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

OREGON NATURAL DESERT ASS’N,

Case No. 05-CV-210-KI

Plaintiff,

v.

FIRST AMENDED COMPLAINT

CARLOS M. GUTIERREZ, Secretary, United States Department of Commerce, **WILLIAM T. HOGARTH**, Director, NOAA Fisheries, and **NAT’L MARINE FISHERIES SERV.**,

Defendants.

(Environmental Matter)

NATURE OF ACTION

1. This action seeks judicial relief ordering Defendants NOAA Fisheries et al. to comply with the requirements of the Freedom of Information Act (FOIA) 5 U.S.C. § 552, as amended, with respect to NOAA Fisheries’ production of documents requested by Plaintiff under the FOIA.

2. The FOIA requires federal agencies to disclose information upon request unless the statute expressly exempts the information from disclosure. 5 U.S.C. § 552 et seq.

3. The Department of Commerce, within which the National Oceanic and Atmospheric Administration's ("NOAA") National Marine Fisheries Service ("NOAA Fisheries") is situated, has regulations setting out the procedures the Department and its component agencies follow to comply with the FOIA. 15 C.F.R. Part 4. One such regulation provides that if a component receives a FOIA request for a record in its possession in which another federal agency has "the primary interest," the component "shall refer the record to that agency for direct response to the requester." 15 C.F.R. § 4.5(b).

4. This regulation is inconsistent with the FOIA, which provides that any person has a right to obtain access to records of any federal agency, except for those documents which are exempt from disclosure by one of nine specific exemptions. Agency records are those records created or obtained by an agency and in the agency's possession at the time of the request. The Department of Commerce's regulation providing that one agency may transfer a request to another agency when the former is in actual possession of the record in question, is contrary to the FOIA and therefore unlawful. In practice, NOAA Fisheries' implementation of this regulation has resulted, and continues to result, in significant delays in processing FOIA requests submitted by Plaintiff.

5. ONDA has been injured by NOAA Fisheries' use of this unlawful regulation because it has resulted in unreasonably lengthy delays well in excess of the statutory time period within which a requester is entitled to receive responsive, non-exempt documents.

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JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), as well as under 28 U.S.C. § 1331 because this action arises under the FOIA, the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq.

7. Venue is proper in this Court under 28 U.S.C. § 1391 and 5 U.S.C. § 552(a)(4)(B) because a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, some or all of the agency records in question may be located in this district, and Plaintiff's principal place of business is in this district.

PARTIES

8. Plaintiff OREGON NATURAL DESERT ASSOCIATION (ONDA) is an Oregon non-profit public interest organization of approximately 1500 members. It is headquartered in Bend, Oregon and also has offices in Portland, Oregon. ONDA's mission is to protect, defend, and restore forever, the health of Oregon's native deserts. ONDA actively participates in Department of Commerce, NOAA Fisheries, proceedings and decisions concerning the management and protection of anadromous fish species in eastern Oregon. ONDA regularly uses the FOIA to obtain from many different federal agencies, including NOAA Fisheries, agency records relevant to its mission. ONDA brings this action on its own behalf and on behalf of its members and staff, who use and benefit from information obtained from federal agencies via the FOIA.

9. Defendant NOAA FISHERIES is an agency of the United States, and has possession of and control over the records Plaintiff seeks.

10. Defendant CARLOS M. GUTIERREZ is sued solely in his official capacity as Secretary of the Department of Commerce. The Secretary of Commerce is the official responsible for adopting the final rule amending the Commerce Department FOIA regulation complained of herein.

11. Defendant WILLIAM T. HOGARTH is sued solely in his official capacity as Director of NOAA Fisheries. The Director is one of the officials responsible for implementing the FOIA regulation at issue in this action, with respect to ONDA's FOIA request, directs the agency in possession of the requested documents, and has the principal authority for the actions and inactions alleged herein.

12. Defendants' failure or refusal to comply with the FOIA directly affects Plaintiff's interests. The interests of Plaintiff and its members have been and will continue to be injured and harmed by NOAA Fisheries' actions and/or inactions as complained of herein, including the agency's failure to provide Plaintiff with all documents responsive to Plaintiff's FOIA request within the statutorily prescribed timeline. Unless the relief prayed for herein is granted, Plaintiff and its members will continue to suffer on-going harm and injury to their interests and have reason to believe they will continue to be adversely affected by Defendants' implementation of the complained-of regulation in current and future FOIA requests.

