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SUBMITTED ELECTRONICALLY

RE: Request for information related to the 2017 Species Status Assessment for the Canada Lynx (*Lynx canadensis*) Contiguous United States Distinct Population Segment

Fee Waiver Request, “other” fee requester category

Dear FOIA Officers,

On behalf of the Sierra Club, I hereby 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 records held by the Fish and Wildlife Service (FWS) that relate to the Species Status Assessment for the Canada Lynx (*Lynx canadensis*) that was finalized in October 2017, and the “Summary and Evaluation” of that final Species Status Assessment, signed by Regional Director Noreen Walsh on November, 13, 2017.¹ Responsive records are likely to be held by the field offices for Regions 1, 3, 5 and 6, as well as Fish and Wildlife Service headquarters. Region 6 is the lead region for the Species Status Assessment in question. The lead field office (FO) is the Montana Ecological Services FO, which received support from the Maine, Minnesota, Northern Idaho, and Western Colorado Ecological Services FOs.

The Sierra Club is the nation’s oldest grassroots organization. It has more than 800,000 members nationwide and is dedicated to the protection and preservation of the environment. One of the Sierra Club’s main national initiatives, the Our Wild America campaign, tackles pressing environmental problems including global warming and threats to wildlife. Sierra Club has long advocated for protections for the Canada Lynx under the Endangered Species Act, including litigation to ensure the FWS meets its obligations to designate critical habitat for the species. Sierra Club sued the FWS in 2009 and again in 2014 to challenge the inadequacy of the critical habitat designation for the species in light of the realities of climate change and the best available science about the species.²

FWS re-initiated work on developing a Species Status Assessment for the Canada Lynx in 2015 and produced a draft Species Status Assessment for the Canada Lynx in December of 2016 to begin compliance with Endangered Species Act (ESA) requirements to review the status

¹ U.S. Fish and Wildlife Service. 2017. Species Status Assessment for the Canada lynx (*Lynx canadensis*) Contiguous United States Distinct Population Segment. Version 1.0, October, 2017. Lakewood, Colorado, available at https://www.fws.gov/mountain-prairie/es/species/mammals/lynx/SSA2018/01112018_SSA_Report_CanadaLynx.pdf. The “Summary and Evaluation” is available at https://ecos.fws.gov/docs/five_year_review/doc5667.pdf.

² See *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1129 (D. Mont. 2010); *Wildearth Guardians v. U.S. Dep't of the Interior*, 205 F. Supp. 3d 1176, 1179 (D. Mont. 2016).

of listed species. As mentioned above, FWS recently has made available at final version of that Species Status Assessment, dated October 2017. FWS subsequently made available a “Summary and Evaluation” of that final Species Status Assessment, signed by Regional Director Noreen Walsh on November, 13, 2017.³ The “Summary and Evaluation” concludes that the species, which is currently listed as threatened under the ESA, is no longer threatened due to recovery. In a January 11, 2018 press release, FWS has indicated that based on the final Special Status Assessment, the agency will initiate rulemaking to delist the species.⁴

Pursuant to FOIA and DOI’s implementing regulations for it, the Sierra Club requests:

- All records generated between November 2016 and January 11, 2018 discussing the Species Status Assessment for the Canada Lynx (*Lynx canadensis*), including but not limited to:
 - Records of all review for the Species Status Assessment for the Canada Lynx that were generated between November 2016 and January 11, 2018, including scientific review from peer reviewers, State and Federal partners with expert knowledge of the species and its habitat, and from internal reviewers by Department of Interior staff.
 - All recommendations for revision of the Species Status Assessment for the Canada Lynx that were generated between November 2016 and January 11, 2018.
 - Records of communications discussing all recommended revisions to the draft Species Status Assessment.
- Records generated between January 1, 2015 and January 11, 2018 discussing the Species Status Assessment for the Canada Lynx with regard to the degree of certainty or uncertainty concerning the timing and extent of stressors on Canada lynx and snow hare habitat and snow regimes, in particular stressors related to climate change.
- Records generated between January 1, 2015 and January 11, 2018 discussing the Species Status Assessment for the Canada Lynx with regard to the cut-off year for the “reasonably foreseeable future.”
- All records generated between December 1, 2016 and January 11, 2018 discussing the development of the “Canada Lynx 5-yr Review: Summary and Evaluation,” including but not limited to:
 - Records discussing the cut-off year for the “reasonably foreseeable future,” and records discussing rationales or scientific support for identifying the “reasonably foreseeable future” to extend to 2050 (mid-century) and to 2100 (end of century), respectively.

