



November 15, 2017

**SENT VIA FOIA ONLINE**

U.S. Department of Commerce  
E: FOIA@noaa.gov

**Re: Freedom of Information Act Request: Review of National Marine Sanctuaries (EO 13795)**

Dear FOIA Officer(s):

Earthjustice submits this request to the Office of National Marine Sanctuaries for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. On April 28, 2017, President Trump signed Executive Order 13795 titled, "Implementing an America-First Offshore Energy Strategy" ("EO 13795"), requiring: "The Secretary of Commerce, in consultation with the Secretary of Defense, the Secretary of the Interior, and the Secretary of Homeland Security, shall conduct a review of all designations and expansions of National Marine Sanctuaries, and of all designations and expansions of Marine National Monuments under the Antiquities Act of 1906, recently recodified at sections 320301 to 320303 of title 54, United States Code, designated or expanded within the 10-year period prior to the date of this order." The review was to include:

1. An analysis of the acreage affected and an analysis of the budgetary impacts of the costs of managing each National Marine Sanctuary or Marine National Monument designation or expansion; and
2. An analysis of the adequacy of any required Federal, State, and tribal consultations conducted before the designations or expansions; and
3. The opportunity costs associated with potential energy and mineral exploration and production from the Outer Continental Shelf, in addition to any impacts on production in the adjacent region.

Under E.O. 13795 the Secretary of the Department of Commerce, in consultation with the Secretary of Defense and the Secretary of the Interior, was required to report the results of the review to the Director of the Office of Management and Budget, the Chairman of the Council on Environmental Quality, and the Assistant to the President for Economic Policy within 180 days, by October 25, 2017.

On June 26, 2017, the Office of National Marine Sanctuaries together with the National Oceanic and Atmospheric Administration published a notice in the Federal Register requesting public comments to inform their review of National Marine Sanctuaries. 82 Fed. Reg. 28,827 (June 26, 2017). The agency received more than 100,000 comments in response.

### **Document(s) Requested**

Any documents, reports, correspondence, comments, conversation records, files, or electronic mail records which were generated, received, kept, and/or considered by the Office of National Marine Sanctuaries, including but not limited to those prepared by the West Coast Regional Office and/or the offices for Monterey Bay, Cordell Bank, Greater Farallones, and Channel Islands National Marine Sanctuaries, concerning the review of marine sanctuaries as required by E.O. 13795, including:

1. An analysis of the acreage affected and an analysis of the budgetary impacts of the costs of managing each National Marine Sanctuary expansion;
2. An analysis of the adequacy of any required Federal, State, and tribal consultations conducted before the expansions; and
3. The opportunity costs associated with potential energy and mineral exploration and production from the Outer Continental Shelf, in addition to any impacts on production in the adjacent region; and
4. Any memoranda, drafts, analyses, or recommendations or other information generated by the review prepared to inform the Department of Commerce report.

For this request, the term “document” should be interpreted to include copies of any and all summaries, memoranda, assessments, evaluations, correspondence, or other responsive records, including, but not limited to, internal memoranda, memoranda and correspondence with any other federal, state or foreign agencies or individuals, papers, maps, data, scientific (clinical and nonclinical) studies, samples, schematics, field notes/reports, telephone logs, briefing/application documents, electronic mail, and notes documenting any communication (regardless of physical form or characteristics), including any recommendations or conclusions, under E.O. 13795. This request does not include publicly available comments submitted in response to the agency’s request for comments (82 Fed. Reg. 28,827) that are readily available on regulations.gov (Docket NOAA-NOS-2017-0066).

## **Fee Waiver Requested**

We are willing to pay up to \$50 of any fees associated with this request. For any fees in excess of that amount, we request a waiver. FOIA mandates that agencies waive or reduce search and copying fees where the disclosure 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 addition to the statutory direction, the U.S. Department of Commerce has issued regulations outlining factors that it considers in deciding whether a fee waiver is warranted. The regulations states the Department should grant a fee waiver if: (1) the disclosure of the requested 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 (2) disclosure of the information is not primarily in the commercial interest of the requestor. 15 C.F.R. § 4.11(l)(1).

As one court explained, if a non-profit organization has “identified why they wanted the administrative record, what they intended to do with it, to whom they planned on distributing it, and the [relevant] expertise of their membership,” then a waiver is appropriate. *Ctr. for Biological Diversity v. Office of Mgmt. & Budget*, 546 F. Supp. 2d 722, 727 (N.D. Cal. 2008) (internal quotation omitted). The information provided below demonstrates that Earthjustice meets the required criteria and are entitled to a full fee waiver.

### **A. The Request is in the Public Interest.**

The Department of Commerce regulations state that in order to determine whether a request is in the public interest, the following factors should be considered: (1) whether the request concerns the operations or activities of the government; (2) whether the disclosure will have value to the public and will likely contribute to public understanding of government operations or activities; (3) whether the disclosure will contribute significantly to public understanding; and (4) whether the disclosure is likely to contribute “significantly to public understanding of the operations or activities of the Government.” 15 C.F.R. § 4.11(l)(1)(i).

