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Western Environmental Law Center

March 15, 2016

Sent via e-mail and USPS certified mail (return receipt)

Melissa Allen
FWS FOIA Officer
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Re: FOIA request pertaining to the U.S. Fish and Wildlife Service's Species Status Assessment (SSA) and progress towards completing a recovery plan for Canada lynx.

Dear Ms. Allen:

This is a request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, for any and all documents and information pertaining to the U.S. Fish and Wildlife Service's (Service's) Species Status Assessment (SSA) and progress towards completing a recovery plan for Canada lynx (lynx) pursuant to the June 25, 2014 order in *Friends of the Wild Swan v. Ashe*, Civ. No. 13-cv-57-DWM (D. Mont. 2014). Specifically, I am requesting the following:

1. All documents and information related to the Service's preparation of a "Species Status Assessment" (SSA) for lynx. This includes, but is not limited to, all inter-agency and intra-agency communications (including correspondence with state wild agencies) including letters, emails, phone records, phone logs, meeting notes, memos, white papers, policy papers, and any other documents or information (and drafts of such documents and information) related to the SSA for lynx.
2. A list of all members of the Service's lynx SSA Framework Implementation Team (which, according to the Service, will oversee development and completion of the SSA) and lynx SSA Core Team (which will draft the SSA and associated documents), as well as any and all documents and information related to the formation and makeup of the two teams.
3. All documents and information provided, considered, produced, and/or discussed before, during, or after (but related to) the Service's October 13, 2015 to October 15, 2015 Expert Elicitation Workshop in Minneapolis, Minnesota. This includes, but is not limited to, a list of

attendees, the Service's "detailed notes of the workshop" which were "subsequently shared with and reviewed by workshop participants," a copy of any and all presentations and power-points presented, and the Service's "report" (both draft and final) analyzing and summarizing the workshop.

4. All documents and information, including schedules, dates, and times related to future meetings and gatherings pertaining to the lynx SSA, lynx recovery planning , or the lynx's listing status.
5. All documents and information related to the Service's preparation of a recovery plan for lynx **since issuance** of the June 25, 2014 order in *Friends of the Wild Swan v. Ashe*, Civ. No. 13-cv-57-DWM (D. Mont. 2014). This includes, but is not limited to, all inter-agency and intra-agency communications including letters, emails, phone records, phone logs, meeting notes, memos, white papers, policy papers, and any other documents or information (and drafts of such documents and information) related to the preparation of a recovery plan for lynx since June 25, 2014.

This FOIA request is made by the Western Environmental Law Center (WELC), a 501(c)(3) public interest environmental law firm, on behalf of *Friends of the Wild Swan*, a 501(c)(3) conservation organization dedicated to ensuring the long-term survival and recovery of lynx and their habitat in Montana and the contiguous United States. *Friends of the Wild Swan* is also committed to ensuring the Service is making progress towards, and complies fully with, the law and the District Court's order *Friends of the Wild Swan v. Ashe*, Civ. No. 13-cv-57-DWM (D. Mont. 2014).

This FOIA request applies to all described documents and information whose disclosure is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested documents, we request that you: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied); (ii) explain in full the basis on which non-disclosure is sought; and (iii) provide us with any segregable portions of the records for which you do not claim a specific exemption. If possible, *Friends of the Wild Swan* requests that all documents and information be provided in electronic format or on CD/DVD.

If this FOIA request is denied in whole or in part, please justify the denial with specific reference to FOIA's specific exemptions. Please also separately explain why the Service decided not to invoke its discretionary authority to release the requested information in the public interest, despite FOIA's exemptions. These justifications and explanations will assist *Friends of the Wild Swan* in deciding whether to appeal an adverse determination and in formulating arguments in the event an appeal is taken. It will also help *Friends of the Wild Swan* avoid unnecessary misunderstandings and litigation.

