

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WILDEARTH GUARDIANS,
a New Mexico non-profit corporation,

Plaintiff,

vs.

ANIMAL AND PLANT HEALTH
INSPECTION SERVICE,
an agency of the United States
Department of Agriculture,

Defendant.

Case No. CIV _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 *et seq.*, to compel the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture, to produce documents and records more specifically described below.

2. Plaintiff WildEarth Guardians is a New Mexico not-for-profit corporation devoted to research, public education, and advocacy on environmental issues of public importance, including but not limited to the management of public lands and resources, the protection of the natural beneficial values of watersheds, and the conservation of wildlife.

3. WildEarth Guardians requested the documents and records that are the subject of this lawsuit in furtherance of its objective of assuring that the public is informed regarding the various ways in which government activities and operations affect wildlife

resources, including, particularly, government support of activities which have as their goal the killing of wildlife to promote the profitability of private ranching businesses.

4. WildEarth Guardians requested the subject documents and records in a FOIA request of APHIS and, as detailed below, APHIS has failed to provide the subject documents in response to the request.

5. APHIS's failure to respond to WildEarth Guardians' June 1, 2012 FOIA request for documents and records constitutes a violation of the FOIA, and further constitutes constructive exhaustion of WildEarth Guardians' right to administratively appeal APHIS's violation of the mandatory requirements of FOIA. 5 U.S.C. §552(a)(6)(C)(i).

6. In this civil action, WildEarth Guardians seeks a court order declaring that APHIS's failure to respond to WildEarth Guardians' request for documents and records violates the FOIA and ordering APHIS to produce the requested documents and records. 5 U.S.C. §552(a)(4)(B). WildEarth Guardians also seeks other relief specified below, as the Court may deem just and proper.

II. JURISDICTION AND VENUE

7. This Court has jurisdiction over this action under 5 U.S.C. §522(a)(4)(B) (FOIA), 28 U.S.C. §1331 (federal question), and 28 U.S.C. §1361 (mandamus).

8. Venue in this Court is proper under 5 U.S.C. §522(a)(4)(B) (FOIA), because Plaintiff WildEarth Guardians is a New Mexico not-for-profit corporation with its principal place of business in New Mexico.

III. THE PARTIES

9. Plaintiff WildEarth Guardians is a non-profit conservation organization with its primary place of business in Santa Fe, New Mexico. WildEarth Guardians has

approximately 5,100 members nation-wide, approximately 2,300 of whom reside in New Mexico. WildEarth Guardians is dedicated to protecting and restoring wildlife, wild rivers, and wild places in the United States. In part, WildEarth Guardians works in furtherance of its goals by acquiring information regarding federal programs and activities through the federal Freedom of Information Act. WildEarth Guardians then compiles and analyzes that information and, subsequently, disseminates that information to its membership, the general public, and public officials through publications, reports, its website and newsletter, general news media coverage, and public presentations. WildEarth Guardians' successful efforts at educating the public on issues concerning federal government programs and activities that affect the environment contribute significantly to the public's understanding of governmental operations and activities. WildEarth Guardians also uses the information that it acquires through FOIA to participate in federal decision-making processes, to file administrative appeals and civil actions, and generally, to ensure that federal agencies comply with federal environmental laws. WildEarth Guardians and its members are directly injured by APHIS's failure to comply with the statutory requirements of FOIA and a favorable outcome of this litigation will redress that injury. WildEarth Guardians brings this action on behalf of itself, its staff, and its members.

10. Defendant APHIS is an independent agency of the United State Department of Agriculture. As a federal agency, APHIS is obligated to comply with the mandatory requirements of FOIA and is being sued in this action as a result of its failure to comply with its statutory duties under the FOIA.

IV. FACTS

11. As the United States Supreme Court has held, FOIA establishes a “strong presumption in favor of disclosure” and that “disclosure, not secrecy, is the dominant objective of the Act.” The United States Congress confirmed these principles and incorporated them into the Openness Promotes Effectiveness in our National Government Act of 2007 or the “OPEN Government Act of 2007.”

12. Except in “unusual circumstances,” the FOIA requires federal agencies to “determine within 20 days . . . after the receipt of any [FOIA] request whether to comply with such request and . . . immediately notify the person making such request of such determination and the reasons therefor.” 5 U.S.C. §552(a)(6)(A)(I).

