

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY  
1411 K. St. NW, Suite 1300  
Washington, D.C. 20005

*Plaintiff,*

v.

OFFICE OF MANAGEMENT AND  
BUDGET,  
725 17<sup>th</sup> St. NW  
Washington, D.C. 20503,

and

OFFICE OF INFORMATION AND  
REGULATORY AFFAIRS,  
725 17<sup>th</sup> St. NW  
Washington, D.C. 20503

*Defendants.*

Case No.: 24-3234

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**(Freedom of Information Act, 5 U.S.C. §  
552)**

## INTRODUCTION

1. This action is based on violations of the Freedom of Information Act (“FOIA” or “the Act”), 5 U.S.C. § 552 *et seq.* It challenges the unlawful failure the Office of Management and Budget (“OMB”) and its subcomponent, the Office of Information and Regulatory Affairs (“OIRA”) (together “Defendants”), to respond to the Center for Biological Diversity’s (“Center” or “Plaintiff”) FOIA requests within the time and in the manner required by FOIA. Defendants have failed to provide determinations regarding records responsive to the Center’s FOIA requests and are unlawfully withholding records responsive to the Center’s FOIA requests.

2. The purpose of FOIA is “to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). “[D]isclosure, not secrecy, is the dominant objective of the Act.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Thus, FOIA requires federal agencies to disclose records to any person upon request unless the information falls within one of nine narrow disclosure exemptions listed in the Act. *See* 5 U.S.C. §§ 552(a)(3)(A), (b); *see also Rose*, 425 U.S. at 361 (“These exemptions are explicitly made exclusive ... and must be narrowly construed.” (internal citation and quotation marks excluded)). Except in unusual circumstances, federal agencies must determine within 20 business days whether requested records are exempt from disclosure and, if they are not, the agency must “promptly disclose” the records to the requester. 5 U.S.C. §§ 552(a)(6)(A)(i), (a)(3)(A), (a)(6)(C)(i).

3. Defendants have violated FOIA in several ways. First, Defendants have failed to make determinations regarding the Center’s FOIA requests within the deadline period required by FOIA. Second, Defendants have improperly withheld, and are continuing to improperly withhold, records responsive to the Center’s FOIA requests. Third, Defendants have failed to

provide the Center with estimated dates on which they would complete action on the Center's requests. Fourth, Defendants have failed to estimate the volume of records they are withholding pursuant to FOIA exemptions for the Center's FOIA requests. Fifth, Defendants failed to provide the Center with estimated dates on which they would make a determination on the Center's FOIA appeal. Sixth, Defendants have failed to make a determination on the Center's appeal within the prescribed statutory period.

4. These failures amount to illegal, constructive withholding of records responsive to the Center's FOIA requests.

5. Each of these failures violates FOIA.

6. In this case, Defendants have missed every applicable FOIA deadline. The requested records are critically important to the Center's mission and work to protect endangered and threatened species and their habitats.

7. Defendants are improperly withholding from disclosure responsive records sought by the Center, records to which the Center is legally entitled. Defendants have violated numerous FOIA mandates by failing to provide determinations on the Center's FOIA requests within the time and manner required by law. Accordingly, the Center seeks a declaration from this Court that Defendants have violated FOIA. The Center also seeks an injunction from this Court that directs Defendants to promptly provide the Center with the requested records.

#### **JURISDICTION, VENUE AND BASIS FOR RELIEF**

8. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) because this action arises under FOIA, and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

9. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for all FOIA cases in the District of Columbia.

10. Declaratory relief is appropriate under 28 U.S.C. § 2201.

11. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

### **PARTIES**

12. Plaintiff Center for Biological Diversity is a member organization incorporated under the laws of the State of California. It is recognized as a not-for-profit corporation under section 501(c)(3) of the United States Internal Revenue Code. The Center has 87,138 active members across the country. The Center is based in Tucson, Arizona, and works throughout the entire United States. Its other major offices are in Washington, D.C., Oakland, California, and Portland, Oregon.

13. The Center and its members are harmed by Defendants' violations of FOIA because the Center intends to use the requested information to better understand Defendants' approach to, and role in, endangered species conservation. Defendants play a crucial role in the promulgation of critical habitat designations, and as such, Defendants' failure to complete this role in a timely manner harms already-imperiled species and the Center's interests in those species. Defendants' failure to comply with FOIA harms the Center's ability to provide full, accurate, and current information to the public on matters of public interest—the implementation of the Endangered Species Act (“ESA”) and other measures that protect the environment. Further, Defendants' failure to respond to the Center's requests in a timely manner could mean that more and more documents are being produced after the date of the Center's requests, and that information will not be included in Defendants' ultimate, untimely response, harming the Center, as it will not receive a full picture of the requested information and Defendants' role. Absent this information,

the Center cannot advance its mission, with its members, to protect native species and their habitat.

14. Defendant Office of Management and Budget is an agency of the executive branch of the United States government and as such is subject to FOIA. OMB plays a central role in providing leadership in the development, oversight, and coordination of the federal government's budget; policies in procurement, financial management, and related information; statistical support; and regulatory oversight. OMB is in possession, custody, or control of the records sought by the Center, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

15. Defendant Office of Information and Regulatory Affairs is a subcomponent of OMB. OIRA is comprised of six subject matter branches and is led by the OIRA Administrator, who is appointed by the President and confirmed by the U.S. Senate. OIRA is in possession, custody, or control of the records sought by the Center, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

### **BACKGROUND**

16. The Center submits FOIA requests, such as those involved in this suit, to agencies involved in rulemaking that affects endangered and threatened species and their critical habitats on a regular basis. Defendants are such agencies.

