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Formerly the Center for  
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FISER + FIKER

July 24, 2002

Paulette Robinson  
FOIA Clearance Officer  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910  
Fax: (301) 713-0956



Via facsimile and U.S. certified mail, return receipt requested

Re: Freedom of Information Act Request

Dear Ms. Robinson:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, on behalf of The Ocean Conservancy (TOC), I request copies of certain records<sup>1</sup> relating to the Atlantic Offshore Cetacean Take Reduction Team convened under the Marine Mammal Protection Act.

I. Documents Requested

This request is for the documents, or categories of documents, as described below:

- Records related to observer data on interactions between the Atlantic Ocean, Caribbean, and Gulf of Mexico large pelagic longline fishery and marine mammals, from November 25, 1996 to the present, including the observer data itself;
- Records related to observer data on interactions between Atlantic Ocean, Caribbean, and Gulf of Mexico squid, mackerel, and butterfish trawl

<sup>1</sup> For purposes of this request, the term "records" means any and all draft and final memoranda, incoming or outgoing correspondence, briefing papers, draft and final settlement agreements, studies, approvals, sign-offs, budget documents or spreadsheets, statements of proposed or final agency position, interagency communications, telephone logs, meeting notes or records, faxes or electronic communications such as e-mail transmissions. "Records" does not mean writings that are available via the Code of Federal Regulations or the Federal Register.

*The Ocean Conservancy strives to be the world's foremost advocate for the oceans. Through science-based advocacy, research, and public education, we inform, inspire and empower people to speak and act for the oceans.*

fishery and marine mammals, from November 25, 1997 to the present, including the observer data itself;

- Records related to NMFS' decision to disband the Atlantic Offshore Cetacean Take Reduction Team, including without limitation any records prepared regarding this decision under the Marine Mammal Protection Act and/or the National Environmental Policy Act;
- Records related to NMFS' consideration and implementation of (or failure to implement) the draft Atlantic Offshore Cetacean Take Reduction Plan, including both regulatory and non-regulatory measures;
- Records related to NMFS' decision not to implement or approve the draft Atlantic Offshore Cetacean Take Reduction Plan under the Marine Mammal Protection Act;
- Records related to any subsequent discussions of whether to reconvene the Atlantic Offshore Cetacean Take Reduction Team under the Marine Mammal Protection Act;
- Records related to NMFS' decision to implement regulatory measures to reduce take of Atlantic cetaceans through the mechanism of the Final Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, as well as any regulatory measures proposed or finalized through this mechanism;
- Records related to NMFS' consideration of the efficacy of regulatory measures to reduce take of Atlantic cetaceans through the mechanism of the Final Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks;
- Records related to NMFS' plans to implement observer programs in the Atlantic fisheries to produce marine mammal and sea turtle mortality estimates, as well as any observer data generated by such observer programs; and
- Records related to NMFS' definition of "serious injury" pursuant to the Marine Mammal Protection Act, in particular NMFS' definition of or criteria to determine "serious injury" in the context of Stock Assessment Reports and observer data.

## II. Waiver of Search and Duplication Fees

The Ocean Conservancy is a non-profit 501(c)(3) organization, dedicated to the conservation of the oceans and their living and non-living resources through advocacy and education. On behalf of TOC, I request that NOAA waive all search and duplication fees under the standards established by statute and regulation. The basis for this request is detailed below.

A. Statutory and Regulatory Framework

The Freedom of Information Act, 5 U.S.C. § 552, provides in relevant part:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii).

In enacting the original statute, "Congress intended that the public interest standard be liberally construed . . . and that fees not be used as an obstacle to disclosure of requested information." Eudey v. Central Intelligence Agency, 478 F. Supp. 1175, 1177 (D.D.C. 1979). In the Freedom of Information Reform Act of 1986, Congress reaffirmed its intent that the fee waiver provision "be liberally construed in favor of waivers for noncommercial requesters." 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy). The 1986 amendment's primary purpose was "to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA." 132 Cong. Rec. S16496 (Oct. 15, 1986) (Sen. Leahy).

