



February 11, 2011

Tonya Woods, FOIA Director
Office of Legislative and Public Affairs
USDA/APHIS/WS
4700 River Road, Unite 50
Riverdale, MD 20737-1232
Via email: foia.officer@aphis.usda.gov

**RE: FREEDOM OF INFORMATION ACT REQUEST
Aerial Gunning in Wilderness Areas and Wilderness Study Areas in Nevada**

Dear Ms. Mason:

This is a formal request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the applicable regulations of the Department of Interior, 43 C.F.R. Part 2, for the release and production of records that may contain information regarding aerial gunning in Wilderness Areas and Wilderness Study Areas in the State of Nevada by U.S. Department of Agriculture - Animal and Plant Health Inspection Service - Wildlife Services (hereinafter "Wildlife Services"), or other governmental (state or federal) or non-governmental entities.

Requested Records:

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We request the following documents¹:

¹ "Document(s)" is used in the broadest sense contemplated by Federal Rule of Civil Procedure 34. It means all written, transcribed, recorded or graphic matters, however produced or reproduced. This definition includes, but is not limited to, any and all originals copies or drafts of any and all of the following: records; notes; nonconforming copies that contain deletions, insertions, corrections, handwritten notes or comment summaries; memoranda; schedules; contracts; binders; work papers; logs; diaries; work sheets; files; letters; correspondence; summaries of memoranda; reports or memoranda of telephone conversations or record of personal conversations or interviews; handwritten notes; telephone logs; facsimiles; summaries; invoices; promissory notes; contracts; loan agreements; vouchers; billing statements; tape recordings or transcripts of tape recordings; photographs; videotapes; computerized output or data bases; electronic files; computer disks; computer CDs; electronic mail transmittals (e-mails); data and all other writings; calculations; and figures or symbols of any kind which, in any manner mentioned, relate to the subjects of the specific requests contained herein.

(1) Any and all documents relating to, providing evidence of, or discussing: the approval, authorization, request for approval, and/or the request for the authorization of any and all aerial gunning in Wilderness Areas and Wilderness Study Areas in the State of Nevada for the past six (6) years (whether the gunning was authorized or approved by the U.S. Forest Service, Bureau of Land Management, Wildlife Services, or another federal or state agency or officer).

(2) Any and all documents relating to, providing evidence of, or discussing aerial gunning activity in Wilderness Areas and Wilderness Study Areas in the State of Nevada for the past six (6) years, including, but not limited to, who conducted the aerial gunning, where the aerial gunning took place, the range and time of the gunning activity (hours, area, etc.), the purpose of such aerial gunning activities, the numbers and kinds of species killed, any notification given to the U.S. Forest Service or the Bureau of Land Management by Wildlife Services or another entity of any aerial gunning activity, and who authorized the aerial gunning.

Presumption in Favor of Disclosure and Exempted Documents:

In the event that any of the requested records are withheld, please note that the FOIA provides that if only portions of a requested record are exempted from release, the remainder must still be released. WildEarth Guardians therefore requests that we be provided with all non-exempt portions that are reasonably segregable. We further request that you describe the deleted material in detail and specify the statutory basis for the denial, as well as your reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination, and in formulating arguments if an appeal is taken. A written justification might also help to avoid unnecessary litigation. WildEarth Guardians has the right to appeal the withholding or deletion of any records and expects that you will list the office and address where such an appeal can be sent.

The Supreme Court has stated that FOIA establishes a “strong presumption in favor of disclosure” of requested information, and that the burden is on the government to substantiate why information may not be released under the act’s various exemptions. Department of State v. Ray, 502 U.S. 164, 173 (1991). Congress affirmed these tenets of FOIA in legislation as recently as December 2007, stating its commitment to “ensure that the Government remains open and accessible to the American people and is always based not upon the ‘need to know’ but upon the fundamental ‘right to know.’” Public Law 110-175, 121 Stat 2524, 2525 (Dec. 31, 2007). President Obama has also directed that “[t]he presumption of disclosure should be applied to all decisions involving FOIA.” 74 Fed. Reg. 4683 (Jan. 26, 2009). Please consider the foregoing before withholding any documents that are responsive to this request. WildEarth Guardians anticipates that you will make the requested materials available within the statutorily prescribed period.

WildEarth Guardians also requests that you waive any applicable fees since disclosure meets the statutory standard for a fee waiver in that it is clearly “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii).

Request for Fee Waiver

The Freedom of Information Act (“FOIA”) provides that, “[d]ocuments 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). 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. *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass 1984). WildEarth Guardians’ current request for records qualifies for a fee waiver under this standard and, accordingly, we request that all fees be waived.

This request satisfies both statutory and regulatory requirements for granting a fee waiver. Below we first state in italics the requirements for a fee waiver delineated in the October 2002 FOIA regulations of the Department of Interior, 43 C.F.R. Pt. 2, App. D (2002), and then state our satisfaction of those requirements.

(1) How do the records concern the operations or activities of the Government?