In accordance with FOIA and its implementing regulations, *Friends of the Wild Swan* respectfully request that you waive any fees, including search and duplication costs, which would otherwise be incurred by this request.

The Service should not charge *Friends of the Wild Swan* for the requested information because “disclosure... is in the public interest [and] is likely to contribute significantly to public understanding of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45. In the event that the Service decides not to waive fees, please contact me before incurring any costs in response to this FOIA request.

In considering whether the organizations meet FOIA’s fee-waiver criteria, the Service should recognize that FOIA carries a presumption of disclosure, and that the fee-waiver amendments of 1986 were designed specifically to allow groups, such as *Friends of the Wild Swan*, to access to government documents without the payment of fees.

As stated by Senator Leahy, “agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298. In interpreting this amendment, the Ninth Circuit noted that the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). Both the Ninth Circuit and the D.C. Circuit have stated that the amendment’s main purpose was “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 v. Rossoti*, 326 F.3d 1309, 1315 (D.C. Cir. 2014). FOIA’s fee waiver provision was added “‘to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in clear reference to requests from journalists, scholars, and non-profit public interest groups.” *Better Gov’t Ass’n v. Department of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986)(quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984)).

As such, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by noncommercial requesters and “watchdog” organizations, including conservation groups like *Friends of the Wild Swan*, which rely on and use FOIA to: (a) inform their members (and the public at large) about federal government actions that impact public resources; (b) monitor government actions and compliance with the law (including court orders); and (c) if necessary, challenge such actions in court.

Here, *Friends of the Wild Swan* satisfies all the requirements for a fee waiver because disclosure of the information requested is in the public interest because it will significantly contribute to the public’s understanding of the operations and activities of the Service, a public agency, entrusted with ensuring the survival and recovery of lynx.

First, the subject matter of this request relates to the Service’s obligation to prepare a recovery plan for lynx, a threatened species, and the Service’s progress towards meeting that obligation as outlined in the Service’s December 31, 2015 progress report to the District of Montana. See *Friends of the Wild Swan v. Ashe*, Civ. No. 13-cv-57-DWM (D. Mont. 2014) (Doc. 48). This request is thus limited to identifiable “operations and activities” of the government. See Department of Justice Guide to the FOIA (2009), p. 25 (conceding that “in most cases records possessed by federal agency will meet [the] threshold” of identifying operations or activities of the government).

Second, disclosure of the requested information will contribute to public understanding of government operations and activities. Specifically, the information requested will provide *Friends of the Wild Swan*, its members, and the public at large with crucial insight into the procedures, policies, and decision-making processes of the Service as it strives to comply with the District Court's order, undertakes the SSA process, and begins preparing a long-overdue recovery plan for lynx.

The documents and information requested in this FOIA are not currently in the public domain. As such, their release is not only "likely to contribute," but is in fact certain to contribute to better public understanding of lynx recovery planning, the preparation of SSAs, and ESA-species management in general. Specifically, the requested documents and information will likely contribute to an understanding of how the Service is approaching the SSA and recovery plan for lynx and whether or not the Service is complying with federal law and the District Court's order. The public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted. See *Judicial Watch*, 326 F.3d at 1314 ("[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.").

In *McClellan Ecological Seepage Situation*, 835 F.2d at 1286, the court made clear that the "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations...." In this instance, the requested documents and information potentially provide new information about the Service's approach to the SSA and recovery plan for lynx, will help illuminate public administrative processes currently pending and proceeding, and will likely provide important oversight of the Service and whether it is appropriately implementing environmental laws and complying with a court order. See *Western Watersheds Project (WWP) v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding."); see also *Community Legal Services v. HUD*, 405 F.Supp.2d 553 (D. Pa. 2005) ("Thus, as in *Forest Guardians*, the CLS request would likely shed light on information that is new to the interested public."); see also *Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 290 F.Supp.2d 1226, 1230 (D. Or. 2003), (finding that the FOIA request was informative of government operations because "there is substantial public interest in agency activities relating to endangered species.").

