IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

No. 3:19CV00017

SOUTHERN ENVIRONMENTAL LAW CENTER and DEFENDERS OF WILDLIFE,

Plaintiffs,

v.

LEOPOLDO MIRANDA, in his official capacity as Director of Region Four of the United States Fish and Wildlife Service,

JAMES KURTH, in his official capacity as Deputy Director Exercising the Authority of the Director of the United States Fish and Wildlife Service,

DANIEL JORJANI, in his official capacity as Principal Deputy Solicitor Exercising the Authority of Solicitor, the head of the Office of the Solicitor, an agency within the Department of the Interior, and

DAVID BERNHARDT, in his official capacity as Acting Secretary of the Department of the Interior,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This Freedom of Information Act ("FOIA") suit challenges the unlawful and unreasonable delay by Defendants Leopoldo Miranda, Director of Region Four of the United States Fish and Wildlife Service ("Region Four"), James Kurth, Acting Director of the United States Fish and Wildlife Service ("FWS" or "the Service"), Daniel Jorjani, Acting Solicitor for

the United States Department of the Interior, and David Bernhardt, Acting Secretary of the Department of the Interior, in responding to Plaintiffs' request for public records.

2. Plaintiffs Southern Environmental Law Center ("SELC"), a nonprofit public interest organization dedicated to protecting the environment of the Southeast, and Defenders of Wildlife ("Defenders"), a nonprofit public interest organization working to protect and restore imperiled wildlife, submitted their request for records in the custody of Region Four on August 15, 2018.

3. Plaintiffs' request sought records of any quotas or targets adopted by Defendants since January 20, 2017 to limit or reduce the number of imperiled species protected under the Endangered Species Act in Region Four. Such policies and practices are influencing the direction, pace, and quality of decisions made by Region Four.

4. Prior to and during the pendency of Plaintiffs' request, Defendants adopted and implemented policies and practices requiring significant delays in the processing of FOIA requests. These policies and practices are unnecessary for Defendants to meet FOIA's requirements.

5. Although Region Four staff belatedly provided a limited quantity of the requested public records, the vast majority of responsive records continue to be delayed with no end in sight. The partial response, moreover, shows the existence and importance of the records that are still being withheld.

6. Defendants have violated FOIA by failing to provide requested records "promptly" and to make a determination within the time allotted under FOIA. 5 U.S.C. § 552(a)(3)(A), (a)(6)(A). Plaintiffs seek a declaration that Defendants have violated FOIA, an order requiring Defendants to provide all nonexempt, responsive documents without further

delay, and an injunction prohibiting Defendants from applying their new policies and practices in such a way that adds further unnecessary delay to the processing of Plaintiffs' FOIA request.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552, 28 U.S.C. § 1331, and 28 U.S.C. § 2201.

8. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i), Plaintiffs are "deemed to have exhausted [their] administrative remedies" because Defendants have "fail[ed] to comply with the applicable time limit provisions."

9. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B). Plaintiff SELC is a 501(c)(3) nonprofit organization headquartered and residing in Charlottesville, Virginia, in the Western District of Virginia.

PARTIES

Plaintiffs

10. Plaintiff Southern Environmental Law Center ("SELC") is a 501(c)(3), nonprofit public interest environmental law firm with a focus on six southeastern states.

11. SELC is a "person" for purposes of FOIA, 5 U.S.C. § 551(2).

12. SELC uses public advocacy and the law to protect the people and the natural resources of the Southeast and, in particular, to gather, analyze, and disseminate public information about activities affecting human health and the environment in the Southeast. SELC disseminates public information it gathers to the general public through its website, *southernenvironment.org*, which is updated regularly, as well as press releases, social media, and public comment letters. SELC attorneys also regularly attend and speak at public meetings and hearings throughout the region, informed by and sharing their analysis of public information.

SELC has been actively engaged in protecting the environment of the Southeast at the federal, state, and local levels for three decades.

13. Plaintiff Defenders of Wildlife ("Defenders") is a 501(c)(3), nonprofit public interest organization headquartered in Washington, D.C. that works to protect and restore imperiled wildlife, including in the Southeastern portion of the United States.

14. Defenders is a "person" for purposes of FOIA, 5 U.S.C. § 551(2).

15. Defenders is one of the nation's leading advocates for endangered species and wildlife conservation. Defenders is a science-based conservation organization with more than 1.8 million members and supporters nationwide and around the world, including in the region within the scope of Region Four's jurisdiction. Defenders is dedicated to the protection of all native wild animals and plants in their natural communities. Defenders uses education, public outreach, science, policy, and litigation, along with legislative and administrative advocacy, to defend the species, ecosystems, and habitats that are central to the organization's mission.

16. Plaintiffs submitted the FOIA request at issue in this case to promote transparency around matters of significant public interest.

17. Both SELC and Defenders regularly submit FOIA requests to Defendants as part of their missions and intend to continue doing so in the future.

Defendants

18. Defendant Leopoldo Miranda is the Director of Region Four of the United States Fish and Wildlife Service, the region to which Plaintiffs' FOIA request was directed.

19. The United States Fish and Wildlife Service ("FWS" or "the Service") is an agency within the United States Department of the Interior. Defendant James Kurth, named in his official capacity as Deputy Director Exercising the Authority of the Director of FWS, has

assumed responsibility for the decisions of FWS under the color of law pursuant to the Department of the Interior's Secretarial Order 3345. Under Defendants' policies and practices, Plaintiffs' request and Region Four's response is subject to review by officials within FWS.

20. The Office of the Solicitor ("Solicitor's Office") is an office within the Department of the Interior. Defendant Daniel Jorjani, named in his official capacity as Principal Deputy Solicitor Exercising the Authority of Solicitor, has assumed responsibility for the decisions of the Office of the Solicitor under the color of law pursuant to the Department of the Interior's Secretarial Order 3345. Under Defendants' policies and practices, Plaintiffs' request and Region Four's response is subject to review by the Solicitor's Office.

21. David Bernhardt, named in his official capacity as Acting Secretary of the Department of the Interior ("the Department"), has ultimate responsibility for the decisions, policies, and practices of the Department and agencies within it, including FWS and the Solicitor's Office.

22. Defendants are "agencies" for purposes of FOIA. 5 U.S.C. § 551(1).

LEGAL BACKGROUND

23. The Freedom of Information Act, 5 U.S.C. § 552, reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting legislative history) (internal quotation marks omitted). FOIA "shines a light on government operations 'to check against corruption and to hold the governors accountable to the governed.'" *Coleman v. Drug Enforcement Admin.*, 714 F.3d 816, 818–19 (4th Cir. 2013) (quoting *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

24. "[T]he time provisions of the Act are central to its purpose." *Hayden v. U.S. Dep't of Justice*, 413 F. Supp. 1285, 1288 (D.D.C. 1976). FOIA requires federal agencies to "promptly" make records available upon request. 5 U.S.C. § 552(a)(3)(A). Agencies must notify requesters of the date on which a request is received, *id.* § 552(a)(7)(A), and provide a tracking number, *id.* § 552(a)(6)(B)(ii). Agencies, including FWS, must "determine . . . whether to comply" with a request within 20 working days of receiving the request, and they must "immediately notify" the requester of that determination. *Id.* § 552(a)(6)(A); *see also* 43 C.F.R. § 2.16(a) (Department FOIA regulations providing a 20 working day time limit for determinations).

25. To make a "determination" under FOIA, "the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions." *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 186 (D.C. Cir. 2013).

26. Agencies may extend their deadline for responding to a FOIA request, typically by up to 10 working days, if unusual circumstances apply and the agencies provide timely notice to the requester. 5 U.S.C. § 552(a)(6)(B); *see also* 43 C.FR. § 2.19(a) (Department FOIA regulations providing for extensions when unusual circumstances apply).

27. FOIA provides that if the agency seeks to extend a deadline further than 10 working days, it must work with the requester to modify the request so it can be fulfilled within the 10 working day extension or arrange an alternative time period. 5 U.S.C. § 552(a)(6)(B)(ii); 43 C.F.R. § 2.19(b)(1) (Department FOIA regulations regarding FOIA request modification and alternative time periods).

28. Records may be withheld under FOIA only pursuant to one of FOIA's narrowly defined exemptions. 5 U.S.C. § 552(b).

29. Exemption 5 to FOIA incorporates the so-called deliberative process privilege. 5 U.S.C. § 552(b)(5). Under this exemption, certain records can be withheld from a FOIA response if they are "deliberative" records generated as a part of the agency's decision-making process. However, deliberative documents cannot be categorically withheld. The FOIA Improvement Act of 2016, P.L. 114-185 (2016), was intended to codify a presumption of disclosure and to curb agencies' overuse of the deliberative process privilege. H.R. Rep. No. 114-391; S. Rep. No. 114-4. Records that qualify for an exemption under FOIA, including deliberative records, must be disclosed unless disclosure is prohibited by law or the agency reasonably foresees that disclosure of a particular record would harm an interest protected by the exemption. 5 U.S.C. § 552(a)(8)(A)(i)(I); *Rosenberg v. U.S. Dep't of Defense*, 342 F. Supp. 3d 62, 76-79 (D.D.C. 2018).

STATEMENT OF FACTS

Background

30. A species' "listing status"—i.e., whether it is included on the lists of endangered and threatened species—determines whether it is entitled to the protections afforded by the Endangered Species Act, 16 U.S.C. §§ 1531-1544.

31. The Service, through its Ecological Services Program, is responsible for maintaining the lists of endangered and threatened wildlife and plant species, determining whether species will be added to or removed from those lists, and periodically reassessing each species' status. *Id*. § 1533(c)(2)(A)-(B).

32. Region Four is currently reviewing the listing status of at least 77 species. See

FWS, 5-Year Status Reviews for 35 Southeastern Species, 83 Fed. Reg. 20092 (May 7, 2018) (providing public notification of status reviews for 35 species); FWS, 5-Year Status Reviews for 42 Southeastern Species, 83 Fed. Reg. 38320 (August 6, 2018) (providing public notification of status reviews for 42 species).

33. The direction, pace, and/or quality of Region Four's recent and pending decisions have been and are being affected by application of policies and practices to increase the number of negative listing decisions, including quotas, targets, requirements, expectations, and/or aspirations. Prior to Plaintiffs' request, the existence of such quotas or targets was not publicly known. This is a matter of significant public interest.

Plaintiffs' FOIA Request

34. On August 15, 2018, Plaintiffs submitted a FOIA request to Region Four seeking any and all records of changes to the region's policies or practices, or associated standards or criteria, for the listing, de-listing, or down-listing of species. Plaintiffs' request specifically sought any records of "quotas, targets, goals, requirements, expectations, or aspirations" for de-listing or down-listing species, as well certain other specifically described records, including instructions, review, or coordination provided by political appointees at the Department. Letter from Sam Evans, National Forests and Parks Program Leader, Southern Environmental Law Center, to Tiffany McClurkin, FOIA Coordinator, Region Four, U.S. Fish and Wildlife Service, U.S. Department of the Interior at 1 (dated Aug. 14, 2018) (attached hereto as Exhibit 1).