13. In unusual circumstances, as defined in the FOIA, including circumstances in which there is a “need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request,” the time required by the FOIA for a response to a request “may be extended by written notice to the person making the request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.” 5 U.S.C. §552(a)(6)(B)(i). However, the FOIA states that “[n]o such notice shall specify a date that would result in an extension for more than ten working days” except under certain specified circumstances that are not relevant to the June 1, 2012 FOIA request made by WildEarth Guardians. Id.

14. In pursuit of its organizational objectives, WildEarth Guardians submitted a FOIA request to APHIS on June 1, 2012 requesting emails to and from the Deputy Administrator for APHIS, William Clay, concerning or referencing (a) compliance with National Environmental Policy Act for any APHIS project, activity or action, (b) compliance

with the federal Endangered Species Act ("ESA") for any APHIS project, activity or action, (c) compliance with the ESA or any APHIS projection, activity or action, as set forth more specifically in the request, a true and correct copy of which is attached hereto as Exhibit A and incorporated herein by reference.

15. The June 1, 2012 FOIA request that is the subject of this action was sent to APHIS's FOIA office (a) by certified return receipt-requested first class mail and (b) via electronic mail at the e-mail address provided to WildEarth Guardians (specifically, FOIA.Officer@aphis.usda.gov) as the e-mail address to be used for the transmission of FOIA requests to APHIS.

16. WildEarth Guardians received a notice via electronic mail from APHIS's FOIA office confirming that the June 1, 2012 FOIA request was received by APHIS via e-mail on June 1, 2012 and that the request was assigned tracking number 2012-APHIS-02591-F. The "return" for the FOIA request, which was sent by certified return receipt-requested first class mail, indicates that the request sent via mail was received by APHIS on June 4, 2012.

17. On July 9, 2012 and July 12, 2012, WildEarth Guardians informed APHIS by e-mail that APHIS had failed to timely respond to the June 1, 2012 FOIA request.

18. On July 12, 2012, WildEarth Guardians received a telephone message from an APHIS employee requesting an extension to respond to the request, but without proposing any specific date to which the respond time would be extended. On July 20, 2012, in further e-mail communications between WildEarth Guardians and an APHIS employee, APHIS indicated that it required an extension on the time to respond to the June 1, 2012 FOIA request but again without proposing a specific date to which the response time would be extended.

19. On July 30, 2012, in response to a request from APHIS's FOIA officer, Tamara Wade, WildEarth Guardians agreed that the deadline for WildEarth Guardians to respond to the June 1, 2012 FOIA request would be extended to August 20, 2012 because Ms. Wade had just received the records that needed to be reviewed in order to respond to the request.

20. On August 21, 2012, Ms. Wade sent an e-mail to WildEarth Guardians in which she stated that "[w]e have reviewed 1200 pages of documents that may be responsive to your request, but had to consult with The Office of General Counsel (OGC) and Wildlife Services (WS)" and that "[c]urrently, OGC and WS are reviewing the documents, [sic] we will make a release as soon as our consultation [sic] has been advised." The e-mail from Ms. Wade did not state a date by which any determination by APHIS, in response to the June 1, 2012 FOIA request, would be forthcoming.

21. Since the foregoing August 21, 2012 e-mail from Ms. Wade, there have been no further communications from APHIS in response to the June 1, 2012 FOIA request.

22. As of this date, virtually no documents have been produced to WildEarth Guardians in response to the June 1, 2012 FOIA request, and there has been no determination, of the type required by FOIA, as to whether APHIS will comply with the request, in whole or in part.

23. APHIS's failure to respond to WildEarth Guardians' June 1, 2012 FOIA request in the manner required by the FOIA, and its failure to produce the documents and records requested by WildEarth Guardians in the subject FOIA request within the mandatory twenty-day period established by FOIA, which was extended by agreement of the parties to August 20, 2012, has frustrated and continues to frustrate WildEarth

Guardians' pursuit of its objective to educate its members, the public, and decision makers as to the environmental effects of federal government programs and activities.

V. CAUSE OF ACTION

(Violations of the mandatory requirements of FOIA)

24. WildEarth Guardians incorporates the preceding paragraphs by reference as if fully set out herein.

25. APHIS has violated FOIA by failing to respond to WildEarth Guardians' request for documents and records within twenty days of receipt and within the agreed-upon extension deadline of August 20, 2012 .

