February 23, 2022

*VIA FOIAONLINE.REGULATIONS.GOV*
U.S. Environmental Protection Agency
Headquarters and Region 4

Re: Freedom of Information Act Request: EPA Phosphogypsum Permit Review (Second Request)

Dear FOIA Officer:

This is a request under the Freedom of Information Act[1], *as amended* ("FOIA"), from the Center for Biological Diversity ("Center"), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

REQUESTED RECORDS

The Center the is requesting the records outlined below from the U.S. Environmental Protection Agency ("EPA") Headquarters and Region 4:

> From September 23, 2021 to December 16, 2021, the records generated in connection to the "full review" of revised the National Pollutant Discharge Elimination System ("NPDES") permit modification FL0036421 that EPA conducted and noted in the attached letter. Attachment A (EPA Region 4's December 1, 2021 Letter to Jaclyn Lopez).

For this request, the term "records" refers to documents, correspondence (including inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), *emails including attachments*, letters, notes, recordings, telephone records, 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files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in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.

[1] 5 U.S.C. § 552.

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.[2]

Should 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.[3]

The Center is 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."[4] 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] Therefore, we 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.[6] If any of the requested records are destroyed, the agency and responsible officials are subject to attorney fee awards and sanctions, including fines

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[2] FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).
[3] 5 U.S.C. § 552(b).
[4] *Id.* § 552(a)(2)(D)(ii)(I).
[5] *Id.* § 552(a)(2)(D)(ii)(II).
[6] 40 C.F.R. § 2.106; *see Chambers v. U.S. Dept. of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) ("[A]n 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").

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."[7] 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.[8]

## FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested.[9] "Readily accessible" means text-searchable and OCR-formatted.[10] 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.[11] Please correlate any redactions with specific exemptions under FOIA.

## RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. *Id*. § 552(a)(6)(A)(i). Failure to comply within the statutory timeframe may result in the Center taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. We prefer email, but you may mail copies of records to:

Ann K. Brown
Center for Biological Diversity
P.O. Box 11374

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[7] *Landmark Legal Found. v. EPA*, 272 F. Supp.2d 59, 62 (D.D.C. 2003); *see also Judicial Watch, Inc. v. Dept. 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).
[8] *Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).
[9] 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.").
[10] *See id*.
[11] *Id*. § 552(b).

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."[12] 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[13]. FOIA's fee waiver requirement is "liberally construed."[14]

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as the Center 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*."[15] As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information ... ."[16]

### I. The Center Qualifies 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."[17] EPA's regulations at 40 C.F.R. § 2.107(l)(1)-(3) establish the same standard.

Thus, EPA must consider six 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, (4) whether the disclosure is likely to contribute "significantly" to public understanding of government

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[12] *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).
[13] 5 U.S.C. § 552(a)(4)(A)(iii).
[14] *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).
[15] *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (emphasis added).
[16] 132 Cong. Rec. S. 14298 (statement of Senator Leahy).
[17] 5 U.S.C. § 552(a)(4)(A)(iii).

operations or activities[18], (5) whether a commercial interest exists and its magnitude, and (6) the primary interest in disclosure. As shown below, the Center meets 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 September 23, 2021 to December 16, 2021, the records generated in connection to the "full review" of revised NPDES permit modification FL0036421 that EPA conducted and noted in the attached letter. Attachment A.

This FOIA will provide the Center and the public with crucial insight into EPA's review of permits from the NDPES program. It is clear that a federal agency's permitting process is identifiable activity of the government, and in this case it is the executive branch agency of EPA.[19] Thus, the Center meets 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 Center to convey to the public information about what steps the EPA took to review the permit that expanded the largest phosphogypsum stack in the country, before and after veto was requested. Once the information is made available, the Center will analyze it and present it to its over 1.7 million members and online 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 EPA's Permitting and Review Process.

The requested records will contribute to public understanding of whether EPA's actions are consistent with EPA's mission "to protect human health and the environment."[20] As explained above, the records will contribute to public understanding of this topic.

Activities of EPA generally, and specifically whether and how the agency is reviewing permits from the NDPES program, are areas of interest to a reasonably broad segment of the public. The

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[18] *Id*. § 2.107(1)(2).
[19] *Judicial Watch*, 326 F.3d at 1313 ("[R]easonable specificity is all that FOIA requires with regard to this factor") (internal quotations omitted).
[20] EPA, *Our Mission and What We Do*, https://www.epa.gov/aboutepa/our-mission-and-what-we-do (last visited Feb. 23, 2022).