STATEMENT OF FACTS

13. On March 11, 2004, ONDA submitted a FOIA request to NOAA Fisheries, requesting information on the impacts of livestock grazing on Upper Columbia River Steelhead and Middle Columbia River Steelhead, including agency consultation documents on those impacts prepared pursuant to the Endangered Species Act (ESA). ONDA specified that its

request was intended to include relevant biological assessments, biological opinions, letters of concurrence, and other related documents prepared as part of the ESA consultation process.

14. NOAA Fisheries responded to ONDA's FOIA request on April 12, 2004. In its response, the agency did not indicate whether it would produce any documents other than biological opinions or documents created by NOAA Fisheries itself. On April 30, 2004, ONDA replied to NOAA Fisheries. ONDA raised this issue and pointed out that NOAA Fisheries was required to produce any records either created or obtained by the agency or under agency control at the time of the FOIA request.

15. On June 15, 2004, ONDA again wrote to NOAA Fisheries and inquired into the status of ONDA's FOIA request, having not heard back from the agency following the April correspondence.

16. On July 1, 2004, ONDA received a letter from NOAA Fisheries indicating the agency had begun searching for responsive records. The letter again left the question as to production of documents other than biological opinions unanswered. It also failed to provide a determination regarding release of the responsive records.

17. On August 18, 2004, ONDA received a letter from NOAA Fisheries that included some of the requested documents as well as the URLs (web addresses) for several biological opinions available on the internet. NOAA Fisheries stated that biological assessments were the primary concern of the federal agency issuing them and that ONDA would have to submit a separate FOIA request to each agency that may have issued such documents.

18. ONDA responded on August 19, 2004, reiterating the controlling statutory and case law indicating that "agency records" are records either created or obtained by an agency and

in the agency's control at the time of the request. ONDA once again requested that NOAA Fisheries release all such documents responsive to ONDA's request.

19. Subsequently, ONDA received letters from NOAA Fisheries on October 6, 2004, October 18, 2004, and November 18, 2004. In none of these letters did the agency answer ONDA's question regarding production of documents other than biological opinions.

20. In its final letter, dated November 18, 2004, NOAA Fisheries indicated it was referring one or more responsive documents to the U.S. Bureau of Land Management, the U.S. Forest Service and the U.S. Fish & Wildlife Service, pursuant to the Commerce Department's FOIA regulation regarding consultations and referrals. NOAA Fisheries indicated ONDA could expect direct responses to its original March 11, 2004 FOIA request from those agencies.

21. At that point, ONDA exercised its right to appeal the adverse determination, and filed an administrative appeal with the Department of Commerce on December 10, 2004, pursuant to the FOIA and the Department's FOIA appeal regulations.

22. ONDA received a letter from NOAA Fisheries dated December 20, 2004, indicating the agency had completed its processing of ONDA's request and providing a determination not to release 79 responsive documents. The letter also stated that 53 documents had been referred to other agencies pursuant to 15 C.F.R. § 4.5(b).

23. Under the FOIA, the Department had twenty business days to respond to ONDA's appeal. After twenty days, ONDA had not received a response to its appeal. At that point, ONDA had exhausted its administrative remedies.

24. On February 3, 2005, ONDA finally received a response from the Department of Commerce's Office of the General Counsel to its December 10, 2004 FOIA appeal. The Department denied ONDA's appeal, asserting that 43 C.F.R. § 4.5(b) and NOAA Fisheries'

implementation of that regulation in responding to ONDA's March 11, 2004 FOIA request, were not in violation of the FOIA.

25. While its appeal was pending, ONDA on January 7, 2005 sent a second FOIA request to NOAA Fisheries, again asking for the same types of grazing consultation documents previously requested. ONDA indicated that the new request was necessary to account for NOAA Fisheries' delay in processing the original request and therefore covered the period from March 2004 to present in order to obtain responsive documents created in the ten months since ONDA's original request.

