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Sent via Email and USPS Certified Mail Return Receipt Requested

Dele Awoniyi, FOIA Officer
Office of Surface Mining Reclamation and Enforcement
MS-233, SIB
1951 Constitution Avenue, NW
Washington, DC 20240
osm-foia@osmre.gov

FREEDOM OF INFORMATION ACT REQUEST

Dear Mr. Awoniyi:

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended. I make this request on behalf of WildEarth Guardians (“Guardians”). This FOIA request is related to the FOIA request submitted by Guardians on April 11, 2017 requesting all records relating to SO 3348 and 3349. This FOIA request, which seeks OSMRE records related to specific portions of SO 3349, is new and is submitted now in light of deadlines contained in SO 3349.

REQUESTED RECORDS

I. Guardians requests all “agency records” of the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) associated with:

Section 5(c)(v) of SO 3349, ordering that “[w]ithin 21 days, each bureau and office head shall provide to the Deputy Secretary, through their Assistant Secretary, a report that identifies all existing Department Actions issued by their bureau or office that potentially burden (as that term is defined in the March 28, 2017 E.O.) the development or utilization of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear resources.”

The request in (I) includes, but is not limited to, the following agency records:

- The final report(s) or briefing(s) and any drafts thereof prepared by OSMRE pursuant to Section 5(c)(v) of SO 3349.

- Intra-agency records within OSMRE (between or among any OSMRE employee(s), staff member(s), official(s), or consultant(s)) regarding or associated with the direction in Section 5(c)(v) of SO 3349.
- Intra-department records within the Department of the Interior (“DOI”), including records between or among any DOI employee(s), staff member(s), official(s), or consultant(s), as well as between or among DOI and OSMRE employee(s), staff member(s), official(s), or consultant(s) regarding or associated with the direction in Section 5(c)(v) of SO 3349.
- Inter-agency or inter-department records between or among OSMRE or DOI employee(s), staff member(s), official(s), or consultant(s) and any other government agency or department or its employee(s), staff member(s), official(s), or consultant(s) regarding or associated with the direction in Section 5(c)(v) of SO 3349.
- Records between or among any Executive Office of the President (e.g., the White House Office, the Office of the President, the Office of the Vice President) and any OSMRE or DOI employee(s), staff member(s), official(s), or consultant(s) regarding or associated with the direction in Section 5(c)(v) of SO 3349.
- External records between or among any OSMRE or DOI employee(s), staff member(s), official(s), or consultant(s) and any non-government entity (e.g., consultants, members of the public, or outside companies, organizations, or groups) regarding or associated with the direction in Section 5(c)(v) of SO 3349.
- Records between or among any OSMRE or DOI employee(s), staff member(s), official(s), or consultant(s) and the United States Senate, any United States Senator(s), or any United States Senate Committee regarding or associated with the direction in Section 5(c)(v) of SO 3349.

II. Guardians requests all “agency records” of OSMRE associated with:

Section 5(b)(i) of SO 3349, ordering that “[w]ithin 14 days of the date of this Order, each bureau and office head shall provide to the Deputy Secretary, through their Assistant Secretary, all Department Actions they have adopted, or are in the process of developing, relating to the Presidential Actions, reports, and guidance that are rescinded by the March 28, 2017 E.O. . . .”

The request in (II) includes, but is not limited to, the following agency records:

- The list of all actions related to climate change policies, and any other final document(s) or briefing(s) and any drafts thereof, prepared by OSMRE pursuant to Section 5(b)(i) of SO 3349.
- Intra-agency records within OSMRE (between or among any OSMRE employee(s), staff member(s), official(s), or consultant(s)) regarding or associated with the direction in Section 5(b)(i) of SO 3349.
- Intra-department records within the Department of the Interior (“DOI”), including records between or among any DOI employee(s), staff member(s), official(s), or consultant(s), as well as between or among DOI and OSMRE employee(s), staff member(s), official(s), or consultant(s) regarding or associated with the direction in Section 5(b)(i) of SO 3349.

- Inter-agency or inter-department records between or among OSMRE or DOI employee(s), staff member(s), official(s), or consultant(s) and any other government agency or department or its employee(s), staff member(s), official(s), or consultant(s) regarding or associated with the direction in Section 5(b)(i) of SO 3349.
- Records between or among any Executive Office of the President (e.g., the White House Office, the Office of the President, the Office of the Vice President) and any OSMRE or DOI employee(s), staff member(s), official(s), or consultant(s) regarding or associated with the direction in Section 5(b)(i) of SO 3349.
- External records between or among any OSMRE or DOI employee(s), staff member(s), official(s), or consultant(s) and any non-government entity (e.g., consultants, members of the public, or outside companies, organizations, or groups) regarding or associated with the direction in Section 5(b)(i) of SO 3349.
- Records between or among any OSMRE or DOI employee(s), staff member(s), official(s), or consultant(s), including Secretary Zinke, and the United States Senate, any United States Senator(s), or any United States Senate Committee regarding or associated with the direction in Section 5(b)(i) of SO 3349.

