



# Animal Welfare Institute

900 Pennsylvania Avenue, SE, Washington, DC 20003  
awionline.org phone: (202) 337-2332 fax: (202) 446-2131

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## **By E-mail and U.S. Mail**

Mr. William H. Clay, Deputy Administrator  
Wildlife Services  
Animal and Plant Health Inspection Service  
U.S. Department of Agriculture  
1400 Independence Ave., S.W.  
Room 1624 South Agriculture Building  
Washington, DC 20250-3402  
[bill.clay@aphis.usda.gov](mailto:bill.clay@aphis.usda.gov)

Mr. Kevin Shea, Administrator  
Animal and Plant Health Inspection Service  
U.S. Department of Agriculture  
4700 River Road, Unit 84  
Riverdale, MD 20737-1234  
[kevin.a.shea@aphis.usda.gov](mailto:kevin.a.shea@aphis.usda.gov)

Mr. Martin Lowney, State Director  
New York Wildlife Services  
Animal and Plant Health Inspection Service  
U.S. Department of Agriculture  
1930 Route 9  
Castleton, NY 12033-9653  
[martin.s.lowney@aphis.usda.gov](mailto:martin.s.lowney@aphis.usda.gov)

Mr. Alton Dunaway, Nat'l Env't'l Manager  
Animal and Plant Health Inspection Service  
U.S. Department of Agriculture  
4700 River Road, Unit 84  
Riverdale, MD 20737-1234  
[alton.dunaway@aphis.usda.gov](mailto:alton.dunaway@aphis.usda.gov)

## **Re: Violations of the National Environmental Policy Act Involving New York Wildlife Services' Proposed Long Island Deer Project**

Dear Messrs. Clay, Shea, Lowney, and Dunaway:

On behalf of the Animal Welfare Institute ("AWI"), I am writing regarding violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., by the U.S. Department of Agriculture ("USDA"), Animal and Plant Health Inspection Service-Wildlife Services ("APHIS-WS") in connection with New York Wildlife Services' Long Island Deer Project, a proposal to reduce the number of white-tailed deer this year in five eastern towns on Long Island, New York, and Brookhaven, New York. Specifically, the Long Island Deer Project ("Project"), which is expected to cost \$505,490 to be paid by the towns/villages, the Long Island Farm Bureau, and APHIS-WS, calls for federal WS sharpshooters to kill up to 5,250 deer over the course of just forty days in both urban/suburban and rural areas.

The Long Island Deer Project is clearly a proposed "major [f]ederal action[ ] significantly affecting the quality of the human environment," *see* 42 U.S.C. § 4331(2)(C), for which preparation of an Environmental Impact Statement ("EIS") is required. APHIS-WS has failed to

prepare an EIS for the Project, and instead appears to assert in a July 29, 2013 letter to the Long Island Farm Bureau that the Project is covered by an Environmental Assessment (“EA”) prepared in 2003—eleven years ago—for its statewide integrated white-tailed deer management program. The 2003 EA is not specific to the deer population on Long Island, does not provide an analysis of the affected environment on Long Island, does not address the current science on deer management or alternative deer management techniques, and does not evaluate the cumulative impacts relevant to the project area. Furthermore, and critically, the 2003 EA contemplated and evaluated the environmental impacts of removing no more than 1,000 deer annually from across the entire state under the statewide program.

While I believe that AWI would prevail should this matter be litigated, AWI’s intention is that by sending this letter, APHIS-WS will seriously consider AWI’s concerns. Accordingly, AWI requests that APHIS-WS provide AWI a response to the concerns outlined in this letter no later than January 31, 2014, which is the end of the Special Firearms White-Tailed Deer Hunting Season for Suffolk County. We seek an expedited response because Mr. Lowney has recently indicated that the “federal agency is expected to begin its cull during the first week of February.” Joseph Pinciario, *Full Speed Ahead on Deer Cull*, THE SUFFOLK TIMES (Jan. 23, 2014). If we do not receive an adequate response to our concerns by that date, AWI will have no choice but to consider moving forward with immediate legal action.

## **BACKGROUND**

### **A. Statutory and Regulatory Framework**

#### **1. National Environmental Policy Act and Council on Environmental Quality NEPA Regulations.**

The National Environmental Policy Act was enacted more than four decades ago “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. In light of this mandate, the Supreme Court has reasoned that NEPA is “intended to reduce or eliminate environmental damage and to promote ‘the understanding of the ecological systems and natural resources important to’ the United States.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321).