17. Pursuant to Executive Order 12866 ("EO 12866"), OIRA plays a role in the rulemaking process. OIRA reviews all proposed rules to determine if they are "significant" as defined by EO 12866.

18. EO 12866 defines "significant" rules as rules that meet a number of potential criteria, including having an annual impact of \$200 million dollars or more on the economy, interfering

with other agencies' actions, or meaningfully impacting the President's priorities, among other criteria.

19. If OIRA determines a proposed rule is "significant" as defined by EO 12866, an interagency review is required.

20. EO 12866 gives OIRA 90 days to perform this "significance" review, which can be extended only once by 30 days at the OMB director's request or extended indefinitely at the request of the agency promulgating the rule at issue. OIRA may then return the rule to the agency for reconsideration for a variety of reasons including, but not limited to, the rule's incompatibility with the law, inadequate quality of the agency's analysis, and inconsistency with the President's policies and priorities.

21. The United States Fish and Wildlife Service ("FWS") is an agency under the Department of the Interior ("DOI"). The Secretary of the Interior is authorized under the ESA to promulgate rules for the listing of threatened and endangered terrestrial and freshwater species, and designation of critical habitat for those listed species. 16 U.S.C. § 1531 *et seq.* The Secretary has delegated the responsibility for administering the ESA to the Director of FWS. *See* 50 C.F.R. § 424.

22. The National Marine Fisheries Service ("NMFS") is an agency under the Department of Commerce ("DOC"). The Secretary of Commerce is authorized under the ESA to promulgate rules for the listing of threatened and endangered marine and anadromous species, and designation of critical habitat for those listed species. 16 U.S.C. § 1531 *et seq.* The Secretary has delegated the responsibility for administering the ESA to the Assistant Administrator of NMFS. *See* 50 C.F.R. § 424.

23. Under the ESA, FWS and NMFS are responsible for, “to the maximum extent prudent and determinable, designating critical habitat for endangered and threatened species at the time of listing.” 16 U.S.C. § 1533(a)(3)(A)(i).

24. Under the ESA, FWS and NMFS propose critical habitat designations based on “the best scientific data available” and those designations “shall be published concurrently” with a final listing determination unless “critical habitat of such species is not then determinable.” *Id.* §§ 1533 (b)(2), (a)(3)(A), (b)(6)(C). If critical habitat is not determinable, FWS and NMFS may extend the deadline for designating critical habitat by one additional year. *Id.* § 1533(b)(6)(C)(ii).

25. Each of the Center’s FOIA requests at issue, described in detail below (*see infra* “STATEMENT OF FACTS”), relates to FWS and NMFS rulemaking that appears to be delayed for an unknown reason within Defendants’ system. The Center has submitted the FOIA requests at issue to better understand—and help the public understand—OMB and OIRA’s role in each of these rulemakings.

### **Miami Cave Crayfish Rulemaking**

26. FWS first added a rule to propose a listing determination and critical habitat designation for the Miami cave crayfish to DOI’s bi-annual Unified Agenda in fall 2021, identified as Regulatory Information Number (“RIN”) 1018-BG31. The Unified Agenda sets out DOI’s planned regulatory actions for the coming 12-months.

27. RIN 1018-BG31 remained on the DOI’s Unified Agenda for spring 2022, fall 2022, spring 2023, and fall 2023.

28. FWS published a proposed rule to designate the Miami cave crayfish as threatened under ESA Section 4(d) on September 20, 2023. 88 Fed. Reg. 64856–70.

29. In this proposed rule, FWS stated, “We have found critical habitat to be prudent and determinable for the Miami cave crayfish and have developed a proposed critical habitat rule for this species. On August 29, 2023, we were informed that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) determined that our proposed critical habitat rule is significant under Executive Order 12866. Therefore, we will publish a proposed critical habitat rule for the Miami cave crayfish following interagency review of the proposed critical habitat rule.” 88 Fed. Reg. 64869.

30. Described in more detail *infra*, on October 3, 2023, the Center submitted a FOIA request to Defendants requesting information related to the Miami cave crayfish’s critical habitat designation.

31. FWS added a proposal of critical habitat designation for the Miami cave crayfish as a new item, separate from the species listing rule, to the DOI’s Unified Agenda as RIN 1018-BH66 in fall 2023, and again in spring 2024.

32. OIRA opened regulatory review under EO 12866 for RIN 1018-BH66 on July 2, 2024.

33. As of the date of this Complaint, no proposed rule has been published for the designation of critical habitat for the Miami cave crayfish.

#### **North Atlantic Right Whale Vessel Strike Reduction Rulemaking**

34. NMFS and the National Oceanic and Atmospheric Administration (“NOAA”) first added to DOC’s spring 2019 Unified Agenda, a “Long-Term Action” to review the Vessel Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, as RIN 0648-BI88.

35. NMFS has listed the Right Whale as an endangered species under the ESA.



36. RIN 0648-BI88 remained on the DOC's agenda as a Long-Term Action for fall 2019 and spring 2020.

37. In fall 2020, RIN 0648-BI88 entered the "Prerule Stage" on the DOC's Unified Agenda, and then the "Proposed Rule Stage" in spring 2021, where it remained for fall 2021 and spring 2022.

