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
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