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Western Watersheds Project

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT,

Plaintiff,

v.

USDA-APHIS WILDLIFE SERVICES,

Defendant.

No. 1:15-cv-219

COMPLAINT

INTRODUCTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, to compel the Defendant USDA-APHIS Wildlife Services (“APHIS Wildlife Services”) to produce documents and records that Plaintiff Western Watersheds Project requested several months ago concerning APHIS Wildlife Services’ operations in Idaho.

2. Western Watersheds Project, an Idaho not-for-profit corporation, requested the documents and records that are the subject of this lawsuit to further its

objective of informing the public about ways in which APHIS Wildlife Services' operations are affecting Idaho's wildlife.

3. Western Watersheds Project requested the subject records in a series of FOIA requests to APHIS Wildlife Services that the agency received on February 2, 2015, February 25, 2015, February 27, 2015, March 10, 2015, and March 10, 2015. To comply with FOIA's requirement that responsive documents be produced within 20 working days of receiving a request, and absent unusual circumstances, the agency should have responded to the last of these requests by April 23, 2015, at the absolute latest.

4. As of the date of filing this Complaint, and despite many communications with APHIS Wildlife Services' FOIA liaisons, Western Watersheds Project has only received a small fraction of the responsive documents requested.

5. In this civil action Western Watersheds Project seeks a court order (1) declaring that Defendant's failure to adequately respond to Western Watersheds Project's requests violates FOIA; (2) enjoining Wildlife Services to immediately produce the requested records; and (3) awarding Western Watersheds Project attorney fees and costs for litigating this matter.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), as well as under 28 U.S.C. § 1331 because this action arises under the FOIA and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

7. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391 because Plaintiff Western Watersheds Project's principal place of business is in this district, the records requested concern Wildlife Service's activities in this district, and

a substantial part of the events or omissions giving rise to the claims herein occurred in this district.

PARTIES

8. Plaintiff Western Watersheds Project (WWP) is an Idaho non-profit membership organization dedicated to protecting and restoring watersheds and wildlife in the American West through education, public policy initiatives, and legal advocacy. WWP has over 1500 members, including many members who live in Idaho. WWP is headquartered in Hailey, Idaho, and has staff in Boise, Idaho, as well as in other western states.

9. WWP is active in seeking to protect and improve the public lands, wildlife, and other natural resources and ecological values of western watersheds, particularly by addressing impacts caused by domestic livestock grazing. WWP has long-standing concerns about APHIS Wildlife Services' predator control activities to benefit agricultural producers in Idaho and other states, which cause unnecessary killing and injury to wildlife and ecological degradation.

10. To further its mission, WWP often requests information regarding federal programs and activities through the FOIA. WWP then compiles and analyzes the information it obtains through the requests and disseminates it to the public by: (1) presenting the material to its 1500 members, as well as members of other state and national conservation organizations, through its newsletter and email alerts; (2) presenting the materials at national and regional conferences, including the 2015 Public Interest Environmental Law Conference; (3) participating in other public forums, such as local government hearings; (4) issuing press releases and presenting the information to

national, regional and local media; (5) posting the information (in a compiled and more readily understandable form) on WWP's internet web site, which has over 12,000 views each week; and (6) posting the information in a compiled and more readily understandable form to a heavily trafficked weblog, The Wildlife News (<http://www.thewildlifeneeds.com>) which receives on average over 15,000 visits each week. The records requested in the FOIA requests at issue here will help WWP inform and educate its members and the public about APHIS Wildlife Services' predator control activities to benefit agricultural producers in Idaho and other states, which cause unnecessary killing and injury to wildlife and ecological degradation.

11. WWP and its staff and members are directly injured by Defendant's failure to comply with the statutory requirements of FOIA, and a favorable outcome of this litigation will redress that injury. WWP brings this suit on behalf of itself, its staff and its members.

