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Plaintiff's Attorneys

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

NATIONAL WILDLIFE FEDERATION,

Plaintiff,

vs.

**UNITED STATES DEPARTMENT OF
STATE,**

Defendant.

Case No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Freedom of Information Act
Administrative Procedure Act

Plaintiff, National Wildlife Federation (“NWF”), alleges as follows:

INTRODUCTION

1. This action is premised upon, and consequent to, violations of both the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et. seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et. seq.* It challenges the unlawful failure of the Defendant, the United States Department of State (“DOS”), to respond to Plaintiff’s FOIA request within the time and in the manner required by FOIA. Although the DOS has disclosed certain documents responsive to

Plaintiff's request, it has unnecessarily, unreasonably, and unlawfully failed to provide a final decision regarding additional records responsive to NWF's request.

2. On June 14, 2012, Plaintiff NWF submitted a Freedom of Information Act request to the DOS. The FOIA request sought information relating to the Department of State's role in granting, amending, or modifying Presidential Permits concerning the operation of the Portland-Montreal Pipe Line (PMPL), a crude oil pipeline that runs from Portland, Maine to Montreal, Quebec and transects Maine, New Hampshire, Vermont and Quebec, and engaging in related correspondence with the Portland Pipe Line Corporation ("PPLC") or its parent company the Montreal Pipe Line Limited.

3. The DOS violated the FOIA's provisions in processing NWF's information request. First, the Agency has failed to release information that does not properly fall within the ambit of any of FOIA's disclosure exemptions. Second, DOS failed to issue a final determination on NWF's administrative request within the time allowed by the Act. Third, DOS has repeatedly failed to inform NWF of the date its information request was received as required by FOIA.

4. Defendant is unlawfully withholding public disclosure of information sought by Plaintiff, information to which it is entitled and for which no valid disclosure exemption applies. Defendant violated the statutory mandates and deadlines imposed by FOIA through its failure to provide a final determination resolving Plaintiff's FOIA request within the time and manner required by law. Accordingly, Plaintiff seeks declaratory relief establishing that Defendant has violated the FOIA and APA. Plaintiff also seeks injunctive relief directing Defendant to promptly provide Plaintiff with the requested material.

JURISDICTION, VENUE AND BASIS FOR RELIEF

5. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28

U.S.C. § 1331 because this action arises under the FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

6. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district because the FOIA request was made on behalf of Plaintiff's Northeast Regional Center office in Montpelier, Vermont. Additionally, NWF has members and staff that work or reside within this judicial district. Assignment is proper in this district for the same reasons.

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

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

PARTIES

9. Plaintiff National Wildlife Federation was founded in 1936 has emerged as the nation's premier grassroots non-profit conservation advocacy and education organization. The group's mission is to inspire Americans to protect wildlife. It is headquartered in Reston, Virginia and has a Northeast Regional Center office in Montpelier, Vermont. Plaintiff has more than one million members and has affiliate organizations in 49 states and territories, including Vermont, New Hampshire and Maine. NWF has three strategic drivers: confronting global warming, protecting and restoring wildlife and its habitat, and connecting people with nature. It is unique among conservation groups for its ability to combine strong science, federal and state policy development, education, litigation and grassroots organizing. NWF has strongly advocated against certain fossil fuel infrastructure projects, including tar sands pipeline projects, due to concerns such as carbon emissions and spill risks to wildlife. The records sought in this action are requested in support of these efforts.

10. Defendant United States Department of State, is an agency of the executive branch of the United States government, it is in possession and control of the records sought by Plaintiff, and

as such, it is subject to the FOIA pursuant to 5 U.S.C. § 552(f).

STATEMENT OF OPERATIVE FACTS

11. As noted above, on June 14, 2012, NWF submitted by certified mail, a FOIA request to the DOS. The FOIA request sought generally information relating to the Department of State's role in granting, amending, or modifying Presidential Permits concerning the PMPL and engaging in related correspondence with the Portland Pipe Line Corporation or its parent company the Montreal Pipe Line Limited.

12. The DOS acknowledged receipt of the FOIA request by a form letter dated September 26, 2012. The letter assigned Case Control Number F-2012-30162 and further informed NWF that “[u]nusual circumstances (including the number and location of Department components involved in responding to your request, the volume of requested records, etc.) *may* arise that would require additional time to process your request.” (emphasis added). Notably, the letter did not *actually assert* that “unusual circumstances” existed in this matter, it simply noted in passing the possibility that they might at some future date. Additionally, the letter did not provide the date that DOS received the request or an estimated decision date.