In achieving NEPA’s substantive goals, Congress created two specific mechanisms whereby federal agencies must evaluate the environmental and related impacts of a particular federal action—an Environmental Assessment and an Environmental Impact Statement. *See* 42 U.S.C. § 4332(2)(C). These procedural mechanisms are designed to inject environmental considerations “in the agency decisionmaking process itself,” and to “help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” *Pub. Citizen*, 541 U.S. at 768–69 (quoting 40 C.F.R. § 1500.1(c)). Therefore, “NEPA’s core focus [is] on improving agency decisionmaking,” *Pub. Citizen*, 541 U.S. at 769 n.2, and specifically on ensuring that agencies take a “hard look” at

potential environmental impacts and environmentally enhancing alternatives, “as part of the agency’s process of deciding whether to pursue a particular federal action.” *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983). NEPA compliance must take place *before* decisions are made in order to ensure that those decisions take environmental consequences into account. *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004).

An EIS must be prepared by an agency for every “major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). “Major reinforces but does not have a meaning independent of significantly.” 40 C.F.R. § 1508.18. “‘Significantly’ as used in NEPA requires considerations of both context and intensity.” *Id.* at § 1508.27. Context means “that the significance of the action must be analyzed in several contexts such as . . . the affected region, the affected interests, and the locality,” and “[b]oth short- and long- term effects are relevant.” *Id.* at § 1508.27(a). Intensity means “the severity of impact.” *Id.* at § 1508.27(b). The factors that the Council on Environmental Quality (“CEQ”) regulations state that agencies should consider in evaluating intensity include:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts. . . .
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

*Id.* § 1508.27(b)(1)–(7), (10). Cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” *Id.* at § 1508.7.

Prior to formulating an EIS, a federal agency may prepare an EA, which is a “concise public document” that serves to “[b]riefly provide sufficient evidence and analysis for determining” whether a federal action is significant enough to require preparation of an EIS. 40 C.F.R. § 1508.9. An EA must contain “brief discussions of the need for the proposal, of

alternatives [to the action], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.” *Id.* An agency prepares a “finding of no significant impact” (“FONSI”) if it determines that an EIS is not required. *Id.* at § 1501.4(c). An agency may “tier” from a broad EIS and prepare a narrower EA for a proposed action, which “is appropriate when the sequence of statements or analyses is . . . [f]rom a program, plan, or policy [EIS] to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.” *Id.* at § 1508.28(a); *see Animal Protection of N.M., Inc. v. United States*, No. 98-538, at \*22 (D.N.M. 2000) (finding APHIS-WS violated NEPA by tiering NEPA documents for New Mexico cougar control to a programmatic EIS for the nationwide Animal Damage Control Program where they “had available to [it] new and relevant information . . . regarding sustainable harvest rates that they failed to adequately consider”).

An agency must prepare an updated, or “supplemental EA,” when the analysis in an existing EA that it asserts covers a proposed action is no longer adequate to “assure[ ] that the agency provided the hard look that it is required to provide.” *See, e.g., Friends of the Wild Swan v. U.S. Forest Service*, 875 F. Supp. 2d 1199, 1220 (D. Mont. 2012) (ordering agency to prepare supplemental EA). CEQ regulations require preparation of a supplemental EIS when new information or changed circumstances require one, 40 C.F.R. § 1502.9(c), and “courts apply the same requirements to supplemental environmental assessments.” NEPA LAW & LIT. § 7:11 (2d ed. 2013) (citing *So. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002), *rev’d on other grounds*, 542 U.S. 55 (2004)). Notably, an EA or supplemental EA that is several years old is likely to be inadequate to cover a current proposed action. *See Comm. for Idaho’s High Desert v. Colinge*, 148 F. Supp. 2d 1097, 1101 (D. Idaho 2001) (finding a likelihood of success on a NEPA claim against APHIS-WS where the agency asserted that a two-year old supplemental EA and a five-year old EA covered a new proposed program for lethal control of sage grouse predators in a 100-square-mile area of Idaho); *see also Animal Protection of N.M.*, No. 98-538, at \*22, 27 (finding EAs for entire predator damage control programs for three WS districts inadequate to address cougar control where a long-term study of cougars in New Mexico was available, EAs relied on sixteen-year-old studies done in other states, and agency “failed to consider an important aspect of the predator damage management program—the [actual] cougar population,” which was “unknown”).