Notably, *Friends of the Wild Swan* has a proven track record of contributing to public understanding of issues surrounding wildlife, plants, and endangered and threatened species through its newsletters and the extensive media coverage it has received on administrative and legal initiatives it has undertaken. These initiatives were based, in part, on materials received from the government and processed by *Friends of the Wild Swan*.

All information received by the Service in response to this FOIA request will be reviewed and shared with *Friends of the Wild Swan's* members, their conservation partners (including the WELC and the other plaintiffs groups who joined the *Friends of the Wild Swan v. Ashe*, Civ. No. 13-

cv-57-DWM (D. Mont. 2014), and members of the public. Any and all materials received will also be carefully copied, organized, and provided to members of the public upon request. The subject of the materials received will also be written about in *Friends of the Wild Swan's* and their conservation partners' newsletters, websites, press releases, and email alerts and made available for public review at the WELC's office in Helena, Montana. As such, the disclosure of the requested documents will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

Friends of the Wild Swan plans to disseminate the documents and information it obtains pursuant to this FOIA request in various effective ways, including through our website, newsletters, press releases, Facebook, and public education events.

Specifically, our and *Friends of the Wild Swan's* experts will first analyze and digest the documents. The information will then be disseminated or shared with our and *Friends of the Wild Swan's* members and supporters, members of other conservation organizations interest in lynx conservation issues, as well as other interested members of the public. These mechanisms for publicizing and distributing information received through FOIA requests demonstrate *Friends of the Wild Swan's* intention to disseminate the information to the public with the goal of disclosing material that will inform the public. *See also Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) (finding an online newsletter and maintenance of a website sufficient to show how the requester will disseminate information); *Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203-04 (D.D.C. 2009) (finding public interest organization's "website [and] newsletter . . . are an adequate means of disseminating information," and noting the organization's "stature as [an] advocacy group . . . len[t] credence" to its dissemination argument). *Friends of the Wild Swan* will use the information obtained through this FOIA request in the methods described herein. The organization, therefore, has the ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject.

Public oversight and enhanced understanding of the Service's recovery planning and SSA process, including its correspondence with state wildlife agencies and the influence they have over the Service, is critical. The public has been heavily involved in issues regarding the survival and recovery of lynx and *Friends of the Wild Swan* intends to use this information to inform the public about the Service's most recent activities and plans with respect to lynx conservation. *Friends of the Wild Swan* also intends to use the information to encourage the public to participate in governmental activities regarding listed species like lynx. The requested information will help illuminate public administrative processes. Administrative processes, such draft plans, decision documents, and appeals, are open to the public and disclosure of the pertinent documents related to them would significantly contribute to the public's understanding of them. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of FOIA.

Finally, obtaining the information is of no commercial interest to either the WELC (the requester) or *Friends of the Wild Swan* (the receiver). As mentioned above, access to government documents and project records through FOIA requests is essential to *Friends of the Wild Swan's* mission and role in educating the general public about lynx conservation issues. As 501(c)(3) non-profit public interest groups, neither WELC or *Friends of the Wild Swan* have commercial interest

in the requested documents and will realize no commercial benefit from the release of the requested information.

In conclusion, I hope this FOIA request sufficiently demonstrates to your satisfaction that *Friends of the Wild Swan* qualify for a full fee-waiver and that you will immediately begin to search and send the requested material. Please note: should the Service decide to not waive fees, *Friends of the Wild Swan* plans to immediately appeal that decision.

Thank you in advance for taking the time to consider and respond to this FOIA request. I tried to be as specific as possible to make your job easier. If you have any questions or require more information, please do not hesitate to contact me at the phone number or email address below. Please send all responsive documents to me at the address provided below. I look forward to your prompt response within the prescribed 20 business days. 5 U.S.C. § 552(a)(6)(A)(i).

Thank you.

Sincerely,

/s/ Matthew Bishop

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