UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910

THE DIRECTOR

JUL 25 2012

Catherine W. Kilduff
Staff Attorney
Center for Biological Diversity
1095 Market Street, Suite 511
San Francisco, California 94103-1628

RE: FOIA Request # 2011-00281

Dear Ms. Kilduff:

This is in reference to your Freedom of Information Act (FOIA) request # 2011-00281 dated February 18, 2011, and received by our offices on February 22, 2011. You requested information regarding consultations with federal agencies under the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq.*, and management of fish and wildlife during oil spill response activities.

More specifically, you have requested information on the following:

- All documents and communications related to consultation under the Endangered Species Act Section 7, 16 U.S.C. § 1536, with any federal agency regarding the National Contingency Plan Product Schedule prepared in accordance with 33 U.S.C. § 1321(d)(2)(G).

- All documents and communications related to consultation under the Endangered Species Act Section 7, 16 U.S.C. § 1536, with any federal agency regarding the use of dispersants during an oil spill response, including but not limited to consultation regarding Region 4 Regional Response Team Oil Spill Dispersant Use Policy (effective date October 8, 1996) or the Region 6 Dispersant Pre-Approval Guidelines and Checklist (initially approved January 10, 1995).

This letter completes our response to your request. This search was conducted within the National Marine Fisheries Service, Office of Protected Resources, Office of Habitat Conservation, Southeast Regional Office, and National Ocean Service, and located **1,051 pages** responsive to your request. A summary follows:

- 791 pages were released on July 5, 2012, *(788 pages released in full and 3 pages released in part that have been determined to be nonresponsive).*
- 10 pages were released on July 12, 2012.
- 5 pages are enclosed.
    - 2 pages of e-mails are being released in full.

THE ASSISTANT ADMINISTRATOR
FOR FISHERIES

Printed on Recycled Paper

- 2 pages are released in part pursuant to:
  - 5 U.S.C. § 552(b)(6), which protects personnel and medical files and similar files about individuals when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy, such as personal home telephone number and personal e-mail address.
- 1 page includes a referral to U.S. Coast Guard-see below;
- A portion of 1 page is released in part and has also been referred to the Council on Environmental Quality-see below.

- 19 pages *(8 e-mails)* are withheld in their entirety under:
  - 5 U.S.C. § 552(b)(5), which exempts from disclosure inter-agency or intra-agency memoranda or letters that would not be available by law to a party in litigation with the agency.
    - All of the pages are exempted from disclosure pursuant to the deliberative process privilege because the withheld records consist of opinions and preliminary recommendations by NMFS staff to staff, subordinate to superior, and NMFS to NOAA regarding consultation requirements for in-situ burning. There is not reasonably segregable portion to these records.
    - All of the pages are exempted from disclosure pursuant to the attorney-client privilege because the withheld records consist of intra-agency discussions and assessments between NMFS and NOAA regarding legal interpretation and analysis of the 1995 consultation requirements for in-situ burning. There is no reasonably segregable portion to these records.
- 226 pages are being referred to the originating federal agencies for review, release determination, and direct response to you:
  - 193 pages have been referred to the U.S. Coast Guard. Enclosed is a copy of our referral letter.
  - 8 pages have been referred to the Council on Environmental Quality. Enclosed is a copy of our referral letter.
  - 25 pages have been referred to the FWS on July 12, 2012. Enclosed is a copy of the referral letter previously released to you.

Under 15 C.F.R. § 4.10(a) (2012), you have the right to appeal these partial and full denial determinations. The Assistant General Counsel for Administration must receive your appeal within **30 calendar days** of the date of the initial denial letter. Address and send your appeal to the following office:

Assistant General Counsel for Administration (Office)
U.S. Department of Commerce
Room 5898-C
14th and Constitution Avenue, NW
Washington, DC 20230

You may also send your appeal by e-mail to **FOIAAppeals@doc.gov** or by facsimile (fax) to **(202) 482-2552**. The appeal must include a copy of the original request, the response to the request, and a statement of the reasons why withheld records should be made available and why denial of the records was in error. The submission (including e-mail and fax submissions) is not complete without the required enclosures. The appeal, the envelope, the e-mail subject line, and the fax cover sheet should be clearly marked "Freedom of Information Act Appeal." The e-mail, fax machine and Office of the General Counsel are monitored only on working days during normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday). FOIA appeals posted to the e-mail box, or sent to the fax machine, or received by the Office of General Counsel after normal business hours will be deemed received on the next normal business day.

If you have any further questions, please contact Ms. Beverly J. Smith, Southeast Region FOIA Coordinator, at (727) 551-5762 or beverly.smith@noaa.gov.

Sincerely,

Samuel D. Rauch III
Deputy Assistant Administrator
for Regulatory Programs,
performing the functions and duties of the
Assistant Administrator for Fisheries

Enclosure

cc: (w/o enclosure)
F/MB2 – Rootes, Justen
SER – Atwell, Crabtree
SER1 – Smith, Aldrich
O/FA – NOAA FOIA Office
GCNR – Walker, Sams
GCSE – Joy, Deliz, Mastry