³ Available at https://ecos.fws.gov/docs/five_year_review/doc5667.pdf.

⁴ See https://www.fws.gov/news/ShowNews.cfm?ref=status-review-indicates-canada-lynx-recovery-in-the-lower-48-states-&_ID=36211.

- Records of communications from January 1, 2015 to January 11, 2018 discussing or analyzing the protections to Canada Lynx provided by regulatory mechanisms or conservation plans such as federal resource management plans developed by the U.S. Bureau of Land Management and the U.S. Forest Service, and state plans.
- Records of communications from January 1, 2015 to January 11, 2018 discussing the implementation or enforcement of the protections to Canada Lynx provided by regulatory mechanisms or conservation plans such as federal resource management plans developed by the U.S. Bureau of Land Management and the U.S. Forest Service, and state plans, or the lack of implementation or enforcement of such plans.

As used throughout this letter, the terms “record” and “records” shall mean all writings (handwritten, typed, electronic, or otherwise produced, reproduced or stored) in FWS’s possession, regardless of whether the record or document was originally produced by another agency, entity, or individual. This includes, but is not limited to, any correspondence, minutes of meetings, memoranda, notes, e-mails, calendar or daily entries, maps, photos, reports, agendas, notices, and telefaxes. Without limitation, the records requested include records relating to the topics described above at any stage of development, whether proposed, draft, pending, interim, final or otherwise.

Excluded Documents

This request *excludes*:

1. Records pertaining to logistical issues such as scheduling of meetings and conference calls, project timelines, assignment of lead offices, document processing, etc.
2. Records containing raw species survey data.
3. Records that are already publically available.

Records Delivery

We request that DOI, in responding to this request, comply with all relevant deadlines and other obligations set forth in FOIA. 5 U.S.C. § 552, (a)(6)(A)(i). Please produce the requested records on a rolling basis as they become available to the FOIA officer; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce.

The Sierra Club prefers electronic copies of all responsive documents. Please send electronic responses to karimah.schoenhut@sierraclub.org.

As detailed below, Sierra Club requests a waiver of fees. However, please provide the records above irrespective of the status and outcome of your evaluation of Requesters' fee category assertion and fee waiver request. In order to prevent delay in FWS's provision of the requested records, Requesters state that they will, if necessary and under protest, pay fees in accordance with Department of Interior's FOIA regulations. Please consult with us, however, before undertaking any action that would cause the fees to exceed \$200. Such payment will not constitute any waiver of Requesters' right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

Withheld Documents

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the agency must include the following information:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club.

Fee Waiver Request

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 43 C.F.R. § 2.19. The Sierra Club has spent years promoting the public interest through the development of policies that provide enhanced environmental protection and protection for wildlife, and has routinely received fee waivers under FOIA. The Sierra Club is a national, non-profit, environmental organization with no commercial interest in obtaining the requested information. Instead, our organization intends to use the requested information to inform the public so that the public can provide meaningful participation in the FWS's decision making with regard to a proposal to remove the Canada Lynx from the ESA list of threatened species.

As explained more fully below, the above referenced FOIA request satisfies the fee waiver criteria listed in 43 C.F.R. § 2.19 of the Department of Interior's FOIA regulations, as well as the requirements of fee waiver under the FOIA statute – that “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 government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(iii), *see also* 43 C.F.R. § 2.19(b).

I. The requested disclosure is in the public interest and is likely to contribute significantly to public understanding of the FWS decision to propose delisting the Canada Lynx

To be eligible for a full fee waiver, FOIA requires that the requested information “contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45(a)(1). DOI’s regulations set forth four factors FOIA Officers will consider in determining whether a request meets this FOIA requirement. 43 C.F.R. § 2.48. Because this request meets each of these four factors, the Sierra Club has shown that the disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.

A. This request concerns the operations or activities of the federal government

DOI regulations require requesters to demonstrate that disclosure of the requested records is “[i]n the public interest because it is likely to contribute significantly to public understanding of government operations or activities.” 43 C.F.R. § 2.45(a)(1). To evaluate this standard, the FOIA officer will consider, *inter alia*, a requester’s explanation of “[h]ow the records concern the operations or activities of the Federal government.” *Id.* § 2.48(a)(1).

The requested documents concern the operations or activities of the Federal government because they are generated in the course of the Fish and Wildlife Service, a federal agency, complying with its obligations under the Endangered Species Act (ESA), a federal law, to evaluate the status of an ESA listed species, the Canada Lynx. That evaluation must be in accordance with factors set forth in the ESA. Thus, because the sought records pertain to a federal agency’s undertaking of duties required by the ESA, and constrained by ESA requirements, this request concerns the operations of the federal government.