12. Defendant USDA-APHIS WILDLIFE SERVICES ("APHIS Wildlife Services") is an agency or instrumentality of the United States, within the U.S. Department of Agriculture's ("USDA") Animal and Plant Health Inspection Service ("APHIS"). APHIS Wildlife Services is charged with conducting "wildlife damage management" activities in compliance with local, state and federal laws and regulations. USDA-APHIS handles the processing of FOIA requests regarding APHIS Wildlife Services's operations, through its Riverdale, Maryland-based FOIA program. The searches for information occur primarily in the offices in Idaho where the requested information is located. For purposes of this Complaint, APHIS's Riverdale, Maryland-

based FOIA program and APHIS Wildlife Service's Idaho-based program are cumulatively referred to as "APHIS Wildlife Services."

THE FREEDOM OF INFORMATION ACT

13. FOIA was enacted "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, at 3 (1st Sess. 1965). As the Supreme Court has affirmed, "Congress believed that this philosophy, put into practice, would help 'ensure an informed citizenry, vital to the functioning of a democratic society.'" *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). Accordingly, "the basic purpose" of FOIA is "to open agency action to the light of public scrutiny." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

14. FOIA requires that federal agencies shall determine within twenty (20) working days after receipt of a request whether to comply with it. 5 U.S.C. § 552(a)(6)(A); 7 C.F.R. §§ 1.7, 370.1.

15. The Secretary of Agriculture's FOIA regulations, which apply to agencies within USDA, including Wildlife Services, *see* 7 C.F.R. § 1.1, provide that the date of receipt of the request is the day it is received by the agency and office responsible for processing FOIA requests, in this case APHIS's Riverdale, Maryland FOIA office. 7 C.F.R. § 1.13. If an agency seeks clarification of a request to identify the records sought, the date of receipt of the request is the date of receipt of the amended or clarified request. 7 C.F.R. § 1.5(c).

16. In determining whether to comply with a request, the agency must first gather and review the requested documents. *Citizens for Responsibility and Ethics in Wash. v. Federal Election Com'n*, 711 F.3d 180, 188 (D.C. Cir. 2013) (“*CREW*”).

17. Then, the agency making the determination “must determine whether to comply with a request—that is, whether a requester will receive all the documents the requester seeks. It is not enough that, within the relevant time period, the agency simply decide to later decide. Therefore, within the relevant time period, 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.” *CREW*, 711 F.3d at 186.

18. The agency “shall immediately notify the [requester] of [its] determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A)(i). “The requirement that the agency notify the requester about administrative appeal rights [] indicates that the ‘determination’ must be substantive, not just a statement of a future intent to produce non- exempt responsive documents.” *CREW*, 711 F.3d at 186.

19. The FOIA provides that “[u]pon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.” 5 U.S.C. § 552(a)(6)(C)(i).

20. An untimely determination or response is a violation of FOIA, regardless of the final outcome of the request. *Gilmore v. U.S. Dept. of Energy*, 33 F.Supp.2d 1184, 1188 (N.D. Cal. 1998), *Ore. Natural Desert Ass’n v. Gutierrez*, 409 F.Supp.2d 1237, 1248 (D. Or. 2006).

21. In case of specified unusual circumstances, the time limits prescribed in the statute may be extended by written notice to the requester “setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.” *Id.* § 552(a)(6)(B)(i). *See also* 7 C.F.R. § 1.16. “No such notice shall specify a date that would result in an extension for more than ten working days,” except as provided elsewhere in the statute. 5 U.S.C. § 552(a)(6)(B)(i). “Unusual circumstances” means “only to the extent reasonably necessary to the proper processing of the particular requests” the need to search for and collect records from separate offices; the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records; or the need for consultation with another agency. *Id.* § 552(a)(6)(B)(iii).

22. The agency and the requester may agree to an extension of time, but “[a]ny such agreement should be confirmed in writing and should specify clearly the total time agreed upon.” 7 C.F.R. § 1.16(d).

