EARTHJUSTICE

August 3, 2018

VIA NOAA FOIA PORTAL

National Oceanic and Atmospheric Administration
Attn: FOIA Officer
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, MD 20910

Re: Freedom of Information Act Request for Records on Oceanic Whitetip Shark Catch in U.S. Fisheries

Dear FOIA Officer:

On behalf of Center for Biological Diversity, Earthjustice submits this request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and its implementing regulations, 43 C.F.R. Part 2.

DOCUMENTS REQUESTED

The National Marine Fisheries Service (NMFS) manages several fisheries that catch oceanic whitetip sharks (*Carcharhinus longimanus*), either as bycatch or as a targeted species. These fisheries include:

- Caribbean Gillnet
- Gulf of Mexico Coastal Migratory Pelagic Troll
- Southeastern Atlantic Coastal Migratory Pelagic Troll
- Central Western Pacific Tuna Purse Seine
- Eastern Pacific Ocean Tuna Purse Seine
- California Pelagic Longline
- Eastern Tropical Pacific Baitboat

For each of the seven above-listed fisheries, we request all records which were generated, received, kept, and/or considered by NMFS containing, describing, and/or referencing:

1. **The data sources used to estimate the bycatch or targeted catch of oceanic whitetip sharks in each fishery;**

2. **Logbook data regarding the bycatch or targeted catch of oceanic whitetip sharks in each fishery;**

3. **Observer data regarding the bycatch or targeted catch of oceanic whitetip sharks in each fishery and any associated observer reports and/or characterizations; and**

4. **Any other data related to oceanic whitetip shark bycatch and/or targeted catch in each fishery.**

This request includes, but is not limited to, any documents, writings, materials, correspondence, internal memoranda, memoranda and correspondence with any other federal, state, or foreign agencies or individuals, papers, emails, files, photos, maps, data, scientific studies, field notes/reports, telephone logs, notes documenting correspondence or reports generated, received and/or issued by NMFS relating to the record categories listed above. Pursuant to 5 U.S.C. § 552(a)(3)(B) we ask that these records be provided in electronic and searchable format.

To the extent that providing individualized data on fishing boats or permits would implicate confidentiality concerns, we request that such data be produced in response to these requests in either a redacted or an aggregated format. We also specifically exclude from this request any reports, documents, or other documents that are currently available for public review on NMFS's website.

We request that responsive records be released as soon as they are available. To the extent that some subset of the requested records is readily available, such as those for a given fishery or one of the listed categories of records for a given fishery (or fisheries), we would be happy to receive them while NMFS processes other records. Insofar as NMFS may choose to process each fishery separately, we request that it prioritize documents from the Central Western Pacific and Eastern Pacific Tuna Purse Seine fisheries.

REQUESTING ORGANIZATION

This request is made on behalf of the Center for Biological Diversity (Center). The Center is a 501(c)(3) nonprofit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

FEE WAIVER REQUESTED

The Center requests 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).

I. Background

In 1974, Congress amended the judicial review section for fee waivers under FOIA, replacing the "arbitrary and capricious" threshold of review, by which courts are required to grant deference to agencies, with the more rigorous *de novo* review standard. *See* 5 U.S.C. § 552(a)(4)(A)(vii). The reason for this change is that Congress was concerned that agencies were using search and copying costs to prevent critical monitoring of their activities:

> Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . . .

132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy).

FOIA's amended fee waiver provision was intended specifically to facilitate access to agency records by citizen watchdog organizations, which utilize FOIA to monitor and mount challenges to governmental activities. *See Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986). Fee waivers are essential to such groups, which:

> rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities — publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions . . . .
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> [The fee waiver] provision was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests," in a clear reference to requests from journalists, scholars and, *most importantly for our purposes, nonprofit public interest groups*.

Id. (emphasis added) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984)). Thus, one of the main goals of FOIA is to promote the active oversight roles of watchdog public advocacy groups, organizations that actively challenge agency actions and policies.

Public interest fee waivers are to be "liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sen. Leahy)). "[T]he presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public." *Ettlinger*, 596 F. Supp. at

873 (quoting legislative history). An agency may not refuse a fee waiver when "there is nothing in the agency's refusal of a fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefiting the general public." *Id.* at 874 (quoting *Fitzgibbon v. CIA*, Civ. No. 76-700 (D.D.C. Jan. 10, 1977)). A fee waiver should be granted when 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). "Once the FOIA requester has made a sufficiently strong showing of meeting the public interest test of the statute, the burden, as in any FOIA proceeding, is on the agency to justify the denial of a requested fee waiver." *Ettlinger*, 596 F. Supp. at 874 (citing 5 U.S.C. § 552(a)(4)(B)).

II. The Center Meets the Department of Commerce's Criteria for a Full Fee Waiver.

In addition to FOIA's 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 state 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). The Center satisfies both of these criteria.

A. Disclosure of the Requested Information is in the Public Interest.

To determine whether a request is in the public interest, NMFS must consider four factors: (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 government's operations or activities." 15 C.F.R. § 4.11(l)(2).

i. The Request Concerns Government Operations and Activities – 15 C.F.R. § 4.11(l)(2)(i)

This FOIA request seeks information relevant to NMFS's management of oceanic whitetip shark bycatch and targeted catch in U.S. fisheries. NMFS has recognized that catch in U.S. fisheries has contributed to the species' decline and remains a threat. Accordingly, the FOIA request directly concerns the operations and activities of NMFS in managing and protecting the species, a public resource. *See* 15 C.F.R. § 4.11(l)(2)(i). This request will enable the Center to evaluate the strength of and basis for the agency's analysis of oceanic whitetip shark catch by U.S. fisheries and the degree to which it is a threat or requires changes in management by the agency. The Center thus meets this factor.

ii. The Requested Information Has Value to the Public and Will Likely Contribute to Public Understanding of Government Operations or Activities – 15 C.F.R. § 4.11(l)(2)(ii)

There is a direct connection between the requested records and NMFS's operations and activities in managing oceanic whitetip shark catch and bycatch. The requested records relate to the government's evaluation of oceanic whitetip shark bycatch and targeted catch, and its management of fisheries in the Gulf of Mexico, Pacific Ocean, and Atlantic Ocean. Access to these records will allow the Center to evaluate NMFS's bycatch estimations for fisheries in these areas. It also will allow the Center to evaluate NMFS's estimations and management of targeted catch of oceanic whitetip sharks in these fisheries. 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 in managing oceanic whitetip sharks and regulating bycatch and targeted catch of the species.

The requested documents are necessary for the public to gain a complete understanding of the government's estimations of oceanic whitetip shark bycatch and targeted catch in certain fisheries. This information is critical to assessing the government's actions in protecting these public resources. Accordingly, disclosure of the requested information will contribute significantly to public understanding of the government's operations and activities with respect to these fisheries. *See* 15 C.F.R. § 4.11(l)(2)(ii).

The Center is a public-interest organization dedicated to protecting wildlife and the environment by, among other mechanisms, monitoring government wildlife regulation, encouraging public participation in government processes, and ensuring enforcement of applicable public laws. The Center will scrutinize the scientific underpinnings of the requested records, and its analyses will form the basis for working to address threats to oceanic whitetip sharks and educating the public. The Center's science and policy staff will also work with communications staff to disseminate their analysis of the information to its members, supporters, and the general public.

iii. Disclosure of the Requested Information Will Contribute to the Understanding of a Reasonably Broad Audience – 15 C.F.R. § 4.11(l)(2)(iii)

A broad audience of persons both in the United States and internationally is interested in the subject of shark conservation generally and, specifically, oceanic whitetip shark conservation. Sharks are top apex predators in marine ecosystems, and their removal from those ecosystems can have cascading effects on other trophic levels. The killing of millions of sharks each year is of serious concern to many people. A number of domestic and international organizations actively work to promote shark conservation, with objectives that include ending the wasteful and cruel practice of shark finning and reducing the excessive numbers of sharks caught deliberately and incidentally in fisheries. The broader U.S. public has also supported legislation banning shark fin trade at both the federal and state levels.

