



October 31, 2016

VIA CERTIFIED MAIL

Mr. Mark Graff
FOIA Officer
National Oceanic and Atmospheric Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910

Re: Freedom of Information Act Request

Dear Mr. Graff:

We write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.¹ In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. To that end, we are examining the Administration’s designations of new national monuments and expansion of existing monuments under the Antiquities Act of 1906, 54 U.S.C. § 320301 (“Antiquities Act” or the “Act”). In addition, we are looking into current and potential proposals for the President to exercise his authority under that Act. The Administration’s broad and frequent use of the Antiquities Act raises questions about the lack of transparency and consultation with local stakeholders leading up to the President’s designation of national monuments.² As relevant here, we are seeking to better understand the process leading to the President’s issuance of Proclamation 9496 of September 15, 2016, 81 Fed. Reg. 65,161 (Sept. 21, 2016), which established the Northeast Canyons and Seamounts Marine National Monument.³

¹ See CAUSE OF ACTION INSTITUTE, *About*, www.causeofaction.org/about/.

² President Obama has used the Antiquities Act to establish more new national monuments than any other president. See Douglas Brinkley, Op-Ed., *Obama the Monument Maker*, N.Y. TIMES, Aug. 27, 2016, available at <http://www.nytimes.com/2016/08/28/opinion/sunday/obama-the-monument-maker.html>.

³ The national monument is comprised of two separate units, the “Canyons Unit” covering approximately 941 square miles, and the “Seamounts Unit” covering 3,972 square miles. Proclamation No. 9496, 81 Fed. Reg. 65, 161 (Sept. 21, 2016).

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), CoA Institute hereby requests access to the following records for the time period of January 1, 2014, to the present:⁴

1. All records or communications (including emails, text messages, and voicemails) referring or relating to a NOAA Town Hall meeting held on or about September 15, 2015, in Providence, Rhode Island, and publicized on NOAA’s website on or about September 3, 2015 (attached as Exhibit 1 to this FOIA request), including but not limited to all written comments, as well as all communications with non-governmental organizations⁵ referring or relating to the September 15, 2015, NOAA Town Hall meeting.
2. All records or communications (including emails and voicemails) referring or relating to a “public event” held by the Conservation Law Foundation, Natural Resources Defense Council, National Geographic Society, and Pew Charitable Trusts at the New England Aquarium on or about September 2, 2015, during which these groups purportedly “formally called for the creation of the Atlantic Coast’s first Marine National Monument,” according to a CLF press release (attached as Exhibit 2 to this FOIA request).
3. All records or communications (including emails and voicemails) by or between NOAA personnel and non-governmental organizations⁶ and/or other outside individuals and entities referring or relating to use of the Antiquities Act to create a national monument in the Atlantic Ocean.

Request for a Public Interest Fee Waiver

CoA Institute requests a waiver of any and all applicable fees. FOIA and applicable regulations provide that the agency shall furnish requested records without or at reduced charge 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

⁴ For purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. *See Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002). The term “record” means the entirety of the record any portion of which contains responsive information. *See Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, No. 15-5201, 2016 WL 4056405, at *7-9 (D.C. Cir. July 29, 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

⁵ By way of example, non-governmental organizations include but are not limited to the Conservation Law Foundation, Pew Charitable Trusts, Earthjustice, Center for American Progress, the National Geographic Society, and the Natural Resources Defense Council. Thus, by way of illustrative example, communications or records to, from, or even “ccing” or “bccing” any “clf.org,” americanprogress.org,” nrdc.org,” and/or “earthjustice.org” email addresses and referring or relating to the September 2015 NOAA Town Hall meeting would be responsive to this request. The term “non-governmental organization” should be construed expansively to include employees, officers, volunteers, and others affiliated with such organizations.

⁶ *See id.*

primarily in the commercial interest of the requester.”⁷ In this case, particularly given concerns that the Antiquities Act process lacks transparency and any meaningful opportunity for public participation, as well as related concerns about collusion between favored outside special interest groups and Administration officials, there is significant public interest educating the public at large about the Administration’s use of the Antiquities Act of 1906. The broad public interest in better understanding the Administration’s Antiquities Act process is underscored by the extensive media coverage its Presidential Proclamations have received,⁸ as well as numerous congressional hearings relating to the Administration’s expansive interpretation and aggressive use of the Antiquities Act.