38. On August 1, 2022, NMFS and NOAA published a proposed rule to amend the North Atlantic Right Whale Vessel Strike Reduction Rule. 87 Fed. Reg. 46921.

39. While DOC's Unified Agendas for fall 2022, spring 2023, fall 2023, and spring 2024 have listed RIN 0648-BI88 in the final ruling stage, as of the date of this Complaint, no final rule has been published in the Federal Register. In the interim, reginfo.gov shows 68 meetings have been held regarding RIN 064-BI88, under EO 12866.

40. Described in more detail *infra*, on April 5, 2024, the Center submitted a FOIA request to Defendants requesting information related to RIN 064-BI88.

#### **Tennessee Clubshell, Tennessee Pigtoe, and Cumberland Moccasinshell Critical Habitat Designation**

41. FWS first added rulemaking to propose a listing determination and critical habitat designation for the Tennessee clubshell, Tennessee pigtoe, and Cumberland moccasinshell to the DOI's Unified Agenda in spring 2020, identified as RIN 1018-BE94.

42. RIN 1018-BE94 remained on DOI's Unified Agenda for fall 2020, spring 2021, fall 2021, spring 2022, fall 2022, spring 2023, and fall 2023.

43. FWS published a proposed rule to list the Tennessee clubshell, Tennessee pigtoe, and Cumberland moccasinshell as endangered on August 22, 2023. 88 Fed. Reg. 57060.

44. In its proposed rule, the FWS stated, "We have found critical habitat to be prudent and determinable for all three mussel species and have drafted a proposed critical habitat rule for

these species. However, the proposed critical habitat rule is proceeding on a different timeline from the proposed listing rule because we were informed on August 9, 2023, that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) had determined that our proposed critical habitat rule is significant under Executive Order 12866 and will be initiating the interagency review process for that proposed rule.” 88 Fed. Reg. 57076.

45. FWS then added, as a new and separate item, proposal of critical habitat designation for these three species to the DOI’s Unified Agenda as RIN 1018-BH58 in fall 2023, and again in spring 2024.

46. OIRA opened regulatory review under EO 12866 for RIN 1018-BH58 on June 6, 2024.

47. Described in more detail *infra*, on June 13, 2024, the Center submitted a FOIA request to Defendants requesting information related to critical habitat designation for these three species, under RIN 1018-BH58.

48. As of the date of this Complaint, no proposed rule has been published in the Federal Register for the designation of critical habitat for these three species.

### **Texas Hornshell Critical Habitat Rulemaking**

49. FWS first added rulemaking to propose critical habitat designation for the Texas hornshell to the DOI’s Unified Agenda in spring 2018, identified as RIN 1018-BD55. The Texas hornshell was listed as endangered under the ESA on February 9, 2018. 83 Fed. Reg. 5720.

50. RIN 1018-BD55 continued to appear on the DOI’s Unified Agenda in a “Proposed Rule Stage” in fall 2018, spring 2019, fall 2019, spring 2020, fall 2020, and spring 2021.

51. A proposed rule designating critical habitat for the Texas hornshell was published on June 10, 2021. 86 Fed. Reg. 30888.

52. RIN 1018-BD55 then appeared on the DOI's Unified Agenda in a "Final Rule Stage" in fall 2021, spring 2022, fall 2022, spring 2023, fall 2023, and most recently, spring 2024.

53. OIRA opened regulatory review under EO 12866 for RIN 1018-BD55 on May 17, 2024.

54. Described in more detail *infra*, the Center submitted a FOIA request to Defendants requesting information related to critical habitat designation for the Texas hornshell, under RIN 1018-BD55, on June 13, 2024.

55. As of the date of this Complaint, no final rule has been published in the Federal Register for the designation of critical habitat for the Texas hornshell.

#### **Rufa Red Knot Critical Habitat Rulemaking**

56. FWS first added rulemaking to propose critical habitat designation for the Rufa red knot to the DOI's Unified Agenda in spring 2021, identified as RIN 1018-BF87. The Rufa red knot was listed as a threatened species under the ESA on January 12, 2015.

57. FWS published a proposed rule designating critical habitat for the Rufa red knot on July 15, 2021. 86 Fed. Reg. 37410. This proposed rule stated that OIRA found it was not significant under EO 12866.

58. RIN 1018-BF87 underwent OIRA review from July 7, 2022, through March 16, 2023.

59. On April 13, 2023, FWS again published the proposed rule designating critical habitat for the Rufa red knot, with revisions and reopening of the comment period. 88 Fed. Reg. 22530. In this version, OIRA found the revised proposed rule was "significant" under EO 12866. 88 Fed. Reg. 22558.

60. Described in more detail *infra*, on June 13, 2024, the Center submitted a FOIA request to Defendants requesting information related to critical habitat designation for the Rufa red knot, under RIN 1018-BF87.

61. As of the date of this Complaint, no final rule has been published in the Federal Register for the designation of critical habitat for the Rufa red knot.

#### **Rice's Whale Critical Habitat Rulemaking**

62. NMFS and NOAA first added rulemaking to propose critical habitat designation for the Rice's whale to the DOC's Unified Agenda in fall 2022, identified as RIN 0648-BL86. The Rice's whale was listed as endangered under the ESA in 2015.

63. RIN 0648-BL86 remained on the DOC's Unified Agenda in spring 2023, fall 2023, and spring 2024.

64. NMFS and NOAA published a proposed rule designating critical habitat for the Rice's whale on July 24, 2023. 88 Fed. Reg. 47453. NMFS and NOAA stated OIRA found the proposed rule to be "significant" under EO 12866.

