

April 2, 2024

Via Email

Ashley Rychak, BOEM FOIA Officer
Bureau of Ocean Energy Management
45600 Woodland Road
VAM-BOEM Dir
Sterling, Virginia 20166
boemfoia@boem.gov

Dear Ms. Rychak:

Pursuant to the Freedom of Information Act, 5 U.S.C. 552, et. seq, and Department of Interior FOIA regulations, 43 C.F.R. Part 2, the Committee for Constructive Tomorrow, The Heartland Institute, and the National Legal and Policy Center, all nonprofit 501(c)(3) public interest organizations, hereby request that the Bureau of Ocean Energy Management (BOEM) promptly release two documents that are being improperly withheld in whole from the public from the Coastal Virginia Offshore Wind Project Construction and Operations Plan (COP) (revised 02/28/2023). <https://www.boem.gov/renewable-energy/state-activities/coastal-virginia-offshore-wind-project-construction-and>

In particular, the two documents being withheld from the public record in their entirety are **Appendix R: Threatened and Endangered Species Review**, and **Appendix FF: Protected Species Mitigations and Monitoring Plan**. Appendix R and Appendix FF was prepared and submitted by Dominion Energy Resources, Inc. to BOEM on or about February 28, 2023 but the cover to these two Appendices contains the following notice “**Proprietary and Confidential Business Information Exempt from Public Disclosure.**”

The information contained in those two appendices is vital for the public to understand the impact of Dominion’s wind energy project on threatened and endangered species, particularly the North Atlantic Right Whale and what mitigation and monitoring measures will be taken. Dominion has refused to release these documents and directed us to contact BOEM.

The FOIA exemption that Dominion is alluding to in withholding the two appendices is Exemption 4, 5 U.S.C. 552(b)(4), which provides an exemption for disclosure if the records contain “*trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.*” It is not clear whether Dominion Energy’s claim of “proprietary information” constitutes “trade secrets,” but their claim of “confidential business information” appears to come within the exemption for “commercial...information [that is] privileged or confidential.”

Because these two documents can be easily located, we request that this request be assigned to the agency's "Simple" processing track, which takes between one to five workdays to process. See 46 C.F.R. 2.15 (C)(1). While this request seeks the release of documents which Dominion Energy claims contains confidential business information, we understand that the agency's regulations required consultation with the submitter. 46 C.F.R. 2.27.

Nevertheless, we request that this process be executed promptly so as not to delay the processing of this FOIA request and that any response given by Dominion to the agency be released to us as well. Moreover, we submit that this request qualifies for expedited treatment under 46 C.F.R. 2.20 because it is a matter of urgent and compelling public interest. Dominion Energy will be engaging in offshore activity on or about May 1, 2024 that is expected to harm the endangered whales, and the information being withheld will shed light on both the impact and any mitigation efforts. The requesters will disseminate this information to the public. Therefore, this request calls for a response in 10 business days than the normal 20 business days for FOIA requests.

We believe that Dominion Energy's invocation of the exemption from disclosure of confidential business information was not made in good faith. In its consultation with Dominion Energy, BOEM should demand that the company provide clear evidence demonstrating that the exemption applies to the entire appendices. Indeed, any submission by Dominion "must provide a **detailed** written statement that explains why the information is a trade secret or... certification that the information is both customarily and actually treated as private by the owner of the information." 46 C.F.R. 2.31. (Emphasis added).

In that regard, we note that this agency's regulations cite to **Executive Order 12600-Predisclosure notification procedures for confidential commercial information** (June 23, 1987). In particular, Section 2(a) of EO 12600 provides the following definition: "'Confidential commercial information' means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure **could reasonably be expected to cause substantial competitive harm.**" (Emphasis added).

We find it implausible that the release of information provided in either appendix regarding "Threatened and Endangered Species Review" in Appendix R and "Protected Species Mitigations and Monitoring Plan" in Appendix FF would cause any competitive harm to Dominion, let alone "substantial" harm required to be shown under EO 12600.

Moreover, we request that any and all non-exempt material be disclosed to us promptly as required by FOIA, and that a *Vaughn v. Rosen* index be prepared to justify the withholding of any documents or portions thereof. It is hard to imagine that the entire contents of the two appendices contain exempt information, and accordingly, non-exempt segregable material must be released under FOIA.

Finally, as nonprofit public interest organizations, we hereby request a waiver of all search and copying fees pursuant to 46 C.F.R. 2.45 because the information requested is in “the public interest because it is likely to contribute significantly to public understanding of government operations or activities,” and the information requested is not “primarily in [our] commercial interests.” Nevertheless, we are prepared to pay reasonable search and copy costs if our waiver request is denied.

Please respond promptly that you have received this FOIA request and provide the tracking number assigned to it so we can follow its processing on your website.

CERTIFICATION

I hereby certify that the above statements are true to the best of my knowledge and belief.

Date: April 2, 2024

/s/ Paul D. Kamenar

Paul D. Kamenar, Esq.