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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION**

**WILDEARTH GUARDIANS,**

Plaintiff,

v.

**U.S. ARMY CORPS OF ENGINEERS,**

Defendant.

Case No.

**COMPLAINT**

**INTRODUCTION**

1. Plaintiff WildEarth Guardians brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief, to seek the disclosure of agency records improperly withheld by Defendant Army Corps of Engineers (“Corps”).

2. WildEarth Guardians seeks records that shed light on the Corps’ secretive meetings that revolve around the significant harm the agency is causing to Upper Willamette River Chinook salmon and steelhead—two native salmonids that are on the brink of extinction and

listed under the Endangered Species Act (“ESA”). This harm flows from the Corps’ operation of the Willamette Project, a massive federal flood control and irrigation project that encompasses, *inter alia*, more than a dozen dams and reservoirs and five fish hatcheries. In 2008, the National Marine Fisheries Service (“NMFS”) issued a Biological Opinion (“BiOp”) that found the Willamette Project was likely to jeopardize the continued existence of the species unless sweeping changes were made to operations of the dams and hatcheries.

3. To ensure the Corps made those changes, the BiOp directed the agency to convene committees of employees from NMFS and other agencies to meet regularly and discuss implementation of the various BiOp requirements. The Corps created a “Managers Forum” to oversee the other committees, and it includes people from state agencies, tribes, and other non-federal entities. Despite these committees and the Managers Forum, the Corps has failed to implement many of the measures required by the BiOp.

4. As part of its efforts to hold the Corps accountable for the agency’s inadequate implementation of the BiOp, WildEarth Guardians sent a FOIA request to the Corps seeking meeting minutes from the Managers Forum. In response, the Corps produced a small number of documents but heavily redacted information from them under FOIA Exemption 5. These redactions were unlawful because the Managers Forum meeting minutes are not solely inter-agency and intra-agency records, and therefore do not fit within Exemption 5. Accordingly, WildEarth Guardians seeks a court order declaring that the Corps violated FOIA by improperly withholding these public records and directing the agency to immediately produce all responsive records and information.

## **JURISDICTION AND VENUE**

5. This Court has jurisdiction over this action under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), and under 28 U.S.C. § 1331, because this action arises under the laws of the United States, including FOIA and the Declaratory Judgment Act, 28 U.S.C. § 2201.

6. Venue is proper in the Portland Division of the District of Oregon under 28 U.S.C. § 1391, 5 U.S.C. § 552(a)(4)(B), and Local Rule 3-2(b) because a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district and some or all of the agency records in question may be located in this district within the Portland Division.

7. Plaintiff submitted a timely administrative appeal and thus exhausted all administrative remedies as required under FOIA, 5 U.S.C. § 552(a)(6)(C)(i), prior to bringing this action.

## **PARTIES**

8. Plaintiff WILDEARTH GUARDIANS is a non-profit organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West. Guardians has over 66,000 members and supporters, including those who live, work, or recreate in the Willamette Basin. Headquartered in Santa Fe, New Mexico, Guardians maintains several other offices around the West, including in Portland, Oregon. WildEarth Guardians regularly uses FOIA to obtain records from federal agencies, including the Corps, which shed light on agency activities that are germane to the organization's mission.

9. Plaintiff WildEarth Guardians uses records obtained under FOIA to further the interests of the organization, and its members, supporters and staff, through educational, advocacy, policy, and litigation activities. The Corps' unlawful withholding of records under FOIA interferes with WildEarth Guardians' ability to engage in these activities and carry out its

mission and thus harms the organization and its members, supporters, and staff. A Court order that requires the Corps to stop its unlawful withholding of documents will remedy these injuries. WildEarth Guardians brings this action in its own right and on behalf of its members, supporters, and staff.

10. Defendant ARMY CORPS OF ENGINEERS is a subdivision of the U.S. Army within the U.S. Department of Defense, which is part of the executive branch of the United States. The Corps operates and maintains federal water resource projects, including the federal dams and facilities that are known as the Willamette Project in Oregon. The Corps is a federal agency subject to FOIA's requirements regarding records within its possession and control. The Corps maintains an office in Portland, Oregon that serves as the headquarters of the Northwest Division, which includes the Portland District and four other districts in the United States.

### **STATEMENT OF FACTS**

11. On August 7, 2017, Guardians sent a FOIA request to the Corps' Portland Headquarters seeking records of minutes from meetings of the Willamette Project Managers Forum.<sup>1</sup> The Corps participates in the Managers Forum as part of the Willamette Action Team for Ecosystem Restoration ("WATER") process described in the 2008 Willamette Project BiOp. According to the documents produced by the Corps, attendees of the Managers Forum include representatives from other federal agencies, state agencies, the Oregon's governor's office, and Tribes. Based upon information and belief, the Managers Forum meetings discuss a wide range of topics about the Corps' implementation of the BiOp and the status of Upper Willamette River salmonids. Past topics have included fish passage improvements, budget issues, technical analyses, hatchery programs, funding, proposed action plans and schedules, and talking points.

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<sup>1</sup> Guardians' FOIA request included two other categories of documents, but this Complaint only addresses the first category of documents.

12. The Corps confirmed receipt of this FOIA Request on August 16, 2017, but did not “officially” acknowledge the FOIA until September 5, 2017. The Corps asked for, and Guardians provided on the same day, clarification about records sought in the FOIA Request.

