

2. This action arises under, and alleges Defendants' violation of, the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Plaintiffs seek (i) declaratory relief that Defendants are in violation of FOIA and (ii) injunctive relief requiring Defendants to provide all requested records to Plaintiffs in a timely manner.

PARTIES

3. Plaintiff Center for Biological Diversity (“the Center”) is a 501(c)(3) non-profit organization established under the laws of California, with offices in Oakland, California and elsewhere in the United States. The Center has approximately 50,000 members and over 800,000 online activists and supporters. The Center works for the protection of endangered species, wild places and a healthy environment through science, law and policy. The Center informs, educates and counsels the public regarding environmental issues, policies and laws relating to environmental issues through media advocacy, the Center’s webpage, and publications that are widely distributed. In support of this mission, the Center has been substantially involved in the management activities of numerous government agencies for years, including those subject to this litigation, and has consistently displayed its ability to disseminate information granted to it through FOIA. The Center brings this litigation on behalf of itself and its adversely affected members and staff.

4. Plaintiff ForestEthics is a 501(c)(3) non-profit organization established under the laws of California, with offices in San Francisco, California and elsewhere in the U.S. and Canada. ForestEthics has approximately 66,500 supporters. ForestEthics works to protect endangered forests, wildlife and human well-being. In support of this mission, ForestEthics uses FOIA to obtain and disseminate information to its members and the public at large concerning the activities of federal agencies, including those subject to this litigation. ForestEthics brings this litigation on behalf of itself and its adversely affected members and staff.

5. The information which Plaintiffs seek to obtain from Defendants through their FOIA request will further the Plaintiffs' missions as non-profit environmental advocacy organizations. Through the Plaintiffs' dissemination of the requested information to their members and the public at large, the requested information is likely to contribute significantly to the public's understanding of the activities, policies and decision-making processes of Defendants as they relate to Defendants'

1 authorization of crude oil exports pursuant to relevant federal law.

2 6. The interests of Plaintiffs and their members are harmed by Defendants' failure to
3 comply with FOIA. Defendants' failure to comply with FOIA prevents Plaintiffs from obtaining,
4 analyzing, synthesizing, disseminating, and otherwise using the requested information to further their
5 organizations' missions and the interests of their members. These injuries would be redressed by a
6 favorable decision granting Plaintiffs their requested relief of releasing the requested documents.

7 7. Defendant Bureau of Industry and Security ("BIS") is an agency within the U.S.
8 Department of Commerce and is responsible for evaluating and processing licenses and other
9 authorizations for proposed exports and re-exports of goods and technology from the U.S, including
10 crude oil. Defendant BIS is an "agency" within the meaning of 5 U.S.C. § 552(f)(1) and is required by
11 law to comply with FOIA.

12 8. Defendant U.S. Department of Commerce ("DOC"), which houses Defendant BIS, is a
13 Department of the Executive Branch of the U.S. Government and is charged with promoting economic
14 growth, sustainable development and improved living standards for all Americans. Defendant DOC is
15 an "agency" within the meaning of 5 U.S.C. § 552(f)(1) and is required by law to comply with FOIA.

16 **JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT**

17 9. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. §
18 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question jurisdiction).

19 10. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §
20 1391(b) and (e) because a substantial part of the events giving rise to this claim occurred in San
21 Francisco and Oakland, California, where Plaintiffs reside and operate their businesses.

22 11. Assignment to the San Francisco or Oakland Divisions is proper pursuant to Civil Local
23 Rule 3-2(c) and (d) because a substantial portion of the events giving rise to this action occurred in San
24 Francisco and Oakland, California, where Plaintiffs reside and operate their businesses.

25 **STATUTORY BACKGROUND**

26 **A. The Freedom of Information Act**

27 12. FOIA allows any person to obtain access to the records of federal agencies provided the
28 statute's disclosure exemptions do not apply to the requested documents. 5 U.S.C. § 552.

1 13. Procedurally, FOIA requires that upon receiving a request for records that “reasonably
2 describes” the records sought and complies with “published rules . . . and procedures to be followed,”
3 the agency “shall make the records promptly available to any person.” *Id.* § 552(a)(3)(A).

4 14. After receiving a FOIA request, an agency must determine within twenty days “whether
5 to comply with such request and shall immediately notify the person making such request of such
6 determination and the reasons therefor, and of the right of such person to appeal to the head of the
7 agency any adverse determination.” *Id.* § 552(a)(6)(A)(i).