26. As of the date of this Complaint, ONDA still has not received from NOAA Fisheries a response to the January 7, 2005 request. Because more than 20 business days have elapsed since the agency received ONDA's January 7, 2005 request, and ONDA has received no response from the agency, ONDA is deemed to have exhausted its administrative remedies with respect to the request. 5 U.S.C. § 552(a)(6)(C)(i).

27. Also as of the date of this Complaint, ONDA has not received the document referred by NOAA Fisheries to the U.S. Fish & Wildlife Service, responsive to ONDA's March 11, 2004 FOIA request.

28. In the various responses to ONDA's March 11, 2004 request received from NOAA Fisheries, the U.S. Forest Service and the Bureau of Land Management, only two responsive documents originated after the date of ONDA's request, dated April 2, 2004 and April 23, 2004.

FIRST CLAIM FOR RELIEF:
Freedom of Information Act

29. Plaintiff realleges and incorporates by reference all preceding paragraphs.

30. The FOIA requires federal agencies to determine within twenty days after receipt of a request whether to comply with the request. 5 U.S.C. 552(a)(6).

31. NOAA Fisheries failed to make a determination within the statutorily prescribed time period and failed to release all responsive, non-exempt documents requested in ONDA's March 11, 2004 request. NOAA Fisheries also failed to make a determination within the statutorily prescribed time period and failed to release all responsive, non-exempt documents requested in ONDA's January 7, 2005 request.

32. ONDA has a statutory right to the records it seeks and there is no legal basis for Defendants' failure to disclose the records.

33. NOAA Fisheries' failure to make a determination within the required 20-day period, and failure to release the requested public information, is in violation of the FOIA. 5 U.S.C. § 552(a)(6). The court should order the production of the agency records that have been improperly withheld from ONDA. 5 U.S.C. 552(a)(4)(B).

SECOND CLAIM FOR RELIEF:
Administrative Procedure Act

34. Plaintiff realleges and incorporates by reference all preceding paragraphs.

35. NOAA Fisheries' failure to make a determination within the mandatory 20-day period and failure to fully release the public information requested in ONDA's March 11, 2004 and January 7, 2005 FOIA requests constitutes agency action unlawfully withheld and unreasonably delayed, and is therefore actionable pursuant to 5 U.S.C. § 706(1).

36. Alternatively, NOAA Fisheries' decision not to make a determination within the mandatory 20-day period and decision not to fully release the public information requested in ONDA's March 11, 2004 and January 7, 2005 FOIA requests is in violation of the FOIA and

therefore arbitrary, capricious, an abuse of discretion, and not in accordance with law, and therefore is actionable pursuant to 5 U.S.C. § 706(2).

THIRD CLAIM FOR RELIEF:
Administrative Procedure Act

37. Plaintiff realleges and incorporates by reference all preceding paragraphs.

38. The FOIA requires federal agencies to determine within twenty days after receipt of a request whether to comply with the request. 5 U.S.C. 552(a)(6).

39. The Department of Commerce FOIA regulations state that “[i]f a component receives a request for a record in its possession in which another Federal agency subject to the FOIA has the primary interest, the component shall refer the record to that agency for direct response to the requester.” 15 C.F.R. § 4.5(b).

40. This regulation is contrary to, and in violation of, the FOIA because the Act provides that any person has a right to obtain access to records of any federal agency, except for those documents which are exempt from disclosure by one of nine specific exemptions. “Agency records” are either (1) documents created or obtained by an agency, and (2) under agency control at the time of the FOIA request.

41. ONDA has a statutory right to the records it seeks and there is no legal basis for Defendants’ failure to disclose the records.

42. The regulation at 15 C.F.R. § 4.5(b), or its implementation by Defendants, violates the FOIA as applied to ONDA’s March 11, 2004 and January 7, 2005 requests, and is also a facial violation of the FOIA for the reasons described above. These violations therefore are actionable pursuant to 5 U.S.C. § 706(2) because they are final agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or are in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. The court should order

the production of the agency records that have been improperly withheld from ONDA. 5 U.S.C. 552(a)(4)(B).

