

# **EXHIBIT 3**



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December 1, 2017

**VIA FAX AND U.S. MAIL**

ATTN: FOIA Office  
Dionne Hardy  
FOIA Officer  
Office of Management and Budget  
1800 G Street NW, Room 9026  
Washington, DC 20503  
Fax: 202.395.3504

Re: Freedom of Information Act Request for Documents, Records, and Materials

Dear FOIA Officer(s):

Oceana submits this request for records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

**Documents Requested**

On June 29, 2017, the National Oceanic and Atmospheric Administration ("NOAA") and National Marine Fisheries Service ("NMFS"), through the Department of Commerce, submitted a Final Rule to the Office of Management and Budget ("OMB") for review. The Final Rule is entitled "Regulation to Reduce Incidental Bycatch and Mortality of Sea Turtles in the Southeastern U.S. Shrimp Fisheries." This matter has been assigned Regulation Identifier Number ("RIN") 0648-BG45. The status of the Final Rule is listed as "Pending [Executive Order ("EO")] 12866 Regulatory Review," per the Office of Information and Regulatory Affairs website. See Attachment (review status as of December 1, 2017); available at <https://www.reginfo.gov/public/do/eoDetails?rrid=127440>.

Oceana requests copies of all documents, records, and materials, including but not limited to all memoranda, studies, reports, data, correspondence, comments, conversation records, meeting notes, files, electronic mail records, or other documents, which have been generated, received, kept, and/or considered by OMB relating to the review of the Final Rule with RIN 0648-BG45.

For purposes of this request, "documents, records, and materials" should be interpreted to include copies of all correspondence, including but not limited to, internal memoranda, memoranda and correspondence with any other federal, state or foreign agencies or individuals, papers, data, scientific studies, samples, schematics, field notes/reports, telephone logs, briefing/application

documents, electronic mail, and notes documenting any communication (regardless of physical form or characteristics).

Please forward the documents to me, Alicia Cate, at [acate@oceana.org](mailto:acate@oceana.org), or by mail to:

Alicia Cate  
Senior Counsel  
Oceana, Inc.  
1350 Connecticut Ave. NW, 5th Floor  
Washington, DC 20036

### **Fee Waiver Requested**

We request a waiver of any fees associated with this request. 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).

Oceana is a nonprofit organization organized under 26 U.S.C. § 501(c)(3). A waiver is appropriate where a nonprofit 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.” *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 Oceana meets the required criteria and is entitled to a full fee waiver.

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

This FOIA request seeks information relevant to OMB’s review of a Final Rule related to NMFS’s management of sea turtle bycatch in the Southeastern U.S. shrimp fisheries. Accordingly, the FOIA request directly concerns the operations and activities of the government in fulfilling its administrative obligations and managing and protecting public resources managed by NMFS. This request will enable Oceana to evaluate (i) the progress of OMB’s review of the Final Rule; (ii) the bases, if any, for OMB’s failure to take action on the rule within the time period contemplated by EO 12866; and (iii) any instructions, directives, or recommendations made by OMB to the Department of Commerce, NOAA, or NMFS for modifying the Final Rule, and the bases for any such actions. Accordingly, the FOIA request directly implicates the operations and activities of the government in protecting endangered and threatened sea turtles and managing public resources in the areas where the Southeastern U.S. shrimp fisheries operate.

#### 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 OMB’s operations and activities under EO 12866, as well as NMFS’s operations and activities in protecting endangered and threatened sea turtles and managing sea turtle bycatch. Access to these records will allow Oceana

to evaluate OMB's review of the Final Rule, and any instructions, directives, or recommendations made by OMB to the Department of Commerce, NOAA, or NMFS regarding NMFS's actions to manage, and protect sea turtles affected by, the Southeastern U.S. shrimp fisheries. Consequently, the requested documents are critical to a meaningful assessment of OMB's actions and a thorough public understanding of the government's operations and activities in protecting endangered and threatened sea turtles and regulating sea turtle bycatch.

Oceana is a public interest organization whose core mission involves using science, law, and policy to protect the world's oceans by, among other mechanisms, monitoring government management of public resources, encouraging public participation in government processes, and ensuring enforcement of applicable public laws. Oceana's experts will scrutinize the underlying documents. These analyses will form the basis for evaluating OMB's and NMFS's actions in reviewing the Final Rule, assessing the bases for any OMB actions with respect to it, and for educating the public regarding the status of the Final Rule and the reasons for OMB's failure to take action on the rule within the time period contemplated by EO 12866. *See Friends of the Coast Fork v. U.S. Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

Oceana 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. These types of public outreach are sufficient to warrant a fee waiver. *See W. Watersheds Proj. v. Brown*, 318 F. Supp. 2d 1036, 1041 (D. Idaho 2004) (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").