With respect to public interest non-profit groups such as TOC, the legislative history of the FOIA fee waiver amendment demonstrates that the fee waiver requests of such groups should be granted if their document requests meet the statutory standard. "Although public interest groups do not fall within the most favorable fee category, all public interest groups--regardless of their status or identity or function--will be able to qualify for fee waivers and thereby obtain documents without charge if their requests meet the standard for waivers." 132 Cong. Rec. H9463 (Oct. 8, 1986) (Rep. English). Legislative history suggests that information has more of this potential to the degree that the information is new and supports public oversight of agency operations. 132 Cong. Rec. H9464 (Oct. 8, 1986) (statements by Reps. Kindness and English).

As the D.C. Circuit has articulated, agencies follow a two-pronged test under the FOIA as amended to determine whether a fee waiver should be granted: "One prong demands that the requester not have a commercial interest in the disclosure of the information sought. . . . The other prong of the test requires that the disclosure of the information be 'likely to contribute significantly to public understanding of the operations or activities of the government.'" Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (citations omitted). Relevant to the second prong of this test is the requester's ability to disseminate the requested information to the public. Id.

The Department of Commerce has promulgated regulations to provide further guidance in implementing the FOIA fee waiver provision. These regulations state in relevant part:

(c) Waiver or reduction of fees.

(1) Documents shall be furnished without charge, or at reduced charges if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and is not primarily in the commercial interest of the requester. To assure that the two basic requirements for waiver are met, Commerce shall rely on the following factors in making a determination on the fee waiver request:

(i) The subject of the request (whether the subject of the requested records concerns the operations or activities of the government);

(ii) The informative value of the information to be disclosed (whether the disclosure is likely to contribute to an understanding of government operations or activities);

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure (whether disclosure of the requested information will contribute to public understanding);

(iv) The significance of the contribution to public understanding (whether the disclosure is likely to contribute significantly to public understanding of government operations or activities);

(v) The existence and magnitude of a commercial interest (whether the requester has a commercial interest that would be furthered by the requested disclosure);

(vi) The primary interest in disclosure (whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester).

15 C.F.R. § 4.9(c)(1). See also D.C. Technical Assistance Org. v. U.S. Dept. of Housing and Urban Development, 85 F. Supp.2d 46, 48-49 (D.D.C. 2000).

This FOIA request satisfies both the two-part test articulated in Larson v. CIA as well as the six factors established under 15 C.F.R. § 4.9(c)(1). Therefore, TOC is entitled to a blanket waiver of both search and duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii).

**B. This Request Meets the Statutory and Regulatory Requirements for a Full Waiver**

The Ocean Conservancy (formerly the Center for Marine Conservation, or CMC) was founded in 1972 as a non-profit public interest environmental advocacy organization. Headquartered in Washington, D.C., TOC has regional offices in Alaska, California, Florida, and Maine and field offices in Santa Barbara and Santa Cruz, CA, the Florida Keys, Virginia Beach, VA, and the U.S. Virgin Islands. TOC is the largest U.S. environmental organization solely dedicated to protecting marine wildlife species, including marine mammals, and their habitats, and to conserving coastal and ocean resources, including those resources off the Atlantic coast. To

further its goals, TOC conducts policy-oriented research, promotes public awareness, education, and citizen involvement in the conservation of marine wildlife and resources, advocates before Congress and in the federal courts, and supports domestic and international programs for the conservation of marine wildlife species and their habitats. TOC has 120,000 members nationwide, many of whom participate in marine mammal conservation and observation programs. More than 50,000 of these members live in states along the Atlantic coast.

The conservation of marine wildlife, especially marine mammals, is one of TOC's four major program areas (in addition to fisheries conservation, ecosystem protection, and clean oceans). The protection of marine mammals was one of the major reasons TOC came into being more than thirty years ago, and remains of vital interest to our staff and members.