65. Described in more detail *infra*, on June 17, 2024, the Center submitted a FOIA request to Defendants requesting information related to critical habitat designation for the Rice's whale under RIN 0648-BL86.

66. As of the date of this Complaint, no final rule has been published in the Federal Register for the designation of critical habitat for the Rice's whale.

#### **Florida Bonneted Bat Critical Habitat Rulemaking**

67. FWS first added rulemaking to propose critical habitat designation for the Florida bonneted bat to the DOI's Unified Agenda in spring 2019, identified as RIN 1018-BE10. The

Florida bonneted bat was listed as endangered under the ESA October 2, 2013. 78 Fed. Reg. 61003.

68. FWS published a proposed rule designating critical habitat for the Florida bonneted bat on June 10, 2020. 85 Fed. Reg. 35510.

69. FWS published a revised proposed rule designating critical habitat for the Florida bonneted bat on November 22, 2022. 87 Fed. Reg. 71466.

70. Described in more detail *infra*, on October 11, 2023, the Center submitted a FOIA request to Defendants requesting information related to critical habitat designation for the Florida bonneted bat under RIN 1018-BE10.

71. FWS finally published the final rule designating critical habitat for the Florida bonneted bat on March 4, 2024. 89 Fed. Reg. 16624.

72. Defendants only returned documents responsive to the Center's FOIA request after the publication of the final rule.

### **STATUTORY FRAMEWORK**

73. FOIA imposes strict and rigorous deadlines on federal agencies. The Act requires a federal agency that receives a FOIA request to determine whether the requested records are exempt from disclosure under 5 U.S.C. § 552(b) and to communicate that determination to the requester within 20 business days. 5 U.S.C. § 552(a)(6)(A)(i). If the agency makes any adverse determination regarding a request, the agency must also communicate to the requester that it has a right to appeal that determination. 5 U.S.C. § 552(a)(6)(A)(i). If the agency determines the records are not exempt from public disclosure, the agency is required to make the requested records "promptly available" to the requester. 5 U.S.C. §§ 552(a)(3)(A), (a)(6)(C)(i).

74. FOIA also mandates that a federal agency that has received a request for records must inform the requester of “the date on which the agency originally received the request[,]” and “an estimated date on which the agency will complete action on the request.” 5 U.S.C. § 552(a)(7)(B).

75. FOIA provides only limited circumstances under which a federal agency may take longer than 20 business days to make a determination. First, the agency may toll the 20 business-day deadline for up to ten additional business days while the agency is waiting for the information that it has reasonably requested from the requester. 5 U.S.C. § 552(a)(6)(A)(ii)(I). Second, the agency may also toll the 20 business-day deadline for up to ten additional business days if it needs to clarify with the requester any issues regarding fee assessment. 5 U.S.C. § 552(a)(6)(A)(ii)(II). Additionally, if the agency faces “unusual circumstances,” the agency may extend the 20 business-day deadline if the agency sets “forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i). No extension will exceed ten business days unless the agency provides written notice to the requester explaining the “unusual circumstances” requiring an extension, establishes the date on which the agency expects to make the determination, and gives the requester “an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” 5 U.S.C. § 552(a)(6)(B)(ii). Under FOIA, “unusual circumstances” are defined as “the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request[,]” or “the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request,” or “the need for consultations ... with another agency

having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.” 5 U.S.C. § 552(a)(6)(B)(iii).

76. Unless an agency subject to FOIA properly establishes a different timeline for disclosing responsive records, according to the above provisions, FOIA’s mandate to make public records “promptly available” to a requester requires federal agencies to provide responsive records to a requester within or shortly after the 20-day deadline set forth in 5 U.S.C. § 552(a)(6)(A)(i).

77. A U.S. district court has jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

### **STATEMENT OF FACTS**

#### **October 3, 2023 FOIA Request Regarding the Miami Cave Crayfish**

78. On October 3, 2023, the Center sent a FOIA request to Defendants via email addressed to MBX.OMB.FOIA@OMB.eop.gov, requesting the records mentioning and/or discussing the proposed critical habitat designations for the Miami cave crayfish (*Procambarus milleri*) from January 1, 2023, to the date Defendants conduct the search. The Center stated that it was willing to receive documents on a rolling basis.

79. The Center’s FOIA request prioritized, without limiting to, the following:

1. The August 29, 2023 notification that OIRA determined that the Miami cave crayfish proposed critical habitat rule is significant under Executive Order 12866;
2. The records of communications within OIRA determining the Miami cave crayfish proposed critical habitat is significant under Executive Order 12866; and

3. Interagency communications generated in connection to the review of the proposed critical habitat rule for the Miami cave crayfish and determination that the proposed critical habitat rule is significant under Executive Order 12866.

80. On October 5, 2023, Defendants sent an email confirming the request was received on October 3, 2023, and assigned FOIA number 2024-005. No timeline or estimated date for completion of the records search or OMB determination was provided. Defendants' email also did not include any information indicating a delay should be anticipated, or the existence of a FOIA backlog.

81. The FOIA-mandated 20 business-day deadline for responding to this request was October 31, 2023. Defendants never requested and the Center never agreed to any extensions of time for Defendants to respond to the request.

82. On April 25, 2024, the Center sent Defendants an email requesting an update on the status of the request. The Center had received no communication or information from Defendants regarding this request since their confirmation email on October 5, 2023.