FOURTH CLAIM FOR RELIEF:
Freedom of Information Act

43. Plaintiff realleges and incorporates by reference all preceding paragraphs.

44. A plaintiff is entitled to receive all responsive documents in an agency's possession or control up to or near the date of the release of records. See, e.g., Public Citizen v. Dept. of State, 276 F.3d 634, 642 (2002) (agency's use of a "cut-off policy" to process FOIA requests held "unreasonable because it forces the requester to 'periodically . . . resubmit the identical request in order to get more recent records'" (citation omitted); see also McGehee v. CIA, 697 F.2d 1095, 1102–03 (D.C. Cir. 1982) (same).

45. The Department of Commerce's regulation stating that "[r]ecords responsive to a request shall include only those records within the Department's possession and control as of the date the proper component receives the request" is unlawful because it improperly imposes a date-of-request cut-off policy.

46. ONDA has a statutory right to the records it seeks and there is no legal basis for Defendants' failure to disclose the records.

47. NOAA Fisheries' decision to not release the requested public information responsive to ONDA's March 11, 2004 FOIA request, up to the date of release of those records, is in violation of the FOIA. 5 U.S.C. § 552(a)(3), (6). The court should order the production of the agency records that have been improperly withheld from ONDA. 5 U.S.C. 552(a)(4)(B).

WHEREFORE, Plaintiff prays for relief as set forth below.

PRAYER FOR RELIEF

Plaintiff respectfully requests that the Court grant the following relief:

A. Declare that Defendants' failure to timely make a determination on and produce all records requested in ONDA's March 11, 2004 and January 7, 2005 FOIA requests is in violation of the FOIA, 5 U.S.C. 552(a)(6); constitutes agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. 706(1); and/or is arbitrary, capricious, an abuse of discretion, and not in accordance with the law, 5 U.S.C. 706(2).

B. Declare that 15 C.F.R. § 4.5(b) is in violation of the FOIA and is unlawful, or has been unlawfully implemented, as applied to ONDA's March 11, 2004 and January 7, 2005 FOIA requests, and is therefore in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, pursuant to 5 U.S.C. § 706(2)(C), and is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law as applied to ONDA's March 11, 2004 and January 7, 2005 requests; and that Defendants' adoption and/or implementation of 15 C.F.R. § 4.5(b) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the FOIA, and therefore actionable pursuant to 5 U.S.C. § 706(2)(A), because the regulation, or its implementation, is facially inconsistent with the statute.

C. Declare that 15 C.F.R. § 4.5(a), or any other Commerce Department policy adopting a date-of-request or similarly unreasonable cut-off date for production of responsive records, is in violation of the FOIA and is unlawful, or has been unlawfully implemented, as applied to ONDA's March 11, 2004 and January 7, 2005 FOIA requests, and is therefore in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, pursuant to 5 U.S.C. § 706(2)(C), and is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law as applied to ONDA's March 11, 2004 and January 7, 2005 requests; and that Defendants' adoption and/or implementation of 15 C.F.R. § 4.5(a) and/or any related Commerce Department policies is arbitrary, capricious, an abuse of discretion, or otherwise not

in accordance with the FOIA, and therefore actionable pursuant to 5 U.S.C. § 706(2)(A), because the regulation, policy, or its/their implementation, is inconsistent with the statute.

D. Order and declare that Defendants may no longer rely on the unlawful regulation at 15 C.F.R. § 4.5(b) in all future FOIA processing, or that Defendants may no longer implement the regulation in a manner that causes unreasonable or excessive delays in processing requests under the FOIA.

E. Order and declare that Defendants may no longer rely on the regulation at 15 C.F.R. § 4.5(a), and/or any related policies, to employ a date-of-request or other unreasonable cut-off date for production of documents in all future FOIA processing.

F. Order Defendants to immediately and fully provide ONDA with the any and all remaining agency records responsive to ONDA's March 11, 2004 and January 7, 2005 FOIA requests, 5 U.S.C. 552(a)(4)(B), including any and all such records that would be responsive to that request as of the date of such court order.

G. Award Plaintiff its reasonable costs, litigation expenses, and attorney's fees associated with this litigation pursuant to the Freedom of Information Act, 5 U.S.C. 552(a)(4)(E), the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq., and all other applicable authorities.

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

DATED this 18th day of February, 2005.

Respectfully submitted,

s/ Peter M. Lacy

Peter M. Lacy ("Mac") (OSB # 01322)
Oregon Natural Desert Association

Of Attorneys for Plaintiff