A wide audience of persons is particularly interested in the protection of the oceanic whitetip shark. For example, the United States, with public support, cosponsored a proposal to list the species under Appendix II of CITES in both 2010 and 2013. And NMFS recently listed the oceanic whitetip as a threatened species under the Endangered Species Act in response to a petition from Defenders of Wildlife and after receiving public comments on the proposed rule overwhelmingly supporting the listing.

While some of the technical reports related to the observer programs in these fisheries are available to the public, to the best of our knowledge the remainder of the reports, data sources, and documents requested by the Center are not. As such, their release will significantly improve the public understanding of fishery interactions with oceanic whitetip sharks.

Disclosure of the requested records will further the understanding of the public at large of this species and the threats it faces, and is likely to be of interest to a broad audience that supports shark conservation. The Center has the institutional expertise to analyze and disseminate the information contained in the requested records.

The Center is a nonprofit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the activities of numerous government agencies for over 25 years. The Center has a number of staff, including scientists, lawyers, and communications personnel with extensive experience in shark conservation and management. Specific actions the Center has taken to help conserve sharks have included petitioning NMFS to have the great white shark listed under the ESA, seeking regulation of the California drift gillnet fishery to protect the thresher shark, and moving to certify Mexico's shark fisheries to prevent their harm to various species of concern. The Center also submitted technical comments in support of the oceanic whitetip shark's listing as threatened, both at the 12-month finding and proposed listing stages.

The Center has consistently displayed its ability to disseminate information provided to it through FOIA. In regularly granting the Center's fee waivers, agencies have recognized: (1) that the information requested by the Center contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in more than 2,500 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, *The Guardian*, and

Los Angeles Times. Many media outlets reporting on agency actions have utilized information obtained by the Center from federal agencies, including from NMFS. In 2016, more than 2 million people visited the Center's extensive website, viewing a total of more than 5.2 million pages. The Center sends out more than 277 email newsletters and action alerts per year to more than 1.5 million members and supporters. Three times a year, the Center sends printed newsletters to more than 61,443 members. More than 259,900 people have "liked" the Center on Facebook, and there are regular postings regarding protections of endangered and threatened species. The Center also regularly tweets to more than 55,000 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request. Therefore, the Center has the expertise and capacity effectively to analyze and distribute information contained in records responsive to this request to the interested public as per the third factor under the public interest determination for fee waiver requests. *See* 15 C.F.R. § 4.11(l)(2)(iii).

iv. Disclosure Is Likely to Contribute "Significantly" to the Public Understanding of Government Operations or Activities – 15 C.F.R. § 4.11(l)(2)(iv)

As stated above, NMFS has recognized that the oceanic whitetip shark is imperiled by catch in U.S. fisheries. The latest data on oceanic whitetip bycatch and targeted catch in U.S. fisheries will provide substantial and updated information on the magnitude and sources of the harm to the species from these activities. The records will provide Center and the public with a better understanding of these risks. And they will help the Center and the public to evaluate the degree to which NMFS has and can further ameliorate those risks through its fisheries management. *See* 15 C.F.R. § 4.11(l)(2)(iv).

B. The Center Has No Commercial Interest in the Requested Records.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 1.5 million members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

CONCLUSION

For the foregoing reasons, this FOIA request satisfies the statutory and regulatory requirements for a full waiver of all search and duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii) and 15 C.F.R. § 4.11(l).

I request that, should this FOIA request take longer than ten days to process, you notify me of the individualized tracking number that has been assigned to the request and information about how I may receive information on the status of my request via telephone or Internet. I also request

that you provide the estimated date on which you will complete action on this request, pursuant to 5 U.S.C. § 552(a)(7).

Please contact me if you have any questions, or if I can clarify this request in any way. I can be reached at (206) 343-7340 x1038. As provided by FOIA, 5 U.S.C. § 552(a)(6)(A), I look forward to a response within twenty working days. Thank you in advance for your assistance.

Sincerely,

Christopher D. Eaton
Associate Attorney
Earthjustice