83. Defendants responded via email on April 26, 2024, stating that the request was currently being processed and their best estimate for completion was June 2024. Defendants also stated they were experiencing a significant backlog of FOIA requests.

84. On June 4, 2024, the Center sent an email to Defendants requesting an update on the status of the request, as Defendants had estimated a June completion.

85. Defendants responded on June 4, 2024, stating that they were currently processing responsive records and estimated completion within 30 to 45 days.

86. On July 16, 2024, the Center sent an email to Defendants referencing their 30 to 45-day estimate on completion and asking when a response could be expected.



87. Defendants responded on July 16, 2024, stating that they were in the final phase of processing the request, and that they anticipated completion by the end of that month—July 2024.

88. On August 9, 2024, Defendants provided the Center with an update, stating again that the request was in the final stage of review and that they anticipated completion by the end of that month: August 2024.

89. Having heard nothing further, the Center sent an email to Defendants on September 23, 2024, asking for an update on the status of the request, and referencing the previously provided estimated completion date of end of August.

90. Defendants responded on September 25, 2024, stating once again that the request was in the final stage of review. This time, Defendants did not provide an estimated completion date, but stated they were dealing with an influx of new FOIA requests. Defendants did not explain how or why newly received FOIA requests would impact a request that was nearly a year old and had been “in the final stage” for over two months.

91. On October 28, 2024, the Center sent another email requesting an update on the status of the request.

92. Defendants responded on October 29, 2024, by simply stating that they were continuing to process the request and intended to respond soon, noting their significant backlog. There was no acknowledgement of the request’s stage or estimated completion date.

93. As of the date of this Complaint, Defendants have not provided any further communication or information, or produced any documents in response to the October 3, 2023 request numbered 2024-005.

**April 5, 2024 FOIA Request Regarding the North Atlantic Right Whale Vessel Strike Reduction Rule**

94. On April 5, 2024, the Center sent a FOIA request to Defendants via email addressed to MBX.OMB.FOIA@OMB.eop.gov, requesting from Defendants, from March 1, 2024, to the date Defendants conduct this search, the records that comprise the decision file for the “Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule” (RIN 064-BI88) (“Vessel Speed Rule”). The Center stated that it was willing to receive documents on a rolling basis.

95. On April 7, 2024, Defendants sent an email confirming the request was received on April 5, 2024, and assigned FOIA number 2024-426. No timeline or estimated date for completion of the records search or determination was provided. Defendants’ email also did not include any information indicating a FOIA backlog.

96. The FOIA-mandated 20 business-day deadline for responding to the request was May 3, 2024. Defendants never requested and the Center never agreed to any extensions of time for Defendants to respond to the request.

97. On May 7, 2024, the Center sent a letter titled, “Notice of Deadline Violation and Request for Estimated Date of Completion for the U.S. Office of Management and Budget FOIA Request 2024-426 (Vessel Speed Rule)” via email to Defendants at OMBFOIA@omb.eop.gov. In this letter, the Center informed Defendants of its statutory violation and required resolution. The Center also informed Defendants that litigation to compel production of the records would be pursued if Defendants did not produce the requested records within 30 days. The Center requested information on the order in which Defendants processes FOIA requests and if on a first-in/first-out basis, where in the queue this request was placed.

98. Defendants responded to the Center via email on May 10, 2024, acknowledging receipt of the Center's May 7, 2024 letter. Defendants stated that a search had been initiated, and once the search was complete, they would then be in a better position to provide an estimated completion date for the request. However, Defendants stated it was experiencing a significant FOIA backlog and its best estimate was three to five months to complete the request. Defendants provided no information on the order in which FOIA requests are processed or where in the queue this request was placed.

99. As of the date of this Complaint, Defendants have not provided any further communication or information, or produced any documents in response to the request submitted on April 5, 2024 and numbered 2024-426.

**June 13, 2024 FOIA Request Regarding the TN Clubshell, TN Pigtoe, and Cumberland Moccasinshell**

100. On June 13, 2024, the Center sent a FOIA request to Defendants via email addressed to MBX.OMB.FOIA@OMB.eop.gov, requesting documents mentioning, discussing, referencing, or otherwise generated in connection to FWS's determination for the critical habitat for the Tennessee clubshell, Tennessee pigtoe, and Cumberland moccasinshell (RIN 1018-BH58), from the date that FWS submitted the relevant rulemaking in question as part of any unified agenda submission to OIRA. The Center stated that it was willing to receive documents on a rolling basis.

101. On June 14, 2024, OMB sent an email confirming the request was received on June 13, 2024, and assigned FOIA number 2024-678. No timeline or estimated date for completion of the records search or determination was provided. Defendants' email also did not include any information indicating a FOIA backlog.

102. The FOIA-mandated 20 business-day deadline for responding to the request was July 12, 2024. Defendants never requested and the Center never agreed to any extensions of time for Defendants to respond to the request.

103. On July 16, 2024, the Center sent an email to Defendants requesting an update on the status of the request.

104. Defendants responded to the Center's request for update on July 16, 2024, stating that a search for potentially responsive documents had been initiated. Defendants stated that they were experiencing a significant backlog, but provided no timeline or estimated date of completion for the search or determination for release of responsive documents.

105. On September 23, 2024, the Center sent an email to Defendants requesting an update on the status of the request.

106. Defendants responded on September 24, 2024, stating that a search for potentially responsive records was still ongoing. Defendants again stated they were experiencing a significant backlog, and again provided no timeline or estimated date of completion.