35. On August 22, 2018, Region Four staff, via email, confirmed receipt of this FOIA request, which was assigned tracking number FWS-2018-01131. In this email, Region Four staff also requested that Plaintiffs join a telephone conference to clarify items in the FOIA request and to assist Region Four in focusing its search.

36. On August 23, 2018, Plaintiffs participated in a telephone conference with Region Four staff during which they confirmed, among other things, that Region Four work plans were responsive to the request. Also during that call, Plaintiffs agreed to certain limiting clarifications to their request. The parties agreed to a "phased" approach, whereby Plaintiffs would exclude from their request emails related to Region Four work planning until after reviewing the work plans themselves.

37. Region Four staff agreed to memorialize the conversation for review by the call's participants. Accordingly, on September 10, 2018, Region Four staff sent Plaintiffs a letter signed by Defendant Leopoldo Miranda, who was at that time the Acting Regional Director of Region Four. The letter purported to memorialize the parties' August 23, 2018 telephone conversation. *See* Letter from Leopoldo Miranda, Assistant Regional Director, Region Four, U.S. Fish and Wildlife Service, U.S. Department of the Interior, to Sam Evans, Southern Environmental Law Center (Sept. 10, 2018) (attached hereto as Exhibit 2).

38. Defendants' letter did not fully represent the parties' conversation or agreements. Defendants' letter contained limitations that Plaintiffs had not agreed to. Defendants' letter also omitted categories of Plaintiffs' request that the parties had not discussed or agreed to limit.

39. On September 24, 2018, Plaintiffs explained by letter which limitations they had agreed to and reiterated that they still sought the other records described in their request. *See* Letter from Sam Evans, National Forests and Parks Program Leader, Southern Environmental Law Center, to Larry Lee, Information Specialist, Region Four, U.S. Fish and Wildlife Service, U.S. Department of the Interior (Sept. 24, 2018) (attached hereto as Exhibit 3).

40. In their September 24, 2018 letter, Plaintiffs offered to extend the due date for Defendants' response until October 15, 2018, based on the time needed to exchange letters

clarifying the request.

41. On October 18, 2018, Plaintiffs contacted Region Four by email explaining that the deadline had passed and seeking a firm completion date for the Service's response.

42. That same day, on October 18, 2018, Region Four staff stated that a partial response would be provided to Plaintiffs no later than October 26, 2018.

43. Plaintiffs did not receive any response, full or partial, by October 26, 2018. Instead, Region Four provided 42 responsive documents in a partial response on February 6, 2019, more than three months following its October 26, 2018 target date.

44. The partial response confirms the existence and relevance of other responsive records that have not been provided.

45. Documents included in Defendants' partial response reference a "wildly important goal" or "WIG" issued by Defendant Miranda to "[c]onserve 30 species by the end of Fiscal Year 2017 through preventing the need to list, downlisting, or delisting." Southeast Region Division of Environmental Review, FWS, *Thought Paper on Methods to Improve Division Activities in Support of Ecological Services' Wildly Important Goal* at 1 (Apr. 17, 2017) (attached hereto as Exhibit 4). The documents that were provided in Defendants' partial response do not include any original instructions or memoranda from Defendant Miranda setting out this "wildly important goal" for Region Four.

46. The objectives set out in the WIG to avoid listing, downlist, and/or delist species remain in effect.

47. Documents included in Defendants' partial response also show that each field office in Region Four has been required to commit to one or more of six "efficiency goals" that would shift resources in order to accomplish the WIG. *See Draft Message on WIG for FY17*

(July 7, 2017) (attached hereto as Exhibit 5). Documentation of the field offices' efficiency goals has not been provided.

48. Documents included in Defendants' partial response also show that the Regional office has provided guidance on "how to select species" for which FWS will take "actions that align with our WIG outcomes" and that "commitments [to make decisions about these selected species will] be clearly documented in workplans." *Id.* at 2. Defendants have not provided records of the guidance from the Regional office or the workplans themselves.

49. After Region Four provided the partial response, Plaintiffs inquired about the status of the remaining responsive documents. On February 14, 2019, Region Four staff informed Plaintiffs that the remainder of the responsive documents had been gathered and provided to the Program Office FOIA coordinator, but that disclosure of these records will be further delayed by several additional layers of review.

50. Plaintiffs have not been provided with any estimate of a date by when the response to their FOIA will be complete.

New and Revised FOIA Policies and Practices that Add Unnecessary Delay

51. Recently, Defendants have adopted and applied new policies and practices which add unnecessary delay to the processing of FOIA requests, including Plaintiffs' request.

52. Defendants' policies and practices contribute to delays not allowed by FOIA by (1) increasing the volume of deliberative records which are subject to additional review by the Solicitor's Office and (2) offering political appointees an opportunity to review records before they are disclosed.

A. Increasing the Number of Deliberative Records Subject to Additional Review

53. While Plaintiffs' request was pending, Defendants adopted a policy, intended to

remain confidential, concerning the "coordination" of FOIA responses with the preparation of Administrative Records for agency decisions challenged under the Administrative Procedure Act. This policy is expressed in a September 6, 2018 Memorandum to FWS staff and was provided to the press by a conservation organization that is not a party to this lawsuit. *See* U.S. Fish and Wildlife Service, U.S. Department of the Interior, *Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20,2017 DOJ Memorandum on Administrative Record* (Sept. 6, 2018) (hereinafter "Deliberative Process Memorandum") (attached hereto as Exhibit 6).

54. The goal of the policy described in Defendants' Deliberative Process Memorandum is to identify for withholding any deliberative records containing substantive information and to develop a record to justify their withholding. The policy causes undue delay and precludes a good faith determination of whether records may be withheld under FOIA's statutory standards.

55. The Deliberative Process Memorandum explains the Department of Justice's categorical position that Administrative Records "should not include deliberative documents" and requires FOIA staff to "process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could subsequently be included in an [Administrative Record]." Deliberative Process Memorandum at 1.

56. The Department of Justice's policy of categorically excluding deliberative records, which Defendants incorporate as the substantive goal of their FOIA policies and practices, is unlawful, because the application of deliberative process privilege must be justified on a document-by-document basis. *Defenders of Wildlife v. U.S. Department of Interior*, No. 18-2090, Doc. 70 (4th Cir. Feb. 5, 2019) (ordering FWS to produce a privilege log for any records

withheld as deliberative).

57. In order to "preserve the consistency of information released under FOIA" with the policy of categorically excluding deliberative records from Administrative Records, it is Defendants' policy that any predecisional, deliberative records containing substantive information "should be considered for withholding." Deliberative Process Memorandum at 1, 5-6.

58. The Deliberative Process Memorandum explains that Defendants' new policy will result in the withholding of records that would commonly have been produced in the past—for example, directing FWS staff to withhold more records related to Endangered Species Act listing decisions, even though FWS's prior practice was to "release[] most, if not all" of such records. Deliberative Process Memorandum at 2.

59. Pursuant to Defendants' policy, the process for reviewing records where the deliberative process privilege may apply begins with a "thorough document review" by the relevant subject matter expert(s) and/or or FOIA staff. *Id*. at 5.

60. This first round of thorough document review is followed by a second review by the FWS FOIA Officer or Regional FOIA Coordinator. *Id*.

61. If based on these two reviews the FOIA Officer or Regional FOIA Coordinator determines that responsive deliberative documents should be disclosed because they would not cause foreseeable harm to an interest protected by one of FOIA's exemptions, the responsible FOIA officer is nonetheless prohibited from disclosing them to the requester and (s)he must instead "seek additional information" from subject matter experts. Memo from Cindy Cafaro, Departmental FOIA Officer, U.S. Department of the Interior to Bureau/Office Freedom of Information Act (FOIA) Officers and FOIA Contacts, U.S. Department of the Interior at 2 (Dec,

22, 2017) (hereinafter, "Foreseeable Harm Standard," which is incorporated by reference in the Deliberative Process Memorandum at 3) (attached hereto as Exhibit 7).

62. The Foreseeable Harm Memorandum suggests that this "additional information" may "change[] your decision" and result in withholding the record. Foreseeable Harm Memorandum at 3, Chart 1.

63. Taken together, the policies and practices described in the Deliberative Process and Foreseeable Harm Memoranda cause unnecessary delay in the disclosure of deliberative records.

64. Prior to the adoption of Defendants' policies and practices, if the responsible FOIA Officer determined that disclosure of a deliberative record would not cause foreseeable harm to an interest protected by the deliberative process privilege, that record would have been provided to the requester.

65. After the adoption of these policies and practices, if the responsible FOIA Officer determines that disclosure would not cause foreseeable harm, that FOIA officer cannot release the record(s) but must instead seek additional facts that may support withholding (as explained in the Foreseeable Harm Memorandum) with the goal of withholding deliberative records containing substantive information consistent with the Department of Justice's policy of excluding deliberative records from Administrative Records (as incorporated in the Deliberative Process Memorandum).

66. Records identified for withholding are not provided to the requester, but are instead forwarded to the Office of the Solicitor for further review. Deliberative Process Memorandum at 5 (*see also* 43 C.F.R. § 2.23(c)).

67. This policy inherently lends itself to delaying the amount of time necessary to

provide responsive records or a determination under FOIA.

68. First, the policy causes delay because staff are expected to conduct more searching reviews of records to identify content that can be withheld under the deliberative process privilege, with a second attempt to find facts to justify withholdings of records that previously would have been disclosed.

69. Second, because the reviews by subject matter experts, FOIA staff, FOIA Officers and Regional FOIA Coordinators are explicitly intended to increase the number of records that will be withheld, the policy increases the number of records that must be reviewed by the Solicitor's Office. Under this policy, all or nearly all deliberative records containing substantive information must go through a bottleneck of review in the Solicitor's Office.

70. Review of voluminous deliberative records by the Solicitor's Office is inherently inefficient and necessarily contributes to delays in the processing of FOIA requests.

B. Review By Political Appointees

71. Defendant has also adopted a binding policy providing for review by political appointees of FOIA responses. This policy is described in the Awareness Process Memorandum, issued on May 24, 2018. *See* Memorandum from Cindy Cafaro, Departmental FOIA Officer, U.S. Department of the Interior to Assistant Secretaries, Heads of Bureaus and Offices, and Bureau/Office FOIA Officers (May 24, 2018) (attached hereto as Exhibit 8).