CoA Institute has both the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Its staff has significant experience and expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, whether through the Institute’s regularly published online newsletter, memoranda, reports, or press releases.⁹ In addition, as CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in making this request.

Request To Be Classified as a Representative of the News Media

For fee status purposes, CoA Institute also qualifies as a “representative of the news media” under FOIA.¹⁰ As the D.C. Circuit recently held, the “representative of the news media” test is properly focused on the requestor, not the specific FOIA request at issue.¹¹ CoA Institute satisfies this test because it gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.¹² Although it is not required by the statute, CoA Institute gathers the news it regularly

⁷ 5 U.S.C. § 552(a)(4)(A)(iii); *see also Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115-19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

⁸ *See, e.g.*, Richard Perez-Pena, “Obama Designates National Monument in Maine, to Dismay of Some,” *New York Times* (Aug. 24, 2016), http://www.nytimes.com/2016/08/25/us/obama-maine-katahdin-woods-and-waters.html?_r=0 (last visited Oct. 3, 2016); Cynthia Barnett, “Obama Creates Connecticut-Size Ocean park, First in Atlantic,” *National Geographic* (Sept. 15, 2016), at <http://news.nationalgeographic.com/2016/09/obama-creates-a-monument-bigger-than-connecticut-in-the-atlantic/> (last visited Oct. 3, 2016); “The Antiquities Act and America’s National Parks,” *U.S. News* (Aug. 19, 2016), at <http://www.usnews.com/news/articles/2016-08-19/the-antiquities-act-and-americas-national-parks> (Oct. 3, 2016); Donald J. Kochan, “Midnight Monuments,” *The Hill* (Oct. 3, 2016), at <http://64.147.104.30/blogs/congress-blog/energy-environment/298916-midnight-monuments> (last visited Oct. 3, 2016).

⁹ *See also Cause of Action*, 799 F.3d at 1125-26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

¹⁰ 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 16 C.F.R. § 4.11(b)(6).

¹¹ *See Cause of Action*, 799 F.3d at 1121.

¹² CoA Institute notes that the agency’s definition of “representative of the news media” (16 C.F.R. § 4.11(b)(6)) is in conflict with the statutory definition and controlling case law. The agency has improperly retained the outdated “organized and operated” standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. *See Cause of Action*, 799 F.3d at 1125 (“Congress . . .

publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. It does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.¹³ These distinct works are distributed to the public through various media, including the Institute's website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via e-mail.

The statutory definition of a "representative of the news media" contemplates that organizations such as CoA Institute, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities."¹⁴ In light of the foregoing, numerous federal agencies have appropriately recognized the Institute's news media status in connection with its FOIA requests.¹⁵

omitted the 'organized and operated' language when it enacted the statutory definition in 2007. . . . [Therefore,] there is no basis for adding an 'organized and operated' requirement to the statutory definition." Under either definition, however, CoA Institute qualifies as a representative of the news media.

¹³ See, e.g., *Cause of Action Testifies Before Congress on Questionable White House Detail Program* (May 19, 2015), available at <http://coainst.org/2aJ8UAA>; COA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://coainst.org/2as088a>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), available at <http://coainst.org/2aJ8sm5>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://coainst.org/2aFWxUZ>; COA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://coainst.org/2apTwqP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

¹⁴ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

¹⁵ See, e.g., FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep't of Justice (Aug. 2, 2016); FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 2016); FOIA Request 796939, Dep't of Labor (Mar. 7, 2016); FOIA Request 2015-HQFO-00691, Dep't of Homeland Sec. (Sept. 22, 2015); FOIA Request F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request 14-401-F, Dep't of Educ. (Aug. 13, 2015); FOIA Request HQ-2015-01689-F, Dep't of Energy (Aug. 7, 2015); FOIA Request 2015-OSEC-04996-F, Dep't of Agric. (Aug. 6, 2015); FOIA Request OS-2015-00419, Dep't of Interior (Aug. 3, 2015); FOIA Request 780831, Dep't of Labor (Jul 23, 2015); FOIA Request 15-05002, Sec. & Exch. Comm'n (July 23, 2015); FOIA Request 145-FOI-13785, Dep't of Justice (Jun. 16, 2015); FOIA Request 15-00326-F, Dep't of Educ. (Apr. 08, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm'n (Feb. 13, 2015); FOIA Request HQ-2015-00248, Dep't of Energy (Nat'l Headquarters) (Dec. 15, 2014); FOIA Request F-2015-106, Fed. Commc'n Comm'n (Dec. 12, 2014); FOIA Request HQ-2015-00245-F, Dep't of Energy (Dec. 4, 2014); FOIA Request F-2014-21360, Dep't of State, (Dec. 3, 2014); FOIA Request LR-2015-0115, Nat'l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request 2015-OSEC-00771-F, Dep't of Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, Dep't of Interior (Office of Sec'y) (Nov. 20, 2014); FOIA Request CFPB-2015-049-F, Consumer Fin. Prot. Bureau (Nov. 19, 2014); FOIA Request GO-14-307, Dep't of Energy (Nat'l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep't of Energy (Nat'l Headquarters) (Aug. 14, 2014); FOIA Request LR-20140441, Nat'l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm'n (May 7, 2014); FOIA Request 2014-4QFO-00236, Dep't of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep't of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep't of

Record Preservation Requirement

CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.¹⁶

Record Production and Contact Information

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be produced more readily, CoA Institute requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact us by telephone at (202) 499-4232 or by email at kara.mckenna@causeofaction.org or michael.pepson@causeofaction.org. Thank you for your attention to this matter.

CAUSE OF ACTION INSTITUTE



MICHAEL PEPSON
COUNSEL



KARA E. MCKENNA
COUNSEL

Agric. (May 3, 2012); FOIA Request 2012-00270, Dep't of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep't of Educ. (Jan. 20, 2012).

¹⁶ See 15 C.F.R. § 4.3(d) ("Components shall not dispose of records while they are the subject of a pending request, appeal, or lawsuit under the FOIA."); 36 C.F.R. § 1230.3(b) ("Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records."); *Chambers v. Dep't of the Interior*, 568 F.3d 998, 1004-05 (D.C. Cir. 2009) ("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act."); *Judicial Watch, Inc. v. Dep't of Commerce*, 34 F. Supp. 2d 28, 41-44 (D.D.C. 1998).

Exhibit 1



NOAA NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

UNITED STATES DEPARTMENT OF COMMERCE

NOAA Town Hall in Providence, Rhode Island

September meeting to discuss deep-sea canyons and seamounts

Posted September 3, 2015

NOAA invites you to participate in a Town Hall meeting to discuss possible permanent protections for three deep-sea canyons — Oceanographer, Gilbert, and Lydonia Canyons — and four seamounts off of New England's coast. Deep-sea canyons, which plunge to depths greater than 7,000 feet, and sea mounts, which rise thousands of feet above the sea floor, create unique habitats supporting tremendous biodiversity and fragile ecosystems that are home to corals, fish, marine mammals, turtles, and more.

To ensure that we protect these unique places for future generations while recognizing the importance of sustainable ocean-based economies, we are seeking input from all interested parties in the region.

The Town Hall discussion will be held on September 15, at the Providence Marriott Downtown, 1 Orms Street, Providence, Rhode Island. The meeting will be in the Sessions/College/Canal Room from 6:00 – 8:00 p.m.

If you are unable to attend the Town Hall in person, please send comments by September 15, 2015 to atlanticconservation@noaa.gov.

Please feel free to forward this invite to anyone who might also be interested in participating. We look forward to hearing from you.

NOAA's mission is to understand and predict changes in the Earth's environment, from the depths of the ocean to the surface of the sun, and to conserve and manage our coastal and marine resources. Join us on [Twitter](#), [Facebook](#), [Instagram](#) and our other [social media channels](#).

Got feedback?

Exhibit 2



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CLF & Coalition Partners Call for Atlantic Coast’s First Marine National Monument

CLF & Coalition Partners Call for Atlantic Coast’s First Marine National Monument

SEP 2, 2015 | CLFSITEKEEPER

Media Contact:

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(617) 850-1709

Enormous outpouring of public support at New England Aquarium for permanent protection of Cashes Ledge and the New England Canyons and Seamounts

September 2, 2015 (BOSTON, MA) – Conservation Law Foundation (CLF) along with a diverse coalition of partners including National Geographic Society, Pew Charitable Trusts and the Natural Resources Defense Council (NRDC) held a public event today at the New England Aquarium in which they formally called for the creation of the Atlantic Coast’s first Marine National Monument. The monument will encompass the Cashes Ledge Closed Area in the Gulf of Maine and New England Canyons and Seamounts off Cape Cod, preserving a total area of 4,647 square nautical miles.

“Cashes Ledge and the Canyons and Seamounts are a rich part of New England’s legacy. Now is the time for these ocean treasures to be part of our national heritage as a Marine National Monument,” said Priscilla Brooks, CLF’s Director of Ocean Conservation. “These biodiversity hotspots offer a refuge for an astonishing array of ocean wildlife including severely depleted Atlantic cod, coldwater corals, whales, dolphins, sharks, bluefin tuna and the largest and deepest coldwater kelp forest on the Atlantic seaboard. These areas are also important laboratories to advance our understanding of the impacts of climate change on the ocean and on our communities. We need to recognize what amazing ocean treasures we have here in New England and protect them permanently for future generations.”

As the only New England-based environmental advocacy organization solely focused on regionwide conservation issues, CLF has been on the frontlines of protecting these beautiful ocean treasures for the past decade. Recognizing the need to bring a national focus to permanent protection of these Atlantic treasures, CLF partnered with a coalition of this country’s top national, regional and state environmental organizations, businesses, scientists, divers, whale watching companies, faith-based leaders and others.

Along with National Geographic Photography Fellow Brian Skerry and Brown University marine biologist, Dr. Jon Witman, CLF has sponsored several dive expeditions to Cashes Ledge to further study its unique habitats and to capture never-before-seen footage of the 500-square mile ledge through Skerry’s remarkable photographs. This work has garnered the attention of other talented photographers and videographers.

Brian Skerry commented, "Cashes Ledge is like no other place I've been. It is one of the last remaining hotspots of biodiversity in the entire Gulf of Maine, protected from the degradation that has befallen too many of our ocean treasures. We have this incredible jewel right in our own backyard, and it's crucial we not wait another moment to ensure its permanent preservation."

At the New England Aquarium on Wednesday, Skerry presented remarkable firsthand photographs from his dives to Cashes Ledge and led a panel discussion with prominent scientists on the importance of protecting these unique habitats that included Brown University marine ecologist Jon Witman, Mystic Aquarium research scientist Peter Auster, and New England Aquarium VP for Research Scott Kraus. The event also included comments from local fishermen, business owners, faith-based leaders and other members of the public, who spoke in support of monument designation for these vulnerable ocean habitats.

Making Cashes Ledge and the New England Canyons and Seamounts a Marine National Monument would permanently protect these places from commercial resource extraction, such as oil and gas drilling, bottom trawling, dredging, and sand and gravel mining. This would be the first Marine National Monument on the Atlantic Coast of the United States.

Photos and video of the area can be viewed [here](https://www.dropbox.com/sh/phg5x1bu7pq10ry/AADsQ-07lOeldsBkUgX_nQ_5a?dl=0&preview=CL+Fish+Short+Lu+Lamar.mov) (https://www.dropbox.com/sh/phg5x1bu7pq10ry/AADsQ-07lOeldsBkUgX_nQ_5a?dl=0&preview=CL+Fish+Short+Lu+Lamar.mov).

CLF experts are available for further comment.

###

Places

Campaigns

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[Why We've Filed Suit Against ExxonMobil](http://www.clf.org/blog/taking-on-exxon-lawsuit/)
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The Federal Energy Regulatory Commission (FERC) recently issued a pair of decisions that underscores the dimming prospects for Spectra's once-dreamed-of...

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PRESS RELEASE

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