8 15. Any appeal of a denial of a request for records must generally be resolved within twenty
9 days of receipt of the appeal. *Id.* § 552(a)(6)(A)(ii). If on appeal the “denial of the request for records is
10 in whole or in part upheld, the agency shall notify the person making such request of the provision for
11 judicial review” under 5 U.S.C. § 552(a)(4)(B). *Id.*

12 16. In determining whether a government agency has properly withheld requested
13 documents under a FOIA exemption set forth in 5 U.S.C. § 552(b), the district court conducts a *de novo*
14 review of the agency’s decision. *Id.* § 552(a)(4)(B).

15 17. FOIA reflects “a general philosophy of full agency disclosure unless information is
16 exempted under clearly delineated statutory language.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360-
17 61 (1976).

18 18. FOIA’s nine exemptions “are limited and must be narrowly construed with doubts
19 resolved in favor of disclosure.” *Church of Scientology Intern. v. IRS*, 995 F.2d 916, 919 (9th Cir.
20 1993). Accordingly, when an agency invokes a FOIA exemption to resist disclosure, the agency bears
21 the burden of proving that records have been properly withheld. 5 U.S.C. § 552(a)(4)(B).

22 19. Relevant here, exemption 3 of FOIA (“Exemption 3”) permits agencies to withhold
23 materials that are “specifically exempted from disclosure by statute . . . if that statute” either (i)
24 “requires that the matters be withheld from the public in such a manner as to leave no discretion on the
25 issue” or (ii) “establishes particular criteria for withholding or refers to particular types of matters to be
26 withheld.” 5 U.S.C. § 552(b)(3). To determine whether an agency may withhold records under
27 Exemption 3, a court must consider “whether there is a statute within the scope of Exemption 3” and, if
28 such a statute exists, whether the withheld information “falls within the scope of the statute.” *Minier v.*

1 *CIA*, 88 F.3d 796, 801 (9th Cir. 1996) (citing *CIA v. Sims*, 471 U.S. 159, 167 (1985)).

2 20. On January 21, 2009, President Obama issued a Freedom of Information Act
3 Memorandum, which declared a presumption under FOIA that “openness prevails” and provided that:

4 The Government should not keep information confidential merely because public
5 officials might be embarrassed by disclosure, because errors and failures might be
6 revealed, or because of speculative or abstract fears. . . . All agencies should adopt a
7 *presumption in favor of disclosure*, in order to renew their commitment to the principles
embodied in FOIA, and to usher in a new era of open Government. The presumption of
disclosure should be applied to *all* decisions involving FOIA.

8 74 Fed. Reg. 4683 (Jan. 26, 2009) (emphasis added).

9 **B. The Energy Policy and Conservation Act and the Export Administration Act**

10 21. In response to the 1973 Arab oil embargo crisis, Congress passed the Energy Policy and
11 Conservation Act of 1975, 42 U.S.C. § 6201 *et seq.* (“EPCA”), which generally prohibits the export of
12 crude oil from the United States. *Id.* § 6212. The statute provides for narrow exemptions to the export
13 ban when such exports are found to be in the “national interest.” *Id.* § 6212(b). Under EPCA,
14 implementation of the export ban is delegated to DOC, pursuant to the procedures contained in the
15 Export Administration Act of 1969, 50 U.S.C. App. §§ 2401 *et seq.* (“the EAA”). 42 U.S.C. § 6212(c).

16 22. The EAA set up an export authorization system by which certain goods and technology,
17 such as nuclear materials, weapons, and crude oil, may only be exported pursuant to licenses or other
18 authorizations issued by DOC. 50 U.S.C. App. § 2403.

19 23. The EAA provided a narrow exception from FOIA, stating that “information obtained
20 for the purpose of consideration of, or concerning, license applications under [the EAA] shall be
21 withheld from public disclosure unless the release of such information is determined by the Secretary
22 [of Commerce] to be in the national interest.” 50 U.S.C. App. § 2411(c).

23 24. Pursuant to the EAA, DOC issued regulations governing covered exports generally, 15
24 C.F.R. §§ 730 *et seq.*, and crude oil exports specifically, *id.* § 754.2. These regulations are generally
25 referred to as the Export Administration Regulations (“EARs”).