13. The FOIA requires an agency to issue a final determination resolving a FOIA request within twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(i).

14. Defendant failed to respond to the information request within 20 business days from receipt of NWF's June 14, 2012 FOIA request as required by 5 U.S.C. § 552(a)(6)(A)(i). Indeed, DOS' September 26, 2012 form letter acknowledging receipt of the request was itself months beyond the FOIA's final decision deadline.

15. Consequently, after DOS did not contact Plaintiff for almost a year, on August 5, 2013, NWF sent the DOS, via email, a letter entitled “Notice of deadline violation and request for esti-

mated decision date for National Wildlife Federation FOIA request F-2012-30162/Offer to Assist.” That letter informed DOS it was in violation of FOIA’s decision deadline, but that “[r]egardless, I am notifying you that my clients are not at this time exercising their legal option under the FOIA to file suit to compel compliance with the FOIA’s time limits. 5 U.S.C. § 552(a)-(6)(C). However, be informed that time is of the essence in this matter and our patience is not without limits.” That letter further requested that DOS “immediately inform us of the date you received this request. We further ask that you provide an estimated date by which we can expect completion of the Agency’s unlawfully delayed response to our FOIA request.”

16. By email dated August 6, 2013, DOS responded to Plaintiff’s letter by informing them that the estimated completion date was “November, 2013.” It did not indicate the date that it receive Plaintiff’s FOIA request.

17. In response to DOS’ email, on August 6, 2013, counsel for Plaintiff called DOS and spoke with staff regarding the status of the FOIA request and requested a “rolling release” of responsive information by which DOS would disclose information as it became available.

18. On August 7, 2013, Plaintiff’s counsel followed up the phone conversation of the previous day with an email describing that conversation and asking, “when we might expect access to the first release of information responsive to this request.”

19. On August 14, 2013, DOS responded to Plaintiff’s counsel by email stating, in its entirety, “Mr. Bahr - The Department records show that you were informed of the November 2013 estimated completion date for the subject case. I have forwarded your request for interim release of relevant documents to the Branch Chief of the assigned Compliance and Research Branch. Regards.”

20. By email dated September 20, 2013, Plaintiff’s counsel inquired of DOS as follows: “Over a month ago I contacted your office regarding establishing a rolling release of documents

you have already collected responsive to the above noted FOIA request. . . . Since that time we have heard nothing from you. Please advise us of your progress in completing your response to this request, when we can expect first receipt of the requested information, and if you are still on track to complete this process by November.”

21. By email dated September 26, 2013, DOS responded to Plaintiff with a generic message indicating that NWF’s request “has been assigned to an analyst, and a request for any relevant records related to your request has been directed to the appropriate office/bureau within the Department. The search and review time of requests vary. Each case is different and the processing time depends on the complexity of information requested, the location of the information, and the time it takes to review the records.”

22. By email dated November 4, 2013, Plaintiff’s counsel contacted DOS as follows:

I am, again, inquiring regarding our desire for a rolling release of information responsive to the above noted FOIA request. Your prior messages . . . have ignored my request that you establish a rolling release of responsive documents already collected rather than await the conclusion of your review process. Regarding the latter, please confirm that we should expect the completion of State's disclosure this month as you previously estimated.

As I have already noted, time is of the essence in this matter and we will not continue to forego litigation if the agency continues to delay its response to a request that is already 15 months overdue. I thank you in advance to a prompt reply to this inquiry.

23. Not having received any response to its email of November 4, 2013, NWF again contacted DOS by email on November 15, 2013:

I have not received any response from your office since I sent my most recent inquiry almost two weeks ago on 11/4/13. . . . I again ask that you provide a response to our request for the release of information responsive to the above noted FOIA request that you have already collected.

Further, I ask for an estimated completion date as required by FOIA. 5 USC § 552(a)(7). Your office has previously estimated sometime this month. Are we still on track? Can you offer a specific date?

24. DOS responded to Plaintiff's email on November 15, 2013 as follows:

It is standard operating procedures for the Department of State to work on rolling releases of documents. I have contacted the Case Analyst and requested an estimated completion date for your case. The Analyst will contact the bureaus doing the searches and the individuals reviewing the material. This will take some time because each case is different. The search and review time varies. The time depends on the complexity of information requested and the time it takes to review the material.