72. Pursuant to this policy, all responsive emails and attachments must be searched for the names and email addresses of all Presidentially Appointed, Senate Confirmed, Non-Career Senior Executive Service, and/or Schedule C employees (collectively, "political appointees") within the Department of the Interior. *Id.* at 1-2.

73. Although it is unclear how many political appointee positions have been filled at

the Department, this review would require searching for the names and email addresses of dozens of political appointees. There are more than 70 vacant and occupied politically appointed positions in the Department.

74. If any of these records contain the names or email addresses of any political appointee(s), the "full set of responsive records" must be provided to the political appointee(s), and the Office of the Solicitor must be notified "simultaneously." *Id.* at 2. The political appointee(s) and the Office of the Solicitor must be given at least 72 hours to review the records, and reviewers may request an indefinite amount of additional time beyond that 72 hours. *Id.*

75. Pursuant to the Awareness Process Memorandum, FOIA personnel cannot provide records to a FOIA requester until after the review period for any applicable political appointees and the Solicitor's Office has ended. *Id*.

76. The Awareness Process Memorandum does not explain what role or expertise political appointees have in the fulfillment of the Department's statutory obligations under FOIA; the sole purpose offered is "to facilitate awareness of the information that will be released." *Id*. at 2 n.9.

77. The Awareness Process Memorandum notes that political appointee reviewers may "follow up" as needed to "understand" a decision whether to disclose records. *Id.* The policy described in the Awareness Process Memorandum therefore makes political appointees aware of a decision to disclose politically sensitive documents pursuant to FOIA, and simultaneously connects the concerned political appointee with an attorney in the Solicitor's Office who, under a related policy, can unilaterally override the decision to disclose the records. *See* Secretarial Order 3371 (Nov. 20, 2018) (attached hereto as Exhibit 9) (consolidating authority over FOIA requests and responses in the Solicitor's Office).

78. This policy necessarily increases the duration of the FOIA response review process for applicable records. First, FOIA staff must take the time to search responsive records for the names of dozens of political appointees at the Department. Second, political appointees are afforded at least three days to review records, and they are allowed to request an indefinite amount of additional review time during which they may question the basis of the disclosures.

C. Defendants' Policies and Practices Cause Unnecessary Delay

79. The response to Plaintiffs' request, already unlawfully delayed, is subject to Defendants' policies and practices, which will contribute to further unlawful delay by increasing the number of records subject to additional review and requiring review by political appointees.

80. Many records responsive to Plaintiffs' request are subject to Defendants' policies and practices described in the Deliberative Process and Foreseeable Harm Memoranda.

81. Any delays in the disclosure of records attributable to the policies and practices described in the Deliberative Process and Foreseeable Harm Memoranda are unnecessary because they are intended to further an unlawful purpose—namely, ensuring that deliberative records containing substantive information are not disclosed under FOIA because they would not be included in a subsequent Administrative Record under the Department of Justice's policy of categorically excluding deliberative records.

82. Records responsive to Plaintiffs' request also include records of political appointee involvement in policy-making and decision-making. As a result, all records responsive to Plaintiffs' request are subject to the review process described in the Awareness Process Memorandum.

83. Any delays in the disclosure of records attributable to the policies and practices described in the Awareness Process Memorandum are unnecessary. A policy could instead achieve the same goal of "awareness" without delaying disclosure until after the records have

been reviewed by political appointees.

84. Defendants are already in violation of FOIA's mandatory timeframes for responding to Plaintiffs' request, and the application of Defendants' unnecessary and unlawful policies to Plaintiffs' request is causing or will cause further delay.

85. Notwithstanding the diligence, dedication, and professionalism of FOIA and program staff within the agencies with custody over requested records, Defendants' policies and practices create a cumbersome, unnecessary, and unlawful framework that runs counter to providing timely responses to FOIA requests, including to Plaintiffs' request.

CLAIMS FOR RELIEF

Count 1

86. Plaintiffs incorporate by reference paragraphs 1 through 85 of this Complaint as if fully stated herein.

87. Defendants are in violation of FOIA and the Department of the Interior's implementing regulations by failing to "promptly" provide responsive records and by failing to provide SELC and Defenders with a determination of which records will be disclosed and which will be withheld within the mandatory time limits established by FOIA and its implementing regulations. *See* 5 U.S.C. § 552(a)(6)(A), (a)(6)(B); 43 C.F.R. §§ 2.16(a), 2.19(a).

88. By failing to provide Plaintiffs with all non-exempt responsive records to this request, Defendants have denied Plaintiffs' right to this information, as provided by law under FOIA.

89. Defendants' failure to timely respond to Plaintiffs' request has frustrated Plaintiffs' ability to submit follow-up requests for Defendants' emails related to work planning,

because Plaintiffs agreed to defer this portion of their request until after the workplans were produced as a part of this overdue FOIA response.

90. Unless enjoined by this Court to produce non-exempt, responsive records, including the emails related to work planning, Defendants will continue to violate Plaintiffs' legal right to be provided with the records to which they are entitled under FOIA.

91. Plaintiffs are directly and adversely affected and aggrieved by Defendants' failure to provide responsive records to their FOIA request as described above.

Count 2

92. Plaintiffs incorporate by reference paragraphs 1 through 85 of this Complaint as if fully stated herein.

93. The policies and practices described in the Deliberative Process Memorandum and the Foreseeable Harm Memorandum create delay in disclosing records by (1) forbidding the disclosure of records determined to be disclosable and instead requiring staff to seek additional facts to justify withholding and (2) increasing the number of records subject to review by the Solicitor's Office.

94. The policies and practices described in this memorandum are unnecessary for Defendants to meet their obligations under FOIA and, indeed, serve a purpose directly contrary to Defendants' obligations under FOIA.

95. The policies and practices outlined in the Awareness Process Memorandum create delay in disclosing records by (1) requiring FOIA staff to search all FOIA responses for the names and email addresses of dozens of political appointees, (2) granting any appointees whose names have been identified in responsive documents at least three days to review the contents of

the entire FOIA response, and (3) allowing the applicable political appointees to request an indefinite amount of additional review time.

96. The policies and practices outlined in the Awareness Process Memorandum are unnecessary for Defendants to meet their obligations under FOIA and, indeed, serve a purpose directly contrary to Defendants' obligations under FOIA. There is no plausible lawful purpose for withholding records the agency has already determined must be disclosed while they are being reviewed by political appointees.

97. The response to Plaintiffs' request has already been delayed beyond the limits imposed by statute, and Defendants' unnecessary and unlawful policies and practices are causing or will cause further delay.

98. Plaintiffs will continue to be harmed by Defendants' unlawful delay in providing information to which Plaintiffs are entitled if Defendants are not enjoined from applying the policies and practices described in the Deliberative Process Memorandum, Foreseeable Harm Memorandum, and the Awareness Process Memorandum to add further delay to the processing of Plaintiffs' request.

99. Plaintiffs are directly and adversely affected and aggrieved by Defendants' policies and practices, which frustrate their right to receive a timely response to their request as described above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(i) Declare that Defendants have violated and are continuing to violate FOIA by failing to timely provide a determination under FOIA for the records that are still being withheld;

(ii) Declare that Defendants have violated and are continuing to violate FOIA by improperly withholding documents that are responsive to Plaintiffs' request;

(iii) Declare that the policies and practices described in the Deliberative Process Memorandum, the Foreseeable Harm Memorandum, and the Awareness Process Memorandum are unlawful to the extent that they add further delay to Defendants' response, which has already exceeded the statutory time limits;

(iv) Enjoin Defendants from applying the policies and practices described in the Deliberative Process Memorandum to add further delay to requests, like Plaintiffs' request, which have already exceeded the statutory time limits;

(v) Enjoin Defendants from applying the policies and practices described in the Awareness Process Memorandum to add further delay to requests, like Plaintiffs' request, which have already exceeded the statutory time limits;

(vi) Direct Defendants to provide all nonexempt, responsive documents to Plaintiffs without further delay;

(vii) Retain jurisdiction over this matter to rule on any assertions by Defendants that any responsive documents cannot be found or are exempt from disclosure;

(viii) Order Defendants to produce an index identifying any documents or parts thereof that they withhold and the basis for the withholdings pursuant to 5 U.S.C. §§ 552(a)(8) and 552(b), in the event that Defendants determine that any responsive records are exempt from disclosure;

(ix) Award Plaintiffs their reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and

(x) Grant any other relief the Court deems just and proper.

Respectfully submitted, this 19th day of March 2018.

/s/ Morgan Butler
Morgan Butler – VA Bar No. 70409

/s/ Kimberley Hunter
Kimberley Hunter – NC Bar No. 41333 (application for admission *pro hac vice* pending)

/s/ Sam Evans
Sam Evans – NC Bar No. 44992 (application for admission *pro hac vice* pending)

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Attorneys for Plaintiff Southern Environmental Law Center

Exhibit 1

Defenders of Wildlife | Southern Environmental Law Center

August 14, 2018

Submitted electronically to foiar4@fws.gov

Tiffany McClurkin
FOIA Coordinator
U.S. Fish and Wildlife Service, Region 4
1875 Century Boulevard
Atlanta, GA 30345

Re: Freedom of Information Act Request for Records Relating to Species' Listing Statuses; Request for Fee Waiver

Dear Ms. McClurkin:

Defenders of Wildlife ("Defenders") and the Southern Environmental Law Center ("SELC") respectfully submit the following request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and its implementing regulations, 43 C.F.R. §§ 2.1–2.34, seeking the records identified below.

This request seeks records within the custody of Region 4 of the U.S. Fish and Wildlife Service ("the Service"), including any of its field offices, that were created, sent, forwarded, re-sent, received, or reviewed by any officers, employees, agents, or consultants of the Service during the time period from January 20, 2017, until the date of search for records responsive to this request. For purposes of this request, "list" and "de-list" mean, respectively, to add or remove a species from the lists of endangered or threatened wildlife species pursuant to 16 U.S.C. § 1533. "Down-list" means to change a species' listing status from endangered to threatened.

