NRDC

December 15, 2015

Via FOIAonline

FOIA Officer
U.S. Environmental Protection Agency

Re: FOIA Request for Records Relating to Enlist Duo herbicide

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable U.S. Environmental Protection Agency (EPA) regulations, 40 C.F.R. §§ 2.100-2.406.

I. Description of Records Sought

Please produce records[1] of the following types in EPA's possession, custody, or control:

1. All records pertaining to the synergistic effects, or potential synergistic effects, between the active ingredients glyphosate and 2,4-D in the herbicide Enlist Duo;

2. All communications (including records communicated, and documentation of communications) between EPA and Dow AgroSciences, Inc. (Dow) relating to the synergistic effects, or potential synergistic effects, between glyphosate and 2,4-D;

3. All communications (including records communicated, and documentation of communications) between Dow and EPA, starting October 2014, pertaining to the registration of Enlist Duo;

4. All communications (including records communicated, and documentation of communications), starting October 2014, between EPA and Dow or other outside persons/entities about glyphosate's cancer risk.

5. All records relating to the 2015 finding of the World Health Organization's International Agency for Research on Cancer (IARC) regarding the cancer risk posed by glyphosate;

[1] "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters offices, and specifically including EPA offices in possession of responsive records.

NATURAL RESOURCES DEFENSE COUNCIL

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6. All records relating to the IARC's 2015 finding regarding the cancer risk posed by 2,4-D;

7. All communications (including records communicated, and documentation of communications), starting January 1, 2005, between EPA and Dow or other outside persons/entities relating to the human health risks posed by 2,4-D; and

8. All internal EPA communications (including records communicated, and documentation of communications), starting January 1, 2005, relating to the human health risks posed by 2,4-D.

II. Request for a Fee Waiver

NRDC requests that EPA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. §552(a)(4)(A)(iii); *see also* 40 C.F.R. §2.107(l)(1). The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as "a representative of the news media" entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 40 C.F.R. §2.107(c)(1)(iii).

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

1. Subject of the request

The requested records directly concern "the operations or activities of the government." 40 C.F.R. § 2.107(l)(2)(i). Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), any new pesticide must be "registered" with EPA before it can be distributed, sold, or used in the United States. 7 U.S.C. § 136a(a). On October 15, 2014, EPA first registered Dow's new Enlist Duo herbicide for use in six states; on March 31, 2015, the agency expanded the herbicide's registration to nine additional states. Subsequently, however, EPA sought remand and vacatur of Enlist Duo's registration via court order, due to the agency's discovery of additional information regarding potentially harmful synergistic effects between the active ingredients glyphosate and 2,4-D . *See* Respondents' Motion for Voluntary Vacatur and Remand, *Natural Resources Def. Council v. EPA*, No. 14-73353 (9th Cir. Nov. 24, 2015), ECF No. 121-1.

In addition, shortly before EPA expanded Enlist Duo's registration from six to fifteen states, the IARC published its groundbreaking finding that glyphosate is "probably carcinogenic

to humans." Kathryn Z. Guyton et al., Monograph Working Group, Int'l Agency for Research on Cancer, World Health Org., *Carcinogenicity of Tetrachlorvinphos, Parathion, Malathion, Diazinon, and Glyphosate*, 16 The Lancet Oncology 490 (online ed. Mar. 2015; print ed. May 2015), *available at* http://www.thelancet.com/pdfs/journals/lanonc/PIIS1470-2045%2815%2970134-8.pdf (Ex. A). To reach this finding, the IARC examined not only the studies on which EPA had relied, in the early 1990s, to conclude that glyphosate is not carcinogenic to humans, but also undertook "a comprehensive review of the latest available scientific evidence." Int'l Agency for Research on Cancer, World Health Org., *IARC Monographs Volume 112: Evaluation of Five Organophosphate Insecticides and Herbicides* 1-2 (Mar. 12, 2015), *available at* http://www.iarc.fr/en/media-centre/iarcnews/pdf/MonographVolume112.pdf (Ex B). According to the President's Cancer Panel, these World Health Organization reports are the "gold standard" in evaluating evidence on cancer causation.[2]

In deciding to expand Enlist Duo's registration, EPA refused to consider the IARC's significant cancer finding for glyphosate. *See* EPA, Response to Public Comments Received Regarding EPA Endangered Species Assessment for 2,4-D Choline Salt in Arkansas, Kansas, Louisiana, Minnesota, Missouri, Mississippi, Nebraska, Oklahoma, Tennessee, and North Dakota (Mar. 31, 2015) (Ex. C). Instead, EPA has articulated that it is evaluating glyphosate's cancer risk through a separate process. *See* Eric Sfiligoj, EPA Plans Response to IARC Glyphosate Finding . . . but Not Just Yet (Apr. 6, 2015), http://www.croplife.com/editorial/epa-plans-response-to-iarc-glyphosate-finding-but-not-just-yet/ (Ex. D). But months after the IARC's finding, EPA has yet to publicly release any new assessment of glyphosate's cancer risk.