Historically, TOC has been deeply involved in the implementation of the Marine Mammal Protection Act (MMPA) since its enactment in 1972. In particular, TOC has played a significant role in the take reduction process to address incidental takes of marine mammals in U.S. fisheries. In 1993, CMC was integrally involved in negotiations with the fishing industry to develop a proposal that became the basis for the 1994 amendments to the Marine Mammal Protection Act of 1972 that added the take reduction provisions to the statute (see 16 U.S.C. § 1387). Since 1994, representatives of TOC have participated as team members in all of the six take reduction teams convened to date. TOC has also participated in the administrative rulemaking processes that resulted from these take reduction teams by commenting on NMFS' proposed rules to implement take reduction plans.

NMFS established the Atlantic Offshore Cetacean Take Reduction Team (AOCTRT) on May 23, 1996, to prepare a take reduction plan to reduce bycatch of strategic marine mammal stocks, including right whales, humpback whales, sperm whales, beaked whales, long- and short-finned pilot whales, common dolphins, bottlenose dolphins, and Atlantic spotted dolphins being incidentally taken in the U.S. Atlantic pelagic drift gillnet, longline, and pair trawl fisheries. 61 Fed. Reg. 25,846 (May 23, 1996). The AOCTRT reached consensus on several take reduction strategies in each fishery and submitted a draft take reduction plan to NMFS on November 25, 1996. Therefore, pursuant to 16 U.S.C. § 1387(f)(7)(B)(i), the Secretary of Commerce was to have published the plan proposed by the team, any changes proposed by the Secretary, and proposed regulations to implement the plan within 60 days.

The Secretary failed to comply with this mandatory statutory requirement. In fact, although the Secretary belatedly published a draft Environmental Assessment under the National Environmental Policy Act in November 1997, 62 Fed. Reg. 59,657 (November 4, 1997), to date, the Secretary has never fulfilled the MMPA's statutory obligations to finalize the Atlantic Offshore Cetacean Take Reduction Plan, see 16 U.S.C. § 1387(f)(7)(C), nor fulfilled the MMPA's statutory mandate to convene the take reduction team to monitor implementation of the final take reduction plan until such time as the objectives of the plan have been met, see 16 U.S.C. § 1387(f)(7)(E).

On March 24, 2000, we sent a letter to the Director of NMFS requesting that it convene the AOCTRT in accordance with the MMPA to review the status of the Atlantic Offshore Cetacean Take Reduction Plan. NMFS did not respond to this letter.

On or around August 7, 2001, NMFS disbanded the AOCTRT.

1. Disclosure of the Requested Information Is In the Public Interest

This FOIA request seeks disclosure of agency documents that is "likely to contribute significantly to public understanding of the operations or activities of the government," 5 U.S.C. § 552(a)(4)(A)(iii), and fulfills the second prong of the test laid out in Larson v. CIA as well as the four applicable regulatory factors of 15 C.F.R. § 4.9(c)(1).

a. The Subject of the Requested Records Concerns NMFS' Operations and Activities

All of the records requested in this FOIA request relate to NMFS' decision-making or data regarding the following topics: the draft AOCTRT plan, the disbanding of the AOCTRT, regulatory measures to reduce take of Atlantic cetaceans under the Magnuson-Stevens Fishery Conservation and Management Act, the definition of "serious injury" under the MMPA, and NMFS-run observer programs in Atlantic fisheries to produce marine mammal and sea turtle mortality estimates. Therefore, it cannot reasonably be disputed that the subject of TOC's FOIA request concerns the operations or activities of the government. See 15 C.F.R. § 4.9(c)(1)(i).

b. The Disclosure is Likely to Contribute to an Understanding of NMFS' Operations and Activities

"To evaluate this factor, fee waiver requests are to be examined in light of the identity and objectives of the requester . . . the scope of the requester's proposed dissemination - whether to a large segment of the public or a limited subset of persons . . . and the requester's capacity to disseminate the requested information . . ." D.C. Technical Assistance Org. v. U.S. Dept. of Housing and Urban Development, 85 F. Supp.2d 46, 48-49 (D.D.C. 2000) (citations omitted).