REQUESTED RECORDS

We request the following records from the Service:

1. All records relating to any change, by instruction, guidance, memoranda, or otherwise, to policy, practice, or procedure governing the decision(s) to list, decline to list, de-list, or down-list any species or category of species or to defer or accelerate any such decision;

2. All records relating to any change in the standards, criteria, or review process applicable to decision(s) to list, decline to list, de-list, or down-list any species or category of species, or to defer or accelerate any such decision;

3. All records relating to any existing or proposed quotas, targets, goals, requirements, expectations, or aspirations for listing, declining to list, de-listing, or down-listing species, whether quantitative or qualitative in nature;

4. All records relating to the selection of the 35 species identified in 83 Fed. Reg. 20092 or the 42 species identified in 83 Fed. Reg. 38320 for status reviews;

5. All requests or instructions that staff identify listed species that could potentially be de-listed or down-listed or candidate species for which listing could potentially be declined, and any records created in response to such requests or instruction; and

6. Any and all listing petitions, de-listing petitions, status reviews, or other documents initiating a proposal to list, de-list, or down-list any species, that were forwarded to or reviewed by any of the following person(s), along with any associated responses, instructions, or annotations from the person(s) to whom they were forwarded or by whom they were reviewed:

    a. Any person other than an employee of the Service in Region 4 or one of its field offices;
    b. Any person who is an employee of the Service in Region 4 or one of its field offices and:
        i. Has, at any time since January 20, 2017, been a political appointee (including without limitation any government employee that was appointed by the President, any government employee that was appointed by the Secretary or Administrator of a federal agency, any government employee that has held a Schedule C position, or any employee who has worked in the Executive Office of the President);
        ii. Has, at any time since January 20, 2017, held a position listed in any version of the document "United States Government Policy and Supporting Positions," otherwise known as the "Plum Book," whether or not the person's actual name appears in a version of the Plum Book;
        iii. Whose hiring was coordinated with the Presidential Personnel Office; or
        iv. Who, as a part of their job responsibilities with the Service, communicates with elected officials or their offices.

This request is not intended to exclude any other records that, although not specifically requested, are reasonably related to the subject matter of this request.

For purposes of this request, "records" is defined to the full extent of the meaning of the term under FOIA. This includes, but is not limited to, documents of any type, including both electronic and paper documents, electronic mail, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, databases, drawings, surveys, graphs, charts, photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, Geographic Information System data, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained.

This request is being sent to Region 4 of the Service with the understanding that it will be forwarded to any other agency offices where responsive records may be located.

WITHHELD DOCUMENTS

In regard to the other requested records, under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information pursuant to FOIA unless prohibited by law or the agency reasonably believes release of the information will harm an interest that is protected by a FOIA exemption. 5 U.S.C. § 552(a)(8)(A). Should you decide to invoke a FOIA exemption, please include in your response a description of which responsive documents are withheld with sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by their release. Please include a detailed index identifying:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and

2. Complete explanation and justification for withholding each record, including the specific exemption(s) under which the record (or portion thereof) is withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination and/or may help to avoid unnecessary litigation.

If you determine that portions of responsive records are exempt from disclosure, please segregate or redact the exempt portions and provide the non-exempt portions within the statutory time limit. 5 U.S.C. § 552(b).

FORMAT OF REQUESTED RECORDS

Defenders prefers receiving electronic copies of all responsive documents. Under FOIA, you are obligated to provide records in a readily accessible electronic format, if possible, and as requested here. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) ("In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."). As used here, "readily reproducible" electronic documents should include text-searchable and OCR-formatted.

Additionally, please provide the records in .pdf file format, without any "portfolios" or "embedded files" Portfolios and embedded files are not readily accessible. *Please do not provide the records in a single, or "batched," .pdf file.* We also appreciate the inclusion of an index of responsive records.

RECORD DELIVERY

We appreciate your assistance in expeditiously responding to this request. As mandated under FOIA, we anticipate a response within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.16(a). We respectfully urge you to post responses to this and parallel FOIA requests online in

accordance with 5 U.S.C. § 552(a)(2)(D)(ii)(II). Defenders is pleased to receive records on a rolling basis if it facilitates the agency's response.

We strongly prefer delivery of the records by Sharefile or a similar FTP or document share service. We are happy to provide a link where you can upload files. Alternatively, you may email or mail copies of the requested records to:

Sam Evans
Southern Environmental Law Center
48 Patton Avenue, Suite 304
Asheville, NC 28801
sevans@selcnc.org
(828) 258-2023

If you find that this request is unclear, or if responsive records are voluminous, please contact us to discuss the scope of this request.

REQUEST FOR FEE WAIVER

Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and the Department of the Interior's implementing regulations, 43 C.F.R. §§ 2.45–2.48, Defenders and SELC request a waiver of all charges (*i.e.*, search, review, and duplication fees) incurred in connection with this request.

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). To provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge" if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *accord Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1177–78 (10th Cir. 2005); *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *Community Legal Servs. v. U.S. Dep't of Hous. and Urban Dev.*, 405 F. Supp. 2d 553, 555 (E.D. Pa. 2005).

Congress specifically designed FOIA's 1986 fee waiver amendments to provide non-profit organizations such as Defenders and SELC access to government records without payment of fees. Indeed, the fee waiver provision was intended to "explicitly recognize[] the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals," including nonprofit public interest groups. *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 94 (D.C. Cir. 1986). FOIA "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver." *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Idaho 2004).

Requesters Satisfy the Qualifications for a Fee Waiver

Under FOIA, a requester is entitled to a fee waiver when "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 [federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45(a)(1). The Department of the Interior's (DOI) implementing regulations at 43 C.F.R. § 2.48 establish the same standard, setting forth four factors to consider in determining whether a request meets the FOIA requirement.

Consequently, the Service must consider the following factors to determine whether a request is in the public interest: (1) "[h]ow the requested records concern the operations or activities of the Federal government," (2) "[h]ow disclosure is likely to contribute to public understanding of those operations or activities," (3) "[h]ow disclosure is likely to significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject," and (4) [h]ow the public's understanding of the subject in question will be enhanced to a significant extent by the disclosure." 43 C.F. R. § 2.48. As presented below, Requesters satisfy each of these four criteria.

Requesters therefore qualify for a fee waiver. Disclosure of the requested records is in the public interest because it will contribute significantly to public understanding of the operations or activities of the government, particularly as they relate to the management of endangered and threatened species. Protection of rare species and their habitats is a matter of significant public interest in the Southeast. In addition, release of the documents is not for commercial use. Founded in 1947, Defenders is a 501(c)(3) nonprofit conservation organization with 1.2 million members and supporters dedicated to the protection of all native animals and plants in their natural communities. Access to government records through FOIA requests is essential to Defenders' role of educating the general public about government activities related to wildlife conservation. Defenders has no commercial interest in and will realize no commercial benefit from the release of the requested records. Likewise, SELC is a 501(c)(3) nonprofit conservation organization working to protect the Southern environment, including rare species and habitats in Region 4. While SELC does provide legal services to partner organizations that share its mission, SELC does not charge legal fees for those services and therefore has no commercial interest in obtaining these records.

Please note that the U.S. Fish and Wildlife Service, U.S. Forest Service, Bureau of Land Management and National Park Service have previously granted requests for fee waivers in their provision of documents to Defenders and/or SELC.

A. The Requested Records Concern Operations or Activities of the Federal Government

In accordance with 43 C.F. R. § 2.48(a)(1), the requested records concern the operations and activities of the federal government, namely an executive branch agency, the U.S. Fish and Wildlife Service within the U.S. Department of the Interior, which is charged with listing and altering the listing status of species, pursuant to the Endangered Species Act. 16 U.S.C. § 1533(a)(1), (c).The requested records describe the agency's views and actions related to rules,

policies, plans and other federal activities concerning management of endangered and threatened species. *See Judicial Watch*, 326 F.3d at 1313 ("[R]easonable specificity is all that FOIA requires with regard to this factor") (internal quotations omitted).

B. Disclosure of the Requested Records is Likely to Contribute to Public Understanding of Government Operations or Activities

In accordance with 43 C.F. R. § 2.48(a)(2), the requested records are meaningfully informative about government operations or activities, there is a logical connection between their contents and those operations or activities, and disclosure will contribute to an increased public understanding of the subject matter. Defenders and SELC have the expertise to analyze and publicize the information in a manner that is useful to a broad audience of persons interested in endangered and threatened species.

The information about government operations and activities contained in the requested records will meaningfully inform public understanding of the Service's management of endangered and threatened species. It will also aid public understanding of department actions that affect endangered and threatened species. This information is highly relevant to Defenders and our members because we are deeply concerned about these issues. Our review and analysis of responsive records will provide the public with critical information about the legal status of endangered and threatened species in the Southeastern United States.

Once the information is made available, we will share it with our many members and supporters, as well as partner organizations which themselves have many additional members and supporters. We will also share the records with members of the media, and we will provide analysis, synthesis, and derivative content that will assist the public in understanding the subject government activities. Defenders' and SELC's track records of active participation in oversight of governmental activities and decision-making and our consistent contributions to the public's understanding of those activities are well established.

Defenders is a national non-profit organization focused on wildlife and habitat conservation and the safeguarding of biodiversity. We inform, educate and counsel the public regarding environmental issues, policies and laws relating to wildlife protection and public lands. We represent our members' interests in ensuring that imperiled species and their habitat receive the full protections due under federal law. We frequently communicate with our members, supporters, partner organizations, and the interested public on news and information relevant to endangered and threatened species. SELC is a regional non-profit organization focused on protecting the Southern environment. We directly communicate with the public in our region through our own outlets (print and electronic), and we are trusted by the regional media as a reliable source of information about information affecting the Southern environment. Further, we provide legal counsel to partner organizations working in our region, including sharing information relevant to our shared interest in the Southern environment, which they pass along to their own members and supporters.

Defenders and SELC will rely on our own legal and scientific experts, as well as outside experts, to analyze the information contained in records produced in response to this FOIA request. We have used, and will continue to use, a full array of tools to ensure the public's significant interest

in the appropriate management of endangered and threatened species is vindicated and the general public is informed through our synthesis of the information gleaned from the requested records.

Defenders and SELC will ensure that the information produced in response to this request, and our analysis thereof, is disseminated to a reasonably broad audience of persons interested in federal lands management and wildlife conservation. In disseminating the information, we will assure that it is made available for the benefit of the interested persons beyond our membership, such as members of other conservation advocacy organizations, the media, the academic community, and the general public.

Defenders has the ability to disseminate information obtained from the requested records in a number of ways to a broad audience. We actively communicate with our members, supporters and the general public through direct mail and email campaigns. We broadcast action alerts notifying the public of opportunities to comment on agency proposals; publish information on and frequently update our website (797,055+ visitors per month) and blog (21,000+ monthly readership) to educate the public on wildlife conservation issues; distribute a quarterly print magazine with a circulation of approximately 350,000; communicate with partner organizations both nationally and internationally; maintain an active online presence through Facebook (652,000+ followers), Twitter (109,000+ followers), and YouTube (6900+ subscribers); distribute press releases directly to media contacts and through our website and RSS feed; and educate lawmakers and advocates on conservation law at the federal, state and local level. SELC distributes a quarterly newsletter to 18,000 supporters, a digital newsletter with a circulation of 12,000, and over 40,000 social media followers. Our partners in the region who are also working to protect endangered and rare species have an even broader reach.