The requested records concern implementation of the Wilderness Act by the Government and aerial gunning in Wilderness Areas and Wilderness Study Areas that are managed by the U.S. Forest Service and the Bureau of Land Management.

(2) If the records concern the operations or activities of the Government, how will disclosure likely contribute to public understanding of these operations and activities?

(i) How are the contents of the records you are seeking meaningfully informative on the Department’s or a bureau’s operations and activities? Is there a logical connection between the content of the records and the operations or activities you are interested in?

The release of the documents requested above will contribute significantly to public understanding and oversight of the operations and activities of the Government related to aerial gunning in Wilderness Areas and Wilderness Study Areas and implementation of the Wilderness Act. Specifically, we endeavor to understand more about aerial gunning operations in Wilderness. There is a logical connection between the content of the records we have requested and the Government’s operations and oversight of activities in Wilderness Areas.

(ii) Other than enhancing your knowledge, how will disclosure of the requested records contribute to the understanding of the public at large or a reasonably broad audience of persons interested in the subject?

The records requested will provide us with the ability to communicate to the public about how Wildlife Service is operating in Wilderness Areas and Wilderness Study Areas, and the role that aerial gunning has in the management of Wilderness Areas. Management of public lands and the actions and assessments of the Department of the Interior and Wildlife Services, as related to aerial gunning of wildlife, is of great concern to the public.

(iii) Your identity, vocation, qualifications, and expertise regarding the requested information (whether you are affiliated with a newspaper, college or university, have previously published articles, books, etc.) may be relevant factors. However, merely stating that you are going to write a book, research a particular subject, or perform doctoral dissertation work, is insufficient, without demonstrating how you plan to disclose the information in a manner which will be informative to a reasonably broad audience of persons interested in the subject.

WildEarth Guardians has effectively advocated for wildlife and wild places for over 20 years. We have a proven track record of contributing to public understanding of these issues via the extensive media coverage we have received on administrative and legal initiatives we have undertaken. These initiatives were based, in part, on materials received from the Government and effectively digested. WildEarth Guardians has on staff or available for consultation biologists, environmental lawyers, and policy analysts with long-term experience in conservation issues and data analysis. We have submitted numerous similar FOIA requests and digested and disseminated the information to a broad audience of persons interested in the subject, including concerned citizens, activists, scientists, our members, and the public-at-large.

For instance, WildEarth Guardians has received extensive records from multiple federal agencies, including the Wildlife Services, regarding Wildlife Services' activities on public lands. We used that information in multiple ways to disseminate information to the public. In 2009, for instance our staff person, Wendy Keefover-Ring, issued a report: *War on Wildlife: The U.S. Department of Agriculture's "Wildlife Services": A Report to Pres. Barack Obama and Congress* (publicly available at http://www.wildearthguardians.org/Portals/0/support_docs/report-war-on-wildlife-june-09-lo.pdf) that details Wildlife Services' activities and the economic, environmental and biological impact of their wildlife-killing program, including statistics and data we received from FOIA requests; we formally petitioned the Obama Administration, BLM and the U.S. Forest Service and requested that aerial gunning and wildlife poisoning activities cease on public lands; and WildEarth Guardians placed a full-page ad in the Washington Post about aerial gunning. WildEarth Guardians also hosts two websites that detail the social and biological ramifications of aerial gunning operations at <http://www.goagro.org/> and http://www.wildearthguardians.org/site/PageServer?pagename=priorities_wildlife_war_wildlife_kill_methods.

We also disseminate information regarding public lands management and aerial gunning through our regularly published newsletter and via emails to our more than 12,500 members and activists. We have been published by the mainstream media, including the Associated Press, numerous times concerning the biological and social ramifications of aerial gunning and/or other predator control measures for over 15 years, as any Google search will show. Furthermore, our staffers have been regular bloggers on the Huffington Post on the issue of predator control.

Information received from FOIA also informs our comment letters to federal agencies, including the U.S. Forest Service, BLM, and letters to decision makers, including the President, his Administration, and members of Congress. We also provide the public with information about Wildlife Services' programs and protection of wildlife.

(iv) Do you have the ability and intention to disseminate the information to the general public or a reasonably broad audience of persons interested in the subject?

(A) How and to whom do you intend to disseminate the information?

(B) How do you plan to use the information to contribute to public understanding of the Government's operations or activities?

WildEarth Guardians has the ability and intention to disseminate the information requested to the public and our approximately 12,500 members and supporters. Our organization has a long history of acquiring, analyzing, and disseminating information and data regarding federal actions and policy. WildEarth Guardians disseminates the information it obtains, including all information obtained pursuant to FOIA, in various effective ways, including through our website, newsletters, press releases, and public participation.

Once the requested information is obtained, we will analyze the data presented and our staff of experts will review and digest the documents and then the information will be disseminated to our members, members of other conservation organizations, and other interested members of the public. WildEarth Guardians regularly issues press releases on agency activities and is consistently interviewed in newspaper articles. We also maintain a website, www.wildearthguardians.org, dedicated to providing information to the general public with access to past press releases, publications, television and video interview and audio clips. See <http://www.youtube.com/watch?v=blX-24KvdiQ>.