In June 2016, the IARC also announced its finding that 2,4-D is possibly carcinogenic to humans. *See* IARC, World Health Org., IARC Monographs Evaluate DDT, Lindane, and 2,4-D, at 1 (June 23, 2015), *available at* https://www.iarc.fr/en/media-centre/pr/2015/pdfs/pr236_E.pdf (Ex. E); Dana Loomis et al., Monograph Working Group, Int'l Agency for Research on Cancer, World Health Org., *Carcinogenicity of Lindane, DDT, and 2,4-Dichlorophenoxyacetic acid*, 16 The Lancet Oncology 891 (online ed. June 2015; print ed. Aug. 2015), *available at* http://reif-lab.org/files/documents/TLO_VOL113.pdf (Ex.F). The IARC's finding calls into question EPA's classification of 2,4-D, in the agency's human health risk assessment underlying EPA's registration of Enlist Duo, as a "Category D chemical, i.e., not classifiable as to human carcinogenicity." EPA, Human Health Risk Assessment for a Proposed Use of 2,4-D Choline on Herbicide-Tolerant Corn and Soybean 4 (Aug. 8, 2013), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2014-0195-0007.

And just this month, the *Chicago Tribune* published an article revealing that, within the past decade, EPA changed its assessment of the health risks posed by 2,4-D to allow forty-one

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[2] President's Cancer Panel, U.S. Dep't of Health & Human Servs., Reducing Environmental Cancer Risk: What We Can Do Now 13 (2010), *available at* http://deainfo.nci.nih.gov/advisory/pcp/annualReports/pcp08-09rpt/PCP_Report_08-09_508.pdf.

times more 2,4-D into the American diet than the agency had previously allowed. *See* Patricia Callahan, EPA Tosses Aside Safety Data, Says Dow Pesticide for GMOs Won't Harm People, *Chicago Tribune*, Dec. 8, 2015, *available at* http://www.chicagotribune.com/news/watchdog/ct-gmo-crops-pesticide-resistance-met-20151203-story.html (Ex. G). This stark increase was based on EPA scientists' revised analysis of a pivotal rat study by Dow, a study that EPA initially requested in 2005. *Id.* After examining Dow's data, the EPA scientists initially concluded that exposure to 2,4-D caused kidney lesions in rat offspring. *Id.* But following a conversation with a Canadian government toxicologist, the scientists discounted the signs of kidney toxicity that Dow's researchers had attributed to 2,4-D. *Id.* Their revised analysis, in turn, paved the way for EPA's decision to approve Enlist Duo. *Id.*

The records requested here concern EPA's registration of Enlist Duo, its evaluation of the human health risk posed by the two active ingredients in Enlist Duo, and its recent decision to request remand and vacatur of the registration. The records thus pertain to government operations and activities. *See* 40 C.F.R. § 2.107(l)(2)(i).

2. Informative value of the information to be disclosed

The requested records are "likely to contribute to" the public's understanding of government operations and activities, 40 C.F.R. § 2.107(l)(2)(ii). The public currently possesses little to no information regarding: the data on which EPA initially relied to conclude that there would not be synergistic effects between glyphosate and 2,4-D; the information that subsequently impelled the agency to conclude that there may actually be synergistic effects between glyphosate and 2,4-D; whether and how EPA's analyses of the synergistic effects between glyphosate and 2,4-D were influenced by Dow, the pesticide registrant; and whether and how EPA's decisions to register Enlist Duo were influenced by Dow.

Likewise, there is a dearth of publicly-available information concerning: why EPA chose to expand Enlist Duo's registration from six to fifteen states without first considering the IARC's significant cancer finding for glyphosate; what EPA's views are regarding the cancer risk posed by glyphosate and 2,4-D, in light of the IARC's recent findings; and the extent to which EPA's assessments of the cancer risk posed by glyphosate and 2,4-D, as well as the other health risks posed by 2,4-D, have been influenced by Dow and/or other persons/entities.

There is more than a reasonable likelihood that these records have informative value to the public. There has been substantial public interest in, and media scrutiny of, the registration of Enlist Duo; the significant environmental and human health risks posed by the herbicide and its active ingredients; the IARC's cancer findings for glyphosate and 2,4-D; the integrity of the process through which EPA has evaluated and registered Enlist Duo; and the influence that Dow and outside persons/entities have exercised over the registration of Enlist Duo and EPA's assessment of the health risks posed by glyphosate and 2,4-D. *See infra* Section A.4; *see also Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

We believe that the records requested are not currently in the public domain. As discussed further below, their disclosure would thus meaningfully inform public understanding with respect to: the potential harmful synergistic effects between the active ingredients in Enlist Duo; EPA's views on the cancer risk posed by glyphosate and 2,4-D, in light of the IARC's recent findings; the extent to which EPA's evaluation of the health risks posed by Enlist Duo and its active ingredients has been influenced by Dow and/or other outside entities; and the degree to which EPA's registration of Enlist Duo has been influenced by Dow or other outside entities. However, if EPA were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

3. Contribution to an understanding of the subject by the public is likely to result from disclosure.

Because NRDC is a "representative of the news media," as explained in Part II.C below, EPA must presume that this disclosure is likely to contribute to public understanding of its subject. 40 C.F.R. § 2.107(l)(2)(iii).