26 25. The EAA contained a termination date, resulting in the statute expiring on August 20,
27 1994. 50 U.S.C. App. § 2419. The EAA termination date was subsequently extended to August 20,
28 2001. Pub. L. 106-508 (Nov. 13, 2000). Subsequent to the EAA’s termination in 2001, Congress has

not reauthorized the statute. However, the President, through Executive Order 13222 of August 17, 2001, 66 Fed. Reg. 44025 (Aug. 22, 2001), as extended by successive presidential notices, *see* 79 Fed. Reg. 46959 (Aug. 11, 2014), has continued the EARs in effect—but not the EAA itself—pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* (“IEEPA”).

FACTUAL AND PROCEDURAL BACKGROUND

A. Crude Oil Production and Exports

26. U.S. crude oil production has rapidly increased in recent years. According to the U.S. Department of Energy’s Energy Information Administration (“EIA”) statistics, U.S. crude oil production increased by over 74% from 2008 to 2014, averaging a total of 8.7 million barrels per day in 2014.¹

27. This dramatic increase of U.S. crude oil production is largely driven by the application of horizontal drilling coupled with hydraulic fracturing, or “fracking,” to extract light “tight” oil from low-permeability shale and sandstone formation. This extraction method unlocks oil reserves which were previously considered uneconomical or unrecoverable.

28. The rise in crude oil production has led to both a rise in authorized crude oil exports as well as calls to repeal the general prohibition on such exports contained in EPCA.

29. According to EIA statistics, U.S. crude oil exports have grown by approximately 800%, from 44,000 barrels per day in 2009 to 351,000 barrels per day in 2014.² Driven by such crude oil exports coupled with increased natural gas exports, the EIA in its Annual Energy Outlook 2015 report forecasted that the U.S. could become a net energy exporter by 2019.³

B Plaintiffs’ FOIA Request and Defendants’ Response

30. In light of the increase of crude oil exports and the environmental impacts flowing from

¹ *U.S. Field Production of Crude Oil*, U.S. ENERGY INFORMATION ADMINISTRATION (Aug. 31, 2015), <http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS2&f=A>.

² *U.S. Exports of Crude Oil*, U.S. ENERGY INFORMATION ADMINISTRATION (Aug. 31, 2015), <http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCREXUS2&f=AA>.

³ U.S. ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY OUTLOOK 2015 ES-5 (2015), [http://www.eia.gov/forecasts/aeo/pdf/0383\(2015\).pdf](http://www.eia.gov/forecasts/aeo/pdf/0383(2015).pdf).

1 such exports, on November 27, 2014, Plaintiffs filed a FOIA request (“FOIA Request”) with BIS
2 seeking information about the authorizations of crude oil exports and any environmental analysis
3 completed prior to authorizing such exports.

4 31. Specifically, Plaintiffs’ FOIA Request sought:

5 (1) A list of all licenses, permits and/or other authorizations made for the export of crude
6 oil from the U.S. since January 1, 2013. This request includes, but is not limited to, any
licenses issued by BIS pursuant to 15 C.F.R. § 754.2.

7 (2) A copy of any license applications for the export of California crude oil pursuant 15
8 C.F.R. § 754.2(g) received by BIS since January 1, 2013.

9 (3) A copy of any other documents related to any license application or other
10 communications, including all internal and external correspondence, emails, phone logs
11 and meeting notes related to the of any license applications for the export of California
crude oil pursuant 15 C.F.R. § 754.2(g) received by BIS since January 1, 2013.

12 (4) A list of all documents ever prepared or received by BIS pursuant to the National
13 Environmental Policy Act (“NEPA”) and/or the Endangered Species Act (“ESA”) for the
consideration and/or issuance of any license for the export of crude oil from the U.S..

14 (5) A copy of any NEPA or ESA document prepared or received by BIS, or relied upon
15 by BIS, related to the issuance of any license for the export of crude oil from the U.S.
16 since January 1, 2013.

17 32. In a letter dated December 22, 2014, BIS stated that “BIS has no responsive documents”
18 for items 4 and 5 of the FOIA Request concerning the agency’s compliance with the National
19 Environmental Policy Act and the Endangered Species Act.

20 33. In the same response letter, BIS also stated that it was withholding from disclosure items
21 1, 2, and 3 of the FOIA Request under Exemption 3, which authorizes an agency to withhold requested
22 information that is “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3).

23 34. In withholding the requested information, BIS explicitly relied upon the exemption
24 formerly contained in the EAA that provided that “information obtained for the purpose of,
25 consideration of, or concerning, license applications under [the EAA] shall be withheld from public
26 disclosure unless the release of such information is determined by the Secretary to be in the national
27 interest.” 50 U.S.C. App. § 2411(c).