As stated above, implementation of the take reduction provisions of the MMPA is central to TOC's mission to protect marine mammals and to inform and empower our members and other citizens to advocate for marine mammal conservation. As outlined below, TOC has multiple capabilities to disseminate the requested information to our 120,000 members, to the media, and to the general public. Because of the importance of reducing take of Atlantic offshore cetacean strategic stocks, and of ensuring that NMFS complies fully with the MMPA, we are prepared to disseminate the information we receive in response to our FOIA request as necessary, through appropriate measures, to our members, the media, and the general public. Therefore, TOC's FOIA request fulfills the criterion set forth in 15 C.F.R. § 4.9(c)(1)(ii).

c. The Disclosure Will Contribute Significantly to the Public's Understanding of NMFS' Operations and Activities

The release of the requested documents will contribute to the public's understanding of NMFS' actions or inactions to reduce take of Atlantic strategic cetacean stocks. Because NMFS has not released the requested information to the general public, the contribution will be significant. To

date, NMFS has failed to release publicly any information on the topics outlined in our FOIA request. TOC, its members, and the general public have no means of discerning NMFS' reasons for failing to publish a draft or final AOCTRT plan and for disbanding the AOCTRT, or any scientific data underlying such reasons. Nor have TOC's members or the general public had any access to information shedding light on NMFS' plans to implement observer programs in lieu of continuing with the AOCTRT process. Significantly, NMFS has failed to publish any Federal Register notices setting forth its decisions with respect to the AOCTRT and the draft plan it produced. The information requested is held solely by NMFS concerning its own operations and activities and is not available to TOC, our members, or the general public through any other mechanism.

Accordingly, TOC, our members, and the general public have no understanding of the decision-making processes whereby NMFS determined to fulfill, or not to fulfill, the statutory mandates of the MMPA with respect to reducing incidental take of Atlantic offshore cetacean strategic stocks. See 16 U.S.C. § 1387(f). Given Congress' explicit recognition of the importance to the American public of conserving marine mammals, see 16 U.S.C. § 1361(6), and of the importance Congress ascribed to following notice-and-comment rulemaking and public notification procedures in the take reduction plan process, see 16 U.S.C. §§ 1387(f)(7)(B),(D), it is clear that Congress intended that the public should understand the agency's decisions, and the reasons therefor, regarding incidental take reduction to protect marine mammals. Once we receive the information responsive to our FOIA request, TOC will be able to educate and inform our members and the general public about these decision-making processes, thereby contributing significantly to public understanding of the AOCTRT process and outcome. Thus, TOC's FOIA request fulfills the criteria set forth in 15 C.F.R. §§ 4.9(c)(1)(iii), (iv).

2. The Ocean Conservancy Has the Ability To Convey Information Responsive to Our FOIA Request to the Public and Intends To Do So

The Ocean Conservancy is well-equipped to disseminate information to its members and to the public at large, and, if our FOIA request is granted, intends to disseminate information regarding NMFS' failure to finalize and implement the Atlantic Offshore Cetacean Take Reduction Plan and NMFS' improper dissolution of the Atlantic Offshore Cetacean Take Reduction Team. See Larson v. CIA, 545 F.2d at 1483. Examples of our capabilities for conveying information to the public, such as information regarding our efforts to reduce incidental take of marine mammals, include:

- > Member contacts. TOC has 120,000 members to whom it sends information relevant to TOC's mission, via direct mailings as well as our magazine, the BluePlanet Quarterly (circulation 140,000 per quarter). Direct mailings and magazine articles frequently focus attention on the plight of marine mammals, particularly strategic stocks that are taken in commercial and recreational fisheries.
- > Recruitment. TOC sends out information on marine conservation issues as part of its ongoing membership recruitment campaign to 300,000-400,000 prospective members every month. Marine mammals and the Marine Mammal Protection Act are often a particular focus of our membership recruitment efforts.