## **2. APHIS’s NEPA Implementing Regulations.**

APHIS has promulgated regulations on its NEPA procedures, which govern proposed actions involving its Wildlife Services program. *See* 7 C.F.R. pt. 372. Under these regulations, the “adoption of strategic or other long-range plans that purport to adopt for future program application a preferred course of action” normally require preparation of an EIS. *Id.* at § 372.5(a)(2). APHIS actions that relate to a “discrete program component” that are “limited in scope (particular sites, species, or activities) and potential effect (impacting relatively few environmental values or systems),” require preparation of an EA. *Id.* at § 372.5(b). Such actions include the “[i]mplementation of program plans at the site-specific action level, except for actions that are categorically excluded.” *Id.* at 372.5(b)(1)(ii).

Actions that are categorically excluded under APHIS NEPA regulations include “routine measures,” which include “seizures, quarantines, removals, sanitizing, inoculations, control, and monitoring.” *Id.* at 372.5(c)(1). As one federal court has observed, “[k]illing is not included,” however, “the listed routine measures may be euphemisms for killing, as the regulation allows the use of ‘potentially hazardous devices,’ presumably to kill [animals], if four criteria are met:”

(A) The use is localized or contained in areas where humans are not likely to be exposed, and is limited in terms of quantity, i.e., individualized dosages and remedies; (B) The use will not cause contaminants to enter water bodies, including wetlands; (C) The use does not adversely affect any federally protected species or critical habitat; and (D) The use does not cause bioaccumulation.

*Collinge*, 148 F. Supp. 2d at 1102 (quoting 7 C.F.R. 372.5(c)(1)(i)(A)–(D)). In order to exercise a categorical exclusion such as this, however, APHIS-WS must explicitly make the necessary findings in the administrative record. *Id.*

## **B. Factual Background**

### **1. APHIS-WS’ 2003 EA for Statewide Deer Damage Management in New York.**

In 2003, APHIS-WS prepared an EA for an “integrated wildlife damage management approach for the management of white-tailed deer damage in the State of New York.” The purpose of this statewide program was “the alleviation of deer damage to agricultural resources, damage to urban/suburban landscaping, damage to property and human safety from deer-vehicle and deer-aircraft collisions, and concerns about the spread of disease.” 2003 EA at 4. Under the preferred alternative, which was the statewide program, “deer management could be conducted on private, federal, state, tribal, county, and municipal lands in the state of New York upon request for WS assistance.” *Id.* The 2003 EA stated that “preference would be given to practical and effective nonlethal methods” of deer management, but stated that “nonlethal methods may not always be applied as a first response to each damage problem.” *Id.*

The analysis of the potential environmental effects of the statewide deer management program in the 2003 EA “relie[d] mainly on existing data contained in published documents . . . including [a 1997 programmatic EIS for APHIS-WS’ nationwide Animal Damage Control Program], to which this EA is tiered.” *Id.* at 2. The 2003 EA broadly discussed, on a statewide basis, New York deer population history and status, annual harvest total data, data on complaints received by the New York State Department of Environmental Conservation (“NYSDEC”) for deer damage to agricultural resources, number of reported deer-vehicle collisions, airport deer strike data, and the incidence of Lyme disease, in addition to non-New York scientific studies on deer damage to landscaping and natural resources. *See id.* at 4–11. The 2003 EA did not discuss information on deer ecology, population status and trend, or damage and threats specific to Long Island. Rather, the 2003 EA “emphasize[d] major issues as they relate to specific areas whenever possible.” *Id.* at 12. The 2003 EA stated that a “WS Decision Model [from 1992]

would be the site-specific procedure for individual actions conducted by WS in New York,” rather than a NEPA document. *Id.*

Under its “affected environments and issues” analysis, the 2003 EA analyzed at a very generic level effects of a statewide deer damage management program on the statewide white-tailed deer population, threatened and endangered species, human health and safety, aesthetic values, and regulated white-tailed deer hunting. *See id.* at 17–20. In a cursory paragraph, without biological analysis or citation to any scientific studies, the 2003 EA stated that the proposed program’s “impact on biodiversity” was “not considered in detail” because “WS operates on small percentage of land area of the State, and the WS take of any wildlife species analyzed in th[e] EA is a small percentage of the total [white-tailed deer] population and is insignificant to the viability and health of the population.” *Id.* at 21. It simply cites to the 1997 programmatic EIS for the nationwide APHIS-WS Animal Damage Control Program. *See id.* Additionally, the 2003 EA stated that alternatives to lethal deer management, including “population stabilization through birth control,” were “not analyzed in detail” and cited no fertility control studies on white-tailed deer. *Id.* at 30–31.