25. Immediately upon receipt of DOS' email, on November 15, 2013, counsel for NWF responded:

Thank you for your reply. However, I am sorry to see that aside from informing me that the rolling release process is "standard operating procedures for the Department of State," you have provided me with no new information regarding our information request. I remind you that when I first inquired as to the status of this FOIA request (filed 6/14/12), you sent me an email on 8/6/13 stating that its ECD was "November, 2013." It is now November, 2013. Further, when I called your office later that same day, I was told that some of the materials responsive to this request had already been identified and collected. I therefore requested that you "advise [me] when we might expect access to the first release of information responsive to this request." *See* email to you dated 8/7/13.

Therefore, I am compelled to ask you why it is that if "[i]t is standard operating procedures for the Department of State to work on rolling releases of documents," and you have identified and collected materials responsive to this request as early as last August, you have not released these documents to us by now, over three months later?

I fully understand that FOIA offices are woefully understaffed and that the governmental shutdown in October was not conducive to working through your backlog. However, please understand that this request is grossly overdue and that we need the requested information for a time-sensitive application. Our patience is therefore nearing a breaking point. We are willing to work with you to promptly resolve this matter at the administrative level. However, if State will not cooperate with our reasonable requests for the timely release of documents you've already obtained and provide us with a current ECD, we will have little option but to seek judicial intervention.

26. Because DOS did not respond to NWF's November 15, 2013 email, on November 19, 2013, Plaintiff's counsel sent Defendant another email requesting, "that you respond to the message I sent you five days ago regarding the above noted FOIA request that was on filed 6/14/12."

- 27.** On November 20, 2013, DOS informed NWF by email that five days earlier, it had authorized release of eleven documents responsive to Plaintiff's FOIA request.
- 28.** On November 20, 2013, NWF responded to DOS by stating: "Thank you for this update. I'll look for the documents in the mail. Can you provide me with an estimated completion date for the rest of this process?"
- 29.** By email dated November 25, 2013, DOS responded to NWF's counsel: "I have contacted the Case Analyst and requested a new estimated completion date for your case. The Analyst will contact the bureaus doing the searches and the individuals reviewing the material. This will take some time because each case is different. The search and review time varies. The time depends on the complexity of information requested and the time it takes to review the material."
- 30.** After not hearing anything further from DOS, on January 6, 2014, NWF was again required to inquire of Defendant: "It has been over a month since you indicated that we would be provided with a new estimated completion date for this process. I remind you that when I first inquired as to the status of this FOIA request (filed 6/14/12), you sent me an email on 8/6/13 stating that its ECD [estimated completion date] was 'November, 2013.' Well, November, 2013 is now history and yet we still await. Please provide us with a projected date by which this process will conclude."
- 31.** The next day, January 7, 2014, DOS responded to NWF as follows: "I have contacted the Case Analyst again and requested a new estimated completion date for your case. The Analyst will contact the bureaus doing the searches and the individuals reviewing the material. This will take some time because each case is different. The search and review time varies. The time depends on the complexity of information requested and the time it takes to review the material." The Court will note that this generic response is identical to that which DOS provided NWF on November 15 and 25, 2013.

32. Confronted by DOS' continuing violation of FOIA's decision deadline, on February 11, 2014, Plaintiff's counsel sent Defendant an email stating "It has been over a month since you last informed me that you would provide a new estimated completion date for this request, yet you have not provided a final estimated completion date. This request was filed on June 14, 2012. Time is of the essence regarding this information and we require that you promptly resolve this long overdue matter."

33. Almost a month later, DOS responded to NWF's counsel with an email dated March 5, 2014, stating only that "Your request for a status update has been forwarded to the assigned Compliance and Research Branch for action."

34. Finally, on March 7, 2014, NWF sent DOS an email stating in material part as follows:

Thank you for your email dated 3/5/14 responding to my email dated 2/11/14. Unfortunately, your message provided us with no useful information; it simply perpetuated the pattern of delay and avoidance that has characterized State's conduct in this matter. In my email to your office dated 11/20/13, I stated . . . please understand that this request is grossly overdue and that we need the requested information for a time-sensitive application. *Our patience is therefore nearing a breaking point.* We are willing to work with you to promptly resolve this matter at the administrative level. However, if State will not cooperate with our reasonable requests for the timely release of documents you've already obtained and provide us with a current ECD, we will have little option but to seek judicial intervention. . . This email is to inform you that our patience has now run out. Accordingly, we require that your office immediately contact me to provide me with the estimated completion date of this almost two year old information request as mandated by FOIA. We further require that the ECD be for a date in the near future. I would appreciate the courtesy of a telephone call rather than another uninformative email so that I may speak to a person knowledgeable about this request regarding the nature and scope of the documents yet to be produced and the nature of the Agency's search for same.