- Activist network. TOC sends out action alerts to 12,000 people via electronic mail on a regular basis. These action alerts convey information necessary for activists to make their opinions known to the Administration, to Congress, and to federal agencies. Marine mammals and the Marine Mammal Protection Act are often a particular focus of our action alerts.
- Marine mammalogist list serve. TOC has the ability to publicize information to thousands of marine mammalogists worldwide via an electronic mail list serve.
- Media. TOC has the ability to send out information packets, press releases, video feed, and audio clips via fax, email, and satellite linkage to every daily and weekly newspaper and every television and radio station (commercial and public) in the country.
- Website. TOC maintains an Internet site, [www.oceanconservancy.org](http://www.oceanconservancy.org), on which it posts information of interest to TOC's members and to the public via action alerts, reports, and press releases.
- Litigation. TOC regularly participates in public interest litigation to advance the cause of marine mammal protection and incidental take reduction. For example, CMC was the lead plaintiff in the 1998 suit captioned Center for Marine Conservation v. Daley, Civ. No. 1:98CV02029 (D.D.C.), challenging NMFS' failure to meet the MMPA's deadlines for implementing a final take reduction plan for the Gulf of Maine/Bay of Fundy harbor porpoise population.
- Publications. TOC staff regularly publish special reports, stories, and articles in various media. As a relevant example, Nina Young, TOC's Director of Marine Wildlife Conservation, has authored or co-authored four published law review articles concerning various aspects of the Marine Mammal Protection Act's implementation in the Ocean and Coastal Law Journal, including most recently an article entitled "The Conservation of Marine Mammals Using a Multi-Party Approach - An Evaluation of the Take Reduction Team Process."

TOC has multiple mechanisms by which to disseminate to the public the information relevant to the AOCTRT that it receives from NMFS in response to our FOIA request. Given the importance of the full and correct implementation of the take reduction plan process under the MMPA to TOC's mission and membership, TOC fully intends to disseminate the information we receive from NMFS in response to our FOIA request regarding the AOCTRT to educate our members and the general public about NMFS' compliance, or lack thereof, with the MMPA's take reduction provisions with respect to Atlantic cetaceans.

Taking into consideration the varied methods by which TOC publishes and disseminates information to the public on a regular basis, it is clear that, under Judicial Watch v. U.S. Department of Justice, 133 F. Supp.2d 52, 53-54 (D.D.C. 2000), TOC qualifies for a waiver of all search fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II). As shown supra, we also demonstrate that we fulfill the criteria for a blanket waiver of fees, including duplication fees, pursuant to 5



U.S.C. § 552(a)(4)(A)(iii).

3. The Ocean Conservancy Has No Commercial Interest in the Information Requested

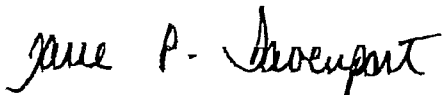
TOC is a 501(c)(3) tax-exempt nonprofit organization. As such, TOC has no commercial interest in any of the information specified in this FOIA request. TOC does not and will not use the information requested for commercial gain. Accordingly, TOC's request fulfills the first prong of the test laid out in Larson v. CIA, and the criteria contained in 15 C.F.R. §§ 4.9(c)(1)(v), (vi) are inapplicable.

For the foregoing reasons, The Ocean Conservancy requests that you waive all search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 15 C.F.R. § 4.9(c)(1).

III. Timing of Agency Response

The Freedom of Information Act requires that you respond to this request within twenty business days of your receipt thereof. 5 U.S.C. § 552(a)(6)(A). If you have any questions or suggestions for facilitating this request, please do not hesitate to contact me, or Nina Young, Director of Marine Wildlife Conservation at (202) 429-5609. I would be happy to discuss any reasonable arrangements that would assist you in complying with this request.

Very truly yours,



Jane P. Davenport, Program Counsel  
Marine Wildlife Conservation Program  
The Ocean Conservancy