While the 2003 EA noted that “[s]ome individuals might question whether preparing an EA for an area as large as the state of New York would meet the NEPA requirements for site specificity,” APHIS ultimately concluded that preparation of an EIS was not legally required and issued a FONSI. *Id.* at 21. The FONSI parroted the CEQ significance factors discussed above, rather than engaging in reasoned analysis. *See* FONSI at 6–7 (Feb. 6, 2003). The FONSI stated that the risks to the public posed by the statewide program would be low based on a nationwide risk assessment contained in the 1997 programmatic EIS. *See id.* Despite a near absence of discussion of the status or trend of the New York white-tailed deer population, the FONSI stated that the program “is not controversial in relation to size, nature, or effects.” *Id.* at 7. Although the 2003 EA stated that it would not conduct site-specific EAs for individual deer damage management actions undertaken pursuant to the program, the FONSI stated that the “proposed action does not establish a precedent for future actions, including future white-tailed deer management that may be implemented or planned within the State.” *Id.* Finally, although the 2003 EA contained a near absence of discussion of the status or trend of the New York white-tailed deer population, the FONSI concluded that the “number of white-tailed deer that will be taken by WS annually is very small in comparison to regional and statewide populations” and “cumulative effects of WS on target and non-target species populations . . . were not significant for this or other anticipated actions to be implemented or planned within the State.” *Id.*

Accordingly, APHIS selected its preferred alternative, the scope of which it:

[B]ased on an anticipated increase of work, New York WS expect[ed] that ***no more than 1,000 deer would be lethally removed annually***, under permits issued by the NYSDEC, while conducting WS direct control activities within the state. Therefore, 1,000 deer was used to analyze WS potential impacts to the statewide deer population in New York.

2003 EA at 41 (emphasis added).

The 2003 EA stated that it “would be reviewed and supplemented if appropriate to ensure compliance with NEPA.” *Id.* at 12. It also stated that it “would remain valid until New York WS and other appropriate agencies determine that new needs for action, changed conditions or new alternatives having different environmental effects must be analyzed.” *Id.* At such time, “th[e] analysis and [EA] would be supplemented pursuant to NEPA. Review of the EA would be conducted each year to ensure that the EA is sufficient.” *Id.*

## **2. APHIS-WS’ 2009 Decision/FONSI for Statewide Deer Damage Management in New York.**

Rather than prepare a supplemental EA, or even a supplement to the 2003 EA, as APHIS has done for other statewide white-tailed deer damage management EAs for other states, *see APHIS, Supplement to the Environmental Assessment White Tailed Deer Management in Maryland* (Nov. 2013), the agency issued a Decision/FONSI in April 2009, in which it “analyze[d] WS’ deer management activities in New York since the 2003 Decision/FONSI.” 2009 FONSI at 1. One of the purposes for this FONSI was to “ensure WS’ activities remain within the scope of analyses contained in the EA.” *Id.* at 3. In this decision document, APHIS again stated that “[i]f WS’ activities, as identified in . . . annual monitoring reports, are outside the scope of the analyses in the EA or if new issues are identified from available information, further analysis would occur and the EA would be supplemented to the degree as identified by those processes pursuant to NEPA.” *Id.*

The 2009 Decision/FONSI included a discussion of “major issues” “related to managing damage associated with deer damage management in New York,” which included: (1) effects on white-tailed deer populations; (2) effects on plants and other wildlife species; (3) effects on human health and safety; (4) humaneness of methods used; (5) effects on aesthetic values; and (6) effects on regulated white-tailed deer hunting. *See id.* at 4–9.

APHIS compared WS’ take of deer with take from other known sources in New York for 2003 to 2008. *See id.* at 5. APHIS estimated the deer population of New York as 860,000 in 2008 simply based on a personal communication with a member of NYSDEC, rather than a published scientific study. *See id.* at 5 n.1. The take during the deer hunting season was 219,000 in 2007, with no data available for 2008. *Id.* at 5. Take by WS was no more than 20 deer in any year except 2005, when 247 deer were killed. *Id.* APHIS estimated WS’ take of the total statewide deer population as 0.0003% in 2008. *Id.* The killing of deer under depredation permits issued by NYSDEC ranged from 2,735 deer taken in 2006 to a high of 4,866 deer in 2004. *Id.* As with the 2003 EA, the 2009 Decision/FONSI contemplated an annual lethal removal of “1,000 deer annually by WS in New York to alleviate damage and threats.” *Id.* The document, however, did not contain any new information about deer damage and threats across New York. In fact, APHIS stated that “[d]eer mortality in New York from other sources (e.g., vehicle collisions, disease, and predation) is currently unknown,” despite having included some discussion of such damage and threats in the 2003 EA. *Id.*