107. Having heard nothing since, on November 4, 2024, the Center sent another email to Defendants asking for an update on the status of the request.

108. As of the date of this Complaint, Defendants have not provided any further communication or information, or produced any documents in response to the request submitted on June 13, 2024 and numbered 2024-678.

#### **June 13, 2024 FOIA Request Regarding the Texas Hornshell**

109. On June 13, 2024, the Center sent a FOIA request to Defendants via email addressed to MBX.OMB.FOIA@OMB.eop.gov, requesting records mentioning, discussing, referencing, or otherwise generated in connection to the FWS's determination for the critical habitat for the

Texas hornshell (RIN 1018-BD55), from the date that FWS submitted the relevant rulemaking in question as part of any unified agenda submission to OIRA. The Center stated that it was willing to receive documents on a rolling basis.

110. On June 14, 2024, Defendants sent an email confirming the request was received on June 13, 2024, and assigned FOIA number 2024-677. No timeline or estimated date for completion of the records search or determination was provided. Defendants' email also did not include any information indicating a FOIA backlog.

111. The FOIA-mandated 20 business-day deadline for responding to the request was July 12, 2024. Defendants never requested and the Center never agreed to any extensions of time for Defendants to respond to the request.

112. On September 3, 2024, the Center sent an email to Defendants requesting an update on the status of this FOIA request.

113. Defendants responded on September 4, 2024, stating that a search for potentially responsive records had been initiated and was ongoing. Defendants noted that were experiencing a significant backlog, but did not provide any timeline or estimated date for completion of the request.

114. Having heard nothing for two months, the Center sent an email on November 4, 2024, requesting an update on the status of this request.

115. As of the date of this Complaint, Defendants have not provided any further communication or information, or produced any documents in response the request submitted June 13, 2024, and numbered 2024-677.

**June 13, 2024 FOIA Request Regarding Rufa Red Knot Critical Habitat**

116. On June 13, 2024, the Center sent a FOIA request to Defendants via email addressed to MBX.OMB.FOIA@OMB.eop.gov, requesting records mentioning, discussing, referencing, or otherwise generated in connection to the FWS's determination for the critical habitat for the Rufa red knot (*Calidris canutus rufa*) (RIN 1018-BF87), from the date that FWS submitted the relevant rulemaking in question as part of any unified agenda submission to OIRA. The Center stated that it was willing to receive documents on a rolling basis.

117. On June 14, 2024, Defendants sent an email confirming the request was received on June 13, 2024, and assigned FOIA number 2024-676. No timeline or estimated date for completion of the records search or determination was provided. Defendants' email also did not include any information indicating a FOIA backlog.

118. The FOIA-mandated 20 business-day deadline for responding to the request was July 12, 2024. Defendants never requested and the Center never agreed to any extensions of time for Defendants to respond to the request.

119. On July 16, 2024, the Center sent an email to Defendants requesting an update on the status of the request. No reply from Defendants was received, and the Center sent another email requesting the same on July 24, 2024.

120. Defendants responded to the Center's requests for update on July 29, 2024, stating that a search for potentially responsive documents had been initiated. Defendants stated that they were experiencing a significant backlog, but provided no timeline or estimated date of completion for the search or determination for release of responsive documents. Defendants did indicate they were processing requests in the order in which they were received.

121. On September 23, 2024, the Center sent an email to Defendants asking for an update on the status of the request.

122. Defendants replied on September 24, 2024, stating that the status was that they were awaiting search results. Defendants also stated they were dealing with an influx of new FOIA requests and therefore asked for patience. Defendants did not explain how or why newly received FOIA requests would have an impact on existing requests since their prior status update stated that requests were being processed in the order in which they were received.

123. Defendants' September 24, 2024 email also did not include any timeline or estimated date for the request to be completed.

124. As of the date of this Complaint, Defendants have not provided any further communication or information, or produced any documents in response to the June 13, 2024 FOIA request, numbered 2024-676.

#### **June 17, 2024 FOIA Request Regarding Rice's Whale Critical Habitat**

125. On June 17, 2024, the Center sent a FOIA request to Defendants via email addressed to MBX.OMB.FOIA@OMB.eop.gov, requesting the records mentioning, discussing, referencing, or otherwise generated in connection to NMFS's determination for the critical habitat for the Rice's whale (*Balaenoptera ricei*) (RIN 0648-BL86), from the date that NMFS submitted the relevant rulemaking in question as part of any unified agenda submission to OIRA. The Center stated that it was willing to receive documents on a rolling basis.

126. On June 18, 2024, Defendants sent an email confirming the request was received on June 17, 2024 and assigned FOIA number 2024-735. No timeline or estimated date for completion of the records search or Defendants' determination was provided. Defendants' email also did not include any information indicating a FOIA backlog.

127. The FOIA-mandated 20 business-day deadline for responding to the request was July 17, 2024. Defendants never requested and the Center never agreed to any extensions of time for Defendants to respond to the request.

128. On September 3, 2024, the Center sent an email to Defendants requesting an update on the status of this FOIA request.

129. Defendants responded on September 4, 2024, stating that the status was that a search had been initiated. Defendants stated that once the search was completed, next steps would be a manual review, and noted they were experiencing a significant backlog of FOIA requests. No timeline or estimated date of completion was provided.

130. On October 4, 2024, the Center sent Defendants an email requesting an update on the status of the request.

131. As of the date of this Complaint, Defendants have not provided any further communication or information, or produced any documents in response to the June 17, 2024 FOIA request, numbered 2024-735.