13. On September 25, 2017, Guardians requested an update from the Corps because FOIA’s 20-day statutory deadline for responding had passed without a determination from the Corps. After exchanging additional emails regarding timing, the Corps provided a final response on October 4, 2017.

14. In its final response, the Corps informed Guardians that it was producing Managers Forum Minutes but withheld “some portions” pursuant to FOIA Exemption 5, the deliberative process privilege, citing 5 U.S.C. § 552(b)(5). The agency explained:

documents containing discussions of proposed actions to address and/or fulfill the BiOp RPA are considered pre-decisional and deliberative because a final course of action continues to evolve. As such, it forms part of the give-and-take between agency officials involved in the decision-making processes. These recommendations and opinions do not necessarily represent the final views of the Corps. Under foreseeable risk, revealing this information would prematurely disclose proposed actions that may or may not be adopted, inhibit candor in the decision-making process, as well as extend protection against public confusion.

15. Along with its final response, the Corps included an index of abbreviated summaries of the subject matter in redacted portions of records, which listed budget and scheduling issues, talking points, proposed actions and status for fish passage at a federal dam, technical issues and analyses, and administrative matters related to the Managers Forum. The index did not identify the specific decision pending before the Corps to which the redacted information related and failed to include specific reasoning for each redaction.

16. WildEarth Guardians filed a timely administrative appeal on November 14, 2017. On November 27, 2017, the Corps acknowledged receipt of the appeal and stated it would consider the basis of the appeal, perform an additional review of records, and keep WildEarth apprised of

its findings. The agency anticipated making a determination by December 1, 2017, and stated its intention to forward the appeal to the office of Army General Counsel accordingly.

17. WildEarth Guardians has not received a determination on its administrative appeal, nor any other correspondence from the Corps since November 27, 2017.

### LEGAL BACKGROUND

18. FOIA requires federal agencies to make its records available to the public upon request. 5 U.S.C. § 552(a)(3)(A). “[T]he 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)).

19. FOIA requires that federal agencies provide a determination of whether the agency will comply with a FOIA request within 20 business days. 5 U.S.C. § 552(a)(6)(A).

20. An agency may only withhold documents that fall within one of the limited exceptions that FOIA enumerates. Exemption 5 permits withholding of “interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Exemption 5 covers documents that are “pre-decisional” and “deliberative.” A predecisional document is one prepared to assist an agency decisionmaker make a decision and reflects the personal opinions of the author and not agency policy. A deliberative document makes recommendations or expresses opinions on legal or policy matters and does not include factual material.

21. FOIA requires that a requestor exhaust her administrative remedies by filing an administrative appeal prior to bringing suit in federal court to seek production of records under the statute. 5 U.S.C. § 552(a)(6)(C)(i). FOIA requires that federal agencies respond to administrative appeals within 20 working days. 5 U.S.C. § 552(a)(6)(A)(ii). Where the federal

agency fails to respond to an administrative appeal, FOIA deems a requestor to have exhausted its administrative remedies with respect to that appeal. 5 U.S.C. § 552(a)(6)(C)(i).

22. A court may review an agency's decision to withhold documents, and "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). An agency cannot justify its withholding by offering nothing more than "[c]onclusory and generalized allegations." *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976). When the agency fails to sustain its burden, the court may "order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

**CLAIM FOR RELIEF**  
FOIA Violations

23. Plaintiff realleges and incorporates by reference all preceding paragraphs.

24. The Corps unlawfully withheld records and information within its possession that WildEarth Guardians requested the release of pursuant to FOIA. The Corps' unlawful withholding has deprived WildEarth Guardians of its right to public documents under FOIA.

25. WildEarth Guardians exhausted its administrative remedies because the Corps failed to act on the administrative appeal that WildEarth Guardians timely filed. The Corps' failure to make a determination on the administrative appeal within 20 working days is a violation of FOIA. *See* 5 U.S.C. § 552(a)(6)(A)(i).

26. The Corps unlawfully redacted records under FOIA Exemption 5, U.S.C. § 552(b)(5), because the agency did not demonstrate the records were "inter-agency or intra-agency memorandums or letters" and also did not demonstrate the documents were pre-decisional and deliberative and therefore would not have been "available by law to a party other than an agency in litigation with the agency." The Corps cannot show the meeting minutes from the Managers Forum are inter-agency or intra-agency records because people outside federal agencies were in

attendance. Thus, the Corps' failure to release the redacted information is a violation of FOIA. 5 U.S.C. § 552(a)(3).

27. The Court should order the production of the agency records that have been improperly withheld from WildEarth Guardians. *See* 5 U.S.C. § 552(a)(4)(B).

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

28. Declare that the Corps violated FOIA by withholding all relevant information and records under FOIA Exemption 5, and failing to make a determination on WildEarth Guardians' administrative appeal;

29. Order the Corps to produce the requested records, including unredacted versions of the records produced and any other such records that are responsive to Plaintiff's request;

30. Award Plaintiff its reasonable costs, litigation expenses, and attorney's fees as provided by 5 U.S.C. § 552(a)(4)(E), and all other applicable authorities; and

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

DATED this 7th day of February, 2018.

Respectfully submitted,

/s/Elizabeth H. Potter

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