With regard to effects on other wildlife species, the 2009 Decision/FONSI cited no New York-specific studies on the effect of white-tailed deer on vegetation or forest ecology nor did it update its assessment of the scientific literature on deer ecology, biology, behavior, and impacts. With regard to effects of human health and safety, the document discussed Lyme disease data for New York generally without discussing specific disease incidence data for Long Island or providing any analysis of the role of deer in Lyme disease transmission on Long Island. Likewise, without discussing or citing several new studies on deer fertility control, the document stated that “[n]o new [deer management] methods were identified in this report that would alter the analysis contained in the [2003] EA on the issue of method humaneness.” *Id.* at 9. On aesthetic values, the document simply stated that “[d]eer population remain high and deer are readily available for viewing if a reasonable effort is made to locate deer in New York.” The FONSI largely parroted the CEQ significance factors in a fashion similar to the 2003 EA. *Id.*

### **3. New York WS’ Proposed Long Island Deer Project.**

Since issuance of the 2009 Decision/FONSI, APHIS has not released any new NEPA documentation attempting to update the analysis in its 2003 EA for statewide deer damage management activities in New York. A July 2013 letter from the State Director of New York WS discussed the “Long Island Deer Project,” which he described as “a proposal to reduce the number of deer in the 5 eastern towns [of Long Island] and Brookhaven.” Letter from M. Lowney, State Dir., N.Y. Wildlife Servs., to J. Gergela, Exec. Dir., Long Island Farm Bureau (July 29, 2013). The letter, which summarized the results of a meeting between APHIS-WS and and NYSDEC, described a proposal to kill up to 5,250 deer over the course of forty nights in a single year in and around several towns and villages in eastern Long Island. *Id.* The letter addressed a number of topics, including the creation of a steering committee, the quality of existing Long Island deer data, implementation of the program in urban/suburban and rural areas, the role of public lands in Long Island deer management, the need to increase the efficacy of hunting, involving various stakeholders, methods to be used, disposition of dead deer, the effectiveness of culling, and budgetary issues. *See generally id.*

The letter sets forth two different budgets for the Project. Under the first budget “for rural areas of towns,” APHIS estimated that it would cost \$300,800 to “conduct sharpshooting for 40 nights,” killing an “average [of] 60–75 deer per night [for a] total harvest [of] 2,400 to 3,000 deer.” *Id.* at 8. Under the second budget “for rural areas of towns and suburban/urban areas,” APHIS estimated the cost to be \$505,490 to “conduct sharpshooting for 40 nights . . . in rural areas and 30 days/nights deer management in urban/suburban areas.” *Id.* at 8–9. Under this scenario, the “estimated deer harvest [New York WS] plan[s] to average is 60–75 deer per night among the three teams in rural areas and 30–75 deer per day in urban/suburban areas,” with a total kill of 2,400 to 3,000 deer in rural areas and 900 to 2,250 deer in urban/suburban areas—***a maximum kill of 5,250 deer in the span of less than forty days.*** *Id.* The letter states that “[d]eer management in rural areas would follow the legal hunting season in January,” while “Wildlife Services could conduct deer management operations in November and December in suburban/urban areas.” *Id.* at 4.

The letter does not discuss the Long Island white-tailed deer population, or damages or threats caused by it, in detail. The letter cites one 2006 study on white-tailed deer population estimates by the Town of East Hampton conducted using distance sampling techniques. *Id.* at 9. Under “[q]uality of deer survey data and interpretation,” the letter mentions “several Forward Looking Infra-Red (FLIR) surveys for deer conducted over the last few years in multiple towns and villages on the east end of Long Island,” but does not disclose or analyze the results of these surveys. *See id.* at 3. The letter notes that the “deer densities provided by the FLIR surveys were thought to be low estimates since current deer harvest indicates the post-hunting season FLIR deer population estimate would be unable to sustain such a harvest year after year,” but fails to provide any credible analysis to justify the need to kill as many as 5,250 deer through the Project, *see id.*, particularly in light of the questionable accuracy of deer population estimates.