#### **October 11, 2023 FOIA Request Regarding the Florida Bonneted Bat**

132. On October 11, 2023, the Center sent a FOIA request to Defendants via email addressed to MBX.OMB.FOIA@OMB.eop.gov, requesting the records mentioning the final critical habitat designations for the Florida bonneted bat from November 15, 2022, through the date OIRA conducted the search.

133. The Center's FOIA request prioritized, without limiting to, the following:

1. The records that document a notification that OIRA determined that the final Florida bonneted bat critical habitat rule is "significant" under Executive Order 12866;



2. The interagency communications generated in connection to the review of the final critical habitat rule for the Florida bonneted bat and determination that the final critical habitat rule is significant under Executive Order 12866; and
3. The records of communications within OIRA that document the review of a final critical habitat rule for the Florida bonneted bat.

134. In an email sent by Defendants to the Center on October 12, 2023, OIRA acknowledged it had received the request on October 11, 2023, and assigned it FOIA number 2024-026.

135. The FOIA-mandated 20 business-day deadline for responding to the request was November 8, 2023. Defendants never requested and the Center never agreed to any extensions of time for Defendants to respond to the request.

136. After not receiving any records or further communication from Defendants, on December 8, 2023, the Center sent an email to Defendants, requesting a status update on the pending request.

137. Defendants did not respond to the Center's December 8, 2023 email, and on December 18, 2023, the Center sent another email requesting an update on the pending request.

138. Defendants responded via email on December 18, 2023, stating that a search had been initiated, Defendants' office was awaiting the results of that search, and that once the search was completed, the results would be placed in queue for processing. The email also stated Defendants had a significant backlog of FOIA matters. The email did not provide any estimated date for completion of the search, how long processing would take, or an estimated date for determination.

139. On January 18, 2024, the Center sent an email to Defendants requesting a status update on the pending requesting. Defendants responded on January 19, 2024, stating that the status "remain[ed] unchanged." Again, Defendants did not provide any estimated date for

completion of the search, how long processing would take, or an estimated date for Defendants' determination.

140. Having received no communication from Defendants, the Center sent another request for status update on February 26, 2024. Defendants replied on February 27, 2024, stating that the search for records had been completed and the search results had been assigned to a processor for manual review. Again, no estimated timeline for the completion of this review or a determination was provided. Defendants again noted a backlog of FOIA requests.

141. On March 28, 2024, the Center sent Defendants an email requesting an update on the status of the request, noting that nearly six months had elapsed since the October 11, 2024 request had first been received by Defendants.

142. Defendants responded to the Center's March 28, 2024 email on April 5, 2024, stating that the processor had completed their review of the records, and the current status was that the documents were undergoing internal and external consultation. No timeline or estimated date for completion of the referenced consultations or of an ultimate determination was provided.

143. Having received no further communication or information from Defendants, the Center sent another email requesting a status update on May 7, 2024. When no response was received, the Center sent another email requesting the same on May 22, 2024. With still no response received, the Center sent another email on May 30, 2024. At this point, the Center had received no communication from Defendants since their April 5, 2024 email.

144. Defendants responded to the Center's three May emails on May 31, 2024. In this email, Defendants stated that the external consultation had been completed, but that the records will still undergoing internal consultation. Again, no timeline or estimated date for completion of the consultation or of an ultimate determination was provided.

145. On June 21, 2024—over eight months after the Center sent their request on October 11, 2023—OMB’s FOIA Officer, Tim Nusraty, sent the agency’s determination letter. The letter indicated that Defendants had found four responsive documents, consisting of 14 pages in total. Of those four documents, only three were being released, in part, consisting of six pages in total. Defendants stated that the one document fully withheld was done so under Exemption 6, because it was a draft document. Defendants cited to Exemption 5 and Exemption 6 for the redactions on the three released documents, stating that even under a presumption of openness, Defendants determined that it was “reasonably foreseeable that the disclosure of the information would harm an interest protected by the applicable exemption.” The letter contained information about how to contact the Office of Government Information Services (“OGIS”) regarding FOIA mediation services, and the option to administratively appeal by writing to OMB within 90 days. The three released-but-redacted documents were attached with the letter.

146. On July 22, 2024, the Center sent a timely appeal of FOIA request 2024-026 via email to [OMBFOIA@omb.eop.gov](mailto:OMBFOIA@omb.eop.gov).

147. In its appeal, the Center appealed on multiple grounds, including: Defendants did not conduct an adequate search for responsive records; Defendants failed to prove that they may lawfully withhold responsive records under Exemption 5 because Defendants did not meet Exemption 5’s threshold requirement and failed to prove the records were both pre-decisional and deliberative; Defendants did not establish reasonably foreseeable harm to any interest under any FOIA exemption; and Defendants failed to show that they provided all reasonably segregable portions of reasonably withheld records.

148. On July 22, 2024, Defendants sent an email to the Center confirming receipt to the appeal, that it had been logged, and was being processed with an assigned OMB FOIA reference number of 2024-924.

149. The FOIA-mandated 20 business day statutory deadline for Defendants to make a determination on this appeal was August 19, 2024.

150. On September 23, 2024, the Center sent an email to Defendants asking for an update on status of their FOIA appeal.

151. Defendants replied on September 25, 2024, stating that their office was continuing to process the appeal. Defendants stated they were working through a backlog.