#### ***1. The Request Concerns the Operations and Activities of the Government.***

The subject of this request concerns the operations and activities of the federal government, specifically the Department of Commerce’s review of sanctuaries pursuant

to an executive order. Accordingly, the FOIA request directly concerns the operations and activities of the government in managing and protecting public resources managed by the Department of Commerce. This request will provide Earthjustice and the public with crucial insights into the agency's review of marine sanctuaries pursuant to EO 13795. *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Accordingly, the FOIA request directly implicates the operations and activities of the government in reviewing governmental operations pursuant to executive order.

2. *The Requested Information Has Value to the Public and Will Likely Contribute to Public Understanding of Government Operations or Activities.*

There is a direct connection between the requested records and the Department of Commerce's activities related to E.O. 13795's mandate to review marine sanctuaries. Access to these records will allow Earthjustice to evaluate the government's compliance with environmental law, including the National Marine Sanctuary Act, 16 U.S.C. ch. 32 §§ 1431 – 1445 (“NMSA”). Consequently, the requested documents are critical to a meaningful assessment of the agency's actions and a thorough public understanding of the government's operations and activities.

Disclosure of these records will help illuminate how the government plans to regulate activities in our nation's public waters. Earthjustice is a national nonprofit environmental law organization dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment. Earthjustice has made safeguarding the nation's oceans one of its top priorities, and our supporters have a strong interest in the issues involved in this request, including activities in our nation's public waters. Our organization's experts – and those we associate with – will scrutinize the scientific and legal underpinnings of the requested documents; these analyses will form the basis for responding to the Department of Commerce's actions, and educating the public. *See Friends of the Coast Fork v. United States Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997). In light of its substantial legal and environmental expertise, Earthjustice is well-prepared to analyze and evaluate the records we receive pursuant to this request. *Cf. W. Watersheds Proj. v. Brown*, 318 F. Supp. 2d 1036, 1040-41 (D. Idaho 2004). Once the information is made available, Earthjustice will analyze it and present it to large segments of the public by means of correspondence, publications, websites that are visited by millions of people each year, media initiatives, and other communications.

Earthjustice intends to disseminate information that may be available in the requested records through various means, including newsletters, reports, newspaper and magazine articles, electronic action alerts, web sites, and through other formal and informal communications. Earthjustice can publicize information received from this request in its monthly electronic newsletter, which serves approximately 223,000 subscribers, and it can utilize its online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request; typically, 15,000 to 20,000 individuals respond to such alerts. Earthjustice's communications staff can disseminate newsworthy information obtained from this request to the media. These types of public outreach are sufficient to warrant a fee waiver. *See W. Watersheds Proj.*, 318 F. Supp. 2d at 1041 (noting cases holding "statements of intent to disseminate requested information through newsletters, popular news outlets, and presentations to public interest groups, government agencies, and the general public sufficient to entitle an organization to a fee waiver").

Finally, because this FOIA request expressly excludes information that is publicly available, the requested information is not already in the public domain. Rather, the disclosure will contribute significantly to the understanding of a broad public audience of persons interested in the subject. *See Friends of the Coast Fork*, 110 F.3d at 55.

3. *The Disclosure Will Contribute Significantly to Public Understanding.*

Disclosure of these documents will further the understanding of the public at large and is likely to be of interest to a broad audience. Earthjustice is a public-interest organization whose core mission is to protect the environment, public resources, and human health. The requested documents will undergo significant legal scrutiny by Earthjustice and these analyses will form the foundation for addressing the Department of Commerce's recommendations regarding sanctuaries.

Activities of the Department of Commerce generally, and specifically its mandate to report results of the reviews pursuant to E.O. 13795, are areas of interest to a reasonably broad segment of the public. Earthjustice will use the information it obtains from the disclosed records to educate the public at large about the Commerce Department's views for the future status and uses of marine sanctuaries. *See W. Watersheds Proj.*, 318 F.Supp.2d at 1040 ("[F]ind[ing] that [the requestor] adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the [the agency] and also how . . . management strategies employed by the [the agency] may adversely affect the environment.").

Through Earthjustice's synthesis and dissemination (by means discussed above), disclosure of information contained in and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984) (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying "public" to require a sufficient "breadth of benefit" beyond the requester's own interests); *Cnty. Legal Servs. v. Dep't of Hous. & Urban Dev.*, 405 F. Supp. 2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's "work by its nature is unlikely to reach a very general audience," "there is a segment of the public that is interested in its work").

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concerns a review of marine sanctuaries pursuant to E.O. 13795 that is not currently in the public domain. *See Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "clarify important facts" about agency policy, "the [] request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations."

Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of the Department of Commerce's review of marine sanctuaries. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested record to the public will educate the public about the government's compliance with environmental laws and will help assess plans to regulate activities in our public waters.

#### 4. *Disclosure is Likely to Contribute Significantly*

Earthjustice is not requesting these documents merely for their intrinsic informational value. Disclosure of the documents will significantly enhance the public's understanding of marine sanctuaries review pursuant to E.O. 13795, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure

because the requested documents will help reveal more about the future of marine sanctuaries.