28 35. Defendant BIS relied upon the FOIA exemption in the EAA notwithstanding the fact

1 that the EAA itself had expired in 2001. In a footnote in its letter, BIS acknowledged that the EAA
2 itself “has been in lapse,” but then cited to the fact that the EARs have been kept in effect by executive
3 order notwithstanding the expiration of the EAA itself. In short, BIS conflated the extension of the
4 effectiveness of the EARs with the effectiveness of the entire EAA, including the confidentiality
5 provision of section 12 of the EAA to which Exemption 3 relates.

6 36. Plaintiffs timely appealed BIS’s withholding of the requested documents to DOC on
7 January 20, 2015.

8 37. Plaintiffs appealed on the grounds that BIS improperly relied upon Exemption 3 to
9 withhold the requested documents. Exemption 3 does not apply to the requested information because
10 the EAA expired in 2001 and thus failed to qualify as an Exemption 3 withholding statute.

11 38. Specifically, Plaintiffs noted that this Court in *Electronic Frontier Foundation v. Dep’t*
12 *of Commerce* held that Exemption 3 does not apply to the expired EAA, and presidential extensions
13 through executive orders do not, consistent with the constitutional separation of powers and plain
14 language of FOIA Exemption 3, qualify as an Exemption 3 withholding *statute* without some clear
15 congressional direction to withhold particular records from the public. *Elec. Frontier Found.*, 58 F.
16 Supp. 3d 1008 (N. D. Cal. 2013), *appeal filed*, No. 13-16480 (9th Cir. Nov. 25, 2013). Since 2001, no
17 Congressional act has revived the EAA.

18 39. Further, Plaintiffs in the appeal explained that none of the non-statutory provisions cited
19 by BIS constitute a “statute” for the purposes of Exemption 3 under FOIA. As this Court in *Electronic*
20 *Frontier Foundation* affirmed, “Executive Order 13222 is not a statute” and “may not be interpreted as
21 extending the EAA’s . . . expiration date.” *Elec. Frontier Found.*, 58 F. Supp. 3d at 1013. Moreover,
22 the IEEPA cannot be relied upon as an Exemption 3 statute because it makes no reference to
23 withholding documents from the public.

24 40. Because the EAA is expired, Executive Order 13222 is not a statute, and the IEEPA is
25 not an Exemption 3 statute, BIS cannot rely on Exemption 3 to withhold the requested documents.

26 41. In a letter dated April 22, 2015, DOC responded to Plaintiffs’ appeal by denying
27 disclosure of information under items 1, 2, and 3 of the FOIA Request on grounds that the EAA is an
28 Exemption 3 statute despite its 2001 expiry because subsequent executive orders extending the

1 regulations promulgated to implement the EAA on a yearly basis exist. DOC informed Plaintiffs of
2 their rights to obtain judicial review of such denial as provided for in 5 U.S.C. § 552(a)(4)(B).

3 **CLAIM FOR RELIEF**

4 42. Plaintiffs re-allege and incorporate, as if fully set forth herein, each and every allegation
5 in the preceding paragraphs of this Complaint.

6 43. FOIA provides that any person may obtain access to the records of federal agencies
7 provided the statute's disclosure exemptions do not apply to the requested documents. 5 U.S.C. § 552.

8 44. Defendants have wrongfully withheld agency records requested by Plaintiffs, improperly
9 relying upon FOIA Exemption 3, which only allows withholding of documents that are "specifically
10 exempted from disclosure by statute." *Id.* § 552(b)(3).

11 45. As this Court in *Electronic Frontier Foundation* held, the expired EAA is not a valid
12 withholding statute under Exemption 3 of FOIA.

13 46. Defendants' failure to provide information responsive to items 1, 2 and 3 of Plaintiffs'
14 FOIA Request violates FOIA and is subject to judicial review under 5 U.S.C. § 552(a)(4)(B).

15 **REQUEST FOR RELIEF**

16 WHEREFORE, Plaintiffs respectfully request that the Court:

- 17 1. Declare that Defendants' failure to produce documents sought by the FOIA Request
18 violates FOIA;
- 19 2. Order Defendants, within 10 days from the date of such order, to produce without charge
20 the records responsive to the FOIA Request in their entirety;
- 21 3. Award Plaintiffs their costs and reasonable attorney fees incurred in this action; and
22 4. Grant such other relief as the Court may deem just and proper.
- 23

24 DATED: September 24, 2015

Respectfully submitted,

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