C. Disclosure of the Requested Records is Likely to Significantly Contribute to the Understanding of a Reasonably Broad Audience of Persons Interested in the Subject

In accordance with 43 C.F. R. § 2.48(a)(3), the requested information is new, not already publicly available, and its disclosure will increase the level of public understanding that existed prior to disclosure. Through Requesters analysis and dissemination, disclosure of the information contained in the requested records will contribute to the understanding of a broad audience of persons that are interested in endangered and threatened species, as stated above.

The requested records will enable Requesters to provide information to the public at large regarding the current agency views and activities related to rules, policies, plans and other department actions concerning management of endangered and threatened species. This information is essential to inform the public about potential changes to the status of endangered and threatened species. The requested records are new and not currently in the public domain. *See Cmty. Legal Servs. V. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "clarify important facts" about agency policy, the request "would likely shed light on information that is new to the interested public.").

Disclosing the requested records to Requesters is not only "likely to contribute," but is certain to contribute, to public understanding of management of endangered and threatened species and the potential impacts to these species and their protections. At present, the public has no information

about whether there is an existing expectation or goal for altering the listing status of endangered and threatened species, or how such a goal might affect consideration of particular species' statuses. Similarly, the public does not know whether policies or procedures have changed under the current administration with respect to how species' statuses are determined. Requesters' dissemination of this information will therefore provide new insight to a broad audience of interested persons as to the management of endangered and listed species. *See id*. at § 2.48(a)(3).

D. The Public's Understanding of the Subject in Question will be Significantly Enhanced by the Disclosure of Requested Records.

In accordance with 43 C.F.R. § 2.48(a)(4), the public's understanding of the subject of this FOIA request will be enhanced to a *significant extent* by disclosure of the requested records. FOIA's legislative history makes clear that the 'significance' test is met where, as here, the information requested will support "public oversight of agency operations":

> A requester is likely to contribute significantly to the public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.

132 Cong. Rec. H9464 (Reps. English and Kindness); *see also McClellan Ecological Seepage Situation*, 835 F.2d at 1284–86.

Disclosure of the requested records will significantly enhance the public's understanding of the agency's management of endangered and threatened species, as compared to the level of understanding that exists prior to disclosure. Disclosure will provide the public with information about how the Department intends to manage its treatment of endangered and threatened species and whether a significant number of species will be delisted or down-listed. The requested records are new information that have not previously been disclosed, and disclosing them will support public oversight of agency operations regarding federal management of endangered or threatened species.

The conservation of federal public lands and waters and the wildlife that depend on them are an ongoing concern for Requesters' members, supporters, partner organizations, and the interested public. The requested records are essential to Requesters' efforts to educate our members and the general public about conservation of imperiled species and their habitat. Our analysis of the records and broad dissemination of the synthesized information will support public participation in government and help ensure that the endangered and threatened species are adequately protected. It will improve the ability of the public to evaluate and supervise the agency and DOI's current and future plans for endangered and threatened species.

CONCLUSION

For all the foregoing reasons, Requesters satisfy the statutory and regulatory requirements for a fee waiver under FOIA and DOI's implementing regulations. We expect that you will immediately grant this request and tender responsive records.

However, if a fee waiver is denied, Requesters are willing to pay up to $100.00 in reasonable search time and/or duplication costs exceeding two hours and 100 pages, or equivalent volume. Please contact us to discuss any costs in excess of $100 prior to fulfilling this FOIA request.

If you determine that this FOIA request will require longer than ten business days to process, please notify me of the request's individualized tracking number and how to obtain status updates via telephone, email or on the Internet. 5 U.S.C. § 552(a)(7). If you anticipate needing more than the 20 working days allotted under FOIA to fully process this request, please also notify me of the expected delay. I appreciate the opportunity to work with the Service to expedite your response.

Thank you for your assistance.

Very sincerely,

Sam Evans
National Forests and Parks Program Leader
Southern Environmental Law Center
48 Patton Avenue, Suite 304
Asheville, NC 28801
(828) 258-2023
sevans@selcnc.org

Exhibit 2

United States Department of the Interior

FISH AND WILDLIFE SERVICE
1875 Century Boulevard
Atlanta, Georgia 30345

In Reply Refer To:
FOIA-FWS-2018-01131

SEP 10 2018

Mr. Sam Evans
Southern Environmental Law Center (SELC)
48 Patton Avenue, Suite 304
Asheville, North Carolina 28801

Dear Mr. Evans:

This is in response to your Freedom of Information Act (FOIA) request, dated August 14, 2018 and subsequent conference call on August 23, 2018. The purpose of the call was to clarify the records being sought and discuss the need to prioritize document release.

Specifically, you requested the following:

1. All records relating to any change, by instruction, guidance, memoranda, or otherwise, to policy, practice, or procedure governing the decision(s) to list, decline to list, de-list, or down-list any species or category of species or to defer or accelerate any such decision;

2. All records relating to any change in the standards, criteria, or review process applicable to decision(s) to list, decline to list, de-list, or down-list any species or category of species, or to defer or accelerate any such decision;

3. All records relating to any existing or proposed quotas, targets, goals, requirements, expectations, or aspirations for listing, declining to list, de-listing, or down-listing species, whether quantitative or qualitative in nature;

4. All records relating to the selection of the 35 species identified in 83 Fed. Reg. 20092 or the 42 species identified in 83 Fed. Reg. 38320 for status reviews;

5. All requests or instructions that staff identify listed species that could potentially be de- listed or down-listed or candidate species for which listing could potentially be declined, and any records created in response to such requests or instruction;

6. Any and all listing petitions, de-listing petitions, status reviews, or other documents initiating a proposal to list, de-list, or down-list any species, that were forwarded to or reviewed by any of the following person(s), along with any associated responses, instructions, or annotations from the person(s) to whom they were forwarded or by whom they were reviewed:

    a. Any person other than an employee of the Service in Region 4 or one of its field offices;
    b. Any person who is an employee of the Service in Region 4 or one of its field offices and:
        i. Has, at any time since January 20, 2017, been a political appointee (including without limitation any government employee that was appointed by the

President, any government employee that was appointed by the Secretary or Administrator of a federal agency, any government employee that has held a Schedule C position, or any employee who has worked in the Executive Office of the President);

ii. Has, at any time since January 20, 2017, held a position listed in any version of the document "United States Government Policy and Supporting Positions," otherwise known as the "Plum Book," whether or not the person's actual name appears in a version of the Plum Book;

iii. Whose hiring was coordinated with the Presidential Personnel Office; or

iv. Who, as a part of their job responsibilities with the Service, communicates with elected officials or their offices?

As a result of our telephone discussion on August 23, 2018, it is our understanding that records production/release take place as follows:

Provide the responsive work plans (Listings, Species Status Assessments, 5-year reviews, Agency Priority Goals) developed by the U.S Fish and Wildlife Service.

Include all work plans produced prior to January 20, 2017.

Include records pertaining to Congressional language directing the Service to make these changes.

Include all responsive records from those individuals noted in 6(b) of your original FOIA request dated August 14, 2018.

Include guidance documents from U.S. Fish and Wildlife Service Headquarters since January 20, 2017 related to listing and delisting.

Provide records as identified in number 4 of your original FOIA request.

If you have any questions or concerns, please contact Larry Lee, Government Information Specialist (FOIA/Records) by phone at (404) 679-4109 or email at Larry_Lee@fws.gov. Thank you for contacting the U.S. Fish and Wildlife Service.

Sincerely Yours,

Leopoldo Miranda
Assistant Regional Director

Exhibit 3

Defenders of Wildlife | Southern Environmental Law Center

September 24, 2018

Larry Lee
Information Specialist
U.S. Fish and Wildlife Service, Region 4
1875 Century Boulevard
Atlanta, GA 30345
larry_lee@fws.gov
foiar4@fws.gov

By e-mail

Re: Clarification of FWS Verification Memorandum dated September 10, 2018
FOIA-FWS-2018-01131

Dear Mr. Lee:

Thank you for circulating the verification memorandum signed by Assistant Regional Director Miranda and dated September 10, which attempts to capture the results of our phone call of August 23. After reviewing the verification memorandum, the listed categories for production/release do not appear to include some of the records we requested or discussed. Accordingly, we offer a few further clarifications.

With respect to request categories 1 and 2, we continue to seek all records in the custody of FWS Region 4 or its field offices containing instructions, guidance, or memoranda about the goals, criteria, or processes for listing decisions. This would include the work plans listed in the verification memorandum, but we were not comfortable excluding other responsive records before a search is made. We did agree to exclude emails related to work planning in this request, instead favoring a phased approach that would allow us to submit follow-up requests for emails if needed. We also agreed that these categories do not include records directly related to the Center for Biological Diversity's listing petition and the resulting settlement agreement.

In addition, we briefly discussed the option (but ultimately did not agree) to limit these categories to records received from the individuals listed in request category 6(b). On the call, FWS staff explained that there would be few, if any, such records. Furthermore, limiting the request to the individuals listed in category 6(b) would exclude records we are specifically requesting, such as instructions, guidance, or memoranda from the Headquarters office, or from regional leadership to regional and field staff. Such a limitation would also exclude instructions, guidance, or memoranda received through Greg Sheehan, who was described on our call as a possible "conduit" for instructions from political appointees. Therefore, as mentioned on the call,

an adequate search should include records in the custody of field staff, regional staff who coordinate the work planning process, and regional leadership with responsibility for status assessments, recovery work, and listing activities.

We continue to specifically request work plans created on or after January 20, 2017. The verification memorandum states only that work plans prior to January 20, 2017 will be provided. To the extent that earlier work plans are needed to show continuity or change in work flow, we are grateful that you are willing to provide them, but we continue to seek the more recent work plans as well. Thank you for your willingness to provide the Congressional budget language relevant to changes in work planning.

With respect to category 3, the verification memorandum incorrectly omits this category. We discussed this category, but we did not agree to amend or exclude it from the request. Instead, our recollection of the discussion is that the request as originally drafted was clear on its face and did not need to be modified.

With respect to category 4, the verification memorandum correctly includes our request for these records.

With respect to category 5, the verification memorandum incorrectly omits this category. On our call, we did not discuss eliminating or amending this category. As with the other categories, an adequate search for records in this category should extend to both field staff who might have received such requests and regional leadership who might have made such requests of them or through whom such requests might have been passed.

With respect to category 6(a), the verification memorandum incorrectly omits this category. As confirmed on the call, we are not seeking records of coordination between peers across geographical boundaries, but we are still seeking records forwarded to or reviewed by other persons outside of Region 4, such as in the Headquarters Office.

With respect to category 6(b), the verification memorandum's rewording of our request is likely to cause confusion. We are not seeking records "from" the listed individuals. If there are relevant instructions, guidance, or memoranda "from" those individuals, those records would be included in the broader request categories 1 and 2. In category 6, we are seeking records "forwarded to or reviewed by" those individuals, along with any responses or annotations from them.