However, even if NRDC were not a media requester, NRDC's expertise in pesticide-related matters, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are "a broad audience of persons interested in the subject" of pesticide regulation, 40 C.F.R. § 2.107(l)(2)(iii), and when combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 40 C.F.R. § 2.107(l)(2)(iii). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of December 2014, these include, but are not limited to the following:

- NRDC's website, available at http://www.nrdc.org (homepage at Att. 1), is updated daily and draws approximately 1,500,000 page views and 712,000 unique visitors per month.
- *OnEarth* magazine (sample issue at Att. 2) is published as a bimonthly digital magazine, and is available free of charge at http://www.onearth.org. The site is updated regularly and also includes *Earthwire*, a daily newsfeed (Att. 3). It receives more than 99,000 unique visitors per month.
- *Nature's Voice* newsletter on current environmental issues (sample issue at Att. 4) is distributed four times a year to NRDC's more than one million members and online activists, and is available online at http://www.nrdc.org/naturesvoice/default.asp (Att. 5).
- *Activist Network* and *BioGems* email lists (sample email at Att. 6) include more than 1.7 million members who receive biweekly information on urgent environmental issues. This information is also made available through NRDC's online Action Center at http://www.nrdc.org/action/default.asp (Att. 7).
- *NRDC This Week* is a monthly electronic environmental newsletter distributed by email to more than 65,000 subscribers, at http://www.nrdc.org/newsletter (Att. 8).
- "Switchboard," available at http://switchboard.nrdc.org (Att. 9) is a staff blogging site that is updated daily and features more than 280 bloggers writing about current environmental issues. The blogs draw approximately 138,000 page views and 90,000 unique visitors per month; Switchboard's RSS feeds have approximately 4,750 subscribers; and Switchboard posts appear on websites of other major internet media outlets, such as "The Huffington Post," at http://www.huffingtonpost.com (sample post at Att. 10).
- NRDC's profiles on "Facebook," at http://www.facebook.com/nrdc.org (Att. 11), and "Twitter," at http://www.twitter.com/nrdc (Att. 12), are updated daily and have approximately 301,000 fans and 158,000 followers, respectively.

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Stories from the Gulf*, narrated by Robert Redford and *Acid Test*, narrated by Sigourney Weaver; participates in press conferences and interviews with reporters and editorial writers; and has approximately forty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, "The requirement to rebuild US fish stocks: Is it working?" *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 13);
- Issue brief, "The Untapped Potential of California's Water Supply: Efficiency, Reuse, and Stormwater," June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 14); *see also* "Saving Water in California," *N.Y. Times*, July 9, 2014 (discussing the report's estimates) (Att. 15);

- Article, "Waves of phony charges over new clean water safeguards," *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner) (Att. 16);
- Article, "Don't Buy the Smear of the EPA," *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke) (Att. 17);
- Transcript, "Conservationists Call For Quiet: The Ocean Is Too Loud!" Nat'l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny) (Att. 18);
- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 19);
- Article, "Pollution Still a Hazard to U.S. Beaches," CBS, *CBS NEWS*, July 29, 2009 (featuring former NRDC Water Program Co-Director Nancy Stoner) (Att. 20);
- Conference brochure, "World Business Summit on Climate Change," May 24-26, 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 21);
- Article, "Is there a 'proper level' of compliance with environmental law?" *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall) (Att. 22);
- NRDC Document Bank, http://docs.nrdc.org/ (Att. 23).

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

(1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are "generally recognized as safe" (Att. 24). *See also* Kimberly Kindy, "Are secret, dangerous ingredients in your food?" *Wash. Post*, Apr. 7, 2014 (discussing NRDC's report) (Att. 25).

(2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA's part to ensure the safety of these drug additives (Att. 26). *See also* P.J. Huffstutter and Brian Grow, "Drug critic slams FDA over antibiotic oversight in meat production," *Reuters*, Jan. 27, 2014 (discussing NRDC's report) (Att. 27).

(3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA's decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, http://www.nrdc.org/health/atrazine/files/atrazine10.pdf (Apr. 2010) (update to 2009 report) (Att. 28); *see also* William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?" *Harper's Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 29).

(4) NRDC incorporated information obtained through FOIA into a report, available at http://www.nrdc.org/wildlife/marine/sound/contents.asp, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report) (Att. 30). The report also relied upon and synthesized information from other sources. Since the report's publication, the sonar issue has continued to attract widespread public attention. *See, e.g.*, "Protest Raised over New Tests of Naval Sonar," Nat'l Pub. Radio, *All Things Considered*, July 24, 2007 (transcript at Att. 31).

(5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 32).

(6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration's Energy Task Force, along with analysis of selected excerpts and links to the administration's index of withheld documents (Att. 33). NRDC's efforts cast light on an issue of considerable public interest. *See, e.g.*, