Cc:** [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett

**Subject:** Re: Meeting Minutes 5.30.17

Kristen,

There is still some doubt surrounding this meeting. I cannot commit at this time. I will see if there is an answer by tomorrow, Friday. What are the options if we have to let this space go?

Cynthia

On 6/15/2017 4:47 PM, Kristen Rickett wrote:

Good afternoon!

I just wanted to check in with you- we are still in good shape with the Crowne Plaza Hotel Seattle Downtown space.

Thank you!

Kristen

Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>  
**Sent:** Friday, June 9, 2017 3:28 PM  
**To:** Kristen Rickett  
**Cc:** Cynthia Decker - NOAA Federal; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Thank you Kristen!

On Fri, Jun 9, 2017 at 3:27 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good afternoon!

I asked our representative if we could have until next Tuesday or Wednesday to make a decision and he said that should be fine but he'll let us know if something changes.

Have a great weekend!

Kristen

Kristen Rickett

[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**Cc:** Cynthia Decker - NOAA Federal; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

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## Cynthia Decker - NOAA Federal

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Thursday, June 15, 2017 6:04 PM  
**To:** Laura Newcomb - NOAA Affiliate  
**Subject:** Re: SNCA FAC website update

Oh, argh, the charter isn't posted anymore either. Can you access it and send me a copy. Preferably a version from which I can cut and paste? Sorry but I don't have my govt laptop so I can't get to the shared drive.

Thank you,  
cynthia

On Thu, Jun 15, 2017 at 5:30 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Cynthia,

I forgot to give you an update on our website during the staff meeting! IT is still unable to understand and fix the current issue. Neither they nor the company that developed the website software can understand why our file directories have disappeared.

IT will be trying another fix this Friday. I plan to check back in with them on Monday. I have expressed how important it is to have this site up and they have been very helpful and responsive to this need.

Thanks,  
Laura

--

Laura Newcomb, PhD  
Program Analyst  
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## Advisory Committee for the Sustained National Climate Assessment

The ACSNCA (or SNCA FAC as it is more commonly referred to), was established to provide advice to the 13 agencies of the Subcommittee on Global Change Research (under the Executive Office of Science and Technology Policy, OSTP) on how, broadly, the national climate assessment process required under the Global Change Research Act of 1990 could be carried out in a more sustained fashion. The language in the charter states  
[language}

The ACSNCA is a federal advisory committee hosted by NOAA on behalf of all the SGCR agencies. Under the Federal Advisory Committee Act, a FAC can only be hosted and funded by one agency. NOAA agreed to take on this responsibility because of its existing portfolio of assessment research and because of its experience in hosting previous FACA committees in support of the National Climate Assessment efforts.

The SNCA FAC is currently working a task that is was given by NOAA on behalf of the SGCR at its meeting in April 2017. This task is as follows:

“In order for the USG to implement a vision for Sustained Assessment in time for the 5th (and future) National Climate Assessment, NOAA requests, on behalf of the USGCRP and its member agencies, that the Advisory Committee for the Sustained National Climate Assessment develop a set of recommendations for a Sustained Assessment process by Spring 2018. We also request a progress or interim report by September 30, 2017. The recommendations should be feasible, realistic in terms of budget implications, and grounded in the Congressional mandate for a quadrennial assessment.”

The SNCA FAC is diligently working on this task. It developed an outline that addresses the task in the context of four topics, about which it will develop a set of recommendations:

Topic 1 Identification of the core elements that make up the basis for a national climate assessment (those that would be supported by the federal government)

Topic 2 Arising from the core elements, creation of a process for development of additional products derived for use by stakeholders and end-users, including scientists, resource managers, industry, non-governmental organizations and others who need to understand the impact of climate change on their activities

Topic 3 Identification of better and more innovative ways to engage users of the NCA across a wide spectrum including those who have not typically used it before but may find it useful

Topic 4 Creation of a process that will evaluate the use of the NCA and its derived products on an ongoing, integrated basis. This will help the federal government and other users to refine the NCA and its products to make them more useful, efficient, and widely available.

The GCRA requires such an assessment be done every four years but it is a huge effort to pull this together in that timeframe. The goal of these recommendations is to help the federal government develop a process for maintaining activities that continually assess various aspects of the national environment and economy and how they are being affected by climate change. This should allow for a “time-stamped” assessment to be released every four years, as required, but also allow for a less-costly, more efficient effort at achieving this.

There are fifteen members of the SNCA FAC, representing a variety of expertise, sectors, and stage of career. Some of them have been involved with previous climate assessments; some have never worked on the NCA before. Five members first terms expired in 2017 and were renewed for two years. Five members first terms expire in 2018 and five members first terms expire in 2019. The Chair of the SNCA FAC is Dr. Richard Moss from the Pacific Northwest National Laboratory.

The value of this committee is to provide advice from experts outside the federal government who work broadly in the area of climate change in different ways. They bring perspectives to the concept of a sustained process that are not found in the federal agencies.



**Cynthia Decker - NOAA Federal**

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Thursday, June 15, 2017 6:42 PM  
**To:** Moss, Richard H; Richard H Moss  
**Subject:** Statement for review  
**Attachments:** ACSNCA Statement 06-16-17.docx

Richard,

Here you go. Pretty rough but I think it hits most of the key points. I'm hoping you can smooth it out and perhaps see where I have left gaps or been terribly inarticulate.

Thanks,  
Cynthia

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Cynthia J. Decker, Ph.D  
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and  
NOAA Scientific Integrity Officer  
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## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Thursday, June 15, 2017 7:41 PM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: SNCA FAC website update

I don't have my gov't laptop home with me now, either but can get it to you first thing tomorrow morning.

Laura

On Thu, Jun 15, 2017 at 6:03 PM, Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)> wrote:

Oh, argh, the charter isn't posted anymore either. Can you access it and send me a copy. Preferably a version from which I can cut and paste? Sorry but I don't have my govt laptop so I can't get to the shared drive.

Thank you,  
cynthia

On Thu, Jun 15, 2017 at 5:30 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Cynthia,

I forgot to give you an update on our website during the staff meeting! IT is still unable to understand and fix the current issue. Neither they nor the company that developed the website software can understand why our file directories have disappeared.

IT will be trying another fix this Friday. I plan to check back in with them on Monday. I have expressed how important it is to have this site up and they have been very helpful and responsive to this need.

Thanks,  
Laura

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Laura Newcomb, PhD  
Program Analyst  
Contractor – NOAA/OAR/LCI - Advisory Committee for the Sustained National Climate Assessment  
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**Kristen Rickett**

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**From:** Kristen Rickett  
**Sent:** Thursday, June 15, 2017 7:32 PM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: Meeting Minutes 5.30.17

Hi!

I spoke with him again the other day and explained the situation to him. He doesn't think we are jerking him around at all. As long as I keep in touch with him, I think we're ok.

Again, I'm available to talk tomorrow if you want.

Take care,

Kris

Kristen Rickett  
kristenr@hb-co.com

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Suite 400 West  
Bethesda, MD 20814  
240.744.7026  
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**From:** Cynthia Decker - NOAA Federal <cynthia.decker@noaa.gov>  
**Sent:** Thursday, June 15, 2017 6:01 PM  
**To:** Kristen Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

OK, well that's good that they don't actually have someone else yet who wants a contract. And I hope he understands we are not trying to jerk him around but that some unexpected circumstances have come up that we are trying to resolve. Thank you for keeping on top of this.

On Thu, Jun 15, 2017 at 5:55 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Hi!

As long as there aren't better options for the Crowne Plaza, we can hold them off. We're checking in with Crowne Plaza daily and he promised to let us know if anyone wants to sign a contract.

Thank you so much for your communication!

Kristen

Kristen Rickett  
[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>  
**Sent:** Thursday, June 15, 2017 5:37 PM  
**To:** Kristen Rickett  
**Cc:** Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Thanks, Kristen. I am so sorry about this. I am trying to get resolution ASAP. I will give you an answer one way or the other by tomorrow if you can hold off with the hotel that long. If we have to give up the space, we can look places other than downtown. The U District has a number of hotels as well. In a pinch, we might be able to get meeting space at one of the NOAA labs and just use a hotel for sleeping rooms. There are some other options.

Thanks again for your patience with this,  
Cynthia

On Thu, Jun 15, 2017 at 5:08 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good afternoon!

Thank you for the information.

If we have to let this space go but there is a possibility that the meeting could still happen, I will let our representative at Crowne Plaza Hotel Seattle Downtown know that so he can keep us in mind. If the space is no longer available, we can certainly revisit our search but we didn't have a lot of response in the first place. An option would be to expand our search from the downtown Seattle area to possibly someplace closer to the airport.

I'm happy to jump on a call tomorrow if you want.

Thank you!

Kris

Kristen Rickett  
[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>  
**Sent:** Thursday, June 15, 2017 4:50 PM  
**To:** Kristen Rickett; Laura Newcomb - NOAA Affiliate  
**Cc:** [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Kristen,

There is still some doubt surrounding this meeting. I cannot commit at this time. I will see if there is an answer by tomorrow, Friday. What are the options if we have to let this space go?

Cynthia

On 6/15/2017 4:47 PM, Kristen Rickett wrote:

Good afternoon!  
I just wanted to check in with you- we are still in good shape with the Crowne Plaza Hotel Seattle Downtown space.  
Thank you!  
Kristen

Kristen Rickett  
[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>  
**Sent:** Friday, June 9, 2017 3:28 PM  
**To:** Kristen Rickett  
**Cc:** Cynthia Decker - NOAA Federal; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Thank you Kristen!

On Fri, Jun 9, 2017 at 3:27 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good afternoon!  
I asked our representative if we could have until next Tuesday or Wednesday to make a decision and he said that should be fine but he'll let us know if something changes.  
Have a great weekend!  
Kristen

Kristen Rickett  
[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>  
**Sent:** Friday, June 9, 2017 1:36 PM  
**To:** Kristen Rickett  
**Cc:** Cynthia Decker - NOAA Federal; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett

**Subject:** Re: Meeting Minutes 5.30.17

Hi Kristen,

Cynthia is on leave until Tues 6/13 checking email intermittently. By what date do we need to respond? If this is urgent I will text Cynthia if you need this info from us today.

Thanks!  
Laura

On Fri, Jun 9, 2017 at 12:11 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good afternoon!

I've heard from our representative at the Crowne Plaza Hotel Seattle Downtown and they've had four other inquiries for our dates. They are encouraging us to make a decision on moving ahead with a contract for this property.

Please let me know if you have any questions. I'm happy to jump on a last minute call to discuss the hotel if needed.

Thanks!

Kris  
Kristen Rickett  
[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Kristen Rickett  
**Sent:** Monday, June 5, 2017 7:04:18 PM

**To:** Cynthia Decker - NOAA Federal  
**Cc:** Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Good evening!

I heard back from Washington Athletic Club and they do not have any availability.

Have you been able to review the site availability matrix for Crowne Plaza Hotel Seattle Downtown?

Thanks!

Kris

Kristen Rickett  
[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Kristen Rickett  
**Sent:** Monday, June 5, 2017 5:07:53 PM  
**To:** Cynthia Decker - NOAA Federal  
**Cc:** Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov); Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

Good afternoon!

I've not heard back from Washington Athletic Club so I reached out again today. They are supposed to have an event manager call me back.

Thanks!

Kris

Kristen Rickett  
[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>  
**Sent:** Saturday, June 3, 2017 10:15 AM  
**To:** Kristen Rickett



**Cc:** Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov) ; Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

OK thanks. My colleague is a member. I could see if she would be willing to sponsor. But only if we think we could get a good del from them, better than Crowne Plaza.

On Fri, Jun 2, 2017 at 10:16 PM, Kristen Rickett <[kristenr@hb-co.com](mailto:kristenr@hb-co.com)> wrote:

Good evening!

Thanks for the info! I reached out to Washington Athletic Club and will let you know what I hear. It appears that you have to be a member (or be sponsored by a member) to stay there or host a meeting.

Have a wonderful weekend!

Kris

Kristen Rickett  
[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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**From:** Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>  
**Sent:** Friday, June 2, 2017 3:36 PM  
**To:** Kristen Rickett; Laura Newcomb - NOAA Affiliate; [elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov) ;  
Brooke Rickett  
**Subject:** Re: Meeting Minutes 5.30.17

We will review, thanks!

One other suggestion, although I do NOT want you to spend a lot of time on this, is the Washington Athletic Club. A colleague of mine in Seattle suggested it. They have both sleeping and meeting rooms although she was not sure how often they contract out for meetings like this. Just a thought.

Have a great weekend,  
Cynthia

On 6/2/2017 3:33 PM, Kristen Rickett wrote:

Good afternoon!

Please find attached the minutes from Tuesday's meeting as well as the site availability matrix. From our initial site search, we received two proposals: Crowne Plaza Hotel Seattle Downtown and Sheraton Seattle. HBC recommends the Crowne Plaza Hotel Seattle Downtown. The Crowne Plaza Hotel Seattle Downtown offered comparable meeting space to our March meeting, per diem room rates, per diem lunch options for the executive lunch, it is walking distance from the Link, they are offering complimentary wifi in the meeting rooms and guest rooms, and they offering a complimentary room block. Sheraton Seattle's meeting space is much smaller and they do not have larger rooms available. Additionally, Sheraton Seattle is not offering wifi in the meeting rooms.

Please let us know your thoughts.  
We hope you have a great weekend!  
Thanks!  
Kris

Kristen Rickett  
[kristenr@hb-co.com](mailto:kristenr@hb-co.com)

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## U.S. DEPARTMENT OF COMMERCE

### CHARTER OF THE

#### ADVISORY COMMITTEE FOR THE SUSTAINED NATIONAL CLIMATE ASSESSMENT

1. **Committee's Official Designation.** Advisory Committee for the Sustained National Climate Assessment
2. **Authority.** The Secretary of Commerce (the Secretary), pursuant to duties imposed by law upon the U.S. Department of Commerce including the Global Change Research Act of 1990, 15 U.S.C. §§ 2921 *et seq.*, and the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App. 2, and with the concurrence of the General Services Administration, hereby establishes the Advisory Committee for the Sustained National Climate Assessment (the committee).
3. **Objectives and Scope of Activities.** The committee's mission is to provide advice on sustained National Climate Assessment activities and products to the Under Secretary of Commerce for Oceans and Atmosphere (Under Secretary), who will forward the advice to the Director of the Office of Science Technology Policy (OSTP). The committee's scope is—as requested by the Under Secretary—to advise on the engagement of stakeholders and on sustained assessment activities and the quadrennial National Climate Assessment report. Within the scope of its mission, the committee's specific objective is to provide advice on a sustained National Climate Assessment process that:
  - a. Integrates, evaluates, and interprets the findings of the U.S. Global Change Research Program (USGCRP) and discusses the scientific uncertainties with such findings;
  - b. Analyzes the effects of current and projected climate change upon ecosystems and biological diversity, agriculture, energy production and use, land and water resources, transportation, human health and welfare, and social systems, including in a regional context;
  - c. Analyzes current trends in global change, both human-induced and natural, and projects major trends for the next 25 to 100 years;
  - d. Is a continuing, inclusive national process that synthesizes relevant science and information about changes in the Earth system as they affect the Nation's climate, and about how such changes relate to and interact with changes in social, economic, ecological, and technological systems;
  - e. Addresses risk-based vulnerabilities for business and industry related to the impacts of weather and climate variations and changes; and
  - f. Supports climate-related decisions by providing information in formats that are useful for decision support.

4. **Description of Duties.** The committee shall function solely as an advisory body and shall comply with all applicable law and policies, including the FACA, the FACA's implementing regulations, and applicable Department of Commerce guidance. Further, the committee shall comply with the National Oceanic and Atmospheric Administration's (NOAA) Information Quality Act Guidelines.
5. **Authority to Which the Committee Reports.** The committee shall report to the Under Secretary or her or his designee. The Under Secretary shall ensure that the committee's advice is forwarded to the Director of OSTP.
6. **Support.** NOAA shall provide funding and administrative support for the committee.
7. **Estimated Annual Operating Costs and Staff Years.**
  - a. The annual cost of operating the committee is estimated to be \$300,000 and 0.5 person years in staff support.
  - b. Members shall not be compensated for their services but may be reimbursed for their committee-related travel and per diem expenses upon request, in accordance with applicable law, and subject to the availability of funds.
  - c. The Under Secretary, at her or his discretion and subject to the availability of funds, may provide the committee with technical and logistical support obtained by NOAA through contract or other means.
8. **Designated Federal Officer.** The Under Secretary shall designate a Federal employee to serve as the committee's Designated Federal Officer ("DFO"). The DFO shall be responsible for all administrative duties, call or provide advance approval of all of the committee's meetings, approve all meeting agendas, attend all committee meetings, and adjourn any committee meeting when the DFO determines adjournment to be in the public interest, or when directed to do so by the Under Secretary.
9. **Estimated Number and Frequency of Meetings.** The committee shall meet at least once each year, with additional meetings likely, and to be called as deemed necessary or desirable by the DFO or the Under Secretary. The Chair or Vice Chair may recommend to the DFO or the Under Secretary that additional meetings be called.
10. **Membership and Designation.**
  - a. To assure a balanced representation of views among preeminent scientists, educators, and other experts reflecting the full scope of issues addressed in the National Climate Assessment and/or relevant to the sustained national assessment process, the committee shall comprise fifteen (15) non-Federal members. The members shall have diverse perspectives and expertise in science and technology to ensure balance. The members will serve as special government employees (SGEs), subject to applicable ethical standards.

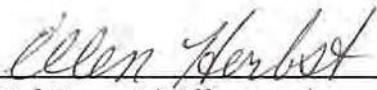
- b. The Under Secretary, in consultation with the Director of OSTP, shall select and appoint members. Members will be selected for appointment on a clear and standardized basis in accordance with Department of Commerce guidance.
- c. Each member shall be appointed for a term of one, two, or three years and shall serve at the discretion of the Under Secretary. Thereafter, members may be reappointed for successive terms of two years. To the extent possible, not more than one-third of the total membership shall change in any one year.
- d. A chair and vice-chair shall be selected from the members by the Under Secretary, in consultation with the OSTP Director, and shall serve at the Under Secretary's discretion.


**11. Subcommittees.** The Under Secretary, in consultation with the Director of OSTP, may create subcommittees and ad hoc groups as necessary. In addition, the chair and vice-chair may recommend the creation of subcommittees and ad hoc groups, for approval by the Under Secretary in consultation with the Director of OSTP. The membership of such groups shall be drawn from among all the members and, if needed, based on the subject matter expertise required, may also be drawn from scientists, educators, government scientists, or other experts who are not members.

**12. Record-keeping.** The DFO shall be responsible for filings and other applicable requirements under FACA. The records of the committee, established subcommittees, or other subgroups of the committee shall be handled in accordance with General Records Schedule 26, Item 2, or other approved agency records disposition schedule. These records shall be available for public inspection and disclosure subject to the Freedom of Information Act, 5 U.S.C. § 552, and other applicable laws.

**13. Duration.** The committee will be needed on a continuing basis.

**14. Termination.** This charter shall terminate two years from the date of its filing with the appropriate U.S. Senate and House of Representatives oversight committees, unless earlier terminated or renewed by proper authority.

  
\_\_\_\_\_  
Chief Financial Officer and  
Assistant Secretary for Administration

  
\_\_\_\_\_  
Filing Date

## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Thursday, June 15, 2017 7:49 PM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: SNCA FAC website update  
**Attachments:** A\_2015.08.20\_FACSNCA signed charter.pdf

nevermind I found a pdf copy in an attachment! im working on trying to see if I can convert to word for you, if so will send that in a few minutes

On Thu, Jun 15, 2017 at 7:40 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

I don't have my gov't laptop home with me now, either but can get it to you first thing tomorrow morning.

Laura

On Thu, Jun 15, 2017 at 6:03 PM, Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)> wrote:

Oh, argh, the charter isn't posted anymore either. Can you access it and send me a copy. Preferably a version from which I can cut and paste? Sorry but I don't have my govt laptop so I can't get to the shared drive.

Thank you,  
cynthia

On Thu, Jun 15, 2017 at 5:30 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Cynthia,

I forgot to give you an update on our website during the staff meeting! IT is still unable to understand and fix the current issue. Neither they nor the company that developed the website software can understand why our file directories have disappeared.

IT will be trying another fix this Friday. I plan to check back in with them on Monday. I have expressed how important it is to have this site up and they have been very helpful and responsive to this need.

Thanks,  
Laura

--

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Program Analyst  
Contractor – NOAA/OAR/LCI - Advisory Committee for the Sustained National Climate Assessment  
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U.S. DEPARTMENT OF COMMERCE

CHARTER OF THE

ADVISORY COMMITTEE FOR THE SUSTAINED NATIONAL CLIMATE ASSESSMENT

1. Committee's Official Designation. Advisory Committee for the Sustained National Climate Assessment
2. Authority. The Secretary of Commerce (the Secretary), pursuant to duties imposed by law upon the U.S. Department of Commerce including the Global Change Research Act of 1990, 15 U.S.C. §§ 2921 et seq., and the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App. 2, and with the concurrence of the General Services Administration, hereby establishes the Advisory Committee for the Sustained National Climate Assessment (the committee).
3. Objectives and Scope of Activities. The committee's mission is to provide advice on sustained National Climate Assessment activities and products to the Under Secretary of Commerce for Oceans and Atmosphere (Under Secretary), who will forward the advice to the Director of the Office of Science Technology Policy (OSTP). The committee's scope is-as requested by the Under Secretary- to advise on the engagement of stakeholders and on sustained assessment activities and the quadrennial National Climate Assessment report. Within the scope of its mission, the committee's specific objective is to provide advice on a sustained National Climate Assessment process that:
  - a. Integrates, evaluates, and interprets the findings of the U.S. Global Change Research Program (USGCRP) and discusses the scientific uncertainties with such findings;
  - b. Analyzes the effects of current and projected climate change upon ecosystems and biological diversity, agriculture, energy production and use, land and water

resources, transportation, human health and welfare, and social systems, including in a regional context;

c. Analyzes current trends in global change, both human-induced and natural and projects major trends for the next 25 to 100 years;

d. Is a continuing, inclusive national process that synthesizes relevant science and information about changes in the Earth system as they affect the Nation's climate, and about how such changes relate to and interact with changes in social, economic, ecological, and technological systems;

e. Addresses risk-based vulnerabilities for business and industry related to the impacts of weather and climate variations and changes; and

f. Supports climate-related decisions by providing information in formats that are useful for decision support.

Page 1 of 3

4. Description of Duties. The committee shall function solely as an advisory body and shall comply with all applicable law and policies, including the FACA, the FACA's implementing regulations, and applicable Department of Commerce guidance. Further, the committee shall comply with the National Oceanic and Atmospheric Administration's (NOAA) Information Quality Act Guidelines.

5. Authority to Which the Committee Reports. The committee shall report to the Under Secretary or her or his designee. The Under Secretary shall ensure that the committee's advice is forwarded to the Director of OSTP.

6. Support. NOAA shall provide funding and administrative support for the committee.

7. Estimated Annual Operating Costs and Staff Years.

a. The annual cost of operating the committee is estimated to be \$300,000 and 0.5 person years in staff support.

b. Members shall not be compensated for their services but may be reimbursed for their committee-related travel and per diem expenses upon request, in accordance with applicable law, and subject to the availability of funds.

c. The Under Secretary, at her or his discretion and subject to the availability of funds, may provide the committee with technical and logistical support obtained by NOAA through contract or other means.

8. Designated Federal Officer. The Under Secretary shall designate a Federal employee to serve as the committee's Designated Federal Officer ("DFO"). The DFO shall be responsible for all administrative duties, call or provide advance approval of all of the committee's meetings, approve all meeting agendas, attend all committee meetings, and adjourn any committee meeting when the DFO determines adjournment to be in the public interest, or when directed to do so by the Under Secretary.

9. Estimated Number and Frequency of Meetings. The committee shall meet at least once each year, with additional meetings likely, and to be called as deemed necessary or desirable by the DFO or the Under Secretary. The Chair or Vice Chair may recommend to the DFO or the Under Secretary that additional meetings be called.

10. Membership and Designation.

a. To assure a balanced representation of views among preeminent scientists, educators, and other experts reflecting the full scope of issues addressed in the National Climate Assessment and/or relevant to the sustained national assessment process, the committee shall comprise fifteen (15) non-Federal members. The members shall have

diverse perspectives and expertise in science and technology to ensure balance. The members will serve as special government employees (SGEs), subject to applicable ethical standards.

Page 2 of 3

b. The Under Secretary, in consultation with the Director of OSTP, shall select and appoint members. Members will be selected for appointment on a clear and standardized basis in accordance with Department of Commerce guidance.

c. Each member shall be appointed for a term of one, two, or three years and shall serve at the discretion of the Under Secretary. Thereafter, members may be reappointed for successive terms of two years. To the extent possible, not more than one-third of the total membership shall change in any one year.

d. A chair and vice-chair shall be selected from the members by the Under Secretary, in consultation with the OSTP Director, and shall serve at the Under Secretary's discretion.

11. Subcommittees. The Under Secretary, in consultation with the Director of OSTP, may create subcommittees and ad hoc groups as necessary. In addition, the chair and vicechair may recommend the creation of subcommittees and ad hoc groups, for approval by the Under Secretary in consultation with the Director of OSTP. The membership of such groups shall be drawn from among all the members and, if needed, based on the subject matter expertise required, may also be drawn from scientists, educators, government scientists, or other experts who are not members.

12. Record-keeping. The DFO shall be responsible for filings and other applicable requirements under FACA. The records of the committee, established subcommittees, or

other subgroups of the committee shall be handled in accordance with General Records Schedule 26, Item 2, or other approved agency records disposition schedule. These records shall be available for public inspection and disclosure subject to the Freedom of Information Act, 5 U.S.C. § 552, and other applicable laws.

13. Duration. The committee will be needed on a continuing basis.

14. Termination. This charter shall terminate two years from the date of its filing with the appropriate U.S. Senate and House of Representatives oversight committees, unless earlier terminated or renewed by proper authority.

t/2o/J5

Chief Financial Officer and Filing Oate

Assistant Secretary for Administration

Page 3 of 3

## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Thursday, June 15, 2017 8:05 PM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: SNCA FAC website update  
**Attachments:** ACSNCA\_Charter\_2015.docx

Charter in word. The spacing is strange because it was converted from the pdf but you should be able to copy and paste.

Laura

On Thu, Jun 15, 2017 at 7:48 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:  
nevermind I found a pdf copy in an attachment! im working on trying to see if I can convert to word for you, if so will send that in a few minutes

On Thu, Jun 15, 2017 at 7:40 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

I don't have my gov't laptop home with me now, either but can get it to you first thing tomorrow morning.

Laura

On Thu, Jun 15, 2017 at 6:03 PM, Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)> wrote:

Oh, argh, the charter isn't posted anymore either. Can you access it and send me a copy. Preferably a version from which I can cut and paste? Sorry but I don't have my govt laptop so I can't get to the shared drive.

Thank you,  
cynthia

On Thu, Jun 15, 2017 at 5:30 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Cynthia,

I forgot to give you an update on our website during the staff meeting! IT is still unable to understand and fix the current issue. Neither they nor the company that developed the website software can understand why our file directories have disappeared.

IT will be trying another fix this Friday. I plan to check back in with them on Monday. I have expressed how important it is to have this site up and they have been very helpful and responsive to this need.

Thanks,  
Laura

--

Laura Newcomb, PhD  
Program Analyst  
Contractor – NOAA/OAR/LCI - Advisory Committee for the Sustained National Climate Assessment  
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**Cynthia Decker - NOAA Federal**

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Thursday, June 15, 2017 8:44 PM  
**To:** Moss, Richard H  
**Subject:** Re: Statement for review

I am so sorry. I have the charter language now and can add it if you think that is a good idea.

On Thu, Jun 15, 2017 at 8:21 PM, Moss, Richard H <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)> wrote:

Hi Cynthia,

We had dinner plans but I'm working on it now and hope to get you something in the next hour.

Richard

--

Richard H Moss  
Senior Scientist

Joint Global Change Research Institute  
5825 University Research Court, Suite 3500  
College Park, MD 20740  
E-Mail: [rhm@pnnl.gov](mailto:rhm@pnnl.gov)

Phone: [301-314-6711](tel:301-314-6711)

Fax: [301-314-6719](tel:301-314-6719)

---

**From:** Cynthia Decker <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>  
**Date:** Thursday, June 15, 2017 at 6:41 PM  
**To:** Richard Moss <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>, Richard Moss <[rmoss@umd.edu](mailto:rmoss@umd.edu)>  
**Subject:** Statement for review

Richard,

Here you go. Pretty rough but I think it hits most of the key points. I'm hoping you can smooth it out and perhaps see where I have left gaps or been terribly inarticulate.

Thanks,  
  
Cynthia

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\*\*\*\*\*

## Cynthia Decker - NOAA Federal

---

**From:** Cynthia Decker - NOAA Federal  
**Sent:** Thursday, June 15, 2017 8:44 PM  
**To:** Laura Newcomb - NOAA Affiliate  
**Subject:** Re: SNCA FAC website update

You rock! I did search my files here to see if I happened to have it but no. This is really helpful and I appreciate your effort.

On Thu, Jun 15, 2017 at 8:04 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:  
Charter in word. The spacing is strange because it was converted from the pdf but you should be able to copy and paste.

Laura

On Thu, Jun 15, 2017 at 7:48 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

nevermind I found a pdf copy in an attachment! im working on trying to see if I can convert to word for you, if so will send that in a few minutes

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I don't have my gov't laptop home with me now, either but can get it to you first thing tomorrow morning.

Laura

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Oh, argh, the charter isn't posted anymore either. Can you access it and send me a copy. Preferably a version from which I can cut and paste? Sorry but I don't have my govt laptop so I can't get to the shared drive.

Thank you,  
cynthia

On Thu, Jun 15, 2017 at 5:30 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hi Cynthia,

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Thanks,  
Laura

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## Moss, Richard H

---

**From:** Moss, Richard H  
**Sent:** Thursday, June 15, 2017 11:02 PM  
**To:** Cynthia Decker - NOAA Federal  
**Cc:** Laura Newcomb - NOAA Affiliate; Elizabeth Akede - NOAA Affiliate  
**Subject:** Re: June Admin Telecon

On the 20<sup>th</sup>, I can meet except from 10-11 EDT and 1-2 EDT. Why don't we say 2-3? Please send an invite.

For the admin meeting itself, am I included in the tally for the 27<sup>th</sup>? If so, that isn't a quorum. Please keep running the non-respondents to ground. Cynthia, thanks for making the 23<sup>rd</sup> work if that is what turns out to be required.

R

--

Richard H Moss  
Senior Scientist  
Joint Global Change Research Institute  
5825 University Research Court, Suite 3500  
College Park, MD 20740  
E-Mail: [rhm@pnnl.gov](mailto:rhm@pnnl.gov)  
Phone: 301-314-6711  
Fax: 301-314-6719

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**From:** Cynthia Decker <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>  
**Date:** Thursday, June 15, 2017 at 5:39 PM  
**To:** Richard Moss <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>  
**Cc:** Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>, Elizabeth Akede <[elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov)>  
**Subject:** Re: June Admin Telecon

Richard,

If we can't get a quorum for the new date, we can go back to the 23rd for a meeting and I'll make it work.

Cynthia

On Thu, Jun 15, 2017 at 5:25 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Dear Richard,

Would you be available for a call Tuesday June 20th to discuss the agenda for the upcoming administrative

call? Other than 11 - 12 pm, we could meet at any time. We have attached a suggested draft agenda and welcome your comments.

Regarding the date, 10 members indicated availability for the June 23 date while 7 indicated availability for June 27 1 - 3pm. I will be tracking down the non-responders to the June 27 date poll to see if that number can possible get higher.

Thank you,  
Laura

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Laura Newcomb, PhD  
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## Advisory Committee for the Sustained National Climate Assessment

Summary: This NOAA committee develops recommendations to make better use of data produced by the US Global Change Research Program (USGCRP), a Congressionally-mandated interagency research program. Specifically, this Advisory Committee seeks to make USGCRP data more accessible and useful to private sector/civic organizations and state/municipal governments for their use in planning and decision-making in domains such as transportation, energy, water resources, and other infrastructure, or planning for coastal developments affected by expected changes in weather patterns and climate extremes. The committee is composed of 15 members from academia, the private sector, municipal government, and non-governmental organizations from across the country. The committee is currently preparing a report in response to a request from NOAA on behalf of the USGCRP. The report will provide options and recommendations on (1) identifying what data from the USGCRP is most needed to improve the effectiveness and profitability of regional and local level decision-making, (2) facilitating use of USGCRP data by private sector and other non-governmental groups to develop products tailored for users, (3) improving interactions with end users, and (4) evaluating program effectiveness. The committee is currently seeking input from the public, including private sector and other groups that have been working with the data, to consider for its recommendations.

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## Advisory Committee for the Sustained National Climate Assessment

This document provides an overview of the Advisory Committee for the Sustained National Climate Assessment. This NOAA committee advises a Congressionally-mandated research program that integrates scientific investigation of global environmental changes across 13 Federal agencies. This overview document covers the following topics: (1) the context of the committee, the interagency US Global Change Research Program, (2) definition and goals of “sustained assessment”, (3) the terms of reference and membership of the committee, and (4) the committee’s current task and pending request for public input.

### 1. Committee context: US Global Change Research Program (USGCRP)

The USGCRP was established by an act of Congress in 1990 to coordinate research on how natural environmental processes and Earth systems (for example, oceans, glaciers/ice sheets, chemical composition of the atmosphere, weather patterns, flows of surface/sub-surface water, coastal processes, biodiversity) are being influenced by a wide variety of human activities. The Global Change Research Act (PL101-606) establishes the program and requires (*inter alia*) the participating agencies (including NOAA) to prepare coordinated budget submissions to the Office of Management and Budget; coordinate US scientific research with other countries; and prepare “assessments” (evaluations of scientific information relevant for understanding changes and their impacts) not less frequently than every four years.

### 2. Sustained assessment

“Assessments” are products that evaluate the state of science relevant to different policy-related and practical questions. The USGCRP has produced three such assessments in the form of extensive technical reports. Such reports have been evaluated as inadequate for informing decisions in sectors such as energy, water resources, forestry, ecosystem management, coastal development, agriculture, public health, national security, and other areas. Thus, the National Academy of Sciences and other bodies have recommended that the USGCRP develop a “sustained assessment” process that provides a more diverse set of data and information that better meet the needs of users. Such information can reduce losses in natural disasters and identify opportunities for sustainable development. “Sustained assessment” engages scientists and stakeholders (end users in these and other sectors) in discovery, communication, and use of scientific knowledge of global change. In addition to preparing reports, the sustained assessment will provide a wider range of products including data sets, visualizations, maps and geographical information systems, decision support tools, and other science-based tools. A key objective is to increase access of private sector and other groups to basic data provided by the USGCRP to enable them to develop needed products, including on a commercial basis, for end users, hence increasing diversity of data interpretation and evaluation of impacts and response strategies.

### 3. Advisory Committee for the Sustained National Climate Assessment (ACSNCA)

The ACSNCA was established in 2015 by NOAA in consultation with the Office of Science and Technology Policy (in the Executive Office of the President) to provide advice on the sustained

assessment process to NOAA and the 13 agencies of the USGCRP. The language in the charter states that the purpose of the committee is to provide advice on assessment products and activities, including “engagement of stakeholders and on sustained assessment activities and the quadrennial National Climate Assessment Report”. Under the Federal Advisory Committee (FAC) Act, a FAC can only be hosted and funded by one agency. NOAA agreed to take on this responsibility because of its existing portfolio of research and because of its experience in hosting previous FAC committees in support of the National Climate Assessment efforts. The current membership is provided as an attachment to this document and consists of 15 members from academia, the private sector, non-governmental organizations, and municipal governments. The chair of the committee is Dr. Richard H. Moss, a senior scientist with the Joint Global Change Research Program at the University of Maryland.

#### 4. Current activity: recommendations on sustained assessment

The committee is currently preparing a short report (expected to be ~50 pages) in response to a request made at its last meeting (March 2017) by NOAA on behalf of the USGCRP. The request states:

“In order for the USG to implement a vision for Sustained Assessment in time for the 5th (and future) National Climate Assessment, NOAA requests, on behalf of the USGCRP and its member agencies, that the Advisory Committee for the Sustained National Climate Assessment develop a set of recommendations for a Sustained Assessment process by Spring 2018. We also request a progress or interim report by September 30, 2017. The recommendations should be feasible, realistic in terms of budget implications, and grounded in the Congressional mandate for a quadrennial assessment.”

The committee is developing recommendations on four key topics:

1. Identifying the most important data, information, and activities for USGCRP to support assessment of the extent and implications of global change in the United States;
2. Facilitating use of core USGCRP data by the private sector, [state/local governments](#), and university-based and other groups to develop specialized (and potentially commercially-provided) sustained assessment products for end users;
3. Improving the development of partnerships and engagement with users of the assessment; and
4. Evaluating the assessment for accuracy, trustworthiness, and utility to end users, to facilitate improvements in the USGCRP and activities of its participating agencies.

The committee is attempting to prepare an interim report by September 2017, and a final report in the spring of 2018. It is using a process that includes opportunities for public input and review, consistent with the intent of the FACA. Its ability to keep to its timeline depends on being able to obtain public input in a timely fashion.

**Moss, Richard H**

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**From:** Moss, Richard H  
**Sent:** Thursday, June 15, 2017 10:50 PM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: Statement for review  
**Attachments:** ACSNCA Statement 06-16-17-rhm.docx

Hi Cynthia,  
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R

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Senior Scientist  
Joint Global Change Research Institute  
5825 University Research Court, Suite 3500  
College Park, MD 20740  
E-Mail: [rhm@pnnl.gov](mailto:rhm@pnnl.gov)  
Phone: 301-314-6711  
Fax: 301-314-6719

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**Date:** Thursday, June 15, 2017 at 8:43 PM  
**To:** Richard Moss <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>  
**Subject:** Re: Statement for review

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Richard

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**Date:** Thursday, June 15, 2017 at 6:41 PM  
**To:** Richard Moss <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>, Richard Moss <[rmoss@umd.edu](mailto:rmoss@umd.edu)>  
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Thanks,  
Cynthia

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and  
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## Cynthia Decker - NOAA Federal

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 6:52 AM  
**To:** Moss, Richard H  
**Subject:** Re: Statement for review

Wow, SO much better than anything I put together. I really appreciate this. You have basically just written the ACSNCA 101 document.

I am sorry to have dumped this on you on short notice. I probably could have gone with what I had but this is so much better.

Thank you, thank you,  
cynthia

On Thu, Jun 15, 2017 at 10:49 PM, Moss, Richard H <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)> wrote:

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Thank you again so much for your help with this at the last minute.  
Cynthia

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**Sent:** Friday, June 16, 2017 8:39 AM  
**To:** Moss, Richard H  
**Subject:** Re: Statement for review

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*Final June 16, 2017*

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## **Advisory Committee for the Sustained National Climate Assessment**

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### Summary

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This NOAA committee develops recommendations to make better use of data produced by the US Global Change Research Program (USGCRP), a Congressionally-mandated interagency research program. Specifically, this Advisory Committee provides advice on making USGCRP data more accessible and useful to private sector/civic organizations and state/municipal governments for their use in planning and decision-making in domains such as transportation, energy, water resources, and other infrastructure, or planning for coastal developments affected by expected changes in weather patterns and climate extremes. The committee is composed of 15 members from academia, the private sector, municipal government, and non-governmental organizations from across the country. The committee is currently preparing a report in response to a request from NOAA on behalf of the USGCRP. The report will provide options and recommendations on (1) identifying what data from the USGCRP is most needed to improve the effectiveness and profitability of regional and local level decision-making; (2) facilitating use of USGCRP data by private sector and other non-governmental groups to develop products tailored for users; (3) improving interactions with end users, and (4) evaluating program effectiveness. The committee is currently seeking input from the public, including private sector and other groups that have been working with the data, to consider for its recommendations.

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*Final June 16, 2017*

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## **Advisory Committee for the Sustained National Climate Assessment**

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This document provides an overview of the Advisory Committee for the Sustained National Climate Assessment. This NOAA committee [provides advice on](#) a Congressionally-mandated research program that integrates scientific investigation of global environmental changes across 13 Federal agencies. This overview document covers the following topics: (1) the context of the committee [with respect to](#) the interagency US Global Change Research Program, (2) definition and goals of “sustained assessment”, (3) the terms of reference and membership of the committee, and (4) the committee’s current task and pending request for public input.

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### 1. Committee context: US Global Change Research Program (USGCRP)

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The USGCRP was established by an act of Congress in 1990 to coordinate research on how natural environmental processes and Earth systems (for example, oceans, glaciers/ice sheets, chemical composition of the atmosphere, weather patterns, flows of surface/sub-surface water, coastal processes, biodiversity) are being influenced by a wide variety of human activities. The Global Change Research Act (PL101-606) establishes the program and requires (*inter alia*) the participating agencies (including NOAA) to prepare coordinated budget submissions to the Office of Management and Budget; coordinate US scientific research with other countries; and prepare “assessments” (evaluations of scientific information relevant for understanding changes and their impacts) not less frequently than every four years.

### 2. Sustained Assessment

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“Assessments” are products that evaluate the state of science relevant to different policy-related and practical questions. The USGCRP has produced three such assessments in the form of extensive technical reports. Such reports have been evaluated as inadequate for informing ~~decisions in sectors such as energy, water resources, forestry, ecosystem management, coastal development, agriculture, public health, national security, and other areas.~~ Thus, the National Academy of Sciences and other bodies have recommended that the USGCRP develop a “sustained assessment” process that provides a more diverse set of data and information that better meet the needs of users. Such information can reduce losses in natural disasters and identify opportunities for sustainable development. “Sustained assessment” engages scientists and stakeholders (end users in these and other sectors) in discovery, communication, and use of scientific knowledge of global change. In addition to preparing reports, the sustained assessment will provide a wider range of products including data sets, visualizations, maps and geographical information systems, decision support tools, and other science-based tools. A key objective is to increase access of [the](#) private sector and other groups to basic data provided by the USGCRP to enable them to develop needed products, including on a commercial basis, for end users, hence increasing diversity of data interpretation and evaluation of impacts and response strategies.

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### 3. History of the Advisory Committee

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The ACSNCA was established in 2015 by NOAA in consultation with the Office of Science and Technology Policy (in the Executive Office of the President) to provide advice on the sustained

Final June 16, 2017

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assessment process to NOAA and, through the agency, to all 13 agencies of the USGCRP. The language in the charter states that the purpose of the committee is to provide advice on assessment products and activities, including “engagement of stakeholders and on sustained assessment activities and the quadrennial National Climate Assessment Report.” Under the Federal Advisory Committee Act (FACA), a federal advisory committee can only be hosted and funded by one agency. NOAA agreed to take on this responsibility because of its existing portfolio of research and because of its experience in hosting previous FACA committees in support of the National Climate Assessment efforts. The current membership is provided as an attachment to this document and consists of 15 members from academia, the private sector, non-governmental organizations, and municipal governments. The chair of the committee is Dr. Richard H. Moss, a senior scientist with the Joint Global Change Research Program at the University of Maryland.

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#### 4. Current Activity: Developing Recommendations on Sustained Assessment

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The committee is currently preparing a short report (expected to be ~50 pages) in response to a request made at its March 2017 meeting by NOAA on behalf of the USGCRP. The request states:

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“In order for the USG to implement a vision for Sustained Assessment in time for the 5th (and future) National Climate Assessment, NOAA requests, on behalf of the USGCRP and its member agencies, that the Advisory Committee for the Sustained National Climate Assessment develop a set of recommendations for a Sustained Assessment process by Spring 2018. We also request a progress or interim report by September 30, 2017. The recommendations should be feasible, realistic in terms of budget implications, and grounded in the Congressional mandate for a quadrennial assessment.”

The committee is developing recommendations on four key topics:

1. Identifying the most important data, information, and activities for USGCRP to support assessment of the extent and implications of global change in the United States;
2. Facilitating use of core USGCRP data by the private sector, state/local governments, and university-based, and other groups to develop specialized (and potentially commercially-provided) sustained assessment products for end users;
3. Improving the development of partnerships and engagement with users of the assessment;
4. Evaluating the assessment for accuracy, trustworthiness, and utility to end users, to facilitate improvements in the USGCRP and activities of its participating agencies.

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The committee is attempting to prepare an interim report by September 2017, and a final report in the spring of 2018. It is using a process that includes opportunities for public input and review, consistent with the intent of the FACA. Its ability to keep to its timeline depends on being able to obtain public input in a timely fashion.

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## Cynthia Decker - NOAA Federal

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 8:44 AM  
**To:** Moss, Richard H  
**Subject:** Re: Statement for review  
**Attachments:** ACSNCA Statement 06-16-17-Final.docx

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**Cynthia Decker - NOAA Federal**

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 9:04 AM  
**To:** Craig Mclean  
**Cc:** Ko Barrett; Noha Gaber - NOAA Federal; Lauren Koellermeier; Katelyn Robinson; Wayne Higgins; Benjamin DeAngelo - NOAA Federal  
**Subject:** Statement on ACSNCA & Membership List w terms

Craig,

Per our discussion yesterday, please find attached a brief document that summarizes the salient facts about the Advisory Committee for the Sustained National Climate Assessment. This was prepared with the help of the Chair of the SNCA FAC, Richard Moss. There is a separate one-paragraph Summary statement that you might find useful as well as two pages that outline the context of this activity with the USGCRP, the definition of "sustained assessment", the role of the SNCA FAC, and the current work of the committee. The document should also be sent with the attached Excel spreadsheet of the members and their terms.

The statement document does not discuss the terms but the detailed information on this can be derived from the spreadsheet. There are fifteen members, five each with 1, 2 and 3-year initial terms. The members with 1-year terms would have expired in early 2017 so they were renewed, per the current charter, for a second term of two years. The members with 2-year terms are due to expire in spring 2018 and could be renewed or replaced. The 5 members with 3-year terms will expire in spring 2019. The revised charter that is up for renewal states that second terms may be for 1-3 years rather than just 2 years. This is because we now have 10 members whose terms expire in 2019 - 5 with a 2nd term and 5 with a first term of 3 years. If there is a decision not to renew the 5 members with a 3-year first term, that means 2/3 of the committee would rotate off in 2019, Too much information?

Please let me know if you have any questions or comments about the attached documents. I am happy to

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\*\*\*\*\*  
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Executive Director  
NOAA Science Advisory Board  
and  
NOAA Scientific Integrity Officer  
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Fax 301-713-1459  
Email: [cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)  
\*\*\*\*\*

**Cynthia Decker - NOAA Federal**

---

**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 8:59 AM  
**To:** Craig Mclean  
**Cc:** Ko Barrett; Noha Gaber - NOAA Federal; Lauren Koellermeier; Katelyn Robinson; Wayne Higgins; Benjamin DeAngelo - NOAA Federal  
**Subject:** Statement on ACSNCA & Membership List w terms

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**Moss, Richard H**

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**From:** Moss, Richard H  
**Sent:** Friday, June 16, 2017 8:55 AM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: Statement for review  
**Importance:** High

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Thanks for getting this into the system. I'm happy to come over and participate in a briefing at any point, if that is helpful.

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Phone: 301-314-6711  
Fax: 301-314-6719

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**Date:** Friday, June 16, 2017 at 8:43 AM  
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With attachment.

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Here's a revised draft. I took your material, put it into a somewhat more structured format, added a bit more on sustained assessment, and then added a 1 paragraph summary that can stand alone if necessary. The main document is still 2 pages long. See what you think.

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**Subject:** Statement for review

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\*\*\*\*\*

## Cynthia Decker - NOAA Federal

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 9:12 AM  
**To:** Moss, Richard H  
**Subject:** Re: Statement for review

Oops, just sent. Will modify and resend.

On 6/16/2017 8:55 AM, Moss, Richard H wrote:

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**Date:** Thursday, June 15, 2017 at 6:41 PM

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**Subject:** Statement for review

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*Final June 16, 2017*

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## **Advisory Committee for the Sustained National Climate Assessment**

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### Summary

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This NOAA committee develops recommendations to make better use of data produced by the US Global Change Research Program (USGCRP), a Congressionally-mandated interagency research program. Specifically, this Advisory Committee provides advice on making USGCRP data more accessible and useful to private sector/civic organizations and state/municipal governments for their use in planning and decision-making in domains such as transportation, energy, water resources, and other infrastructure, or planning for coastal developments affected by expected changes in weather patterns and climate extremes. The committee is composed of 15 members from academia, the private sector, municipal government, and non-governmental organizations from across the country. The committee is currently preparing a report in response to a request from NOAA on behalf of the USGCRP. The report will provide options and recommendations on (1) identifying what data from the USGCRP is most needed to improve the effectiveness and profitability of regional and local level decision-making; (2) facilitating use of USGCRP data by private sector and other non-governmental groups to develop products tailored for users; (3) improving interactions with end users, and (4) evaluating program effectiveness. The committee is currently seeking input from the public, including private sector and other groups that have been working with the data, to consider for its recommendations.

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*Final June 16, 2017*

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## **Advisory Committee for the Sustained National Climate Assessment**

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This document provides an overview of the Advisory Committee for the Sustained National Climate Assessment. This NOAA committee [provides advice on](#) a Congressionally-mandated research program that integrates scientific investigation of global environmental changes across 13 Federal agencies. This overview document covers the following topics: (1) the context of the committee [with respect to](#) the interagency US Global Change Research Program, (2) definition and goals of “sustained assessment”, (3) the terms of reference and membership of the committee, and (4) the committee’s current task and pending request for public input.

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### 1. Committee context: US Global Change Research Program (USGCRP)

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The USGCRP was established by an act of Congress in 1990 to coordinate research on how natural environmental processes and Earth systems (for example, oceans, glaciers/ice sheets, chemical composition of the atmosphere, weather patterns, flows of surface/sub-surface water, coastal processes, biodiversity) are being influenced by a wide variety of human activities. The Global Change Research Act (PL101-606) establishes the program and requires (*inter alia*) the participating agencies (including NOAA) to prepare coordinated budget submissions to the Office of Management and Budget; coordinate US scientific research with other countries; and prepare “assessments” (evaluations of scientific information relevant for understanding changes and their impacts) not less frequently than every four years.

### 2. Sustained Assessment

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“Assessments” are products that evaluate the state of science relevant to different policy-related and practical questions. The USGCRP has produced three such assessments in the form of extensive technical reports. Such reports have been evaluated as [necessary but insufficient](#) for informing decisions in sectors such as energy, water resources, forestry, ecosystem management, coastal development, agriculture, public health, national security, and other areas. Thus, the National Academy of Sciences and other bodies have recommended that the USGCRP develop a “sustained assessment” process that provides a more diverse set of data and information that better meet the needs of users. Such information can reduce losses in natural disasters and identify opportunities for sustainable development. “Sustained assessment” engages scientists and stakeholders (end users in these and other sectors) in discovery, communication, and use of scientific knowledge of global change. In addition to preparing reports, the sustained assessment will provide a wider range of products including data sets, visualizations, maps and geographical information systems, decision support tools, and other science-based tools. A key objective is to increase access of [the](#) private sector and other groups to basic data provided by the USGCRP to enable them to develop needed products, including on a commercial basis, for end users, hence increasing diversity of data interpretation and evaluation of impacts and response strategies.

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### 3. History of the Advisory Committee

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The ACSNCA was established in 2015 by NOAA in consultation with the Office of Science and Technology Policy (in the Executive Office of the President) to provide advice on the sustained

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Final June 16, 2017

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assessment process to NOAA and, through the agency, to all 13 agencies of the USGCRP. The language in the charter states that the purpose of the committee is to provide advice on assessment products and activities, including “engagement of stakeholders and on sustained assessment activities and the quadrennial National Climate Assessment Report.” Under the Federal Advisory Committee Act (FACA), a federal advisory committee can only be hosted and funded by one agency. NOAA agreed to take on this responsibility because of its existing portfolio of research and because of its experience in hosting previous FACA committees in support of the National Climate Assessment efforts. The current membership is provided as an attachment to this document and consists of 15 members from academia, the private sector, non-governmental organizations, and municipal governments. The chair of the committee is Dr. Richard H. Moss, a senior scientist with the Joint Global Change Research Program at the University of Maryland.

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#### 4. Current Activity: Developing Recommendations on Sustained Assessment

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The committee is currently preparing a short report (expected to be ~50 pages) in response to a request made at its March 2017 meeting by NOAA on behalf of the USGCRP. The request states:

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“In order for the USG to implement a vision for Sustained Assessment in time for the 5th (and future) National Climate Assessment, NOAA requests, on behalf of the USGCRP and its member agencies, that the Advisory Committee for the Sustained National Climate Assessment develop a set of recommendations for a Sustained Assessment process by Spring 2018. We also request a progress or interim report by September 30, 2017. The recommendations should be feasible, realistic in terms of budget implications, and grounded in the Congressional mandate for a quadrennial assessment.”

The committee is developing recommendations on four key topics:

1. Identifying the most important data, information, and activities for USGCRP to support assessment of the extent and implications of global change in the United States;
2. Facilitating use of core USGCRP data by the private sector, state/local governments, and university-based, and other groups to develop specialized (and potentially commercially-provided) sustained assessment products for end users;
3. Improving the development of partnerships and engagement with users of the assessment;
4. Evaluating the assessment for accuracy, trustworthiness, and utility to end users, to facilitate improvements in the USGCRP and activities of its participating agencies.

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The committee is attempting to prepare an interim report by September 2017, and a final report in the spring of 2018. It is using a process that includes opportunities for public input and review, consistent with the intent of the FACA. Its ability to keep to its timeline depends on being able to obtain public input in a timely fashion.

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## Cynthia Decker - NOAA Federal

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 9:17 AM  
**To:** Moss, Richard H  
**Subject:** Re: Statement for review  
**Attachments:** ACSNCA Statement 06-16-17-Finalv2.docx

Final version attached for your files.

On 6/16/2017 8:55 AM, Moss, Richard H wrote:

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On 6/15/2017 10:49 PM, Moss, Richard H wrote:

Hi Cynthia,  
Here's a revised draft. I took your material, put it into a somewhat more structured format, added a bit more on sustained assessment, and then added a 1 paragraph summary that can stand alone if necessary. The main document is still 2 pages long. See what you think.

R

--

Richard H Moss  
Senior Scientist  
Joint Global Change Research Institute  
5825 University Research Court, Suite 3500  
College Park, MD 20740  
E-Mail: [rhm@pnnl.gov](mailto:rhm@pnnl.gov)  
Phone: 301-314-6711  
Fax: 301-314-6719

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**From:** Cynthia Decker <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>

**Date:** Thursday, June 15, 2017 at 8:43 PM

**To:** Richard Moss <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>

**Subject:** Re: Statement for review

I am so sorry. I have the charter language now and can add it if you think that is a good idea.