For purposes of this request, “agency records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, emails, writings (handwritten, typed, electronic or otherwise produced, reproduced, or stored), correspondence, letters, memoranda, reports, consultations, notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, photographs, videos, meeting notes or minutes, and electronic and magnetic recordings of meetings. All of the foregoing is included in this request if it is in OSMRE’s possession and control. If such recordings are no longer under the control of OSMRE but were at any time, please refer this request to the relevant federal agency or agencies.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. Please provide responsive records in digital format whenever possible.

* * *

Please identify and inform us of all responsive or potentially responsive records within 20 working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the basis of any claimed exemptions or privilege, including the specific responsive or potentially responsive records(s) to which such exemption or privilege may apply. *See Citizens for Responsibility and Ethics in Washington v. Federal Election Com’n*, 711 F.3d 180, 182-183 (D.C. Cir. 2013) (holding that the agency must identify the exemptions it will claim with respect to any withheld documents within the time frame prescribed by FOIA). 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 FOIA’s limited 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 that government remains 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).

If your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.” *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979). A *Vaughn* index must (1) identify each document or portion of document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure of the document or portion of document would damage the interests protected by the claimed exemption. See *Citizens Comm’n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). “The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document,” in order to provide “the requestor with a realistic opportunity to challenge the agency’s decision.” *Oglesby v. U.S. Dept. of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Such explanation will be helpful in deciding whether to appeal a decision to withhold documents and may help to avoid unnecessary litigation.

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. §552(b). If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. See *Mead Data Central v. U.S. Department of the Air Force*, 455 F.2d 242, 261 (D.C. Cir. 1977). Claims of non-segregability must be made with the same detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

FOIA requires federal agencies to make their records “promptly available” to any person who makes a proper request for them. 5 U.S.C. § 552(a)(3)(A) (as amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524).

Presumption of Openness and “Foreseeable Harm” Standard

On his first full day in office President Obama demonstrated his commitment to the ideals of transparency and openness by issuing a Memorandum to the heads of all Executive Branch Departments and agencies by calling on them to “renew their commitment to the principles embodied in FOIA.” See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the FOIA, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President directed all agencies to administer the FOIA with a clear presumption in favor of disclosure, to resolve doubts in favor of openness, and to not withhold information based on “speculative or abstract fears.” *Id.* In addition, the President called on agencies to ensure that requests are responded to in “a spirit of cooperation,” that disclosures are timely made, and that modern technology is used to make information available to the public even before a request is made. *Id.*

In accordance with the President’s directives, on March 19, 2009, Attorney General Holder issued new FOIA guidelines, calling on all agencies to reaffirm the government’s

“commitment to accountability and transparency.” Memorandum from Att’y Gen. Eric Holder for Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>. The Guidelines stress that the FOIA is to be administered with the presumption of openness called for by the President. *Id.* at p. 1.

The Attorney General “strongly encourage[d] agencies to make discretionary disclosures of information.” *Id.* He specifically directed agencies not to withhold information simply because they may do so legally and to consider making partial disclosures when full disclosures are not possible. *Id.* He also comprehensively addressed the need for each agency to establish effective systems for improving transparency. *Id.* at p. 2. In doing so he emphasized that “[e]ach agency must be fully accountable for its administration of the FOIA.” *Id.*

In issuing these new guidelines, Attorney General Holder established a new “foreseeable harm” standard for defending agency decisions to withhold information. Under this new standard, the U.S. Department of Justice will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *Id.* As a result, “agencies must now include the ‘foreseeable harm’ standard as part of the FOIA analysis at the initial request stage and the administrative appeal stage.” Department of Justice Guide to the FOIA (2009), p. 25, *available at* http://www.justice.gov/oip/foia_guide09.htm.

Request for Fee Waiver

FOIA was designed to grant a broad right of access to government information, with a focus on the public’s “right to be informed about what their government is up to,” thereby “open[ing] agency action to the light of public scrutiny.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). A key component of providing public access to those records is FOIA’s fee waiver provision, 5 U.S.C. § 552(a)(4)(A)(iii), which provides that “[d]ocuments shall be furnished without any charge or at a [reduced] charge . . . 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.”

FOIA’s fee waiver requirement is to be “liberally construed.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver amendments of 1986 were designed specifically to provide organizations such as Guardians access to government documents without the payment of fees. As one Senator stated, “[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298 (statement of Senator Leahy). Indeed, FOIA’s waiver provision was intended “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. Dep’t of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984)).

