

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

WILDEARTH GUARDIANS,)	
)	
Plaintiff,)	
)	Civil No. _____
vs.)	
)	
ANIMAL AND PLANT HEALTH)	
INSPECTION SERVICE, an agency of the)	
United States Department of Agriculture,)	
)	
Defendant.)	
_____)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. Preliminary Statement

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 in response to three separate FOIA requests which were sent to APHIS on July 1, 2013.

2. The FOIA requests at issue sought documents (1) concerning the status of APHIS’s compliance with its mandatory legal obligations under the National Environmental Policy Act (“NEPA”), (2) investigations of APHIS employees for possible violations of state and federal criminal codes, and (3) an incident in which an APHIS employee shot a Mexican gray wolf.

3. Plaintiff WildEarth Guardians (“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.

4. Guardians requested the documents and records that are the subject of this lawsuit on July 1, 2013 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 private commercial enterprises and the preservation of private property values.

5. To comply with FOIA's requirement that responsive documents be produced in response to a request within 20 working days (except in certain circumstances not applicable here), APHIS should have produced the information that WildEarth Guardians requested by no later than July 30, 2013.

6. As of the date of this filing of this Complaint, WildEarth Guardians has not received a single responsive document in connection with the subject FOIA requests.

7. In this civil action, WildEarth Guardians seeks a court order (1) declaring that APHIS's failure to respond to WildEarth Guardians' requests for documents and records violates the FOIA and (2) enjoining APHIS to produce the requested documents and records. 5 U.S.C. §552(a)(4)(B).

II. Jurisdiction and Venue

8. This Court has jurisdiction over this action under 5 U.S.C. §522(a)(4)(B) (FOIA), 28 U.S.C. §1331 (federal question jurisdiction), 28 U.S.C. §1361 (mandamus), 28 U.S.C. §§2201-2202 (declaratory and injunctive relief), and 5 U.S.C. §704 (APA provision for judicial review).

9. Venue in this Court is proper under 5 U.S.C. §522(a)(4)(B) (FOIA) because WildEarth Guardians is a New Mexico not-for-profit corporation with its principal place of business in New Mexico and under 28 U.S.C. §1391(e) because this is an action against an agency of the United States and because the cause of action arises in New Mexico.

III. Parties

10. Plaintiff WildEarth Guardians is a non-profit conservation organization with its primary place of business in Santa Fe, New Mexico. WildEarth Guardians has approximately 7,500 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 program 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 bring this action on behalf of itself, its staff, and its members.

11. Defendant APHIS is 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 sued in this action in connection with its failure to comply with its statutory duties under the FOIA.

IV. Facts

12. The United States Supreme Court has held that the FOIA establishes a “strong presumption in favor of disclosure” and that “disclosure, not secrecy, is the dominant objective of the Act.”

A. July 1, 2013 FOIA Request – Request No. 2013-APHIS-04168

13. In pursuit of its organizational objectives, WildEarth Guardians submitted a FOIA request to APHIS on July 1, 2013 requesting specifically identified information concerning the agency’s compliance with NEPA in connection with certain of its activities and operations.

14. More specifically, Guardians has learned that APHIS has reviewed the status of its NEPA compliance with respect to certain of its activities and operations because it was concerned that it was “vulnerable” to such suits which Guardians might bring. With the FOIA request which is the subject of this lawsuit, Guardians seeks to acquire information relative to APHIS’s assessment of these “vulnerabilities” as well as its plan to address them.

15. The documents requested in the subject FOIA request are very narrow in scope and easily identifiable. They include records of specific tasks performed by agency personnel in connection with the specified Program.

16. The first response to the July 1, 2013 FOIA request which gave rise to this action was an e-mail from Ms. Sophie Lau-Lopez, APHIS FOIA Specialist, to the undersigned counsel on July 30, 2013. In that e-mail – and in subsequent e-mails of July 31, 2013 and August 16, 2013 – Ms. Lau-Lopez has requested extensions of the FOIA “due date,” but never provided a date by which Guardians could expect to receive a full response to its request.

17. The undersigned informed Ms. Lau-Lopez that Guardians was not opposed to a “reasonable extension,” but stated that Guardians could not agree to an “open ended” extension which would not obligate APHIS to finish its response by a date certain.

18. Ms. Lau-Lopez never sought to negotiate a mutually agreeable extension in connection with the subject FOIA request.

19. In her e-mail of August 16, 2013, Ms. Lau-Lopez stated that the production of records responsive to the request would begin on September 6, 2013, and continue on a “rolling basis” until complete.

20. The undersigned wrote Ms. Lau-Lopez on August 16, and again informed her that Guardians would not agree to an open-ended extension in connection with the FOIA request of July 1, 2013. The undersigned also stated in his August 16, 2013 e-mail to Ms. Lau-Lopez that Guardians expected to receive certain discrete and easily identifiable documents by August 21, 2013.