On Thu, Jun 15, 2017 at 8:21 PM, Moss, Richard H <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)> wrote:

Hi Cynthia,  
We had dinner plans but I'm working on it now and hope to get you something in the next hour.  
Richard

--

Richard H Moss  
Senior Scientist  
Joint Global Change Research Institute  
5825 University Research Court, Suite 3500  
College Park, MD 20740  
E-Mail: [rhm@pnnl.gov](mailto:rhm@pnnl.gov)  
Phone: [301-314-6711](tel:301-314-6711)  
Fax: [301-314-6719](tel:301-314-6719)

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**From:** Cynthia Decker <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>

**Date:** Thursday, June 15, 2017 at 6:41 PM

**To:** Richard Moss <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>, Richard Moss <[rmosse@umd.edu](mailto:rmosse@umd.edu)>

**Subject:** Statement for review

Richard,

Here you go. Pretty rough but I think it hits most of the key points. I'm hoping you can smooth it out and perhaps see where I have left gaps or been terribly inarticulate.

Thanks,  
Cynthia

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Cynthia J. Decker, Ph.D  
Executive Director  
NOAA Science Advisory Board  
and  
NOAA Scientific Integrity Officer  
SSMC3, Room 11230  
1315 East- West Hwy  
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\*\*\*\*\*

**Cynthia Decker - NOAA Federal**

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 9:27 AM  
**To:** Elizabeth Akede  
**Cc:** Laura Newcomb  
**Subject:** ACSNCA Statement

Liz,

Attached is the statement that Richard and I (mostly Richard) created for Craig to provide to the folks at Commerce about the SNCA FAC. I think the language in here will be useful to you in drafting the ACSNCA 101 document that we will use with a new NOAA Administrator eventually. We tried to use pretty plain English and not a lot of the usual jargon so that it would be understandable to someone who is either not a scientist or at least, not someone with a background in climate science.

It is saved into the SNCAFAC folder but not under any subfolder. Since it is a broad statement about what the group does, I was not sure if there was a subfolder that was appropriate for that at this time.

Thanks,  
Cynthia

--  
\*\*\*\*\*  
Cynthia J. Decker, Ph.D  
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*Final June 16, 2017*

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## **Advisory Committee for the Sustained National Climate Assessment**

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### Summary

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This NOAA committee develops recommendations to make better use of data produced by the US Global Change Research Program (USGCRP), a Congressionally-mandated interagency research program. Specifically, this Advisory Committee provides advice on making USGCRP data more accessible and useful to private sector/civic organizations and state/municipal governments for their use in planning and decision-making in domains such as transportation, energy, water resources, and other infrastructure, or planning for coastal developments affected by expected changes in weather patterns and climate extremes. The committee is composed of 15 members from academia, the private sector, municipal government, and non-governmental organizations from across the country. The committee is currently preparing a report in response to a request from NOAA on behalf of the USGCRP. The report will provide options and recommendations on (1) identifying what data from the USGCRP is most needed to improve the effectiveness and profitability of regional and local level decision-making; (2) facilitating use of USGCRP data by private sector and other non-governmental groups to develop products tailored for users; (3) improving interactions with end users, and (4) evaluating program effectiveness. The committee is currently seeking input from the public, including private sector and other groups that have been working with the data, to consider for its recommendations.

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*Final June 16, 2017*

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## **Advisory Committee for the Sustained National Climate Assessment**

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This document provides an overview of the Advisory Committee for the Sustained National Climate Assessment. This NOAA committee [provides advice on](#) a Congressionally-mandated research program that integrates scientific investigation of global environmental changes across 13 Federal agencies. This overview document covers the following topics: (1) the context of the committee [with respect to](#) the interagency US Global Change Research Program, (2) definition and goals of “sustained assessment”, (3) the terms of reference and membership of the committee, and (4) the committee’s current task and pending request for public input.

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### 1. Committee context: US Global Change Research Program (USGCRP)

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The USGCRP was established by an act of Congress in 1990 to coordinate research on how natural environmental processes and Earth systems (for example, oceans, glaciers/ice sheets, chemical composition of the atmosphere, weather patterns, flows of surface/sub-surface water, coastal processes, biodiversity) are being influenced by a wide variety of human activities. The Global Change Research Act (PL101-606) establishes the program and requires (*inter alia*) the participating agencies (including NOAA) to prepare coordinated budget submissions to the Office of Management and Budget; coordinate US scientific research with other countries; and prepare “assessments” (evaluations of scientific information relevant for understanding changes and their impacts) not less frequently than every four years.

### 2. Sustained Assessment

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“Assessments” are products that evaluate the state of science relevant to different policy-related and practical questions. The USGCRP has produced three such assessments in the form of extensive technical reports. Such reports have been evaluated as inadequate for informing ~~decisions in sectors such as energy, water resources, forestry, ecosystem management, coastal development, agriculture, public health, national security, and other areas.~~ Thus, the National Academy of Sciences and other bodies have recommended that the USGCRP develop a “sustained assessment” process that provides a more diverse set of data and information that better meet the needs of users. Such information can reduce losses in natural disasters and identify opportunities for sustainable development. “Sustained assessment” engages scientists and stakeholders (end users in these and other sectors) in discovery, communication, and use of scientific knowledge of global change. In addition to preparing reports, the sustained assessment will provide a wider range of products including data sets, visualizations, maps and geographical information systems, decision support tools, and other science-based tools. A key objective is to increase access of [the](#) private sector and other groups to basic data provided by the USGCRP to enable them to develop needed products, including on a commercial basis, for end users, hence increasing diversity of data interpretation and evaluation of impacts and response strategies.

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### 3. History of the Advisory Committee

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The ACSNCA was established in 2015 by NOAA in consultation with the Office of Science and Technology Policy (in the Executive Office of the President) to provide advice on the sustained

Final June 16, 2017

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assessment process to NOAA and, through the agency, to all 13 agencies of the USGCRP. The language in the charter states that the purpose of the committee is to provide advice on assessment products and activities, including “engagement of stakeholders and on sustained assessment activities and the quadrennial National Climate Assessment Report.” Under the Federal Advisory Committee Act (FACA), a federal advisory committee can only be hosted and funded by one agency. NOAA agreed to take on this responsibility because of its existing portfolio of research and because of its experience in hosting previous FACA committees in support of the National Climate Assessment efforts. The current membership is provided as an attachment to this document and consists of 15 members from academia, the private sector, non-governmental organizations, and municipal governments. The chair of the committee is Dr. Richard H. Moss, a senior scientist with the Joint Global Change Research Program at the University of Maryland.

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#### 4. Current Activity: Developing Recommendations on Sustained Assessment

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The committee is currently preparing a short report (expected to be ~50 pages) in response to a request made at its March 2017 meeting by NOAA on behalf of the USGCRP. The request states:

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“In order for the USG to implement a vision for Sustained Assessment in time for the 5th (and future) National Climate Assessment, NOAA requests, on behalf of the USGCRP and its member agencies, that the Advisory Committee for the Sustained National Climate Assessment develop a set of recommendations for a Sustained Assessment process by Spring 2018. We also request a progress or interim report by September 30, 2017. The recommendations should be feasible, realistic in terms of budget implications, and grounded in the Congressional mandate for a quadrennial assessment.”

The committee is developing recommendations on four key topics:

1. Identifying the most important data, information, and activities for USGCRP to support assessment of the extent and implications of global change in the United States;
2. Facilitating use of core USGCRP data by the private sector, state/local governments, and university-based, and other groups to develop specialized (and potentially commercially-provided) sustained assessment products for end users;
3. Improving the development of partnerships and engagement with users of the assessment;
4. Evaluating the assessment for accuracy, trustworthiness, and utility to end users, to facilitate improvements in the USGCRP and activities of its participating agencies.

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The committee is attempting to prepare an interim report by September 2017, and a final report in the spring of 2018. It is using a process that includes opportunities for public input and review, consistent with the intent of the FACA. Its ability to keep to its timeline depends on being able to obtain public input in a timely fashion.

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Advisory Committee for the Sustained National Climate Assessment  
Membership

June 2017

Name (term expires)	Position/Affiliation	Brief Biographical Sketch	Sector	End Date of Appointment
Susan Avery (2nd term 2019)	President Emerita, Woods Hole Oceanographic Institution	Dr. Avery's research includes atmospheric circulation and precipitation, the development of new radar techniques and instruments for observing the atmosphere, and the role of climate science in decision support.	Academia	April 15, 2019
Maxine Burkett (1st term 2018)	Professor of Law, University of Hawai'i	Ms. Burkett specializes in climate change law and policy with a specialty in climate ethics and climate equity especially as it pertains to island communities.	Academia	April 15, 2018
Ann Marie Chischilly (1st term 2019)	Executive Director, Northern Arizona University - Institute for Tribal Environmental Professionals	Ms. Chischilly's life and career is dedicated to advocating on behalf of tribes, including her own (Navajo Nation), throughout the United States on the issues of climate change and its impacts on Tribes and Indigenous peoples.	Academia	April 15, 2019
Jan Dell (2nd term 2019), Vice Chair	Vice President, Clean Energy, Water & Climate, Wood Group	Ms. Dell leads strategic development of projects in the energy-water-climate nexus for global energy and chemical producers.	Industry	April 15, 2019
Riley Dunlap (1st term 2018)	Regents Professor of Sociology and Dresser Professor, Oklahoma State University	Dr. Dunlap's research in environmental sociology has three major foci: (1) environmental concern; (2) the environmental movement; and (3) climate change.	Academia	April 15, 2018
Paul Fleming (2nd term 2019)	Climate Resiliency Group Manager, Seattle Public Utilities	Mr. Fleming works in water resources management, water utility management, climate risk management, use of climate data/projections, climate assessment and adaptation, and decision making under uncertainty.	Government	April 15, 2019
Lucas Joppa (1st term 2019)	Lead Environmental Scientist, Microsoft Research	Dr. Joppa's work focuses on developing the science, policy, and tools and technology necessary to manage environmental systems. His research is targeted towards achieving international biodiversity conservation goals.	Industry	April 15, 2019
Kim Knowlton (1st term 2018)	Senior Scientist, Science Center Deputy Director, Natural Resources Defense Council and Assistant Clinical Professor, Columbia University	Dr. Knowlton's research focuses on impacts of climate change on health relative to heat, air pollution, wildfires, extreme weather events, and infectious diseases; on the health costs of climate change; human vulnerability to climate impacts; and climate-health preparedness and adaptation.	NGO	April 15, 2018
Maria Carmen Lemos (1st term 2019)	Professor of Natural Resources and Environments, University of Michigan School of Natural Resources and Environment	Dr. Lemos researches the human dimensions of global change and social studies of science.	Academia	April 15, 2019
Jerry Melillo (2nd term 2019)	Distinguished Scientist and Director Emeritus, The Ecosystems Center, Marine Biological Laboratory	Dr. Melillo specializes in understanding the impacts of human activities on the biogeochemistry of ecological systems from local to global scales, using a combination of field studies and simulation modeling.	NGO	April 15, 2019
Richard Moss (1st term 2018), Chair	Senior Scientist, Pacific Northwest National Laboratory's Joint Global Change Research Institute at the University of Maryland	Dr. Moss is a research scientist studying interactions of human and natural systems affected by global environmental change.	Academia	April 15, 2018
Kristin Poppleton (1st term 2019)	Director of Education, Climate Generation - a Will Steger Legacy	Ms. Poppleton is a climate change educator whose work focuses on developing, implementing, evaluating and sharing what constitutes effective climate literacy.	NGO	April 15, 2019
Michael Prather (2nd term 2019)	Professor of Earth System Science, University of California, Irvine	Dr. Prather has an extensive background in atmospheric chemistry, bio-geochemical cycles of greenhouse gases and aerosols. He also analyzes emerging issues in science and the environment for statesmanship.	Academia	April 15, 2019