Guardians, a non-commercial and public-interest requester, hereby requests a waiver of

all fees associated with this request because disclosure “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); *see also* 43 C.F.R § 2.45. This request satisfies both statutory and regulatory requirements for granting a fee waiver, including fees for search, review, and duplication.¹ Below, stated first in bold, are the criteria the OSMRE considers in assessing requests for fee waivers, followed by an explanation of Guardians’ satisfaction of those requirements. *See* 43 C.F.R § 2.48.² Fee waiver requests must be evaluated based on the face of the request. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Justice*, 602 F. Supp. 2d 121, 125 (D.D.C. 2009).

(1) The subject of Guardians’ request concerns identifiable operations or activities of the Federal Government:

The subject matter of the requested records directly and specifically concerns identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote. Guardians requests documents related to Secretarial Order 3349, which was designed to implement the directives in the Executive Order of March 28, 2017 (E.O. 13783), to, *inter alia*, “review all existing regulations, orders, guidance documents, policies, and any other similar agency actions . . . that potentially burden the development or use of domestically produced energy resources.”

The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by a federal agency will meet this threshold” of identifiable operations or activities of the government. *See* Department of Justice Guide to the FOIA (2009), p. 25. This requirement is clearly met in this case.

(2) How disclosure is likely to contribute to public understanding of those operations or activities:

Disclosure of these records is likely to contribute to public understanding of the operations and activities of the government. OSMRE “must not make value judgments about whether the information at issue is ‘important’ enough to be made public; it is not the bureau’s role to attempt to determine the level of public interest in requested information.” 43 C.F.R. § 2.45(f).

(i) How the contents of the records are meaningfully informative:

The requested records are meaningfully informative about government operations or

¹ Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iv), no fee may be charged for the first two hours of search time or for the first one hundred pages of duplication.

² *See also* Department of Justice Fee Waiver Guidance to Agency Heads From Stephan Markman, Assistant Att’y Gen. (Apr. 2, 1987) (advising agencies of factors to consider when construing fee waivers), *available at* http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm.

activities and are likely to contribute to an increased public understanding of those operations or activities. The records requested will provide Guardians with the ability to communicate to the public about the activities of the OSMRE, and, more broadly, of the federal government. The documents will give Guardians, and therefore the public, crucial insight into the way the federal government intends to manage energy development on public lands. Regarding this issue, the actions and assessments of the OSMRE, and the actions and assessments of other branches of the federal government which would be revealed by records in the possession of OSMRE, are of concern to the public. Disclosure of the requested records will enhance the public's knowledge of this issue and support public oversight of federal agency operations.

These documents are not currently in the public domain. Their release is "likely to contribute" to better public understanding of the federal government's management of public lands. 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.").

(ii) The logical connection between the content of the records and the operations or activities:

The requested records directly concern the operations or activities of the federal government.

(iii) How disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding:

The public currently does not have the ability to fully evaluate the actions or inactions of the federal government regarding the management of public lands. Disclosure of these records will contribute to the understanding of a reasonably broad audience of persons interested in the subject because we will disseminate the information we receive to a large audience of interested persons. Once the information is made available, it will be analyzed and presented to the public in a manner that will meaningfully enhance the public's understanding of this issue.

(iv) Your identity, vocation, qualifications, and expertise regarding the requested information and information that explains how you plan to disclose the information in a manner that will be informative to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding:

WildEarth Guardians is a nonprofit organization dedicated to environmental protection. WildEarth Guardians protects and restores wild places, wildlife, and wild rivers in the American West. Through its Climate and Energy Program, Guardians works to sustain a transition from fossil fuels to clean energy in order to safeguard the American West.

WildEarth Guardians regularly utilizes FOIA to obtain, analyze, and disseminate information and data regarding federal actions and policy. For example, WildEarth Guardians has utilized FOIA to obtain records related to BLM's federal coal leasing activities in Wyoming and has disseminated this information through the media, its own website, and through other forms of public commentary. Guardians most recently utilized FOIA to obtain and disseminate information regarding BLM management of oil and gas resources in New Mexico. This information was related to the agency's decision to abruptly change the location of a planned oil and gas lease sale. The responsive FOIA documents have been shared with the media and have been reported on in various news stories.

Further, WildEarth Guardians regularly utilizes FOIA to obtain, analyze, and disseminate information and data regarding other federal agency actions and is consistently granted fee waivers from these agencies. Just in the last five years, Guardians has been granted fee waivers in conjunction with FOIA requests to the U.S. Environmental Protection Agency, U.S. Bureau of Land Management, U.S. Forest Service, U.S. Fish and Wildlife Service, and U.S. Bureau of Reclamation. In granting WildEarth Guardians' requests for fee waivers, these agencies have acknowledged Guardians' ability to obtain, analyze, and disseminate information to a reasonably broad audience.