Moreover, the information may be featured in monthly updates posted by WildEarth Guardians to our email listserve. Our listserve details WildEarth Guardians' efforts, through litigation and other means, to protect rare and endangered ecosystems and wildlife. Since these efforts rely almost exclusively on information we obtain through FOIA, a synopsis of this information is disseminated on a regular basis to almost ten thousand recipients on our listserve and all visitors to our website. Our quarterly newsletter, Wild at Heart, is also distributed at news-stands throughout the West. WildEarth Guardians will use the information obtained through this FOIA request in the methods described above.

We plan to use all of the above information dissemination strategies to significantly contribute to public understanding of the Forest Service's management of Wilderness and Wilderness Study Areas, and oversight of aerial gunning of wildlife in Wilderness Areas and Wilderness Study Areas in Nevada.

(3) If there is likely to be a contribution to public understanding, will release of the requested records contribute significantly to public understanding?

(i) Is the information being disclosed new?

The records requested include new information regarding the Government's implementation of the Wilderness Act, Government operations related to aerial gunning of wildlife in Wilderness Areas and Wilderness Study Areas, and Government oversight of possible non-governmental aerial gunning in Wilderness Areas.

(ii) Does the information being disclosed confirm or clarify data which has been released previously?

The contents of the information requested are currently unknown to us. We do not request any documents previously provided to us by Wildlife Services.

(iii) How will disclosure increase the level of public understanding of the operations or activities of the Department or a bureau that existed prior to disclosure?

The requested documents will increase our understanding, and subsequently, contribute to public understanding of the Government's management of Wilderness Areas and oversight of Government and potentially non-governmental activities related to aerial gunning of wildlife in Wilderness Areas and Wilderness Study Areas.

(iv) Is the information already publicly available? If the Government previously has published the information you are seeking or it is routinely available to the public in a library, reading room, through the Internet, or as part of the administrative record for a particular issue (e.g., the listing of the spotted owl as an endangered species), it is less likely that there will be a significant contribution from release.

The information WildEarth Guardians is requesting is not, to our knowledge, publicly available. The Government may omit sending us requested records that are available in publicly accessible forums such as on the internet or in published materials that are routinely available at public or university libraries so long as the Government provides us with adequate references and/or website links so that we may obtain these materials on our own. However, we suspect that the majority of requested materials will not be available unless we receive them from the Government in satisfaction of this FOIA request.

(4) Would disclosure be primarily in your commercial interest?

(i) Do you have a commercial interest that would be furthered by disclosure? A commercial interest is a commercial, trade, or profit interest as these terms are commonly understood. Your status as "profitmaking" or "non-profitmaking" is not the deciding factor. Not only profitmaking entities, but other organizations or individuals may have a commercial interest to be served by disclosure, depending on the circumstances involved.

(ii) If you do have a commercial interest that would be furthered by disclosure, would disclosure be primarily in that interest? Would the public interest in disclosure be

greater than any commercial interest you or your organization may have in the documents? If so, how would it be greater?

(iii) Your identity, vocation, and the circumstances surrounding your request are all factors to be considered in determining whether disclosure would be primarily in your commercial interest. For example:

(A) If you are a representative of a news media organization seeking information as part of the news gathering process, we will presume that the public interest outweighs your commercial interest.

(B) If you represent a business/corporation/association or you are an attorney representing such an organization, we will presume that your commercial interest outweighs the public interest unless you demonstrate otherwise.

(c) If the bureau cannot make a determination based on the information you have provided, it may ask you for additional justification regarding your request.

WildEarth Guardians does not have a commercial, trade, or profit interest in the requested records. In fact, WildEarth Guardians does not have any commercial, trade, or profit interests. WildEarth 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 wildlife and public lands policy and an institutional commitment to defending and restoring wildlands and wildlife. WildEarth Guardians is incorporated as a New Mexico nonprofit corporation under Certificate NM 1587757. The Internal Revenue Service recognizes WildEarth 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 WildEarth Guardians' well-orchestrated and demonstrably successful efforts at educating the public on issues relating to Wilderness Areas and the aerial gunning of Wildlife, and the fact that WildEarth 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

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,

Ashley D. Wilmes
Staff Attorney
WildEarth Guardian



Ashley Wilmes

To foia.officer@aphis.usda.gov

cc

bcc

Subject: FOIA request WS

02/11/2011 06:15 PM

Dear Ms. Woods or FOIA officer:

Attached please find a FOIA request on behalf of WildEarth Guardians. Please acknowledge receipt of this request by letter to the address below and provide us with a tracking number for this request if it will take longer than ten days to process, pursuant to the FOIA, 5 U.S.C. § 552(a)(7), as amended.

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.

Thank you,

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Ashley D. Wilmes
Staff Attorney
WildEarth Guardians
827 Maxwell Avenue, Suite L
Boulder, Colorado 80304