Please understand that if we are not apprised by Friday, March 14, 2014 of substantial progress towards the resolution of this FOIA request, we will consider all available options up to and including litigation.

35. By email dated April 17, 2014, DOS provided NWF with a revised estimated completion date of "March 2015."

36. As alleged above, the FOIA requires an agency to issue a final determination resolving a FOIA request within twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)-(A)(i).

37. The FOIA also requires that “Each agency shall . . . establish a phone line or Internet service that provides information about the status of a request to the person making the request . . . including . . . the date on which the agency originally received the request.” 5 U.S.C. § 552(a)(7)(B)(i) (emphasis added).

38. Defendant did not provide NWF with the date it received Plaintiff’s FOIA request, but at the very latest, based on the June 14, 2012 date of NWF’s FOIA request, the deadline for issuing a final determination of NWF’s FOIA request elapsed sometime in mid-July 2012.

39. None of FOIA’s nine exemptions to mandatory disclosure apply to the information currently being withheld by the DOS that is responsive to Plaintiff’s FOIA request.

40. As of the date this action was filed, the deadline for the DOS to issue a final determination on Plaintiff’s pending FOIA request has passed.

41. As of the date this action was filed, the DOS has not provided a final determination on Plaintiff’s FOIA request pending with the Agency.

42. As of the date this action was filed, the DOS has not informed Plaintiff of the date it received its FOIA request currently pending with the Agency.

43. Plaintiff has fully exhausted all administrative remedies required by FOIA. 5 U.S.C. §§ 552(a)(6)(A), (a)(6)(C).

44. Plaintiff has been required to expend costs and to obtain the services of a law firm to prosecute this action.

CAUSES OF ACTION

COUNT I VIOLATION OF THE FREEDOM OF INFORMATION ACT: CONSTRUCTIVE DENIAL/UNLAWFUL WITHHOLDING

45. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.
46. Plaintiff has a statutory right to the records it seeks, and there is no legal basis for defendant DOS to assert that any of FOIA's nine disclosure exemptions apply. *See* 5 U.S.C. § 552(b)(1)-(9).
47. Defendant DOS violated Plaintiff's rights in this regard by unlawfully withholding information responsive to Plaintiff's FOIA request.
48. Based on the nature of Plaintiff's organizational activities, it will undoubtedly continue to employ FOIA's provisions in information requests to Defendant DOS in the foreseeable future.
49. Plaintiff's organizational activities will be adversely affected if Defendant DOS is allowed to continue violating FOIA's disclosure provisions as it has in this case.
50. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, Defendant DOS will continue to violate the rights of Plaintiff to receive public records under the FOIA.
51. Plaintiff is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT II VIOLATION OF THE FREEDOM OF INFORMATION ACT: DECISION DEADLINE VIOLATION

52. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

53. Plaintiff has a statutory right to have Defendant DOS process its FOIA request in a manner which complies with FOIA. Plaintiff's rights in this regard were violated when the Defendant DOS unlawfully delayed its response to its information request beyond the determination deadline imposed by the FOIA. 5 U.S.C. § 552(a)(6)(A)(i).

54. Defendant DOS is unlawfully withholding public disclosure of information sought by Plaintiff, information to which it is entitled and for which no valid disclosure exemption applies.

55. Based on the nature of Plaintiff's organizational activities, it will undoubtedly continue to employ FOIA's provisions in information requests to Defendant DOS in the foreseeable future.

56. Plaintiff's organizational activities will be adversely affected if Defendant DOS is allowed to continue violating FOIA's response deadlines as it has in this case.

57. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, Defendant DOS will continue to violate the rights of Plaintiff to receive public records under the FOIA.

58. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT III
VIOLATION OF THE FREEDOM OF INFORMATION ACT:
FAILURE TO INFORM NWF OF THE DATE ITS REQUEST WAS RECEIVED

59. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

60. Pursuant to 5 U.S.C. § 552(a)(7)(B)(i), "Each agency shall . . . establish a phone line or Internet service that provides information about the status of a request to the person making the request . . . including . . . the date on which the agency originally received the request."