B. Disclosure is likely to contribute to public understanding of the operations and activities of the Fish and Wildlife Service

To evaluate the standard at 43 C.F.R. 2.45(a)(1), the FOIA officer will also consider a requester’s explanation of “[h]ow disclosure is likely to contribute to public understanding of those operations or activities, including: (i) How the contents of the records are meaningfully informative; [and] (ii) The logical connection between the content of the records and the operations or activities.” *Id.* § 2.48(a)(2)(i)–(ii).

Among other things, the ESA imposes an obligation on the agency to utilize the best available scientific information in its decisions as to the listing status of species. The requested documents will allow the public to ascertain how the agency has considered the available scientific information in the course of developing the Species Status Assessment, and what factors other than the best available scientific information may have shaped the conclusions in the final Species Status Assessment and the Summary and Evaluation of that Assessment. The documents will also allow the public to better understand how the FWS has applied, or disregarded, the best available science in light of the ESA’s statutory definition for a threatened species, in particular the concept of the “reasonably foreseeable future.” The requested documents will therefore help Sierra Club and the public determine whether the final Species

Status Assessment and the Summary and Evaluation thereof provide a valid basis for a listing decision that comports with the requirements of the ESA, or whether those documents should not be relied upon in a listing decision due to their failure to properly consider and apply the factors required by the ESA.

This information is highly relevant to the Sierra Club because we and our members are deeply concerned about preventing the extinction of the Canada Lynx, and the continued necessity for ESA protections to ensure the recovery of the species. The requested documents will help the Sierra Club to better understand and analyze the conclusions in the final Species Status Assessment about the viability of the species in the future, and the conclusions in the Summary and Evaluation that ESA protections are no longer necessary because the species has purportedly recovered. The Sierra Club and its members have long-standing experience and expertise in the subject area of this FOIA request, specifically the need for continued ESA protections for Canada Lynx to ensure the recovery of the species. Sierra Club has repeatedly engaged in efforts to ensure that sufficient habitat necessary for Canada Lynx recovery will be protected through the ESA. Those efforts included litigation which required a high level of engagement with the science related to Canada Lynx persistence in the face of threats such as climate change and forest management, and the importance of certain habitats to the species.

The Sierra Club also has the ability and intention to disseminate the information it receives through FOIA. The information is disseminated through a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, emailing and list serve distribution to our members, and posting on the Club's website. Each month, the Sierra Club website receives approximately 850,000 visits. Sierra Magazine, which is published bimonthly by the Sierra Club, reaches more than a million people across North America. Sierra Club Insider, our e-newsletter, is sent to over a million people twice a month. In addition, Sierra Club disseminates information obtained through FOIA through comments to administrative agencies, and when necessary, through the judicial system. The Sierra Club has already published, posted, and disseminated information on the need for protections for the Canada Lynx, and will continue to do so. The Sierra Club intends to use the information obtained through this FOIA both to provide more informed public comments to FWS regarding its imminent proposal to delist the species, and to communicate to the public directly about the Species Status Assessment and the proposal to delist.

Thus, Sierra Club unquestionably has the "specialized knowledge" to address the issue of the ESA status of Canada Lynx, the protections needed to ensure the species' recovery, the science underlying that determination, and the legally relevant factors under the ESA; the "ability and intention" to disseminate the information requested; and the capacity to do so in a manner that contributes to the understanding of the "public-at-large."

C. Disclosure is likely to significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject.

To evaluate the standard at 43 C.F.R 2.45(a)(1), the FOIA officer will also consider a requester's explanation of "[h]ow disclosure is likely to significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to

[the requester's] individual understanding." *Id.* at 2.48(a)(3). The FOIA officer will consider whether the information requested is new, *id.* § 2.48(a)(3)(i), or already publicly available, *id.* § 2.48(a)(3)(iv), and whether disclosure will increase the level of public understanding that existed prior to disclosure, § *id.* § 2.48(a)(iii).