26. APHIS continues to violate FOIA by failing to respond to WildEarth Guardians' request for documents and records within the twenty-day period allotted by FOIA.

VI. REQUEST FOR RELIEF

WHEREFORE, WildEarth Guardians requests that this Court:

A. Declare unlawful APHIS's failure to respond to WildEarth Guardians' requests for documents and records within twenty days of receipt and within the agreed-upon extension deadline of August 20, 2012. 5 U.S.C. §552(a)(4)(B).

B. Order APHIS to produce immediately the documents and records requested by WildEarth Guardians in its June 1, 2012 FOIA request. 5 U.S.C. §552(a)(4)(B).

C. Declare that APHIS has a mandatory obligation under the FOIA to respond to requests for documents and records within the time prescribed by the FOIA.

D. Award WildEarth Guardians its reasonable attorney fees and costs incurred in prosecuting this civil action. 5 U.S.C. §552(a)(4)(E).

E. Grant such other and further relief as the Court deems just and proper.

RUBIN KATZ AHERN HERDMAN
& MACGILLIVRAY, P.A.
Attorneys for Plaintiff

By 

Frank T. Herdman
P.O. Box 250
Santa Fe, New Mexico 87508
(505) 982-3610



FREEDOM OF INFORMATION ACT REQUEST

FOIA Request # 12-02591
Date Rec'd 6/1/2012
Date Due 6/29/2012
Assigned to Tamara
Category Media/Non-Commercial
Search WS

June 1, 2012

Certified Mail; Return Receipt

Office of Legislative and Public Affairs
USDA/APHIS/WS
4700 River Road, Unite 50
Riverdale, MD 20737-1232

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and implementing regulations, 49 C.F.R. § 370 *et seq.*, we hereby request the following documents from USDA Animal and Plant Health Inspection Services:

All emails to and from William (Bill) Clay, Deputy Administrator for APHIS' Wildlife Services program, from June 1, 2011 to the present, concerning or referencing the National Environmental Policy Act ("NEPA") and/or concerning or referencing compliance with NEPA for any APHIS project, activity, or action (including applicability of NEPA to that project, action, or activity).

All emails to and from William (Bill) Clay, from June 1, 2011 to the present, concerning or referencing the Endangered Species Act ("ESA") and/or concerning or referencing compliance with the ESA for any APHIS project, activity, or action (including consultation under the ESA for that project, action, or activity).

All emails to and from Mark Jenson, State Director for APHIS' Wildlife Services program, from June 1, 2011 to the present, concerning or referencing the National Environmental Policy Act ("NEPA") and/or concerning or referencing compliance with NEPA for any APHIS project, activity, or action (including applicability of NEPA to that project, action, or activity).

All emails to and from Mark Jenson, from June 1, 2011 to the present, concerning or referencing the Endangered Species Act ("ESA") and/or concerning or referencing compliance with the ESA for any APHIS project, activity, or action (including consultation under the ESA for that project, action, or activity).



Please tender responsive documents in digital format whenever possible.

Fee Waiver

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 43 C.F.R. § 2.19(b), WildEarth Guardians ("Guardians") hereby requests a fee waiver for all copying costs, mailing costs, and other costs associated with locating and tendering responsive documents. See Judicial Watch v. Rossotti, 326 F.3d 1309 (D.C. Cir. 2003). The release of these documents is not for commercial use and is in the public interest because it will significantly contribute to public understanding of government operations. The FOIA states: "Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if 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)(A)(iii). Guardians' current request for information qualifies for a fee waiver under this standard and, accordingly, we request that all fees be waived.

The legislative history of FOIA, as well as case law interpreting FOIA, indicates that the statute's fee waiver provision is to be liberally construed favoring the public interest. See Ettlinger v. FBI, 596 F. Supp. 867, 872 (D. Mass 1984); McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (The FOIA "is to be liberally construed in favor of waivers for noncommercial requesters," citing Sen. Leahy). Indeed, the fee waiver amendments of 1986 were designed specifically to provide organizations such as Guardians access to government documents without the payment of fees. Both the Ninth Circuit and the D.C. Circuit courts have stated that the amendments' main purpose were "to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA." Id.; Judicial Watch, 326 F.3d at 1315. Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the fee waiver amendments is to facilitate access to agency records by noncommercial requesters and "watchdog" organizations, such as conservation organizations, which use FOIA to monitor, analyze, publicize and challenge government activities.