Notwithstanding such population information, and rather than discussing any studies or information on the current public opinion on deer damage or threats, the letter states that the “efficacy of the deer damage management project will need to be measured by public opinion on whether deer damage increased, stabilized, or decreased.” *Id.* The letter simply states that “conflicts with deer are reported to have been in the making for decades.” *Id.* at 1. Similarly devoid of rigorous analysis, the letter states that New York WS “considered the data sets available to decide properties or areas where deer management action would be directed,” but does not specifically mention what data sets it used, who collected the data, or “[w]here [it plans] to reduce local deer populations.” *Id.* at 3. Along these lines, the letter discusses the that “[t]he role of public lands [on Long Island, including several units of Long Island National Wildlife Refuge] in a management program may be allowing hunting, sharpshooting, or both,” but it does not state whether it plans to carry out sharpshooting activities on these public lands as part of the Long Island Deer Project, which could require separate NEPA compliance. *See id.* at 5. Further, despite the substantial budgets, competing stakeholder interests, large number of deer proposed to be killed, and the urban/suburban areas involved, the letter does not even discuss the possibility of incorporating deer fertility control into the Long Island Deer Project.

With regard to NEPA compliance, the letter simply mentions that “[t]he Wildlife Services program has completed a state wide deer management environmental assessment for federal actions.” *Id.* at 7.

## **DISCUSSION**

### **A. APHIS-WS Is Violating NEPA And Its Own Regulations By Failing to Prepare a Site-Specific EIS For The Long Island Deer Project.**

APHIS-WS’ proposed Long Island Deer Project is a “major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). First, even if APHIS-WS believes that the Project will ultimately be beneficial to the ecosystems on Long Island and the white-tailed deer population there, the environmental impacts of the Project are likely to be significant under NEPA given the large geographic scope (five towns on Long Island and

Brookhaven) and the large number of deer proposed to be killed—a maximum kill of 5,250 deer in the span of less than forty days. *See* 40 C.F.R. § 1508.27(b)(1). The size of this proposed kill/cull would be nearly two times the total deer take of 2,655 in Suffolk County during the 2012 hunting season, *see* NYSDEC, *Region 1 2013 Deer Hunting Forecast 1* (last accessed Jan. 15, 2014), [http://www.dec.ny.gov/docs/wildlife\\_pdf/deerforecastr1r3.pdf](http://www.dec.ny.gov/docs/wildlife_pdf/deerforecastr1r3.pdf), and it would be more than 20 times the *statewide* maximum number of deer killed by New York WS over the past ten years, which was 247 deer in 2005. *See* 2009 FONSI at 5. Further, it would be 5.8 times more than the number of deer taken on NYSDEC deer damage permits (900) in 2012. *See Region 1 Forecast* at 1; *see also* Frank Verret, *White-Tailed Deer Population Estimates in the Town of East Hampton, New York* 6 (Oct. 20, 2006) (estimating total of 3,293 deer residing in the Town of East Hampton). Finally, the potential removal of 5,250 deer in a single year is over five times the number of deer that APHIS-WS contemplated removing annually, on a statewide basis, in its 2003 EA. Removing this number of deer within such a short time period is unprecedented in eastern Long Island (and anywhere in New York), and the need for such a scorched-earth strategy and its subsequent environmental impacts on private, public, urban/suburban, and rural lands have not been evaluated in detail. Indeed, given the proximity of the rural and urban/suburban areas to state and federal public lands such as Long Island National Wildlife Refuge, the Project is also likely to have significant environmental impacts on the ecosystems of these public lands.

The geographic size and magnitude of the proposed kill/cull for the Project is much larger than other deer damage management projects undertaken by federal agencies for which EISs were prepared without hesitation. For example, most recently, the U.S. National Park Service (“NPS”) in 2011 finalized an extensive EIS for its Rock Creek Park Deer Management Plan after gathering over twenty years of site-specific data on deer impacts to vegetation and forest regeneration in Rock Creek Park. *See generally* NPS, *Final White-Tailed Deer Mgmt. Plan/EIS* (Dec. 2011), *available at* <http://parkplanning.nps.gov/projectHome.cfm?projectID=14330>. With regard to geographic size, the total land area of Suffolk County where the five eastern towns and Brookhaven are located is approximately 912 square miles, whereas the total land area of Rock Creek Park is just 4.4 square miles. With regard to deer densities and the magnitude of the proposed kill/cull, the Town of East Hampton estimated a deer density of 10–85 deer per square mile in 2006 and the Long Island Deer Project proposes to kill/cull as many as 5,250 deer, whereas Rock Creek Park had an estimated 82 deer per square mile in 2007 (with an estimated 360 deer) and proposed reducing the number of deer in the park to around 70 deer over a span of three years and then considering implementing a reproductive control agent. *See generally id.* As compared to the Rock Creek Park Deer Management Plan for which NPS prepared a detailed EIS, given the similarities in deer densities, the much larger geographic size and magnitude proposed kill/cull, and the shorter time frame for implementing the program, the Long Island Deer Project is likely to have impacts significant enough to require preparation of an EIS by APHIS-WS, the federal agency leading implementation of the Project.