23. “If the agency does not make a ‘determination’ within the relevant statutory time period, the requester may file suit without exhausting administrative appeal remedies.” *CREW*, 711 F.3d at 185; 7 C.F.R. § 1.17.

24. Upon taking office, President Obama reaffirmed the importance of providing government records to the public under FOIA, echoing the words of Congress and the Supreme Court that “[a] democracy requires accountability, and accountability requires transparency,” and emphasizing that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.” Memorandum of President Obama Regarding FOIA (Jan. 21, 2009).

STATEMENT OF FACTS

A. FOIA Request No. 2015-APHIS-01763-F.

25. On February 2, 2015, WWP submitted via certified mail and electronic mail a FOIA request to APHIS Wildlife Services' FOIA office and to APHIS Wildlife Services' Idaho Director, Todd Grimm, requesting an itemized list of information regarding the agency's Pocatello Supply Depot. APHIS Wildlife Services received the request on February 2, 2015 and assigned it No. 2015-APHIS-01763-F. WWP included a fee waiver request for the requested documents.

26. On February 9, 2015, counsel for WWP spoke with the APHIS Wildlife Services FOIA liaison assigned to this FOIA request and agreed to narrow its scope in certain respects to speed response time.

27. On March 12, 2015, counsel for WWP received a first partial response to the request, in the form of a publicly-available environmental impact statement. In the communication accompanying that response, APHIS Wildlife Services stated it would provide the right to appeal in the final response and would continue making partial releases. WWP received no further information regarding whether APHIS Wildlife Services expected to fully comply with the request, or which documents might be withheld.

28. Because WWP was already in possession of the released document (i.e., the EIS), on March 12, 2015, counsel for WWP requested to broaden the scope of the list item to which the EIS responded to encompass a greater range of documents and APHIS Wildlife Services agreed to forward the request to the relevant personnel. No further communications occurred on this matter.

29. On March 12, 2015, counsel for WWP wrote to APHIS Wildlife Services FOIA personnel to inquire whether a fee waiver had been granted for FOIA No. 2015-APHIS-01763-F and what the timeline for processing the request would be. APHIS Wildlife Services' FOIA personnel responded saying the request was being processed and that they could provide no further information about a fee waiver and/or timeline for response.

30. On April 10, 2015, counsel for WWP again wrote to APHIS Wildlife Services FOIA liaisons to inquire about the status of the request. APHIS Wildlife Services FOIA personnel responded that same day, forwarding to counsel for WWP a second partial response along with a communication dated March 17, 2015. In that communication, APHIS Wildlife Services again stated it would provide the right to appeal in the final response and would continue making partial releases.

31. A response to request No. 2015-APHIS-01763-F was due on March 3, 2015. If counsel for WWP's March 12 request to broaden the scope of one item in the request is regarded as a clarification, a response would still have been due by April 9, 2015. As of this date, WWP has received no further communications regarding FOIA Request No. 2015-APHIS-01763-F, and has not received a full set of responsive records.

B. FOIA Request No. 2015-APHIS-02212-F.

32. On February 25, 2015, APHIS Wildlife Services received from WWP a FOIA request for information regarding permits under which APHIS Wildlife Services operates in Idaho, along with a fee waiver request. APHIS Wildlife Services acknowledged receipt of the request and the request was assigned No. 2015-APHIS-02212-F, with a due date of March 25, 2015. WWP received no further information

regarding whether APHIS Wildlife Services expected to comply with the request, what documents might be withheld, or any right to appeal.

33. On April 10, 2015, counsel for WWP inquired about the status of the request. In response, the FOIA liaison assigned to the request stated that she had received the responsive records on April 7, 2015, and would have her supervisor inform WWP of the estimated timeline for release of the records when she submitted them for her supervisor's secondary review.

34. A response to request No. 2015-APHIS-02212-F was due on March 25, 2015. As of this date, WWP has received no further communications regarding these records and has not received responsive records.

