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

Ms. Margaret Townsend
Center for Biological Diversity
P. O. Box 11374
Portland, OR 97211-0374

NOV 14 2016

Re: FOIA Request DOC-NOAA-2016-000605

Dear Ms. Townsend:

This letter is in response to your Freedom of Information Act (FOIA) request # 2016-000605 dated *February 10, 2016* and received by our office on *February 16, 2016.* You requested records relating to the National Marine Fisheries Service's (NMFS) and United States 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.

Per our scope conversation and email on March 11, 2016, and your response email dated March 14, 2016, we processed this request with the understanding that you seek documents reflecting development of the policy up through its signing, i.e., the decision file. As we discussed, we tailored our search in light of the fact that NMFS had already compiled an administrative record for the policy, which has been filed as a supplemental record to the record of the Department of the Interior (DOI) in litigation regarding FWS' listing determination for the Gunnison sage grouse (D. Colorado).

As we agreed, for the period covered in that administrative record (June 21, 2010, through June 19, 2014), we did not conduct a new search for agency records, but rather reviewed 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 in that litigation after filing of the record. Because you indicated you 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. As we discussed, in doing this, we did not search for records of departed or deceased employees.

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This constitutes our final response to this request. Our search within the National Marine Fisheries Service and the NOAA Office of the General Counsel located a total of 559 documents responsive to your request, setting aside duplicates; this final response provides **444 responsive records,** *totaling 1,744 pages.* A summary of the releases are as follows:

- **37 documents** were previously released to you in full on April 19, 2016.

- **78 documents** were previously released to you on June 28, 2016 [*49 in full, 29 in part, and 4 were withheld in full].*

- **27 documents** *[totaling 69 pages]* are currently being released to you in their entirety.

- **58 documents** *[totaling 466 pages]* are currently being partially withheld:

    - 50 documents, *totaling 433 pages* pursuant to 5 U.S.C. § 552 (b)(5) which exempts from disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. The records are exempted from disclosure by application of the Attorney Client Privilege and Deliberative Process Privilege.

    - 8 documents, *totaling 33 pages* pursuant to 5 U.S.C. § 552 (b)(5) which exempts from disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. The records are exempted from disclosure by application of the Deliberative Process Privilege.

- **1 document** *[totaling 6 pages]* is currently being withheld in full pursuant to exemption:
    - 5 U.S.C § 552 (b)(5) which exempts from disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. The record is exempted from disclosure by application of the Deliberative Process Privilege and the Attorney-Client Privilege.

- **358 documents** *(totaling 1,249 pages)* were found pertaining to this request that originated in their entirety from FWS or DOI. Although we believe the majority of this material qualifies for protection under (b)(5), due to their deliberative nature and/or the inclusion of attorney-client information, FWS has the primary concern and is in the best position to evaluate and process the records. Accordingly, per our governing regulations, 15 C.F.R. § 4.5(b), we are simultaneously referring these documents for review and release determination. You can contact them at:

    HEADQUARTERS OFFICE
    Carrie Hyde-Michaels, FWS FOIA Officer
    U.S. Fish and Wildlife Service

5275 Leesburg Pike
MS:IRTM
Falls Church, VA 22041
Phone: 703-358-2291
Fax: 703-358-2251
FWS FOIA Officer at fwhq_foia@fws.gov

Some of the 58 documents released in part to you as described above include records originating in part from FWS or DOI, and those portions of the documents are marked as "other agency." These consist of **22 documents** *(totaling 55 pages)*. As indicated above, we have redacted the privileged NOAA-origin portions as warranted and, in some cases, from the FWS-origin text as well, where privileged material bearing on NOAA's interests has been identified, due to the joint nature of the underlying process. Pursuant to 15 C.F.R. § 4.5(b), we will refer the portions of documents originating from FWS/DOI to FWS for a separate release determination, and you should receive a response directly from them.

You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to 202-482-2552, or by FOIAonline at https://foiaonline.regulations.gov/foia/action/public/home#.

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- "Freedom of Information Act Appeal" must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov
Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence please contact **Lamar Turner** at **nmfs.hq.pr.foia@noaa.gov** or by phone at **301-427-8492**, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

Samuel D. Rauch III,
Deputy Assistant Administrator
for Regulatory Programs