



January 23, 2019

VIA FOIAONLINE.REGULATIONS.GOV

U.S. Environmental Protection Agency

Re: Freedom of Information Act Request: Aminocyclopyrachlor and Oregon

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), Beyond Pesticides, and Beyond Toxics (collectively referred to as “the Requesters”). The Requesters are non-profit organizations working towards environmental protection and the eradication of pesticides that harm human and environmental health.

REQUESTED RECORDS

The Requesters are seeking the following records from the U.S. Environmental Protection Agency (“EPA”) Headquarters:

From January 1, 2012 to the date EPA conducts this search:

1. The records, including but not limited to records of communications, between EPA and the State of Oregon, the Oregon Department of Agriculture, and/or other Oregon state agencies mentioning or including the use of Perspective and the active ingredient aminocyclopyrachlor;
2. The records, including but not limited to records of communications, between EPA and Oregon agency officials mentioning or including the use of the pesticide product Imprelis;
3. The records, including but not limited to records of communications, between EPA and the U.S. Forest Service mentioning or including the use of Imprelis or Perspective and the active ingredient aminocyclopyrachlor on federal lands located in Oregon;
4. The adverse incident reports from aminocyclopyrachlor registrants and/or other entities to EPA; and
5. A list of received and accepted, including outstanding data requirements mentioning or including the conditional registration of aminocyclopyrachlor.

For this request, the term “records” refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

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. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

If you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

The Requesters are willing to receive records on a rolling basis.

FOIA’s “frequently requested record” provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give “reading room” treatment to any FOIA-processed records that, “because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records.” *See* 5 U.S.C. § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA’s Rule of 3 requires all federal agencies to proactively “make available for public inspection in an electronic format” “copies of records, regardless of form or format ... that have been released to any person ... and ... that have been requested 3 or more times.” 5

U.S.C. § 552(a)(2)(D)(ii)(II). Therefore, the Requesters respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

Finally, agencies must preserve all the records requested herein while this FOIA is pending or under appeal. The agency shall not destroy any records while they are the subject of a pending request, appeal, or lawsuit under the FOIA. 40 C.F.R. § 2.106; *see Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) (“an agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act”). If any of the requested records are destroyed, the agency and responsible officials are subject to attorney fee awards and sanctions, including fines and disciplinary action. A court held an agency in contempt for “contumacious conduct” and ordered the agency to pay plaintiff’s costs and fees for destroying “potentially responsive material contained on hard drives and email backup tapes.” *Landmark Legal Found. v. EPA*, 272 F.Supp.2d 59, 62 (D.D.C. 2003); *see also Judicial Watch, Inc. v. Dep't of Commerce*, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (awarding attorneys’ fees and costs because, among other factors, agency’s “initial search was unlawful and egregiously mishandled and . . .likely responsive documents were destroyed and removed”), *aff'd* in relevant part, 470 F.3d 363, 375 (D.C. Cir. 2006) (remanding in part to recalculate attorney fees assessed). In another case, in addition to imposing a \$10,000 fine and awarding attorneys’ fees and costs, the court found that an Assistant United States Attorney prematurely “destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending” and referred him to the Department of Justice’s Office of Professional Responsibility. *Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily accessible” means text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B). Pursuant to this requirement, we hereby request that you produce all records in an electronic format and in their native file formats. Additionally, please provide the records in a load-ready format with a CSV file index or Excel spreadsheet. If you produce files in .PDF format, then please omit any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily accessible. Please do not provide the records in a single, or “batched,” .PDF file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

RECORD DELIVERY

The Requesters appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Failure to comply within the statutory timeframe may result in the Requesters taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. On behalf of the Requesters, you may email or mail copies of the requested records to:

Ann K. Brown
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
foia@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please email me to discuss the scope of this request.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *NARA v. Favish*, 541 U.S. 157, 171 (2004) quoting *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). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "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 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as the Requesters access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and *non-profit public interest groups*." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). 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).