The following information concerning this request and WildEarth Guardians is relevant to our application for a fee waiver: The requested records concern implementation of NEPA and the ESA by the Government, which is of great concern and interest to the public. The documents requested here will increase public knowledge of Wildlife Services' compliance with NEPA and the ESA in carrying out its activities and practices. These documents will illuminate in a clear and direct way, the operations and activities of Wildlife Services to fulfill important Congressional mandates under NEPA and the ESA.

Guardians (www.wildearthguardians.org) is a 501(c)(3) non-profit membership organization dedicated to protecting and restoring wildlife, wild rivers, and wild places in the American West. The mission of Guardians' coalition AGRO: A National Coalition to End the Aerial Gunning of Wildlife (www.goAGRO.org) is to focus both public attention and conservation resources on protecting and restoring America's wild native carnivores. Guardians has 9,000 members and activists and maintains offices in Santa Fe, Denver, and Phoenix.

As recognized authorities on native carnivore policies and management, as well as NEPA and the ESA, Guardians possesses the necessary expertise to extract and interpret the relevant information from the requested documents, and to disseminate this information to the public through press releases, news letters, web sites, and other electronic mediums. Conservation and other organizations and the public regularly seek analysis from Guardians concerning carnivore conservation and rely on its dissemination of information about these species. This recognized expertise and organizational capacity, and the important issues described herein, assures that provision of the requested documents to the Guardians will significantly contribute to public understanding of government operations and activities. Information obtained from this FOIA request will contribute to an understanding of government programs by the public-at-large, biologists, and fellow conservationists as opposed to the individual understanding of the requester or a narrow segment of interested persons.

Guardians employs a variety of methods to disseminate information to the public, including electronic (circulation: 10,000) and print (circulation: 5,000) newsletters; news releases; presentations to members; presentations to the general public; publication of reports, factsheets and white papers; radio and television interviews, and postings on our websites. We plan to use all of the above information dissemination strategies to significantly contribute to public understanding of Wildlife Services' compliance with the ESA and NEPA. The information Guardians is requesting is not, to our knowledge, publicly available. Documents provided by Wildlife Services to Guardians in the past have contributed to multiple reports and extensive media coverage that have increased the public's understanding of government operations as they pertain to livestock protection and carnivore killing. For example, because of our press releases, the Associated Press has frequently covered issues pertaining to Wildlife Services' annual killing activities (that are focused on the numbers and species of animals killed); the danger of aerial gunning because of the frequency of accidents in recent years; and oversight agencies such as the Environmental Protection, the General Accounting Office, and Wildlife Services itself for lapses in public and employee safety. Information provided to Guardians also aids staff who are frequently interviewed by news media and take part in public forums to analyze and interpret government programs and activities. As an example, Guardians' staff frequently speak in public forums at events that we set up, and as invited speakers.

Guardians does not have a commercial, trade, or profit interest in the requested records. In fact, Guardians does not have any commercial, trade, or profit interests. Guardians is a not-for-profit organization that serves the public interest by increasing the general public awareness of endangered species and other conservation issues. We have expertise in endangered species policy and an institutional commitment to defending and restoring wildlands and wildlife. Guardians is incorporated as a New Mexico nonprofit corporation under Certificate NM 1587757. The Internal Revenue Service recognizes Guardians as a 501(c)(3) tax-exempt organization with Certificate No. 51-019-8509 (IRS Tax ID # 85-0406306). We do not have any commercial interest in the records requested.

Given Guardians' well-orchestrated and demonstrably successful efforts at educating the public on endangered species issues, and the fact that Guardians' education program has significantly contributed to an understanding of government operations and activities, it is clear

that WildEarth Guardians is entitled to a fee waiver.

Conclusion

Thank you for your attention to this request. If you have any questions about the requested documents or the requested fee waiver, please do not hesitate to contact me at (505) 988-9126 x1162 or wkeefover@wildearthguardians.org.

I look forward to hearing from you within twenty days (excepting Saturdays, Sundays, and public holidays), as required by FOIA. *Please send all responses to this FOIA to:*

**Wendy Keefover
WildEarth Guardians
P.O. Box 1471
Broomfield, CO 80038**

Sincerely,

A handwritten signature in black ink that reads "Wendy Keefover". The signature is written in a cursive, flowing style.

Wendy Keefover
Director, Carnivore Protection Program
WildEarth Guardians
wendy@wildearthguardians.org