Advisory Committee for the Sustained National Climate Assessment  
Membership

June 2017

Jessica Whitehead (1st term 2018)	Coastal Communities Hazards Adaptation Specialist, North Carolina Sea Grant	Dr. Whitehead's work in coastal climate extension engages local stakeholders to develop solutions in anticipation of vulnerabilities to near-term hazards, and assists local communities in incorporating scenarios of long-term climate and sea level changes in climate adaptation planning.	Academia	April 15, 2018
Daniel Zarrilli (1st term 2019)	Senior Director, Climate Policy and Programs, and Chief Resilience Officer, New York City Office of the Mayor	Mr. Zarrilli is responsible for assessing and responding to the risks of climate change by implementing the resiliency program of OneNYC as well as overseeing the City of New York's involvement with the New York City Panel on Climate Change and the Climate Change Adaptation Task Force.	Government	April 15, 2019

**Cynthia Decker - NOAA Federal**

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 9:09 AM  
**To:** Craig Mclean  
**Cc:** Ko Barrett; Noha Gaber - NOAA Federal; Lauren Koellermeier; Katelyn Robinson; Wayne Higgins; Benjamin DeAngelo - NOAA Federal  
**Subject:** Statement on ACSNCA & Membership List w terms  
**Attachments:** ACSNCA Statement 06-16-17-Final.docx; SNCA FAC membership June 2017.xlsx

Craig,

Per our discussion yesterday, please find attached a brief document that summarizes the salient facts about the Advisory Committee for the Sustained National Climate Assessment. This was prepared with the help of the Chair of the ACSNCA, Richard Moss. There is a separate one-paragraph Summary statement that you might find useful as well as two pages that outline the context of this activity with the USGCRP, the definition of "sustained assessment", the role of the ACSNCA, and the current work of the committee. The document should also be sent with the attached Excel spreadsheet of the members and their terms.

The statement does not discuss the details of the terms but this information can be derived from the spreadsheet. There are fifteen members, five each with 1, 2 and 3-year initial terms. The members with 1-year terms would have expired in early 2017 so they were renewed, per the current charter, for a second term of two years. The members with 2-year terms are due to expire in spring 2018 and could be renewed or replaced (note that the Chair, Richard Moss, is one of these). The five members with 3-year terms will expire in spring 2019. The revised charter that is up for renewal states that second terms may be for 1-3 years rather than just 2 years. This is because we now have 10 members whose terms expire in 2019 - five with a 2nd term and five with a 1st term of 3 years. If there is a decision not to renew the five members with a 3-year first term, that means 2/3 of the committee would rotate off in 2019, Too

Please let me know if you have any questions or comments about the attached documents. I am happy to revise if necessary.

Thank you,  
Cynthia

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\*\*\*\*\*  
Cynthia J. Decker, Ph.D  
Executive Director  
NOAA Science Advisory Board  
and  
NOAA Scientific Integrity Officer  
SSMC3, Room 11230



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Silver Spring, MD 20910  
Phone 301-734-1156  
Fax 301-713-1459  
Email: [cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)

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**Elizabeth Akede - NOAA Affiliate**

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**From:** Elizabeth Akede - NOAA Affiliate  
**Sent:** Friday, June 16, 2017 10:05 AM  
**To:** Cynthia Decker - NOAA Federal  
**Cc:** Laura Newcomb  
**Subject:** Re: ACSNCA Statement

Hi Cynthia,

Great, this is very helpful. I think we can put this in the Administration & Management folder, we have things such as the charter and the 2 pager that Laura developed in that folder.

Best,  
Liz

Contractor – NOAA/OAR/ LCI & SAB  
**CollabraLink Technologies, Inc.**  
Phone: 301-734-1004  
[elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov) | <http://www.collabralink.com>

On Fri, Jun 16, 2017 at 9:27 AM, Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)> wrote:

Liz,

Attached is the statement that Richard and I (mostly Richard) created for Craig to provide to the folks at Commerce about the SNCA FAC. I think the language in here will be useful to you in drafting the ACSNCA 101 document that we will use with a new NOAA Administrator eventually. We tried to use pretty plain English and not a lot of the usual jargon so that it would be understandable to someone who is either not a scientist or at least, not someone with a background in climate science.

It is saved into the SNCAFAC folder but not under any subfolder. Since it is a broad statement about what the group does, I was not sure if there was a subfolder that was appropriate for that at this time.

Thanks,  
Cynthia

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\*\*\*\*\*

Cynthia J. Decker, Ph.D  
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\*\*\*\*\*

## Cynthia Decker - NOAA Federal

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 10:31 AM  
**To:** Amanda McQueen (Contractor)  
**Cc:** Moss, Richard H; David Reidmiller  
**Subject:** Re: Input to the June 2017 USGCRP Updates Package for SGCR

Yes, I finally read enough emails to see that the SGCR meeting next week is closed. So I don't have to feel guilty about not attending! If the July meeting is to be closed, that will also be helpful to me. But I am happy to work with Richard to provide updates on the work of the SNCA FAC at all of these meetings. And certainly if you ever need us to attend in person we can probably arrange for at least one of us to be there.

On 6/16/2017 10:15 AM, Amanda McQueen (Contractor) wrote:

Hi Cynthia,

I hope this is helpful to your busy schedule next Thursday, but the SGCR meeting is now a closed session starting later in the day for Principals only to discuss the budget. In lieu of a presentation from you all, I'm looking for a brief narrative or PowerPoint slide update on the SNCAFAC.

We will be holding our July meeting in the same format, but working to determine the best date (July 14 or 21).

Thanks so much,  
Amanda

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Amanda McQueen, MPH  
*Executive Secretary*  
Subcommittee on Global Change Research  
*Implementation Coordinator*  
U.S. Global Change Research Program  
Contractor

Phone: (202) 419-3468  
Email: [amcqueen@usgcrp.gov](mailto:amcqueen@usgcrp.gov)

USGCRP National Coordination Office  
1800 G Street NW, Suite 9100  
Washington, DC 20006  
[GlobalChange.gov](http://GlobalChange.gov)

On Thu, Jun 15, 2017 at 2:18 PM, Cynthia Decker - NOAA Federal  
<[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)> wrote:

Richard,

I have a Science Advisory Board Working Group meeting next Thursday that I must attend. That means I will not be able to attend the SAWG meeting and probably not the SGCR meeting either. I may be able to dial in to the latter but not sure until I see the final agenda for the working group meeting. So sorry about this. Liz and Laura will come to the SAWG meeting.

Thanks,  
Cynthia

On 6/15/2017 2:07 PM, Moss, Richard H wrote:

Hi Amanda,

When do you need this information?

Richard

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Richard H Moss  
Senior Scientist

Joint Global Change Research Institute  
5825 University Research Court, Suite 3500  
College Park, MD 20740  
E-Mail: [rhm@pnnl.gov](mailto:rhm@pnnl.gov)

Phone: 301-314-6711

Fax: 301-314-6719

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**From:** "Amanda McQueen (Contractor)" <[amcqueen@usgcrp.gov](mailto:amcqueen@usgcrp.gov)>

**Date:** Thursday, June 15, 2017 at 9:16 AM

**To:** Richard Moss <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>, Cynthia Decker  
<[Cynthia.Decker@noaa.gov](mailto:Cynthia.Decker@noaa.gov)>

**Cc:** David Reidmiller <[dreidmiller@usgcrp.gov](mailto:dreidmiller@usgcrp.gov)>

**Subject:** Input to the June 2017 USGCRP Updates Package for SGCR

Hi Richard and Cynthia,

Given that the SGCR will be having a closed executive session instead of a full meeting this month, I'd like to pull together a more robust updates package for them to review ahead of this June 22 meeting in lieu of a presentation from you all.

If you have slides, documents, or even a brief blurb regarding updates on the SNCAFAC, I'll include it as part of the more materials package.

As for July, we are look return to our regular meeting structure, although we are exploring a date change to either 7/14 or 7/21.

Thanks very much,

Amanda

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Amanda McQueen, MPH

*Executive Secretary*

Subcommittee on Global Change Research

*Implementation Coordinator*

U.S. Global Change Research Program

Contractor

Phone: (202) 419-3468

Email: [amcqueen@usgcrp.gov](mailto:amcqueen@usgcrp.gov)

USGCRP National Coordination Office

1800 G Street NW, Suite 9100

Washington, DC 20006

[GlobalChange.gov](http://GlobalChange.gov)

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Email: [cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)

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**[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)**

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**Subject:** Invitation: hold for SNCA FAC admin call @ Tue Jun 27, 2017  
1pm - 3pm (cynthia.decker@noaa.gov)

**Start:** Tuesday, June 27, 2017 1:00 PM  
**End:** Tuesday, June 27, 2017 3:00 PM

**Recurrence:** (none)

**Meeting Status:** Not yet responded

**Organizer:** laura.newcomb@noaa.gov

**Attachments:** invite.ics

[more details »](#)

**hold for SNCA FAC admin call**

*When*

Tue Jun 27, 2017 1pm – 3pm Eastern Time

*Calendar*

cynthia.decker@noaa.gov

*Who*

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e

Going? [Yes](#) - [Maybe](#) - [No](#) [more options »](#)

Invitation from [Google Calendar](#)

You are receiving this email at the account [cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov) because you are subscribed for invitations on calendar [cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov).

To stop receiving these emails, please log in to <https://www.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. [Learn More](#).



## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Friday, June 16, 2017 10:16 AM  
**To:** Moss, Richard H  
**Cc:** Cynthia Decker - NOAA Federal; Elizabeth Akede - NOAA Affiliate  
**Subject:** Re: June Admin Telecon

Hi Richard and Cynthia,

We have now reached a quorum for the 27th with now have 8 members (including Richard) available. There may be two additional members I am waiting to hear back from that can join.

Laura

On Thu, Jun 15, 2017 at 11:02 PM, Moss, Richard H <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)> wrote:

On the 20<sup>th</sup>, I can meet except from 10-11 EDT and 1-2 EDT. Why don't we say 2-3? Please send an invite.

For the admin meeting itself, am I included in the tally for the 27<sup>th</sup>? If so, that isn't a quorum. Please keep running the non-respondents to ground. Cynthia, thanks for making the 23<sup>rd</sup> work if that is what turns out to be required.

R

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Richard H Moss  
Senior Scientist

Joint Global Change Research Institute  
5825 University Research Court, Suite 3500  
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Fax: [301-314-6719](tel:301-314-6719)

---

**From:** Cynthia Decker <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)>

**Date:** Thursday, June 15, 2017 at 5:39 PM

**To:** Richard Moss <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)>

**Cc:** Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)>, Elizabeth Akede <[elizabeth.akede@noaa.gov](mailto:elizabeth.akede@noaa.gov)>

**Subject:** Re: June Admin Telecon

Richard,

If we can't get a quorum for the new date, we can go back to the 23rd for a meeting and I'll make it work.