I. The Requesters Qualify for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "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 [Federal] government and is not primarily in the commercial

interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). EPA’s regulations at 40 C.F.R. § 2.107(1)(1)-(3) establish the same standard.

Thus, EPA must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 40 C.F.R. § 2.107(1)(2). As shown below, the Requesters meet each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of the EPA. This request asks for from January 1, 2012 to the date EPA conducts this search: (1) the records, including but not limited to records of communications, between EPA and the State of Oregon, the Oregon Department of Agriculture, and/or other Oregon state agencies mentioning or including the use of Perspective and the active ingredient aminocyclopyrachlor; (2) the records, including but not limited to records of communications, between EPA and Oregon agency officials mentioning or including the use of the pesticide product Imprelis; (3) the records, including but not limited to records of communications, between EPA and the U.S. Forest Service mentioning or including the use of Imprelis or Perspective and the active ingredient aminocyclopyrachlor on federal lands located in Oregon; (4) the adverse incident reports from aminocyclopyrachlor registrants and/or other entities to EPA; and (5) a list of received and accepted, including outstanding data requirements mentioning or including the conditional registration of aminocyclopyrachlor.

This FOIA will provide the Requesters and the public with crucial insight into aminocyclopyrachlor, a highly toxic pesticide commonly used for roadside spraying in Oregon. It is clear that a federal agency’s regulation of a pesticide is a specific and identifiable activity of the government, and in this case it is the executive branch agency of EPA. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, the Requesters meet this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow the Requesters to convey to the public information about aminocyclopyrachlor, which a toxic pesticide that has caused the death of thousands of ponderosa trees including many old growth trees on Oregon’s national forests. The responsive records will show EPA’s rationale for regulating this pesticide. Once the information is made

available, the Requesters will analyze it and present it to its members, activists, and the general public in a manner that will meaningfully enhance the public's understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of EPA's operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of Aminocyclopyrachlor Use in Oregon.

The requested records will contribute to public understanding of whether EPA's actions are consistent with its mission "to protect human health and the environment."¹ As explained above, the records will contribute to public understanding of this topic.

Activities of EPA generally, and specifically its regulation of toxic pesticides are areas of interest to a reasonably broad segment of the public. The Requesters will use the information they obtain from the disclosed records to educate the public at large. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.").

Through the Requesters' synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying "public" to require a sufficient "breadth of benefit" beyond the requester's own interests); *Cnty. Legal Servs. v. Dep't of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's "work by its nature is unlikely to reach a very general audience," "there is a segment of the public that is interested in its work").

Indeed, the public does not currently have an ability to easily evaluate the requested records, which are not currently in the public domain. *See Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "clarify important facts" about agency policy, "the CLS request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[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... ."²

¹ EPA, *About EPA: Our Mission and What We Do*, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Jan. 22, 2019).

² In this connection, it is immaterial whether any portion of the Requesters' request may currently be in the public domain because the Requesters request considerably more than any

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of EPA’s basis for regulating the pesticide aminocyclopyrachlor. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about this topic.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

The Requesters are not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public’s understanding of aminocyclopyrachlor’s adverse effect on old growth trees in Oregon, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about this subject matter.

The records are also certain to shed light on EPA’s compliance with its own mission.³ Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Requesters meet this factor as well.

II. The Requesters Have a Demonstrated Ability to Disseminate the Requested Information Broadly.

The Requesters are non-profit organizations that inform and educate the public about environmental issues. In consistently granting the Requesters’ fee waivers, agencies have recognized: (1) that the information requested by the Requesters contributes significantly to the public’s understanding of the government’s operations or activities; (2) that the information enhances the public’s understanding to a greater degree than currently exists; (3) that the Requesters possess the expertise to explain the requested information to the public; (4) that the Requesters possess the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Requesters as established experts in the field of environmental protection. The Requesters’ track records of active participation in oversight of governmental activities and decision making, and their consistent contribution to the public’s understanding of those activities as compared to the level of public understanding prior to disclosure are well established. The Requesters intend to use the records requested here similarly.