C. FOIA Request No. 2015-APHIS-02229-F.

35. On February 27, 2015, APHIS Wildlife Services received from WWP a FOIA request for information regarding equipment that APHIS Wildlife Services owns or leases for use in its animal damage control operations in Idaho, along with a fee waiver request. APHIS Wildlife Services acknowledged receipt of the request and the request was assigned No. 2015-APHIS-02229-F, with a due date of March 27, 2015. The same request was also assigned No. APHIS-02240-F. WWP received no further information regarding whether APHIS Wildlife Services expected to comply with the request, what documents might be withheld, or any right to appeal.

36. On April 10, 2015, counsel for WWP inquired about the status of the request, without any response from APHIS Wildlife Services.

37. On April 15, 2015, counsel for WWP again inquired about the status of the request. On April 16, 2015, an APHIS Wildlife Services FOIA officer informed

counsel for WWP that the request was logged twice in APHIS's tracking system and had been assigned No. 2015-APHIS-02229-F.

38. On April 21, 2015, counsel for WWP again inquired about the status of No. 2015-APHIS-02229-F. On May 4, 2015, the FOIA liaison assigned to the request stated that he would begin work on the request that week. He represented: "This is a large request and will be done in partial releases." WWP received no further information regarding whether APHIS Wildlife Services expected to comply with the request, what documents might be withheld, or any right to appeal.

39. A response to request No. 2015-APHIS-02229-F was due on March 27, 2015. As of this date, WWP has received no further communications regarding these records and has not received responsive records.

D. FOIA Request No. 2015-APHIS-02457-F.

40. On March 10, 2015, APHIS Wildlife Services received from WWP a FOIA request for information regarding certain wildlife management activities that APHIS Wildlife Services conducts in the State of Idaho, along with a fee waiver request. APHIS Wildlife Services acknowledged receipt of the request and the request was assigned No. 2015-APHIS-02457-F, with a due date of April 8, 2015. The same request was also assigned FOIA No. 2015-APHIS-02461-F, with a due date of April 7, 2015.

41. On March 24, 2015, WWP received a response requesting clarification of request No. 2015-APHIS-02457-F. On March 25, 2015, counsel for WWP responded to the request for clarification and telephonically conferred with the APHIS Wildlife Services FOIA liaison assigned to No. 2015-APHIS-02457-F. WWP received no further

information regarding whether APHIS Wildlife Services expected to comply with the request, what documents might be withheld, or any right to appeal.

42. A response to request No. 2015-APHIS-02457-F was due on April 8, 2015. Even if the March 24, 2015, communication related to request No. 2015-APHIS-02457-F is considered a clarification that reset the “date of receipt” of the request, pursuant to 7 C.F.R. § 1.5(c), APHIS Wildlife Services’ response nonetheless would have been due on April 23, 2015.

43. As of this date, WWP has received no further communications regarding these records and has not received responsive records.

E. FOIA Request No. 2015-APHIS-02407-F.

44. On March 10, 2015, Wildlife Services received from WWP a FOIA request for information regarding certain cooperative agreements between APHIS Wildlife Services and other entities relating to APHIS Wildlife Services’ activities within the State of Idaho, along with a fee waiver request. APHIS Wildlife Services acknowledged receipt of the request and the request was assigned No. 2015-APHIS-02407-F, with a due date of April 7, 2015. WWP received no further information regarding whether APHIS Wildlife Services expected to comply with the request, what documents might be withheld, or any right to appeal.

45. On April 15, 2015, counsel for WWP wrote to APHIS Wildlife Services FOIA staff to inquire about the status of the FOIA request.

46. On May 4, 2015, counsel for WWP received a communication from the APHIS Wildlife Services FOIA liaison assigned to the request representing that he had completed his initial review of the request and transmitted it to his supervisor for review.