Center will use the information it obtains from the disclosed records to educate the public at large about this topic.[21]
Through the Center's 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.[22]

Indeed, the public does not currently have an ability to easily evaluate the requested records, which are not currently in the public domain.[23] As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, "[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… ."[24]

Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of the environmental impact of phosphogypsum. 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.

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

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of what EPA's NPDES review consists of, 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 and purpose. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

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[21] *See W. Watersheds Proj. v. Brown*, 318 F. Supp.2d 1036, 1040 (D. Idaho 2004) (finding 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").

[22] *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. Dept. 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); *Cmty. 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").

[23] *See Cmty. Legal Servs.*, 405 F. Supp.2d at 560 (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.").

[24] *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987. In this connection, it is immaterial whether any portion of the Center's request may currently be in the public domain because the Center requests considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

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

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than over 1.7 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.

IV. The Center's Primary Interest in Disclosure is the Public Interest.

As stated above, the Center has no commercial interest that would be furthered by disclosure. Although even if it did have an interest, the public interest would far outweigh any pecuniary interest.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the activities of numerous government agencies for over 25 years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee waivers, agencies have recognized: (1) that the information requested by the Center 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 Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision making, and its 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 Center's work appears in over 5,000 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*, *Los Angeles Times*, and *USA Today*. Many media outlets have reported on the government's management of toxic chemicals utilizing information obtained by the Center from federal agencies. In 2021, more than 3.5 million people visited the Center's extensive website, viewing pages more than 6.3 million times. In 2021, nearly 2.4 million actions were completed by more than 1.7 million members and supporters. Three times a year, the Center sends printed newsletters to more than 89,610 members. More than 606,000 people follow the Center on Facebook, and there are regular postings regarding environmental protection. The Center also regularly tweets to more than 121,000 followers on Twitter, and has more than 40,000 followers on Instagram. 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. 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.

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.[25] The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity."[26] It is sufficient for the Center to show how it distributes information to the public generally.[27]

## V. Conclusion

For all of the foregoing reasons, the Center qualifies 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 at foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

Ann K. Brown
Open Government Coordinator
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
foia@biologicaldiversity.org

Attachment

Attachment A (EPA Region 4's December 1, 2021 Letter to Jaclyn Lopez)

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[25] *Carney*, 19 F.3d 807.
[26] *Judicial Watch*, 326 F.3d at 1314.
[27] *Id.*

**Attachment A**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW
ATLANTA, GEORGIA 30303-3104

DEC 1 2021

Ms. Jaclyn Lopez
Florida Director
Center for Biological Diversity
P.O. Box 2155
Saint Petersburg, Florida 33731

Dear Ms. Lopez:

Thank you for your September 29, 2021, letter concerning the proposed National Pollutant Discharge Elimination System (NPDES) permit modification, FL0036421, for Mosaic Fertilizer, LLC - New Wales Concentrates Plant (the Facility). The U.S. Environmental Protection Agency appreciates your interest in this matter and your concerns with the proposed revisions to the permit.

The current NPDES permit issued by the Florida Department of Environmental Protection (FDEP) became effective on July 31, 2018 and expires on July 30, 2023. A permit revision became effective on October 15, 2021. The EPA reviewed the draft permit in 2018 and did not provide any comments to FDEP following the review. The modification authorized an expansion of the Facility's lined south phosphogypsum stack. The permit includes provisions for ground stabilization, enhanced groundwater monitoring and ongoing subsurface monitoring. FDEP found that the permit modification was not likely to affect the quality or quantity of treated surface water discharge from the NPDES outfall, Outfall D-006.

Region 4 does not conduct a full review on every permit undertaken by delegated states; however, when we received your letter, we conducted a full review of the modification action taken by FDEP. Based on our review, we agree with FDEP's determination that the modification is not likely to affect the quality or quantity of treated surface water discharge from the NPDES outfall, Outfall D-006. Since the permit is now in full effect and meets the NPDES program requirements, EPA has no authority to take further action on the permit itself; however, EPA will monitor permit implementation. In addition, EPA will review this permit at reissuance in 2023.

Also, in response to your letter, the EPA looked at the Facility's compliance history using the Enforcement and Compliance History Online (ECHO) tool and found that the Facility was inspected by FDEP on August 25, 2019, and September 27, 2021. ECHO also indicates that the Facility has not had any Clean Water Act violations in the past three years.

We appreciate your desire to protect and preserve the environment and hope you find this information helpful. If I may be of further assistance, please contact me or Ms. Brandi Jenkins in the Outreach and External Engagement Office at (404) 562-8327.

Sincerely,

John Blevins
Acting Regional Administrator