The Center intends to use the records requested here similarly. The Center’s work appears in more than 2,500 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, *The Guardian*, and *Los Angeles Times*. Many media outlets have reported on the impact that pesticides have on our environmental and human health utilizing information obtained by the Center from federal

piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

³ *See supra* note 1.

agencies. utilizing information obtained by the Center from federal agencies including EPA. In 2018, more than 2.5 million people visited the Center's extensive website, and viewed pages a total of 4.3 million times. The Center sends out more than 277 email newsletters and action alerts per year to more than over 1.4 million members and supporters. Three times a year, the Center sends printed newsletters to more than 69,500 members. More than 420,000 people have "liked" the Center on Facebook, and there are regular postings regarding environmental protection. The Center also regularly tweets to more than 71,200 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Beyond Pesticides work and activities to protect U.S. residents from toxic pesticides has been reported in major news outlets such a *Reuters*, *Bloomberg*, *Environmental Health News*, and many regional and local newspapers. In 2018, more than 300,000 people visited Beyond Pesticides website, and viewed pages a total of 1.2 million times. Beyond Pesticides sends an action of the week to its 50,000 members and supporters at least once per week. Four times a year, Beyond Pesticides sends printed newsletters to more than 1,000 members. More than 46,000 people have "liked" Beyond Pesticides on Facebook, and there are regular postings regarding pesticide hazards and alternatives. Beyond Pesticides also regularly tweets to more than 8,300 followers on Twitter. Beyond Pesticides intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Beyond Toxics has statewide impact in Oregon. In 2018, their website received over 250,000 views enabling people to learn information from pesticides to environmental justice. Beyond Toxics communicates with Oregonians through a number of social media outlets including Facebook, Instagram, Twitter, Youtube, Meetup and Reddit. Beyond Toxics reports on its environmental justice and environmental protection work to over 150,000 Oregonians through weekly e-newsletters and additional print media and newsletters. As Oregon's premier grassroots organization addressing pesticide issues, Beyond Toxic' work has been reported in regional news outlets such *Bloomberg News*, *National Public Radio*, *Oregon Public Broadcasting*, *The Oregonian*, *The Salem*, *Statesman Journal*, *The Register Guard*, *The Bend Bulletin*, *Environmental Health News*, and many regional and local television stations. Beyond Toxics has already been interviewed by Oregon reporters on the issue of the use and environmental impacts of aminocyclopyrachlor in Oregon. Beyond Toxics intends to use any or all of its media outlets to share the public information and educate the public with the information obtained as a result of this request.

Public oversight and enhanced understanding of the EPA's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Requesters need not show how they intend to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Requesters to show how they distribute information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to the Requesters.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Requesters' roles of educating the general public.

Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 1.4 million members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

Founded in 1981, Beyond Pesticides (formerly National Coalition Against the Misuse of Pesticides) is a 501(c)3 nonprofit organization 52-1360541 headquartered in Washington, D.C., which works with allies in protecting public health and the environment to lead the transition to a world free of toxic pesticides. The founders who established Beyond Pesticides felt that without the existence of such an organized, national network, local, state and national pesticide policy would become, under chemical industry pressure, increasingly unresponsive to public health and environmental concerns.

Founded in 2001, Beyond Toxics is a 501(c)(3) nonprofit organization in Oregon (EIN: 93-1294227) that protects and enhances human and environmental health. Beyond Toxics uses environmental justice engagement and community-based environmental grassroots organizing to ensure environmental protection and health for all communities. The organization empowers communities to enact lasting solutions to environmental health threats.

IV. Conclusion

For all of the foregoing reasons, the Requesters qualify for a full fee waiver. We hope that EPA will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me on behalf of the Requesters at foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,



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