47. A response to request No. 2015-APHIS-02407-F was due on April 7, 2015. As of this date, WWP has received no further communications regarding these records and has not received responsive records.

Relevant Facts With Respect to all Requests

48. APHIS Wildlife Services never requested, and WWP never agreed to, an extension for processing any of the requests described above.

49. APHIS Wildlife Services has not stated whether it plans to grant WWP a fee waiver related to any or all of the requests described above.

50. APHIS Wildlife Services has never provided WWP with a timeframe for processing any of the requests described above.

51. APHIS Wildlife Services has never informed WWP with regards to any of the requests described above whether it expects to fully comply with the requests, which documents might be withheld and why, or of WWP's right to appeal.

52. APHIS Wildlife Services' failure to timely and fully respond to *any* of WWP's requests described above frustrates WWP's pursuit of its objective to educate its members, the public, and decision makers about APHIS Wildlife Services' predator control activities to benefit agricultural producers in Idaho and other states, which cause unnecessary killing and injury to wildlife and ecological degradation.

FIRST CLAIM FOR RELIEF

Violations of FOIA—Failure to timely respond to FOIA Request No. 2015-APHIS-01763-F.

53. WWP realleges and incorporates by reference all preceding paragraphs.

54. Defendant has violated and continues to violate the FOIA and USDA's FOIA regulations in multiple respects by failing to provide WWP with timely and full responses to the FOIA requests described above.

55. Defendant has failed to make an adequate and timely determination with respect to WWP's FOIA Request No. 2015-APHIS-01763-F because Defendant has failed to inform WWP whether it plans to comply with the request; if so, whether it will grant WWP's request for a fee waiver and when WWP may anticipate receiving responsive documents; and if not, the reasons for which it is denying the request, the volume of records denied, and how WWP may appeal. 5 U.S.C. § 552(a)(6)(A)(i); 7 C.F.R. §§ 1.2(a), 1.7.

56. Although WWP has agreed to modify and/or clarify its FOIA request in certain respects as described above, APHIS Wildlife Services has still violated the statutory deadline for the modified request. 7 C.F.R. § 1.7(c). APHIS Wildlife Services has never, in writing, requested any extension of time, or specified a timeframe for responding to the request, 5 U.S.C. § 552(a)(6)(B)(ii); *see* 7 C.F.R. § 1.16(d), and the 20-day statutory deadline expired on April 9, 2015.

57. Defendant has failed to make the records that it has determined to release to WWP promptly available, as required by FOIA. 5 U.S.C. § 552(a)(6)(C)(i); 7 C.F.R. § 1.19(a).

58. Defendant is improperly withholding records from WWP in violation of FOIA.

SECOND CLAIM FOR RELIEF

Violation of FOIA—Failure to timely respond to FOIA Request No. 2015-APHIS-02212-F.

59. WWP realleges and incorporates by reference all preceding paragraphs.

60. Defendant has failed to make an adequate and timely determination with respect to WWP's FOIA Request No. 2015-APHIS-02212-F because Defendant has failed to inform WWP whether it plans to comply with the request; if so, whether it will grant WWP's request for a fee waiver and when WWP may anticipate receiving responsive documents; and if not, the reasons for which it is denying the request, the volume of records denied, and how WWP may appeal. 5 U.S.C. § 552(a)(6)(A)(i); 7 C.F.R. §§ 1.2(a), 1.7.

61. Defendant has failed to make the records that it has determined to release to WWP promptly available, as required by FOIA. 5 U.S.C. § 552(a)(6)(C)(i); 7 C.F.R. § 1.19(a).

62. Defendant is improperly withholding records from WWP in violation of FOIA.

THIRD CLAIM FOR RELIEF

Violation of FOIA—Failure to timely respond to FOIA Request No. 2015-APHIS-02229-F.