Considering the other CEQ significance factors, APHIS-WS has not considered in any great detail the impact of the Long Island Deer Project on the public health or safety of Long Island residents and visitors. *See* 40 C.F.R. § 1508.27(b)(2). An adequate analysis would

consider the impact of sharpshooting activities on urban/suburban areas in Long Island and the most appropriate areas in eastern Long Island to carry out such activities. In addition, an adequate analysis would consider the incidence of Lyme disease on Long Island and the extent to which deer and other animals contribute to its incidence on Long Island. APHIS-WS has not adequately considered whether the environmental impacts of the Project on Long Island are likely to be highly controversial or uncertain, *see id.* at § 1508.27(b)(4)–(5), given that, in its 2009 Decision/FONSI, APHIS-WS stated that “[d]eer mortality in New York from other sources (e.g., vehicle collisions, disease, and predation) is currently unknown.” 2009 FONSI at 5. It is likely that such a large-scale deer damage management project, if successful, would establish a precedent for future deer damage management projects on Long Island, other locations in New York, or other locations nationwide. *See* 40 C.F.R. § 1508.27(b)(6). Likewise, APHIS-WS does not explain in its letter how the Project relates to, or is consistent with, NYSDEC’s white-tailed deer management plan for 2012–2016, *see* NYSDEC, *Mgmt. Plan for White-Tailed Deer in New York State 2012–2016* (Oct. 2011), [http://www.dec.ny.gov/docs/wildlife\\_pdf/deerplan2012.pdf](http://www.dec.ny.gov/docs/wildlife_pdf/deerplan2012.pdf), or NYSDEC’s deer hunting forecasts for Suffolk County.

Further, the Project is clearly related to APHIS-WS’ statewide deer damage management program and NYSDEC’s regulation of deer harvest. *See* 40 C.F.R. § 1508.27(b)(7). It is reasonable to anticipate that this Project, in combination with these actions, will have cumulatively significant impacts on the white-tailed deer population on Long Island, particularly given the size of the proposed kill/cull in relation to 2012 total harvest data for Suffolk County and discrepancies in deer population data, i.e., comparing FLIR survey results, hunter kill data, and data from a 2006 East Hampton deer study. *See* Letter from M. Lowney, *supra* p. 8, at 3. Finally, the Project likely threaten violations of state or local law, *see* 40 C.F.R. § 1508.27(b)(10), because neither the towns/villages nor the NYSDEC have yet to prepare State Environmental Quality Review Act documents for the Project, at least one lawsuit has been filed in connection with the Project, *see* Christopher Walsh, *Suit Aims to Stop Deer Harvest*, THE EAST HAMPTON STAR (Dec. 26, 2013); Compl., *Crain v. Town of East Hampton*, No. 13-33432 (N.Y. Sup. Ct. filed Dec. 18, 2013), and APHIS-WS has not clarified whether it intends to conduct sharpshooting activities on public lands, which may require separate NEPA compliance.

In summary, it is quite clear that the Long Island Deer Project may have a significant effect on the human environment on Long Island, which necessitates preparation of an EIS for the Project. *See, e.g., Fritiofson v. Alexander*, 772 F.2d 1225, 1248 (5th Cir. 1985) (stating that a court will require an agency to prepare an EIS “if it finds that the project may have a significant effect on the human environment”).

**B. APHIS-WS Is Violating NEPA And Its Own Regulations By Failing to Prepare a Supplemental EA that Updates Its Eleven-Year Old 2003 EA for Statewide Deer Management in New York.**

Notwithstanding APHIS-WS’ failure to prepare an EIS for the Long Island Deer Project, APHIS-WS is violating NEPA and its own regulations by failing to prepare a supplemental EA that updates its eleven-year old 2003 EA for statewide deer management in New York. It is

important to note that the Project is an “[i]mplementation of [New York WS’] program plans [for statewide deer damage management] at the site-specific action level,” and, as such, APHIS’ own NEPA regulations contemplate the preparation of an EA at the very least. 7 C.F.R.