The report is also certain to shed light on the Department of Commerce's compliance with the NMSA. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of FOIA. Thus, Earthjustice meets this factor as well.

B. Earthjustice Has No Commercial Interest in the Disclosure of the Information.

Earthjustice is a § 501(c)(3) tax-exempt nonprofit public interest organization with no commercial interest in obtaining the requested information. Earthjustice does not charge for its legal services, nor does it have any financial stake in the litigation it undertakes. Earthjustice has spent years successfully promoting the public interest through the development of policies that provide enhanced environmental protection, including for our oceans and waterways. The public will be the primary beneficiary of this requested information because we have no commercial interest in the requested disclosure. Thus, the requester is a nonprofit organization that has no commercial interest in the requested records. See *McClellan Ecological Seepage Situation*, 835 F.2d at 1284 (noting that FOIA's fee waiver provision is to be "liberally construed in favor of waivers for noncommercial requestors" (quoting legislative history)).

C. Earthjustice Is a Media Representative.

Members of the news media are entitled to waivers of search fees. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Department of Commerce regulations also state that "if a news media requestor has satisfied the public interest standard, the public interest is the primary interest served." 15 C.F.R. § 4.11(l)(3)(ii). A representative of the news media includes "publishers of periodicals . . . who make their products available for purchase by or subscription by or free distribution to the general public." 5 U.S.C. § 552(a)(4)(A)(ii)(III); 43 C.F.R. § 2.70. News media broadly disseminate "information that is about current events or that would be of current interest to the public." *Id.* The waiver extends to a nonprofit organization that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (quoting 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986)); *Cause of Action v. FTC*, 799 F.3d 1108, 1115-17 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr. V. Dep't of Def.*, 241 F. Supp.2d 5, 12 (D.D.C. 2003).

Earthjustice publishes and transmits news to the public daily. Earthjustice publishes a quarterly magazine, *Earthjustice Quarterly*, which is distributed every three months to approximately 70,000 supporters. Earthjustice also maintains an *Action and e.Brief* email list which has more than 915,000 subscribers who receive information on urgent environmental issues. This information is also made available through the Earthjustice online Action Center at <http://earthjustice.org/action>. The Newsletter is available online at <http://earthjustice.org/newsletter>. Earthjustice also transmits information to the public through a blog, available at <http://earthjustice.org/blog> which is updated weekly and features staff members writing about current environmental issues. The blogs draw approximately 175,000 page views and 109,200 unique visitors per month. Earthjustice also transmits news to the public through social media. Earthjustice on “Facebook,” at <https://www.facebook.com/Earthjustice> has 126,623 fans, “Twitter,” at <https://twitter.com/Earthjustice>, which has 46,200 followers, and “YouTube” at <https://www.youtube.com/user/Earthjustice>, which has generated 1,130,096 video views.

Earthjustice also publishes books on issues of current interest to the public, including the following:

- Tom Turner, with photographs by Carr Clifton, *Wild by Law: The Sierra Club Legal Defense Fund and the Places It Has Saved* (San Francisco: Sierra Club Legal Defense Fund and Sierra Club Books, 1990) ISBN 0871566273
- Tom Turner, *Justice on Earth: Earthjustice and the People It Has Served* (White River Junction, VT: Chelsea Green Publishing Co., 2002) ISBN 1931498318
- Tom Turner, *Roadless Rules: The Struggle for the Last Wild Forests* (Washington, DC: Island Press 2009 ISBN: 1597264407)

The communications staff at Earthjustice relies on information acquired under FOIA and through other means. The fact that Earthjustice is a public interest advocacy organization is inconsequential so long as “its activities qualify as those of a representative of news media,” and Earthjustice’s do. *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 12. Public interest organizations meeting the requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union); *Cause of Action*, 799 F.3d at 1124 (for the news-media provision, an organization’s website, newsletter, press releases, and press contacts will be considered in combination); *Judicial Watch v. U.S. Dept. of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (website that disseminated information and radio show were sufficient to establish status of representative of media).



Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of Earthjustice's publications or other suitable media channels. Staff at Earthjustice gather information from a variety of sources (including documents provided pursuant to FOIA requests) to write original articles and reports that are featured in its *Earthjustice Quarterly* magazine, newsletters, blogs, and other Earthjustice-operated media outlets. Earthjustice seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

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As provided by 5 U.S.C. § 552(a)(6)(A), we look forward to a reply within twenty (20) working days. If the agency chooses to withhold the requested documents from disclosure pursuant to FOIA exemptions, we request that it: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied); (ii) explain in full the basis on which non-disclosure is justified; and (iii) provide us with any segregable portions of the documents for which a specific exemption is not claimed. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases.

Please contact me if you have any questions, or if I can clarify this request in any way. I can be reached at (415) 217-2142. Thank you in advance for your assistance.

Sincerely,

s/ Brettny Hardy  
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