Oceana possesses the experience and expertise necessary to evaluate the requested information and provide it to the public in a useful form. *Cf. W. Watersheds Proj.*, 318 F. Supp. 2d at 1040-41. Oceana is highly qualified to extract, synthesize, analyze, and convey the requested information to its members, other organizations, and the public at large in a way that will increase understanding of government actions affecting endangered and threatened sea turtles and public resources in the areas where the Southeastern U.S. shrimp fisheries operate.

Oceana staff and board include resource analysts, scientists, lawyers, and professionals who specialize in public outreach. They use that expertise to analyze and evaluate information about government processes and decisions affecting public resources, such as the review of agency actions, compliance with the Endangered Species Act and Administrative Procedure Act, and the management of sea turtle bycatch in fisheries across the United States. They use their expertise and resources to provide analyses and evaluations to members, other organizations, and the general public.

Oceana has a long history of evaluating information similar to that requested here and distributing it to help inform the public and encourage participation in government processes. Oceana also has a detailed understanding of the issues surrounding endangered and threatened sea turtles, the problem of sea turtle bycatch in the Southeastern U.S. shrimp fisheries, and the fishing gear

modifications that would be required when the Final Rule is published.

Oceana has a dedicated campaign to protect endangered and threatened sea turtles and to reduce bycatch throughout the United States. Oceana has engaged in a public awareness campaign to inform U.S. citizens of the need for NMFS to take measures that will ensure the survival and recovery of threatened and endangered sea turtle species and reduce sea turtle bycatch.<sup>1</sup> In November 2016, Oceana published a report directly related to the substance of the Final Rule, entitled, “What’s In An Inch? The Case for Requiring Improved Turtle Excluder Devices in All U.S. Shrimp Trawls.”<sup>2</sup> Likewise, Oceana published a report in May 2016 entitled, “TEDs for All Trawls: A Net Positive for Fishermen and Sea Turtles.”<sup>3</sup> Oceana has also published reports related to problems related to bycatch generally, including in the U.S. shrimp fisheries specifically. In March 2014, Oceana published a report entitled, “Wasted Catch: Unsolved Problems in U.S. Fisheries,” which reported on comprehensive national bycatch estimates nation-wide.<sup>4</sup> And, in June 2014, Oceana published a report entitled, “Wasted Cash: The price of Waste in the U.S. Fishing Industry.”<sup>5</sup>

Moreover, Oceana staff and members have participated extensively in the relevant public processes over the last decade, by, among other things, submitting comments to NMFS concerning the management of fisheries and the protection of marine life in the marine ecosystem through the reduction of sea turtle bycatch (including comments in the proceedings leading to the Final Rule)<sup>6</sup>; commenting on the protection of endangered and threatened species; and engaging in the more general public discourse over these fisheries and associated marine life in various public and scientific symposia.

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

Disclosure of these records will further the understanding of the public at large and is likely to be of interest to a broad audience. Oceana is a public interest organization whose core mission is to protect the environment, public resources, and human health by, among other mechanisms, monitoring government management of marine waters, encouraging public participation in government processes, and ensuring enforcement of applicable public laws. Oceana will scrutinize the requested documents and its analyses will form the foundation for responding to OMB’s review of the Final Rule and NMFS’s actions to address sea turtle bycatch. The records will further both the organization’s and members’ understanding of the government’s actions to review the Final Rule under EO 12866 and the Administrative Procedure Act, and actions to reduce sea turtle bycatch in the Southeastern U.S. shrimp fisheries.

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<sup>1</sup> Oceana, Responsible Fishing: Reducing Bycatch, <http://oceana.org/our-campaigns/bycatch/campaign> (last visited Nov. 29, 2017).

<sup>2</sup> Mariah Pflieger et al., What’s In An Inch? The Case for Requiring Improved Turtle Excluder Devices in All U.S. Shrimp Trawls (Nov. 2016), [http://usa.oceana.org/sites/default/files/ted\\_report\\_nov\\_10\\_2.pdf](http://usa.oceana.org/sites/default/files/ted_report_nov_10_2.pdf).

<sup>3</sup> Benjamin Carr et al., TEDs for All Trawls: A Net Positive for Fishermen and Sea Turtles (May 2016), [http://usa.oceana.org/sites/default/files/teds\\_for\\_all\\_trawls\\_report.pdf](http://usa.oceana.org/sites/default/files/teds_for_all_trawls_report.pdf).