§ 372.5(b)(1)(ii). In addition, a substantial amount of new scientific information has been published since 2003 on deer management methods, including fertility control methods, and deer ecology and impacts, which APHIS-WS must incorporate in a supplemental EA. *See, e.g.,* Verret, *supra* note 9, at 6 (estimating total of 3,293 deer residing in the Town of East Hampton); *see also Rock Creek Park FEIS, supra* p. 9, at App. D (review of white-tailed deer fertility control). For example, APHIS-WS must analyze how the NYSDEC’s 2012–2016 deer management plan affects the analysis in its 2003 EA. *Compare Animal Protection of N.M.*, No. 98-538, at \*22, 27 (finding EAs for entire predator damage control programs for three WS districts inadequate to address cougar control where a long-term study of cougars in New Mexico was available, EAs relied on sixteen-year-old studies done in other states, and agency “failed to consider an important aspect of the predator damage management program—the [actual] cougar population,” which was “unknown”). In addition, it is likely that circumstances involving the need for, dynamics and harvest of the Long Island deer populations have changed since 2003. For example, the Long Island Farm Bureau received \$1,000,000 from the New York State Legislature recently for fence construction to mitigate deer damage to crops on Long Island, which may have reduced deer depredation of crops thereby reducing the need to kill deer.

Further, a supplemental EA is required because the Project vastly exceeds the scope of the 2003 EA, which was based on a kill of no more than 1,000 deer annually by APHIS-WS across the entire state of New York. 2003 EA at 41. In stark contrast, the Project proposes to kill a maximum of 5,250 deer just on eastern Long Island over the course of just forty days, more than five times the scope of the annual statewide kill/harvest covered by analysis in the 2003 EA. While APHIS-WS prepared the 2009 Decision/FONSI in which it analyzed its deer damage control activities in New York since the 2003 EA, a FONSI or a supplement to an EA is not a legal substitute for an actual supplemental EA. *See, e.g., Friends of the Wild Swan*, 875 F. Supp. 2d at 1220 (refusing to dissolve injunction against agency for violating NEPA where agency prepared a “supplement to the [EA],” rather than the supplemental EA required by a court order). More importantly, the scope of the 2009 Decision/FONSI was also limited to a statewide annual take by New York WS of 1,000 deer annually. *See* 2009 FONSI at 5. Given that the 2003 EA is eleven years old, the 2009 Decision/FONSI is not an EA and is approximately four years old, and the scope of the Project, a court is likely to require APHIS-WS to prepare a supplemental EA. *See Comm. for Idaho’s High Desert v. Collinge*, 148 F. Supp. 2d 1097, 1101 (D. Idaho 2001) (finding a likelihood of success on a NEPA claim against APHIS-WS where the agency asserted that a two-year old supplemental EA and a five-year old EA covered a new proposed program for lethal control of sage grouse predators in a 100-square-mile area of Idaho).

## **CONCLUSION**

In light of the serious and brazen NEPA violations raised in this letter and the immediate threats posed to the white-tailed deer on Long Island by the Long Island Deer Project, **we request that APHIS provide AWI a response its concerns raised in this letter no later than**

**January 31, 2014, which is the end of the Special Firearms White-Tailed Deer Hunting Season for Suffolk County.** If we do not receive an adequate response to our concerns by that date, AWI will have no choice but to consider moving forward with immediate legal action. It is our preference, however, to work in a collaborative fashion with APHIS to rectify its NEPA violations. You can reach me at (202) 446-2123. Alternatively, should I be unavailable, please contact our General Counsel, Georgia Hancock, at [georgia@awionline.org](mailto:georgia@awionline.org), or (202) 446-2122.

Sincerely,



Susan Millward  
Executive Director

Cc: Horst Greczmiel, Associate Director, NEPA, U.S. Council on Environmental Quality  
James Gette, Acting Chief, Natural Resources Section, U.S. Department of Justice  
Edward Romaine, Supervisor, Town of Brookhaven  
Larry Cantwell, Supervisor, Town of East Hampton  
Paul Richenbach, Jr., Mayor, Village of East Hampton  
Sean Walter, Superintendent, Town of Riverhead  
Donald Louchheim, Mayor, Village of Sagaponack  
James Dougherty, Supervisor, Town of Shelter Island  
Anna Throne-Holst, Supervisor, Town of Southampton  
Mark Epley, Mayor, Village of Southampton  
Scott Russell, Supervisor, Town of Southold