The requested records will enable Sierra Club to provide information to the public at large about the basis for the FWS's final Species Status Assessment and the Summary and Evaluation thereof, including the evaluation of the threats posed to the species by climate change, and the extent to which the threats to the species are addressed by regulatory mechanisms. The protection of Canada Lynx, the impacts of climate change on wildlife, and the potential for extinctions due to climate change are issues of interest to thousands of Americans. In particular, the treatment of science related to climate change impacts by the current administration is an interest of intense interest to a wide audience. The Summary and Evaluation purports that climate change impacts to the species beyond 2050 are too uncertain to be considered as part of the "reasonably foreseeable future." The requested documents, among other things, will allow the public to evaluate how FWS has changed its position regarding the certainty or uncertainty associated with the best available science on impacts to Canada Lynx and the species habitat from climate change, and whether that position is based on scientific assessments of uncertainty, or on political considerations.

At present, the public has no access to information showing how and why the conclusions of the status assessment changed between the 2016 draft and the 2017 final version, or how the agency's view of the relevant scientific information or legally relevant factors changed between those two versions. Nor does the public have information on shifts in the FWS's position regarding the level of uncertainty that places impacts beyond the reasonably foreseeable future. Because FWS has not made available the underlying documents requested here, which will reveal how FWS assessed scientific information about climate change impacts to the species, Sierra Club's dissemination of this information through social media and other public fora will provide new insight to a broad audience of interested persons as to the basis for the FWS's assessment that the species is no longer threatened because it has recovered. *See id.* at § 2.48(a)(3).

D. The public's understanding of the subject in question will be enhanced to a significant extent by the disclosure.

DOI regulations require consideration of whether the public's understanding of the subject will be enhanced to a *significant extent* by disclosure. 43 C.F.R. § 2.48(a)(4). 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.

The responsive records Sierra Club has requested, and will disseminate to members, supporters, partner organizations, and the interested public, are essential in Sierra Club's efforts to ensure that the FWS complies with the ESA to protect wildlife imperiled by climate change and other threats from habitat-destroying activities such as energy extraction and logging.

In providing currently unavailable information about how FWS reviewed scientific data in reversing its conclusions between the draft 2016 Species Status Assessment and the final version, the requested records will reveal whether FWS has complied with or violated the requirements of the ESA in the course of producing its Species Status Assessment and the Summary and Evaluation thereof. The records will reveal whether FWS has rationally relied on the best available scientific information and other legally relevant factors in reaching the conclusion that the species has recovered, or whether it has unlawfully disregarded the best available scientific information about climate change impacts on the Canada Lynx and other impacts to the species based on factors that are not permissible under the ESA. The records will also better reveal how and why FWS has changed position regarding the adequacy of regulatory mechanisms, such as Bureau of Land Management and Forest Service plans, to address threats to Canada Lynx.

Sierra Club plans to use the requested records to educate its members and the public at large about whether FWS has rationally relied on the best available scientific information and other legally relevant factors in its final Species Status Assessment and the Summary and Evaluation thereof. This information will improve the ability of the public to oversee and evaluate FWS's imminent proposal for rulemaking to remove the Canada Lynx from the list of threatened species. This information will improve the ability of the public to comment on that proposal, and to advocate for continued ESA protections for the Canada Lynx. This information will help the public to ensure that science related to the impacts of climate change and other threats is not irrationally and unlawfully disregarded by the agency.

Therefore, disclosure of such records, and the analysis and dissemination of the information contained therein, will improve the public's ability to evaluate the FWS's compliance with its ESA obligations regarding Canada Lynx, and thus will enhance to a significant extent the public's understanding of the subject of this FOIA request. *See* 43 C.F.R. § 2.48(a)(4).

II. Obtaining the information is of no commercial interest to the Sierra Club

The Sierra Club has no commercial interest in the requested records. Nor does the Club have any intention of using these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. Sierra Club is a tax-exempt organization under section 501(c)(3) and 501(c)(4) of the Internal Revenue Code. The requested records will be used for the furtherance of the Club's educational mission to inform the public on matters of vital importance to the environment, wildlife, and natural resources.

If the requester does have a commercial interest, the fee waiver must not be granted unless the public interest in disclosure outweighs the requester's commercial interest. As noted above, the Sierra Club has no commercial interest in the requested records. Therefore, this

requirement is not applicable. If any commercial interest was present, however, it would be outweighed by the public interest in disclosure of the information sought.

For the aforementioned reasons, the Sierra Club qualifies for a fee waiver under the test set out under 43 C.F.R. § 2.19(b). Pursuant to the same rule, FWS should waive processing and copying fees for this FOIA request. If FWS does not agree to this fee waiver request, then I request that you contact me before incurring any copying or production fees above \$200.

If you require clarification of any aspect of this FOIA records request and fee waiver request, please contact me at karimah.schoenhut@sierraclub.org or 202-548-4584.

Sincerely,



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