152. As of the date of this Complaint, the Center has received no further communication or information from Defendants regarding 2024-924, the appeal of 2024-026.

## **CAUSES OF ACTION**

### **CLAIM I VIOLATION OF THE FREEDOM OF INFORMATION ACT: DETERMINATION DEADLINE VIOLATIONS**

153. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

154. The Center has a statutory right to receive a determination on its seven currently pending FOIA requests and one pending appeal from Defendants in a manner that complies with FOIA, as well as to promptly receive the underlying records it seeks.

155. Defendants violated FOIA by failing to make a timely determination on the Center's seven currently pending FOIA requests and one pending appeal by the deadlines imposed by FOIA. 5 U.S.C. §§ 552(a)(6)(A)(i), 552(a)(6)(A)(ii).

156. Based on the nature of the Center’s organizational activities, it will undoubtedly continue to employ FOIA’s provisions in record requests to Defendants in the foreseeable future.

157. The Center’s organizational activities and interests will be adversely affected if Defendants continue to violate FOIA’s requirement to provide a lawful determination on the Center’s FOIA requests.

158. Unless enjoined and made subject to a declaration of the Center’s legal rights by this Court, Defendants will continue to violate the Center’s rights to receive public records under FOIA.

## **CLAIM II**

### **VIOLATION OF THE FREEDOM OF INFORMATION ACT: UNLAWFULLY WITHHOLDING RESPONSIVE RECORDS**

159. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

160. Defendants are unlawfully withholding public disclosure of records sought by the Center, records that are “agency records” within the meaning of FOIA, to which the Center is entitled, and for which no valid disclosure exemption applies. *See* 5 U.S.C. § 552(b)(1)–(9).

161. Defendants have not given the Center a determination on its seven currently pending FOIA requests that describe the scope of the records it intends to produce or withhold and the reasons for withholding any records or informed the Center that it may appeal any specific adverse determination within the relevant time periods in 5 U.S.C. § 552(a)(6)(A)(i) or 5 U.S.C. § 552(a)(6)(B). *See also* 5 U.S.C. § 552(a)(7).

162. Defendants violated the Center’s rights under FOIA by failing to comply with the Act’s decision deadlines and to make a determination on the Center’s currently pending FOIA

appeal and by thus constructively withholding information responsive to the Center's seven currently pending FOIA requests and one pending appeal.

163. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to Defendants in the foreseeable future.

164. The Center's organizational activities will be adversely affected if Defendants continue violating FOIA's disclosure provisions as it has in this case.

165. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, Defendants will continue violating the Center's rights to receive public records under FOIA.

### **CLAIM III**

#### **VIOLATION OF THE FREEDOM OF INFORMATION ACT: FAILURE TO PROVIDE AN ESTIMATED DATE BY WHICH THE AGENCY WILL COMPLETE ACTION ON THE FOIA REQUESTS AND APPEAL**

166. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

167. FOIA requires federal agencies to provide the requester with information about the status of the agency's response to an appeal, including an estimated date on which the agency will complete action on the request or appeal. 5 U.S.C. § 552(a)(7)(B)(ii).

168. The Center repeatedly and regularly has requested from Defendants status updates and estimated dates of completion, on the Center's seven currently pending requests and one pending appeal.

169. As of the date this action was filed, Defendants have failed to provide an estimated date on which action would be completed on the Center's seven currently pending FOIA requests and one appeal.

170. As of the date of this action was filed, Defendants have provided only vague timeframes for completion on two of the Center’s seven currently pending requests, the timeframes for both of which have since passed without completion of the requests.

171. Defendants have repeatedly violated and continue to violate FOIA by failing to provide the Center with estimated dates of completion for their pending requests and appeal.

#### **CLAIM IV**

##### **VIOLATION OF THE FREEDOM OF INFORMATION ACT: FAILURE TO ESTIMATE THE VOLUME OF REQUESTED DOCUMENTS THAT ARE EXEMPTED**

172. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

173. In response to a FOIA request, Defendants are required to make a determination within the 20-day statutory timeframe. One element of that determination is that the agency must “estimate the volume of any requested matter the provision of which is denied.” 5 U.S.C. § 552(a)(6)(F).

174. As of the date this action was filed, Defendants have failed to provide an estimate of the volume of any requested material that is responsive to the Center’s seven currently pending FOIA requests.

#### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiff requests this Court:

1. Adjudge and declare that Defendants have violated FOIA for the reasons set forth above;
2. Order Defendants to respond immediately to the Center’s FOIA requests and appeal as required by the FOIA;

3. Order Defendants to conduct a search that is reasonably calculated to locate all records responsive to each of the Center's FOIA requests, and to provide the Center with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action;
4. Declare that Defendants' failure to undertake a search that is reasonably calculated to locate all records that are responsive to the Center's FOIA requests, as alleged above, is unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i);
5. Declare that Defendants' failure to provide the Center with reasonably segregable portions of records that may be lawfully subject to a FOIA exemption, as alleged above, is unlawful under FOIA, 5 U.S.C. § 552(a)(8);
6. Declare that Defendants' failure to timely make determinations on the Center's FOIA requests and appeal are unlawful under FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i) and (ii);
7. Award the Center its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or any other applicable law;
8. Expedite this action in every way pursuant to 28 U.S.C. § 1657(a); and
9. Grant such other and further relief as the Court may deem just and proper.

DATED: November 15, 2024

Respectfully submitted,

/s/ Kevin Cassidy

Kevin Cassidy

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