Finally, with respect to the timeline for providing responsive records, we understand that FWS may toll the response up to 10 days in order to clarify a request. Given the number of people involved in clarifying this particular request, however, the actual time required here has been somewhat longer (from August 23rd to September 24th). We are amenable to tolling the response deadline for that entire period, and we will therefore anticipate production of responsive records by October 15, 2019.

Thank you again for your assistance with this request. Please contact me if you have further questions.

Sincerely,

Sam Evans
National Forests and Parks Program Leader
Southern Environmental Law Center
48 Patton Avenue, Suite 304
Asheville, NC 28801
(828) 258-2023
sevans@selcnc.org

Exhibit 4

Southeast Region Division of Environmental Review

Thought Paper on Methods to Improve Division Activities in Support of Ecological Services' Wildly Important Goal

April 17, 2017

Background: The Division of Environmental Review is multifaceted and oversees multiple programs from the Regional perspective. We coordinate consultation and most permitting under section 7 of the Endangered Species Act, Non-Deepwater Horizon Natural Resource Damage Assessment and Restoration (NRDAR), policy related to mitigation and Fish and Wildlife Coordination Act, oil spill response and contaminant assessments, and environmental review of (and dissemination of guidance related to) energy projects (including renewable energy). We also host the Regional Hydrologist, who provides technical assistance and training to the ES field offices and other regional programs, and the Branch of Decision Support, which provides training and assistance in Species Status Assessments (SSA) and structured decision processes.

In April, 2016, the Southeast Regional Directorate released the Region's Vision Statement, which reads ""***Together, we will connect lands and waters to sustain fish, wildlife, and plants by being visionary leaders, bold innovators and trusted partners, working with and for people."*** The individual regional programs were then tasked with developing "Wildly Important Goals" (WIGs) in order to make this vision a reality. The WIG for Ecological Services is to "***Conserve 30 species by the end of Fiscal Year 2017 through preventing the need to list, downlisting, or delisting****."*

The Division considered our wide range of programs and responsibilities, and focused on improvements in our programs that would allow us to work smarter, faster, and more efficiently, with the goal of freeing up as much time and financial resources as possible. The main metrics we identified were 1) reduction in response time (to the customer), 2) reduction in staff time in processing, and 3) a corresponding reduction of cost. Any human and financial resources saved would then be applied directly towards the WIG. However, it is important to note that many of our programs already directly contribute to the WIG (e.g., needed endangered species research can't happen without a recovery permit, consultation through the ESA helps to avoid and minize impact to our target species).

A breakdown of possible improvements on a program by program basis follows….

<u>Branch of Decision Support (Angela and Erin)</u>

- Develop Branch workload allocation tool – Estimates optimal allocation of Branch workload given regional priorities (especially the WIG)
- Continue to provide training, development guidance, review, and writing of SSA documents

    - 4-Day Structured Decision Making (SDM)/SSA Training delivered to field offices every 3 months – Vero Beach (Completed March 2017), Cookeville, Tennessee (June 2017), and Jackson, MS (September 2017)
    - Complete the SSA Workload Heuristic Tool currently under development – Estimates resources needed based on SSA complexity measures
    - Pair all FY18 Species Leads with SSA Support (either from the Branch or the National SSA Framework Implementation Team) – to help the FOs save time (both in terms of finding appropriate tools and capacities) and ensuring smooth transition to a new process
    - Provide, where possible, facilitation capacity for SSA development which fosters efficient use of staff and expert time, as well as, efficiently incorporating most up-to-date information in status assessments.
- Structured Decision Making (SDM)
    - Be available to provide decision support to help optimize allocation of limited resources (e.g., FTEs and dollars for conservation actions) to most efficiently achieve program goals.
    - Improve listing decisions – Branch developed and facilitates new cooperative, listing decision process to minimize cumulative time spent making decisions and maximize transparency.
    - Maximize use of NRDAR as a conservation tool – Get maximum conservation value from NRDAR funds via strategic allocation and investment, possibly involving restructuring the program.
    - Improve section 7 efficiencies and workload allocation in Florida through development of a workload allocation tool that allocates more FTEs to projects with the highest conservation value.

<u>Planning for Infrastructure and Energy Development in the Southeast (Christine)</u>

Explore further delegation of signature authority for ER assignments. This involves balancing trust with risk of lower level signature/less review. All assignments now go directly from HQ to Field Office staff with limited RO staff involvement/oversight. In addition, signature levels have been delegated down to limit unnecessary review of staff and time. This includes multiple FOs involved and the trust to allow the lead FO has authority to sign off on the project. There may be some additional opportunities to delegate even further but additional risk should be discussed and acknowledged by management before doing so. Requests for numerous briefings and data calls and even lawsuits can quickly undo the timesaving that occurred from delegation. *Streamlining the process only works if field level delegation is supported. Overturned or influence decisions can easily create the opposite effect.*

We also should continue to explore and promote programmatic agreements and advance planning tools (balancing cost versus streamlining and risk). An example of a high cost, high

efficiency, low risk tool is the Information for Planning and Conservation (IPAC) website._ This system allows project proponents to streamline the Service's environmental review process. Although the development and inputting of information into the system was extensive the expectation is that now that the system is live it will significantly reduce staff review time. This is especially true for Department of Transportation projects, one of the major contributors to the IPAC system**.**

Other examples, ranging in cost and risk, that demonstrate the payoff of planning ahead and streamlining consultation include: cell tower self-certification, Indiana bat conservation bank (KY example), Alabama's Strategic Habitat Unit maps (SHU), North Carolina's Wind Risk Maps, and Georgia Field Office efforts with solar development maps. All of these have demonstrated benefits. Project leaders could discuss cost and risk versus Efficiency with each of these approaches, and use these examples to do similar things in their states.

We need to continue to identify areas where we will no longer engage. Determine upfront and communicate openly where the Service will no longer engage in project review. An example of this is the decision by the Migratory Bird program to not review cell towers less than 200ft. We could utilize the LCC conservation blueprint to help determine those areas we will no longer review. Putting "no action areas" on each office's website makes this transparent to our partners, private developers, and the public that we no longer review these areas. Generally there are more regulations where there are more people and less where there aren't people. Often this results in development pressure in areas that are remote and not always the most efficient. By doing a map of where they don't need a permit we may be able to encourage more infrastructure and power generation close to population centers rather than in remote less regulated landscapes.

We likewise need to identify areas where we will fully engage. We should also communicate to the public areas of high importance and the Service's commitment to fully engage with all of our authorities (NEPA, 404, ESA, FWCA, Migratory Birds and State Partnerships) on projects proposed in our high priority areas. Often time spent on NEPA review (e.g., responding to scoping notices) or Fish and Wildlife Coordination Act review early in the project, the less time you need to spend on the ESA consultation.

Identify mitigation goals for areas or species Finally, high priority areas should also be areas we target to encourage the development of high priority Mitigation Banks – Identification up front of where and what types of mitigation are appropriate will help streamline processes for when energy development companies approach the Service.

Federal Regulatory Hydropower Relicensing (Wilson Laney – placeholder).

From the DER standpoint the units of measure we are focusing on are staff time, response time, and $$. For instance having a FERC hydropower relicensing prioritization plan in place could lead to an agreement with the Office of the Regional Solicitor for automatic intervention on qualifying projects, saving vast amounts of staff time (and therefore $$) in having to prepare and

review materials to request solicitor assignment through the RD's office. It could shorten response time by 1-2 weeks.

Interagency Consultation (Jerry Ziewitz)

Consultation is the process required of Federal agencies under ESA §7(a)(2) when they propose actions that may affect listed species and critical habitats. In consultation with the Service, agencies must insure that their actions are not likely to jeopardize species or destroy critical habitat. The Service has no authority to significantly alter federal actions that comply with this mandate. The terms and conditions we include in Incidental Take Statements to exempt the taking of listed wildlife that is incidental to such actions are limited to minor modifications that are necessary and appropriate to minimize such taking. Therefore, the procedural mandate of §7(a)(2) does not itself advance the conservation purpose of the ESA, because actions that are not likely to jeopardize or destroy do not necessarily contribute to recovery. With rare exceptions, Federal actions achieve progress towards recovery when agencies explicitly propose to do so, consistent with their mandate under §7(a)(1) to use their authorities for the conservation of listed species.

The challenge of using consultation as a recovery tool is almost entirely one of creating a conservation culture among Federal agencies. Agency personnel must understand their §7(a)(1) responsibility before they can exercise it. We need good relationships with action-agency personnel to bring about that understanding. Good relationships open doors to collaborating on practical ways of building conservation progress into federal actions. Our personnel are the species experts. Their personnel are the action-planning experts. We must work together to achieve the purpose of a federal action in a way that also furthers the purpose of species' recovery. This is why §7 is titled "Interagency Cooperation."

One key incentive to building conservation progress into Federal actions is to substantially streamline the consultation process associated with those that are crafted to contribute to species' recovery. Agency budgets are tight, and getting tighter. Few agencies can afford significant discretionary investments in conservation, but for most, time is money. Significant savings in the cost of surveys and biological assessments, along with abbreviated consultation schedules and predictable outcomes, can justify adopting standard impact avoidance, minimization, and compensation measures as part of a program of Federal actions. We have several examples of programmatic consultations that represent a "win-win" outcome for action agencies and the species their actions affect, such as the recently completed program of federally-funded transportation projects that may affect the Indiana bat and northern long-eared bat.

I propose that we systematically identify the potential for conservation progress through programmatic consultations. This will involve analyzing our consultation workload by action agency and species at the regional scale. Where can get the biggest bang for the buck for both action agencies and species through programs of Federal actions that incorporate conservation

measures? For what agencies and species have we not already adopted suites of avoidance and minimization measures that would support advance concurrence with "not likely to adversely affect" determinations? For what species have we not already developed advance compensatory mitigation strategies that federal agencies might use programmatically to offset the unavoidable impacts of their actions? Answering these questions will allow us to focus on those areas and agencies that could most effectively contribute to species conservation through the consultation process.

Natural Resource Damage Assessment and Restoration (NRDAR)

NRDAR, which is authorized under the Oil Pollution Act, CERCLA, and Clean Water Act, is a tool to ensure restoration of habitats impacted by contaminant releases. It has the potential for large settlements that can be used for land purchase, habitat restoration, and non-Federal match. Approximately $6 million in money disbursed to DOI bureaus annually from NRDA fund, administered by Office of Restoration and Damage Assessment, and additional monies available from Oil Spill Liability Trust Fund. Assistance is potentially available from Deepwater Horizon NRDAR Field Office. It is a tool used by some other regions to great effect.

