



Oregon Natural Desert Association

VIA EMAIL

December 10, 2004

Assistant General Counsel for Administration (Office)
Room 5898-C
U.S. Department of Commerce
14th and Constitution Avenue, N.W.
Washington, D.C. 20230.

Re: Freedom of Information Act Appeal

Dear Assistant General Counsel:

This is a Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, appeal, made pursuant to 15 C.F.R. § 4.10, concerning a failure to provide a timely determination. For the reasons that follow, appellant Oregon Natural Desert Association (ONDA) respectfully requests the Department to order NOAA Fisheries to immediately provide ONDA with all records responsive to its March 11, 2004 FOIA request.

FACTUAL BACKGROUND

ONDA submitted a FOIA request to NOAA Fisheries on March 11, 2004,¹ requesting information on the impacts of livestock grazing on Upper Columbia River Steelhead and Middle Columbia River Steelhead, and including agency consultation documents on those impacts prepared pursuant to the Endangered Species Act. ONDA specified that its request included biological assessments, biological opinions, letters of concurrence, and other related documents. NOAA Fisheries responded to ONDA's FOIA request on April 12, 2004. In its response, the agency left unclear whether it would produce any documents other than biological opinions or documents created by NOAA Fisheries itself. In an April 30, 2004 reply, ONDA raised this issue and pointed out that NOAA Fisheries is required under the FOIA to produce any records either created or obtained by the agency or under agency control at the time of the FOIA request. 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.

On July 1, 2004, ONDA received a letter from NOAA Fisheries indicating the agency had begun searching for responsive records, but again leaving the question as to production of documents other than biological opinions unanswered. On August 18, 2004, ONDA received a

¹ The original request, as well as all subsequent correspondence between ONDA and NOAA Fisheries, is attached to this appeal pursuant to 15 C.F.R. § 4.10(b).

letter from NOAA Fisheries that included a portion of the requested documents, which the agency had determined to release at that time, as well as the web addresses for several biological opinions available on the internet. Subsequently, ONDA received similar letters 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. In its final letter, 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 and Wildlife Service, pursuant to the Department of Commerce's FOIA regulations regarding consultations and referrals. NOAA Fisheries indicated ONDA could expect direct responses to its original March 11, 2004 FOIA request from those agencies.

STATEMENT OF REASONS

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). 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. The Supreme Court has developed a two-part test to determine whether a document requested under the FOIA is an “agency record” within the meaning of the Act. U.S. Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 144–45 (1989). First, the document must be either created or obtained by an agency. Id. at 144. Second, the document must be under agency control at the time of the FOIA request. Id. at 145. Reviewing its holdings in similar cases, the Court further observed:

This requirement is suggested by [Forsham v. Harris, 445 U.S. 169 (1980)] as well, 445 U.S. at 183, 100 S.Ct. at 985, where we looked to the definition of agency records in the Records Disposal Act, 44 U.S.C. § 3301. Under that definition, agency records include ‘all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business’

Id. (emphasis added, italics in original). Applying the straightforward Tax Analysts test makes clear that the documents requested by ONDA—particularly the Forest Service’s and BLM’s biological assessments—are “agency records” within the meaning of the FOIA. Therefore, NOAA Fisheries is required by statute to produce those documents.

CONCLUSION

The FOIA requires federal agencies to fully provide requested information within twenty days from the time of the request. 5 U.S.C. 552(a)(6). NOAA Fisheries’ failure to produce the responsive records in a timely manner constitutes an unreasonable delay, and its reliance on the unlawful regulation at 15 C.F.R. § 4.5(b) renders the agency’s decisions arbitrary, capricious, and abuse of discretion or otherwise not in accordance with the FOIA. Therefore, ONDA

requests that the Department order NOAA Fisheries to immediately provide ONDA with the all responsive documents in its possession at the time of the request. If you have any questions regarding this appeal, please feel free to contact me at the address provided below.

Sincerely,

s/ Peter M. Lacy

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