Cynthia

On Thu, Jun 15, 2017 at 5:25 PM, Laura Newcomb - NOAA Affiliate <[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Dear Richard,

Would you be available for a call Tuesday June 20th to discuss the agenda for the upcoming administrative call? Other than 11 - 12 pm, we could meet at any time. We have attached a suggested draft agenda and welcome your comments.

Regarding the date, 10 members indicated availability for the June 23 date while 7 indicated availability for June 27 1 - 3pm. I will be tracking down the non-responders to the June 27 date poll to see if that number can possibly get higher.

Thank you,

Laura

--

Laura Newcomb, PhD

Program Analyst

Contractor – NOAA/OAR/LCI - Advisory Committee for the Sustained National Climate Assessment

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Cynthia J. Decker, Ph.D

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and

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Laura Newcomb, PhD

Program Analyst

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## Michael Kuperberg

---

**From:** Michael Kuperberg  
**Sent:** Friday, June 16, 2017 11:42 AM  
**To:** Laura Newcomb - NOAA Affiliate  
**Cc:** Kristin Lewis; Cynthia Decker - NOAA Federal; David R Reidmiller; Elizabeth Akede - NOAA Affiliate; Dr. Julie Morris; Katie Reeves; Richard Moss  
**Subject:** Re: FAC tag-up this week

Follow up from my suggestions this morning:

Leanna Hefter, Science Communications Coordinator, U.S. Fish & Wildlife, Western Alaska LCC  
[Leanna\\_Heffner@fws.gov](mailto:Leanna_Heffner@fws.gov)

Aaron Poe, Science Coordinator, U.S. Fish & Wildlife, Aleutian and Bering Sea Islands LCC  
[Aaron\\_Poe@fws.gov](mailto:Aaron_Poe@fws.gov)

Patricia Cummins, Government Strategist, ESRI (St Paul, MN)  
[pcummins@esri.com](mailto:pcummins@esri.com)

Mike

On Jun 15, 2017, at 2:25 PM, Laura Newcomb - NOAA Affiliate  
<[laura.newcomb@noaa.gov](mailto:laura.newcomb@noaa.gov)> wrote:

Hello All,

In anticipation of tomorrow's meeting, we in the FAC office have a few items we hope can be discussed.

First, we would like to continue the discussion to select speakers for our September meeting. Attached is a summary of the speaker suggestions taken from the email train two weeks ago. Second, we are writing a transition document to the incoming administration and would like to ask for your input on the contributions of the FAC to USGCRP.

As we must jump onto a call with one of our topic teams immediately after this call, we won't be able to make the trip downtown. We look forward to speaking to you all by phone!

Thank you,  
Laura

--

Laura Newcomb, PhD  
Program Analyst

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<SNCAAdvisoryCmte\_3rdMtg\_Agenda\_brainstorm.docx>

## Moss, Richard H

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**From:** Moss, Richard H  
**Sent:** Friday, June 16, 2017 12:57 PM  
**To:** Laura Newcomb - NOAA Affiliate; Cynthia Decker - NOAA Federal; Elizabeth Akede - NOAA Affiliate; Susan Avery; Lucas Joppa; Jessica Whitehead; Maria Carmen Lemos; SNCA AdvisoryCommittee - NOAA Service Account  
**Subject:** Re: SNCA FAC Topic lead calls

I don't find an invitation or phone number for this call. Please let me know what number to call. Thanks

--

Richard H Moss  
Senior Scientist  
Joint Global Change Research Institute  
5825 University Research Court, Suite 3500  
College Park, MD 20740  
E-Mail: [rhm@pnnl.gov](mailto:rhm@pnnl.gov)  
Phone: 301-314-6711  
Fax: 301-314-6719

---

**From:** Laura Newcomb - NOAA Affiliate <laura.newcomb@noaa.gov>  
**Date:** Monday, June 12, 2017 at 12:38 PM  
**To:** Cynthia Decker <cynthia.decker@noaa.gov>, Richard Moss <rhm@pnnl.gov>, Elizabeth Akede <elizabeth.akede@noaa.gov>, Susan Avery <susan.avery@averyconsulting.net>, Lucas Joppa <lujoppa@microsoft.com>, Jessica Whitehead <j\_whitehead@ncsu.edu>, Maria Carmen Lemos <lemos@umich.edu>, SNCA AdvisoryCommittee - NOAA Service Account <snca.advisorycommittee@noaa.gov>  
**Subject:** SNCA FAC Topic lead calls

Dear Topic Leads,

Thank you for responding to our poll. We will hold these calls topic lead bi-weekly check-in calls on Fridays from 2 -3 pm ET starting this Friday 6/16. You should receive a calendar invite shortly.

We understand not everyone will be able to call in to every meeting and will circulate a summary after the call to help keep everyone on the same page.

Thank you!  
Laura

--

Laura Newcomb, PhD  
Program Analyst  
Contractor – NOAA/OAR/LCI - Advisory Committee for the Sustained National Climate Assessment  
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Phone: [\(301\) 734-1274](tel:3017341274)



**Cynthia Decker - NOAA Federal**

---

**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 1:51 PM  
**To:** Moss, Richard H; Richard H Moss  
**Subject:** SNCA FAC Admin call June 23 vs June 27

Richard,

We have a quorum of nine people confirmed for the SNCA FAC administrative call on June 27. There were 10 people confirmed for the June 23 call time. It is up to you to decide which date to pick. As I told you, I have worked it out with my sister to take the call from the car on my mobile. We will hopefully have connectivity during the drive but if it drops out, we can turn around and go back until we pick it up again. One other factor to consider is that the topic teams have just barely started their work so there may be more to discuss on the 27th compared to the 23rd.

No word yet on the FRN for the July 27 public teleconference. If we miss the deadline for that, my recommendation is that we use the time for another administrative call and have the public call on the September date we asked people to hold on their calendars. At that time, the group can approve the interim report in advance of the Sept. in-person meeting. Just wanted to get this idea in front of you.

Let us know what you decide about the June date for the administrative call.

Thanks,  
Cynthia

--  
\*\*\*\*\*

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\*\*\*\*\*



**Moss, Richard H**

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**From:** Moss, Richard H  
**Sent:** Friday, June 16, 2017 2:44 PM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: SNCA FAC Admin call June 23 vs June 27

Let's go with the 27th.

--

Richard H Moss  
Senior Scientist

Joint Global Change Research Institute  
5825 University Research Court, Suite 3500 College Park, MD 20740 E-Mail: rhm@pnnl.gov  
<mailto:rhm@pnl.gov>

Phone: 301-314-6711

Fax: 301-314-6719

On 6/16/17, 1:51 PM, "Cynthia Decker - NOAA Federal" <cynthia.decker@noaa.gov> wrote:

Richard,

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\*\*\*\*\*

## Laura Newcomb - NOAA Affiliate

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Friday, June 16, 2017 3:00 PM  
**To:** Lucas Joppa; Michael Prather; Fleming, Paul; Moss, Richard H; Ana Pinheiro Privette; Reid Sherman  
**Cc:** Cynthia Decker - NOAA Federal; Elizabeth Akede - NOAA Affiliate  
**Subject:** SNCA FAC Topic 2 call with CDI, GCIS, PREP

Dear Topic 2 Members, Ana, and Reid,

Following Topic 2's inaugural call yesterday, it became clear members would benefit from the opportunity to talk with Ana and Reid about CDI, GCIS, and PREP. Ana and Reid are happy to join in on a call with the group.

In order to find a time to hold this call, could you please fill out the following [poll](#) to indicate your availability the week for June 26th?

Thank you!

Laura

--

Laura Newcomb, PhD  
Program Analyst  
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## Laura Newcomb - NOAA Affiliate

---

**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Friday, June 16, 2017 3:07 PM  
**To:** Cynthia Decker  
**Subject:** Re: Comments on draft minutes of March meeting

Hi Cynthia,

The members did not send any changes or corrections. With regards to Richard's comments, on the word "vote" would you like to change or keep as is?

I will work with IT to post after your final approval.

Thanks,  
Laura

On Tue, Jun 6, 2017 at 1:28 PM, Moss, Richard H <[rhm@pnnl.gov](mailto:rhm@pnnl.gov)> wrote:

Thanks for putting together a good set of minutes. In order to get things moving, I have provided a high-level review focused on the summary and sections of the detailed minutes related to our report. Please see attached. I didn't propose alternative language for different forms of the word "vote" that appear in 3 instances. Since we operate by consensus, I wasn't sure that word is appropriate, but I leave that to you to decide.

From my perspective, this is ready to circulate to members with an appropriate deadline for comment that will still leave us enough time to post the final minutes within the required deadline.

Again, many thanks,

Richard

--

Richard H Moss  
Senior Scientist

Joint Global Change Research Institute  
5825 University Research Court, Suite 3500  
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## Cynthia Decker - NOAA Federal

---

**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 3:10 PM  
**To:** Laura Newcomb - NOAA Affiliate  
**Subject:** Re: Comments on draft minutes of March meeting

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On 6/16/2017 3:07 PM, Laura Newcomb - NOAA Affiliate wrote:

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**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Friday, June 16, 2017 3:11 PM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: Comments on draft minutes of March meeting

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Thanks!  
Laura

On Fri, Jun 16, 2017 at 3:09 PM, Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)> wrote:

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## Cynthia Decker - NOAA Federal

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 3:14 PM  
**To:** Laura Newcomb - NOAA Affiliate  
**Subject:** Re: Comments on draft minutes of March meeting

Great! An accomplishment by the end of the week!

On 6/16/2017 3:11 PM, Laura Newcomb - NOAA Affiliate wrote:

great I can do that.

Thanks!  
Laura

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## Laura Newcomb - NOAA Affiliate

---

**From:** Laura Newcomb - NOAA Affiliate  
**Sent:** Friday, June 16, 2017 3:17 PM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: Comments on draft minutes of March meeting

Do you want any type of designation on the website to indicate the minutes have not yet been voted on and accepted by the members?

On Fri, Jun 16, 2017 at 3:14 PM, Cynthia Decker - NOAA Federal <[cynthia.decker@noaa.gov](mailto:cynthia.decker@noaa.gov)> wrote:

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**Cynthia Decker - NOAA Federal**

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**From:** Cynthia Decker - NOAA Federal  
**Sent:** Friday, June 16, 2017 3:20 PM  
**To:** Moss, Richard H  
**Subject:** Re: SNCA FAC Admin call June 23 vs June 27

OK, we will set it up and get the word out! Have a great weekend.  
Here is the link to the group in Kensington. They perform at the Town Hall.  
<http://www.britishplayers.org/>

On 6/16/2017 2:43 PM, Moss, Richard H wrote:  
> Let's go with the 27th.  
>

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Cynthia J. Decker, Ph.D  
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**Moss, Richard H**

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**From:** Moss, Richard H  
**Sent:** Friday, June 16, 2017 4:18 PM  
**To:** Cynthia Decker - NOAA Federal  
**Subject:** Re: SNCA FAC Admin call June 23 vs June 27

Thanks, Cynthia. You, too. Have a great weekend.

--  
Richard H Moss  
Senior Scientist

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