An increased emphasis in NRDAR could result in additional "boots on the ground," more restoration work throughout the region and additional money (settlement funds) that can be used as non-Federal match to grow conservation projects.

We have already started a critical review of the Southeast Region NRDAR program to determine if we are fully utilizing this powerful tool. We are assembling a team of ES and Deepwater Horizon personnel (including some field office biologists working as case managers) in an effort to identify the objectives of a successful regional NRDAR program, and identify various organizational/structural alternatives to address those objectives. We plan on reporting results of this activity to senior Southeast Region leadership for further discussion.

Through this effort we hope to improve efficiency, as well as fully engage in NRDAR in order to bring additional monies to bear on our WIG.

Building Efficiencies in the Section 10(a)(1)(A) Recovery Permits Program (Karen Marlowe):

Recovery permits issued under section 10(a)(1)(A) of the Endangered Species Act (ESA) authorize take, import, export, or interstate commerce, all of which are prohibited under the ESA, if such activities are necessary to conduct scientific research that promotes conservation (i.e., recovery) of the species or to enhance the propagation or survival of the species (e.g., captive propagation and reintroduction). Without these permits many critical recovery tasks, specified in Recovery Plans prepared in accordance with section 4 of the ESA, cannot be implemented. Permits for take and interstate commerce of native species are handled by the Regional Offices, while import and export remain the provenance of the Division of Management Authority.

For well over a decade, the Southeast Region has experienced serious delays in processing recovery permits, due to staffing shortages, lack of training and support of the recovery permits staff, increased workload as a result of multiple new endangered/threatened species listings, and, to some extent, a lack of recognition of the importance of a well-functioning recovery permits program to achieve recovery tasks on the ground. As a result, permits that are supposed to take only 90 or so days to process are taking years. Researchers lose funding opportunities and the ability to conduct critical research, consultants lose jobs, and Field Offices fail to obtain critical information needed for the conservation of the species within their State(s). Bottom line: recovery permits facilitate addressing our WIG through providing the authorization needed to do critical work leading to downlisting and delisting threatened and endangered species.

Measures to Achieve More Recovery Permit Efficiency in the Southeast Region

Completed in the past year and/or in the works:

- Make recovery permits valid for 5 years, rather than 2;
- Eliminate need to issue paper permits and send them to permittees by email rather than hard copy by mail;
- Eliminate issuance of unnecessary permits, such as permits issued for facilities to accept and rehabilitate sea turtles and other endangered/threatened species, 4(d) rule species, and activities covered by regulatory exemptions;
- Provide full-time administrative support to the Recovery Program Coordinator for handling in-processing of applications and fees and issuance of simpler permit types (e.g., interstate commerce);
- Batch the *Federal Register* (FR) notices for issued permits, rather than each Region publishing their own notices, and have these batched notices prepared by Headquarters, using information from SPITS;
- Seek assistance in the form of details by biological staff to help with the current backlog (currently approximately 120 applications in backlog).

Recommended:

- Streamline the Recovery and Interstate Commerce permit applications and make them more user-friendly and understandable in an effort to increase the quality of applications received;
- Create ability to accept fees electronically;
- Create a web-based system that allows permit applicants to complete and submit their applications and annual reports on-line;
- Increase staffing levels in the recovery permitting program to address, once and for all, the backlog of permit applications. Consider the development of a recovery permitting branch. Additional staff would allow the Recovery Permit Coordinator (RPC) to create checklists for permit application reviews, standard operating procedures, training

materials, etc., and allowing the RPC to provide overall quality control over the work products of the branch; and,

- Work with Headquarters and Region 5 to streamline processing of applications that involve Region 5 species (e.g., obtaining necessary biological opinions and reviews) and eliminate the need for us to continue handling multi-regional permit applications that should be handled by Region 5.

Still awaiting one pagers in the following areas….

HCPs, David Dell

Fish and Wildlife Coordination Act – David Walther

SE aquatic resources – John Faustini

Exhibit 5

Dear ES Staff,

Last year we started using the concept of a Wildly Important Goal (WIG) as a way to focus our work, and this approach is paying off. Our WIG for FY17 was to conserve 30 species by delisting, downlisting, or precluding the need to list them. We actually exceeded the WIG and conserved 31 species this way! I want to congratulate you and thank you for all of that hard work.

To put this into perspective, below is the list of the 31 species and how we conserved them. Keep in mind that where it says "Precluded" we either demonstrated the species was sufficiently abundant and/or in enough protected places that it did not warrant being listed.

	Species	**How was it conserved?**
1	West Indian Manatee	Downlisted
2	Apalachicola Floater	Precluded
3	Warrior Pigtoe	Precluded
4	Savannah Lillliput	Precluded
5	One-toed Amphiuma	Precluded
6	Quahcita Madtom	Precluded
7	Narrowleaf Carolina Scalystem	Precluded
8	Bighorn Hornwort	Precluded
9	Gorge Leafy Liverwort	Precluded
10	Cumberland Reedgrass	Precluded
11	Bear Tupelo	Precluded
12	West Florida Cow Lily	Precluded
13	Variable-lef Indian Plantain	Precluded
14	Southern Racemose Goldenrod	Precluded
15	Piedmont Barren Strawberry	Precluded
16	Sharp's Leafy Liverwort	Precluded
17	Succarnoochee River Crayfish	Precluded
18	Saline Burrowing Crayfish	Precluded
19	Whitehaired Goldenrod	Delisted
20	Florida Black Bear	Precluded
21	Woodville Karst Cave Crayfish	Precluded
22	Big Blue Springs Cave Crayfish	Precluded
23	Blackfin Sucker	Precluded
24	Kirtland's Snake	Precluded
25	Barbours Map Turtle	Precluded
26	Bicknell's Thrush	Precluded
27	Holiday Darter	Precluded
28	Bridled Darter	Precluded
29	Florida Keys Mole Skink	Precluded
30	Cedar Keys Mole Skink	Precluded

31	?	?

It's also important to note that as we did this work we held strong to using the best available information and scientific objectivity. So for example, we made listing decisions on 15 species last year, and of those we decided 7 warranted listing and 8 did not. So the 8 counted towards the WIG and show up as "precluded" in the table, while the other 7 go forward to formal listing. Sound science will always be foremost in those kinds of decisions, but whenever we can work proactively to prevent the need to list species, that proactive work will be our first priority. Similarly, whenever we can help a species reach a sustainable place where it can be delisted or downlisted we will also make that our priority. The WIG helps us focus clearly on achieving those positive outcomes. And don't forget – whenever we conserve one species we are also conserving many other plants and animals that use the same habitat!

Now we have entered FY18, and our WIG for this year will again be to conserve 30 species using the tools of delisting, downlisting, and preventing the need to list. You might notice these tools fall within the "inherently federal actions" that Congress and the Administration have instructed us to focus on. By using the WIG to focus our work we readily meet the intentions of Congress and the Administration.

For this coming year we will review for listing more than a dozen species that are in "Bin 5". Bin 5 species are described as "Limited Data Currently Available – Species for which there is little information on status and threats available to inform a petition finding." From recent experience, we know that we can often survey and document populations of these species, and put in place appropriate conservation provisions, and thereby conserve them without having to list them. That is the type of positive, proactive conservation we all want. Of course, if the science says they should be listed, we will do that without hesitation.

Wildly Important Goals work best when you have a forward-looking performance measure that forecasts the capacity to deliver the WIG. Our forward-looking measure is our capacity to complete Species Status Assessments (SSA's). That's because SSA's are crucial when we make listing and reclassification decisions. To implement this forward measure we need to start tracking SSA capacity in an organized way. Therefore, I am asking each project leader to complete the attached table for their staff and return it to Nikki Price (nikki_price@fws.gov) by December 22.

Once we have them, we will share with everyone the Regional SSA capacity numbers. From there, we will begin tracking this measure together. I have already seen our capacity for SSA's grow rapidly in recent months, and I appreciate the focus on this. Please consider taking SSA training and participating in developing an SSA. We have to keep growing our capacity for this important work!

In closing, I want to thank you again for all your hard work in meeting our FY17 WIG. I also appreciate all of the focus you are putting into building our SSA capacity. I challenge everyone to take these efforts up another notch and meet our FY18 WIG of conserving 30 additional species. I am confident we can achieve that goal, and I look forward to working with you to do it!

Exhibit 6

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior's Departmental FOIA Officer, addressing the "Foreseeable Harm Standard," (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, "…injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion." The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, "…the lawyer would no longer be kept fully informed by their [*sic*] client, resulting in unsound legal advice and advocacy." Further, the foreseeable harm arising from releasing attorney work product may include, "…harm to the adversarial trial process by exposing the attorney's preparation to scrutiny." Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys' advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office's FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
    - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
    - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
    - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):

    - Draft outlines, conceptual treatments, etc.;
    - Draft inserts of language for team consideration or inclusion in policy/rule;
    - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
    - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
    - Internal comments from other Service offices and regions;
    - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
    - PowerPoints/webinars not shared with audiences external to the federal government;
    - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
    - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
    - Internal briefing documents that address pre-decisional substantive issues;
    - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.

- Categories of information and documents that are typically released in full:

    - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
    - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
    - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

  - Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
  - Subject lines and attachment names, unless they reveal content that reflects substantive information;
  - Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
  - PowerPoints/webinars that have been shared with non-federal audiences;
  - Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
  - Decision memoranda that reflect the final decision and rationale of the agency; and
  - Final memoranda communicated to OMB Directors.

- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:

  - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
  - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
  - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

Exhibit 7

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA[1] generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.[2] Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

[1] 5 U.S.C. § 552.
[2] See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.[3]

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.[4] Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.[5] See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL.*

- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.

- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

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[3] "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See 383 DM 15 § 15.6.H.

[4] See *43 C.F.R. § 2.23(c)* (requiring bureaus to consult with SOL before withholding a record in full or in part).

[5] All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See 383 DM 15 § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

	CHART 1	
If	**Then**	**And**
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL
		After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.

- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.[6] The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.

- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.[7] If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.[8] Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

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[6] For example, these statutes have been found to be covered by Exemption 3.
[7] For more information on Exemption 4, see Exemption 4 in a Nutshell.
[8] This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law[9], however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.[10]

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials[11] that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

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[9] It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

[10] Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

[11] If this threshold is not met, Exemption 5 cannot protect the record. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uniformed decisionmaking, and public confusion.[12]

- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.

- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

	CHART 2	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

[12] For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

	CHART 2 (CONT.)	
Factors to consider when Exemption 5 applies to a record	**The factors lead to questions**	**And the answers to the questions lead to conclusions**
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at https://www.doi.gov/foia/contacts and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	**Generally Protects this Type of Information**	**If this Exemption Applies then Conduct**
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis

Exhibit 8

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAY 24 2018

Memorandum

To: Assistant Secretaries
Heads of Bureaus and Offices
Bureau/Office FOIA Officers

From: Cindy Cafaro
Departmental FOIA Officer

Subject: Awareness Process for Freedom of Information Act Productions

For more than 6 years, the Department of the Interior (Department) leadership and the Solicitor's Office (SOL) have been made aware of impending Freedom of Information Act (FOIA) responses on a case-by-case basis. This has allowed the Department's leadership and SOL to efficiently respond to queries and legal ramifications arising from FOIA responses. Given the unprecedented number of incoming FOIA requests[1] and increased FOIA litigation the Department has faced in the past year,[2] we are formalizing the awareness process to ensure it is consistent and effective.[3]

The Department will continue to process FOIA requests as usual, including: directing searches for responsive records;[4] searching for and providing responsive records;[5] processing responsive records;[6] and reviewing proposed responses.[7] After these steps are completed, the awareness process is as follows:

1) FOIA personnel search responsive emails and attachments to emails for the names and email addresses of current Department employees who are Presidentially Appointed,

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[1] In Fiscal Year (FY) 2016, the Department received 6,428 FOIA requests; in FY 2017, 8,005 FOIA requests; and in FY 2018, to date, more than 5,000 FOIA requests. Some Bureaus have particularly large increases in FOIA requests. For example, in FY 2016, the Office of the Secretary (OS) received 512 FOIA requests; in FY 2017, 1,226 FOIA requests; and in FY 2018, to date, more than 1,000 FOIA requests. For more information, see the Department's FOIA Annual Reports.

[2] For example, in FY 2016, 24 FOIA cases were filed and handled by SOL's Division of General Law; in FY 2017, 59 FOIA cases; and in FY 2018, to date, more than 40 FOIA cases.

[3] Please note that this process, in its entirety, does not apply to the Office of Inspector General's (OIG) FOIA personnel or processes. Other Bureaus should continue, however, to consult with OIG as they normally would for any documents that originated with or contain reference to OIG business, including OIG investigations, audits, or inspections. See 43 C.F.R. § 2.13(b) (outlining the consultation and referral process).

[4] See 383 DM 15 § 15.6.H (outlining the responsibilities of the office and/or employee that will be making a final decision on a particular FOIA request).

[5] See 383 DM 15 § 15.6.L (outlining the responsibilities of all employees of the Department to respond promptly and accurately to FOIA-related requests).

[6] See 5 U.S.C. §§ 552(a)(8) & (b) (outlining FOIA exemptions and foreseeable harm); 43 C.F.R. § 2.13(b); see also 383 DM 15 § 15.6.H; and the Department's Foreseeable Harm Standard Memorandum.

[7] See 43 C.F.R. § 2.23(c) (requiring Bureaus to consult with SOL before withholding a record in full or in part).

Senate Confirmed (PAS), Non-Career Senior Executive (NCSE), and/or Schedule C employees.

2) If the names of current Department employees who are PAS, NCSE, and/or Schedule C employees are identified:

   i. FOIA personnel notify each PAS, NCSE, and/or Schedule C employee identified in responsive emails and provide him/her access to the full set of responsive records[8] (in the same format and with the same withholdings that have been approved by SOL, so he/she will see the records exactly as the FOIA requester will).

   ii. FOIA personnel simultaneously notify a SOL attorney. When applicable, this will be the attorney who reviewed the proposed redactions and/or is handling related FOIA litigation, otherwise the FOIA personnel will contact the SOL Division or Region he/she would contact to review proposed redactions.

   iii. The PAS, NCSE, and/or Schedule C employee(s) and SOL attorney have up to *72 hours* to review the responsive records.[9]

      a. If a reviewer needs a reasonable amount of additional time to review the responsive records, he/she must inform the FOIA personnel within 72 hours.

      b. If a reviewer does not reply to the FOIA personnel within 72 hours, *his/her silence will be taken as an affirmation that he/she has concluded his/her review*.

3) FOIA personnel will then respond to the FOIA requester in accordance with their usual response process.

As you know, FOIA is a statutory requirement, and full and timely compliance with FOIA obligations is expected. The awareness process discussed above does not change the Department's statutory or, when applicable, litigation deadlines and must be conducted within those existing deadlines.

If you need assistance with a particular FOIA request, please contact your Bureau FOIA Officer using the information found at https://www.doi.gov/foia/contacts. If you have general FOIA questions, please contact me at (202) 208-5342 or cindy_cafaro@ios.doi.gov.

cc: Sylvia Burns, Chief FOIA Officer
Timothy Murphy, Acting Deputy Solicitor, Division of General Law, Office of the Solicitor
FOIA Contacts

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[8] This is true even if the FOIA personnel is not in the same Bureau as the PAS, NCSE, and/or Schedule C employee identified in responsive emails.

[9] As noted above, the purpose of this review is to facilitate awareness of the information that will be released after the application of FOIA exemptions. Reviewers are not expected to confirm that the appropriate exemptions have been applied, but may follow up as necessary to understand their basis.

Exhibit 9

THE SECRETARY OF THE INTERIOR
WASHINGTON

ORDER NO. 3371

Subject: The Department of the Interior Freedom of Information Act Program

Sec. 1 **Introduction**. The Freedom of Information Act (FOIA) is an integral part of the Department of the Interior's (Department) operations and cross-cuts all of the Department's programs and initiatives. A stable, agile, and secure FOIA program is necessary to ensure effective compliance with the FOIA. It is the responsibility of every employee to cooperate with FOIA staff throughout the Department, including timely producing agency records that are responsive to FOIA requests and assisting FOIA staff with understanding the program interests the responsive records impact.

Sec. 2 **Purpose**. The Department is fully committed to an equitable FOIA program that ensures compliance with statutory requirements of transparency, accountability, and prompt production. The decentralized manner in which the Department's FOIA operations are currently managed creates challenges for coordination and accountability. Exponential increases in requests and litigation have made improvements to the program a priority. The Office of the Solicitor (SOL) has established a strong legal framework for, and expertise in, the FOIA; there is a logical legal and policy nexus between SOL and the FOIA (particularly given SOL's ongoing interface with the Department of Justice on litigation and other matters).

This Order designates the Solicitor as the Chief FOIA Officer; creates the position of Deputy Chief FOIA Officer (DCFO); establishes a reporting relationship for the Departmental FOIA Officer and Bureau FOIA officers with the DCFO; and creates a team to provide strategic direction for selected FOIA requests that impact Department-level interests.

Sec. 3 **Background**. From Fiscal Year (FY) 2016 to FY 2018, incoming FOIA requests to the Department increased 30 percent (from 6,428 to more than 8,350). Some Bureaus and Offices have been hit especially hard. The Office of the Secretary (OS) FOIA Office, for example, has received a 210 percent increase in FOIA requests from FY 2016. The Department's attempts to respond accurately, completely, and in a timely manner to every request have been further hindered by the dramatic increase in litigation, particularly over Bureau non-response to initial FOIA requests. For example, at the close of FY 2018, the Department had a total of 129 active FOIA cases in litigation (39 in OS alone) compared to a total of just 6 cases in litigation at the close of FY 2015 and a total of 30 cases in litigation at the end of FY 2016.

The Department processed more than 6,900 requests in FY 2018, compared to 6,437 in FY 2016. Despite the increased production, the Department's backlog of requests without at least a partial response has also increased. It is clear that some aspects of the FOIA program's decentralized structure hinder efficient and effective management of operations in the current environment. Different reporting structures across Bureaus, varying sets of operating

procedures, and insufficient levels of accountability contribute to the need for Department-wide clarification of the roles and responsibilities of the FOIA program.

Sec. 4 **Authority**. This Order is issued under the authority of the Freedom of Information Act, as amended (5 USC 552), and section 2 of Reorganization Plan No. 3 of 1950 (64 Stat.1262), as amended.

Sec. 5 **Roles and Responsibilities**. Provided below are descriptions for the primary roles and responsibilities of the FOIA program:

a. Chief FOIA Officer. The Solicitor is hereby designated as the Chief FOIA Officer.

b. Deputy Chief FOIA Officer. The position of the Deputy Chief FOIA Officer (DCFO) is hereby established. The DCFO shall report to the Solicitor and oversee the Department's FOIA program, which may include establishing FOIA policies, procedures, and practices, and directing the activities of the FOIA program throughout the Department in consultation with, as appropriate, the Deputy Bureau Directors. The DCFO may also assume control over any aspect of any FOIA request in the Department, with the exception of those sent to the Office of the Inspector General (OIG). The DCFO will manage, and determine when to utilize, the FOIA Assistance Coordination Team (FACT).

c. DCFO. The DCFO shall provide appropriate guidance to the Departmental FOIA Officer and have a reporting relationship with the Departmental FOIA Officer, including approving the annual performance plan, providing input into the progress review and rating narrative, and approving the final rating.

d. Bureaus. Each Bureau shall have a full-time Bureau FOIA Officer who is responsible for their Bureau's FOIA functions and shall have, with the exception of the Bureau FOIA Office for the OIG, a dual reporting relationship to the DCFO and their respective Bureau Deputy Director. With the exception of the Bureau FOIA Office for OIG, the DCFO will approve Bureau FOIA Officers' annual performance plans, provide input into progress reviews and rating narratives, and approve the final rating. Bureau Deputy Directors will assess, ensure, and report their Bureau's FOIA compliance to the Chief FOIA Officer.

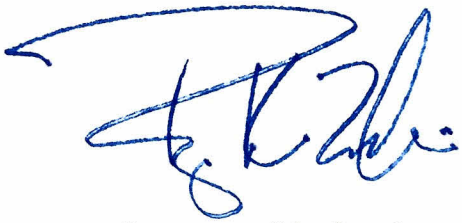
e. FACT. This Order establishes the FACT.

(1) The FACT shall consist of the DCFO, a representative of the Division of General Law, the Departmental FOIA Officer, and additional members requested by the DCFO (including, as appropriate, FOIA professional or program experts from Bureaus affected by a FOIA request).

(2) Bureau FOIA Officers will be responsible for providing input into decisions of the FACT, when requested by the DCFO, and for executing all decisions affecting their Bureaus that are made by the FACT.

Sec. 6 **Implementation**. The Solicitor is responsible for implementing this Order. Heads of Bureaus must ensure completion of revisions to their Departmental Manual functional descriptions and Bureau manuals and policies to reflect the requirements/changes in this Order within 30 days of the effective date of the Order.

Sec. 7 **Effective Date**. This Order is effective immediately and will remain in effect until the provisions are converted to the Departmental Manual, or until it is amended, superseded, or revoked, whichever occurs first.



Secretary of the Interior

Date: NOV 20 2018