61. Plaintiff asked DOS numerous times in 2012-2014 for the date the Agency received its pending FOIA request. In so doing, Plaintiff specifically invoked 5 U.S.C. § 552(a)(7)(B).

62. Defendant has never informed NWF of the date its FOIA request was received by the Agency.
63. Upon information and belief, this refusal to do so represents an ongoing policy, practice, or standard operating procedure (“SOP”).
64. A policy, practice, or SOP of refusing to inform requesters of the dates their information requests are received is in violation of FOIA. Such a practice constitutes outrageous conduct for purposes of the broad equitable powers provided by FOIA to the Court. Such a policy is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.
65. Based on the nature of Plaintiff’s organizational activities, it will undoubtedly continue to employ FOIA’s provisions in information requests to Defendant DOS in the foreseeable future.
66. Plaintiff’s organizational activities will be adversely affected if Defendant DOS is allowed to continue violating FOIA’s requirement to provide dates of receipt as it has in this case.
67. Unless enjoined and made subject to a declaration of Plaintiff’s legal rights by this Court, Defendant DOS will continue to violate the rights of Plaintiff to receive public records in the manner mandated by the FOIA.
68. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT IV
VIOLATIONS OF THE ADMINISTRATIVE PROCEDURES ACT

69. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.
70. Defendant DOS has failed to act in an official capacity under color of legal authority by failing to comply with the mandates of FOIA consequent to its failure and refusal to issue a timely final determination on Plaintiff’s administrative request as well as to inform NWF the

date of receipt of that request.

71. Defendant DOS has unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to: (1) provide to NWF documents responsive to its information request that are not within the scope of any of FOIA's disclosure exemptions; (2) issue a timely final determination on NWF's administrative request, and; (3) provide NWF with the date its request was received.

72. Plaintiff has been adversely affected and aggrieved by the Defendant DOS' failure to comply with the mandates of FOIA. Defendant's failure and refusal to: (1) provide to NWF documents responsive to its information request that are not within the scope of any of FOIA's disclosure exemptions; (2) issue a timely final determination on NWF's administrative request, and; (3) provide NWF with the date its request was received, has injured Plaintiff's interests in public oversight of governmental operations and constitute a violation of Defendant DOS' statutory duties under the APA.

73. Plaintiff has suffered a legal wrong as a result of the Defendant DOS' failure to comply with the mandates of FOIA. Defendant DOS' failure and refusal to: (1) provide to NWF documents responsive to its information request that are not within the scope of any of FOIA's disclosure exemption; (2) issue a timely final determination on NWF's administrative request and; (3) provide NWF with the date its request was received, has injured Plaintiff's interests in public oversight of governmental operations and constitute a violation of Defendant DOS' statutory duties under the APA.

74. Defendant DOS' failure and refusal to: provide to NWF documents responsive to its information request that are not within the scope of any of FOIA's disclosure exemptions, and; (2) issue a timely final determination on NWF's administrative request, constitutes agency action unlawfully withheld and unreasonably delayed and is therefore actionable pursuant to the APA, 5

U.S.C. § 706(1).

75. Alternatively, Defendant DOS' failure and refusal to: (1) provide to NWF documents responsive to its information request that are not within the scope of any of FOIA's disclosure exemptions, and; (2) issue a timely final determination on NWF's administrative request, is in violation of FOIA's statutory mandates and is therefore arbitrary, capricious, or an abuse of discretion and not in accordance with law and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2).

76. Plaintiff is entitled to judicial review under the Administrative Procedure Act 5 U.S.C. §§ 702, 706.

77. Plaintiff is entitled to costs of disbursements and costs of litigation, including reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C.S. § 2412.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendant in the form of injunctive and mandamus relief to promptly provide Plaintiff all of the information sought in this action;
2. Declare Defendant's failure to disclose the information requested by Plaintiff to be unlawful under the FOIA, 5 U.S.C. § 552(a)(3), as well as agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(2);
3. Declare Defendant's failure to make a timely determination on Plaintiff's administrative request to be unlawful under the FOIA, 5 U.S.C. § 552(a)(6)(A)(i), as well as agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(2);

4. Declare Defendant's failure inform NWF of the date its request was received, to be unlawful under the FOIA, 5 U.S.C. § 552(a)(7)(B)(i), as well as agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(2);

5. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412, or any other applicable law;

6. Expedite this action in every way pursuant to 28 U.S.C. § 1657(a); and

7. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted for the Court's consideration, this 23rd day of April, 2014.

s/ James G. Murphy
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