UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

November 10, 2016

HEADQUARTERS OFFICE
Carrie Hyde-Michaels, FWS FOIA Officer
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FWS FOIA Officer at fwhq_foia@fws.gov

Re: FOIA Request# **DOC-NOAA-2016-000605**

Dear FOIA Officer:

Enclosed is a copy of a request for agency records under the Freedom of Information Act request 2016-000605, from Ms. Margaret E. Townsend on behalf of the Center for Biological Diversity addressed to NOAA's FOIA Officer requesting records relating to the National Marine Fisheries Service's (NMFS) and Fish and Wildlife Service's (FWS) joint "Significant Portion of Range Policy":

1. All records related to the Joint Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species." 79 Fed. Reg. 37,578 (July 1, 2014); 76 Fed. Reg. 76,987 (Dec. 9, 2011).

2. All records related to, concerning, and/or generated by or in connection with the Significant Portion of Its Range Team consisting of representatives from the U.S. Fish and Wildlife Service and NOAA Fisheries.

We understand FWS received a substantially similar request that you are currently processing.

Per a scope conversation we had with the requestor and ensuing emails on March 11, 2016, and March 14, 2016, we processed this request with the understanding that the requester is only seeking documents that reflect development of the policy up through its signing, *i.e.,* the decision file. We also discussed with the requester that our search would need to be conducted in light of the fact that NMFS had already compiled an administrative record for the policy, which has been filed in litigation regarding FWS' listing determination for the Gunnison sage grouse (D. Colorado). The requestor agreed that, for the period covered in that administrative record (June 21, 2010, through June 19, 2014), we would not need to conduct a new search for agency records, but could review those documents that had already been collected but that were either excluded from the administrative record per the NOAA 2012 Administrative Record Guidance or

provided to the plaintiffs after filing of the record. Because the requester indicated they were interested in also receiving documents dated "from around and just before the time that the 2010 white paper was written," we conducted a new search for and collected documents going back to the start of the joint drafting team that developed the Policy, which was in October 2009. In doing this, we did not search for records of departed or deceased employees.

We have finished processing this request:

- We found **358 documents, totaling 1,249 pages** that include material that appears to have originated in their entirety from FWS or DOI, giving your agency the primary interest in the document. Though we believe the majority of these materials likely qualify for protection under (b)(5) due to their deliberative nature and/or the inclusion of attorney-client information, they are being referred to you for release determination.

    - Accordingly, per our governing regulations, 15 CFR § 4.5(b), we hereby refer the requester to FWS/DOI for further action related to these *358 documents.* Enclosed are the referral document*(s)* with this letter. Please respond directly to the requester regarding these documents. Please send us a copy of your final transmittal letter.

- In addition, we identified **22 documents, totaling 55 pages**, that include portions that originated from FWS or DOI. We have partially redacted those records to shield as "other agency" those portions where FWS or DOI has the primary concern. We have applied partial redactions as appropriate to the NOAA-origin portions.

    - Accordingly, per our governing regulations, 15 CFR § 4.5(b), we are also referring the FWS/DOI portions of these *22 documents* to you. We request that you make a determination on the FWS-origin text. You should respond directly to the requestor as to the FWS/DOI portions while maintaining protection of any NOAA portions that we have redacted on the basis of privilege.

We think going forward it would be beneficial to discuss and put in place an informal agreement between our two agencies addressing generally what kinds of communications should be released and which should be withheld in response to similar requests. For example, we are currently continuing to process another request from the Center for Biological Diversity seeking documents related to the similar joint deliberative processes leading to the recent policy on interpretation of ESA Section 4(b)(2) and the meaning of "destruction or adverse modification of critical habitat." (Request No. 2016-000603). As you may be aware, the underlying deliberative process to develop the subject policies and regulations involved a joint drafting team of staff and attorneys from FWS, NMFS, DOI, and DOC that functioned as one large group. Having an agreement in place would avoid needing to refer records in the future where portions originated from FWS or DOI. Attorneys from the NOAA Office of General Counsel have been in communication with attorneys from the Office of the Solicitor to discuss this matter, and we look forward to expanding and continuing those conversations to ensure we can most efficiently process those records.

Also please find enclosed a copy of the final response letter that was sent to the requester from NMFS.

Thank you for your attention to this matter. Please do not hesitate to call me, Lamar Turner at 301-427-8492 or email to nmfs.hq.pr.foia@noaa.gov should you have any questions.

Sincerely,

Lamar N. Turner, FOIA Coordinator
Office of Protected Resources

Enclosures
Original FOIA Request
NMFS Final Response Letter dated & signed
FWS Referral Documents on CD