21. Ms. Lau-Lopez never responded to the undersigned’s e-mail of August 16, 2013.

22. Despite Ms. Lau-Lopez’s representation that the production of documents in connection with the subject FOIA request would begin on September 6, 2013, Guardians has yet to receive a single document in response to the subject FOIA request.

B. July 1, 2013 FOIA Request – Request No. 2013-APHIS-04169-F

23. In pursuit of its organizational objectives, WildEarth Guardians submitted a FOIA request to APHIS on July 1, 2013 requesting information pertaining to investigations of its employees in connection with possible criminal violations of state and federal law. Guardians made this request after it learned that at least four APHIS employee were investigated by the U.S. Fish and Wildlife Service for possible criminal violations of federal law in connection with the illegal killing of species that are listed for protection under the Endangered Species Act.

24. On July 30, 2013, Mr. Reginald Sheperd wrote an e-mail to Ms. Wendy Keefover – the FOIA requester – requesting a “voluntary extension” of the FOIA due date. In his e-mail, Mr. Sheperd stated that APHIS would provide “partial responses” until the response was complete and final.

25. Ms. Keefover responded to Mr. Shepherd by e-mail on the same date, indicating that Guardians would not agree to an “open ended” extension, and asking Mr. Shepherd how much time he would need to provide a complete response to the subject FOIA request.

26. Ultimately, APHIS and Guardians agreed to a three week extension – until and through August 21, 2013 – as a new due date for the final response to this FOIA request.

27. As of this date, Guardians has yet to receive a single document which is responsive to this FOIA request.

C. July 1, 2013 FOIA Request – Request No. 2013-APHIS-04169-F

28. In pursuit of its organizational objectives, WildEarth Guardians submitted a FOIA request to APHIS on July 1, 2013 requesting information pertaining to an incident in which a Mexican gray wolf was shot by one of its employees. Guardians made this request after it learned that this

killing was not authorized by APHIS, and that the killing possibly occurred in violation of federal law protecting threatened and endangered species.

29. Pursuant to correspondence between APHIS and Guardians, an agreement was reached whereby this particular FOIA request would be consolidated for response with the FOIA request described in the paragraphs immediately preceding regarding investigations of possible criminal violations by APHIS employees.

30. As with the consolidated request, Guardians agreed to extend the deadline for response to this request from July 30, 2013 to August 21, 2013.

31. To date, Guardians has not received a single document in response to this FOIA request.

32. APHIS has never provided a final determination in response to any of the three FOIA requests of July 1, 2013 which are the subject of this action.

33. Pursuant to the FOIA and to United States Department of Agriculture regulations implementing the FOIA, APHIS had a period 20 working days to respond to the subject FOIA request following receipt of the request. 5 U.S.C. §552(a)(6)(A)(i), 7 C.F.R. §1.7(a).

34. The only exception to the FOIA's 20 day period for response is a limited exception for "unusual circumstances" that are specifically and narrowly defined in the FOIA. 5 U.S.C. §552(a)(6)(B).

35. APHIS has not claimed that there are any "unusual circumstances," as those circumstances are specifically and narrowly defined in the FOIA.

36. There are no "unusual circumstances" present in this case, as those circumstances are specifically and narrowly defined in the FOIA.

37. The FOIA's exception for "unusual circumstances" is not applicable in this case since "unusual circumstances" do not exist, and since the policy of the United States Department of Agriculture is to inform FOIA requesters of the "unusual circumstances" within the initial 20 day period follow receipt of the request if the receiving agency believes that the exception is available in a given situation. 7 C.F.R. §1.2(a).

38. APHIS's failure to provide a full and adequate responses to Guardians' July 1, 2013 FOIA requests constitutes a violation of the FOIA and frustrates 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. Causes of Action

(Violations of the mandatory requirements of FOIA)

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

40. APHIS has violated FOIA by failing to provide WildEarth Guardians with a full and adequate response to its July 1, 2013 FOIA requests.

VI. Request for Relief

WHEREFORE, WildEarth Guardians request that this Court:

1. Declare unlawful APHIS's failure to provide a full and adequate response to WildEarth Guardians' requests for documents and records.
2. Order APHIS to produce immediately the documents and records requested by WildEarth Guardians.

3. Award WildEarth Guardians its reasonable attorney fees and costs incurred in prosecuting this civil action. 5 U.S.C. §552(a)(4)(E), 28 U.S.C. §2412(d)(1)(B).
4. Grant such other and further relief as the Court deems just and proper.

Dated: September 16, 2013

Respectfully submitted,

/s/ Steven Sugarman

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