<sup>4</sup> Amanda Keledjian et al., Wasted Catch: Unsolved Problems in U.S. Fisheries (Mar. 2014), [http://usa.oceana.org/sites/default/files/reports/Bycatch\\_Report\\_FINAL.pdf](http://usa.oceana.org/sites/default/files/reports/Bycatch_Report_FINAL.pdf).

<sup>5</sup> Amanda Keledjian et al., Wasted Catch: The Price of Waste in the U.S. Fishing Industry (June 2014), [http://usa.oceana.org/sites/default/files/reports/wasted\\_cash\\_report\\_final.pdf](http://usa.oceana.org/sites/default/files/reports/wasted_cash_report_final.pdf).

<sup>6</sup> Oceana Comments on Proposed Shrimp Trawling Requirements for Sea Turtle Conservation, 81 Fed. Reg. 91,097, Dkt. No. 161109999-6999-01, RIN 0648-BG45, and Draft Sea Turtle Environmental Impact Statement to Reduce the Incidental Bycatch and Mortality of Sea Turtles in the Southeastern U.S. Shrimp Fisheries (Jan. 30, 2017).

The requested disclosure will significantly increase public understanding of OMB's processes for reviewing Final Rules under EO 12866, and NMFS's operations and activities pertaining to public resources. Issues involving sea turtle bycatch in the Southeastern U.S. shrimp fisheries are of significant public interest and have been the subject of significant public discourse as well as NMFS and fishery management council processes.

Oceana will contribute to the public understanding through its extensive outreach mechanisms. Oceana's headquarters is located in Washington, D.C., and Oceana has additional offices in key U.S. coastal areas. Oceana is the largest international ocean conservation organization solely focused on protecting the world's oceans, with over 1.6 million members and supporters worldwide and over 600,000 members in the United States. Oceana's website and publications educate its members and supporters and the public regarding sea turtle bycatch and the protection of endangered and threatened sea turtle populations. Oceana obtains broad media coverage. For example, in 2016, over 12,000 media stories about Oceana or citing Oceana were published or broadcast in the United States. And, thus far in 2017, over 7,400 media stories about Oceana or citing Oceana were published or broadcast in the United States.

These records will provide information underlying OMB's, the Department of Commerce, and NMFS's processes and decision-making, afford insight into the government's evaluation of rules submitted for review under EO 12866, and highlight any competing viewpoints, thereby facilitating public oversight of government operations.

#### 4. Oceana Has No Commercial Interest in the Disclosure of the Information.

Oceana is a 501(c)(3) tax-exempt nonprofit international advocacy organization dedicated to mitigating environmental threats to the oceans, including threats that affect marine wildlife, such as sea turtles. Oceana has long sought protections for endangered and threatened sea turtles. Oceana has no commercial interest in the requested records. *See McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (noting that FOIA's fee waiver provision is to be "liberally construed in favor of waivers for noncommercial requestors" (quoting legislative history)).

#### 5. Oceana 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); 43 C.F.R. § 2.39(a). 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).

Oceana functions as a member of the news media because it regularly gathers, publishes, and disseminates information to the public. Oceana gathers, synthesizes, and publishes information and news concerning marine conservation and bycatch which it broadly disseminates to its membership and the press through its website and blog, press releases, quarterly print magazine, and monthly email newsletter which it distributes to its over 700,000 members and supporters. *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); 880 F.2d at 1387 (quoting 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986)); 241 F. Supp. 2d at 14 n.6 (noting that newsletter that was "published regularly, over a period of time, and . . . disseminate[d] actual 'news' to the public" was evidence that nonprofit organization was a member of the news media).

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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 you deny all or any part of this request, or choose to withhold any documents from disclosure pursuant to FOIA exemptions, we request that you (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied); (ii) cite each specific exemption you think justifies your withholding of information and 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. We also request that you notify us of appeal procedures available under the law.

If you have any questions about handling this request, you may contact me, Alicia Cate, at 202.833.3900 or at [acate@oceana.org](mailto:acate@oceana.org). Thank you in advance for your assistance.

Sincerely,

/s/ Alicia Cate  
Alicia Cate  
Senior Counsel

# **ATTACHMENT A**



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Pending EO 12866 Regulatory Review

RIN: [0648-BG45](#) [View EO 12866 Meetings](#)

Title: Regulation to Reduce Incidental Bycatch and Mortality of Sea Turtles in the Southeastern U.S. Shrimp Fisheries

Agency/Subagency: DOC / NOAA

Legal Deadline: None

International Impacts: No

Received Date: 06/29/2017

Stage: Final Rule

Economically Significant: No

Affordable Care Act [PPACA, P.L. 111-148 & 111-152]: No

Dodd-Frank Act [Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203]: No

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