(v) Your ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject (for example, how and to whom do you intend to disseminate the information):

Guardians has the ability and intention to disseminate the information requested to the public and its many members and supporters. Therefore, the disclosure of the requested documents will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

Guardians plans to disseminate the information it obtains pursuant to this FOIA request in various effective ways, including through its website, newsletter, press releases, Facebook page, public education events, comments on proposed agency actions, and other public interest advocacy. Guardians' staff will first analyze and digest the documents. The information will then be disseminated to Guardians' members and supporters, members of other conservation organizations, as well as other interested members of the public.

(3) How disclosure is likely to significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding:

(i) Whether the information being requested is new:

The information being requested is new. Although the full contents of the requested records are currently unknown to us, Guardians does not request any records previously provided to us by the Government.

(ii) Whether the information would confirm or clarify data that has been

released previously:

The information Guardians requests has not, to our knowledge, been released previously.

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

Because this information is not currently in the public domain, disclosure of these records will increase the level of public understanding of the operations or activities of DOI and OSMRE that existed prior to disclosure. Guardians will disseminate the information obtained from this FOIA request to a large public audience, as explained above, and will help the public understand the information in a simple and informative way.

(iv) Whether the information is already publicly available:

The information Guardians requests 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 that are routinely available at public or university libraries. However, please provide us with adequate references and/or website links so that we may obtain these materials on our own.

(4) How the public's understanding of the subject in question will be enhanced to a significant extent by the disclosure:

The public's understanding of the federal government's management of public lands will be enhanced to a significant extent by the disclosure of these records. The directives in Secretarial Order No. 3349 have the potential to create a dramatic shift in the way the Department of the Interior manages energy development on public lands. For example, depending on which policies or actions are deemed to "burden" energy development, public access, wildlife, and a range of public land recreation activities could be at risk. The public currently does not have the ability to evaluate the actions or inactions of DOI or OSMRE regarding management decisions on public lands as directed by Secretarial Order No. 3349.

Guardians' dissemination of the information obtained pursuant to this FOIA request will enhance the public's understanding of this issue because this information is not currently available to the public. *See Federal CURE*, 602 F. Supp. 2d at 205 (the existing public availability of the information is weighed when determining the degree of significance that will be derived from the disclosure of the information) (citing *Forest Guardians*, 416 F.3d at 1181). As described above, Guardians will disseminate the information it obtains pursuant to this FOIA in various effective ways, including through its website, newsletter, press releases, Facebook page, and public education events. Furthermore, the information obtained through this FOIA request will be used to contribute to one or more of the following: public interest litigation, petitions, newsletters, public presentations, e-mail and postal mail publications, press releases, and local and national news stories.

Given Guardians' positions and abilities, disclosure will lead to a significant enhancement of the public's understanding of the Government operations and activities at issue.

(5) Any commercial interest that would be furthered by the requested disclosure:

Guardians has no commercial, trade, or profit interest that would be furthered by the requested disclosure. Guardians is a tax-exempt organizations under section 501(c)(3) of the Internal Revenue Code. As such, Guardians has no commercial interests. The requested records will be used in the furtherance of Guardians' mission as an education and advocacy group to protect and restore the natural environment.

Guardians, a non-profit organization, has no commercial interests and will realize no commercial benefit from the release of the requested information. Therefore, no assessment of the magnitude of the interest is required. *See* 43 C.F.R. § 2.48(b)(2)-(3).

Conclusion

Given Guardians' demonstrably successful efforts at educating the public on environmental issues, and the fact that their education programs have significantly contributed to an understanding of Government operations and activities, it is clear that Guardians is entitled to a fee waiver. *See* 43 C.F.R § 2.48. In the event that your agency denies Guardians a fee waiver, please send a written explanation for the denial along with a cost estimate. Please contact us for authorization before incurring any costs in excess of \$50.

I look forward to your determination on this FOIA request within twenty days, as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). The twenty-day statutory deadline is also applicable to Guardians' fee waiver request. *See, e.g., Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (finding where an agency "fails to answer the [fee waiver] request within twenty days," judicial review is appropriate).

Please direct all correspondence and responsive records to counsel for WildEarth Guardians:

**Laura King, Staff Attorney
Western Environmental Law Center
103 Reeder's Alley
Helena, Montana 59601
king@westernlaw.org**

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 the phone number or email address below.

Sincerely,

A handwritten signature in cursive script that reads "Laura King". The signature is fluid and elegant, with a prominent initial "L" and a long, sweeping tail on the "g".

Laura King, Attorney
Western Environmental Law Center
103 Reeder's Alley
Helena, Montana 59601
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Attorney for WildEarth Guardians