63. WWP realleges and incorporates by reference all preceding paragraphs.

64. Defendant has failed to make an adequate and timely determination with respect to WWP's FOIA Request No. 2015-APHIS-02212-F because Defendant has failed to inform WWP whether it plans to comply with the request; if so, whether it will grant WWP's request for a fee waiver and when WWP may anticipate receiving responsive documents; and if not, the reasons for which it is denying the request, the volume of records denied, and how WWP may appeal. 5 U.S.C. § 552(a)(6)(A)(i); 7 C.F.R. §§ 1.2(a), 1.7.

65. Defendant has failed to make the records that it has determined to release to WWP promptly available, as required by FOIA. 5 U.S.C. § 552(a)(6)(C)(i); 7 C.F.R. § 1.19(a).

66. Defendant is improperly withholding records from WWP in violation of FOIA.

FOURTH CLAIM FOR RELIEF
Violation of FOIA—Failure to timely respond to FOIA Request No. 2015-APHIS-02457-F.

67. Defendant has failed to make an adequate and timely determination with respect to WWP's FOIA Request No. 2015-APHIS-02457-F because Defendant has failed to inform WWP whether it plans to comply with the request; if so, whether it will grant WWP's request for a fee waiver and when WWP may anticipate receiving responsive documents; and if not, the reasons for which it is denying the request, the volume of records denied, and how WWP may appeal. 5 U.S.C. § 552(a)(6)(A)(i); 7 C.F.R. §§ 1.2(a), 1.7.

68. Although WWP has agreed to modify and/or clarify its FOIA request in certain respects as described above, APHIS Wildlife Services has still violated the statutory deadline for the modified request. 7 C.F.R. § 1.7(c). APHIS Wildlife Services has never, in writing, requested any extension of time, or specified a timeframe for responding to the request, 5 U.S.C. § 552(a)(6)(B)(ii); *see* 7 C.F.R. § 1.16(d), and the 20-day statutory deadline expired on April 23, 2015.

69. Defendant has failed to make the records that it has determined to release to WWP promptly available, as required by FOIA. 5 U.S.C. § 552(a)(6)(C)(i); 7 C.F.R. § 1.19(a).

70. Defendant is improperly withholding records from WWP in violation of FOIA.

FIFTH CLAIM FOR RELIEF

Violation of FOIA—Failure to timely respond to FOIA Request No. 2015-APHIS-02407-F.

71. WWP realleges and incorporates by reference all preceding paragraphs.

72. Defendant has failed to make an adequate and timely determination with respect to WWP's FOIA Request No. 2015-APHIS-02407-F because Defendant has failed to inform WWP whether it plans to comply with the request; if so, whether it will grant WWP's request for a fee waiver and when WWP may anticipate receiving responsive documents; and if not, the reasons for which it is denying the request, the volume of records denied, and how WWP may appeal. 5 U.S.C. § 552(a)(6)(A)(i); 7 C.F.R. §§ 1.2(a), 1.7.

73. Defendant has failed to make the records that it has determined to release to WWP promptly available, as required by FOIA. 5 U.S.C. § 552(a)(6)(C)(i); 7 C.F.R. § 1.19(a).

74. Defendant is improperly withholding records from WWP in violation of FOIA.

PRAYER FOR RELIEF

WHEREFORE, WWP respectfully prays that this Court:

A. Declare that Defendant APHIS Wildlife Service's failure to provide WWP with timely and full responses to WWP's FOIA requests described above, including its failure to make a timely determination and produce all records requested, is in violation of the FOIA, 5 U.S.C. § 552(a)(6).

B. Order Defendant to immediately and fully provide WWP with any and all remaining agency records responsive to WWP's FOIA requests described above, 5 U.S.C. § 552(a)(4)(B), including any and all such records that would be responsive as of the date of such court order.

C. Award WWP its reasonable costs, litigation expenses, and attorney's fees incurred in prosecuting this civil action under the FOIA, 5 U.S.C. § 552(a)(4)(E), and/or all other applicable authorities.

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

Dated: June 22, 2015

Respectfully submitted,

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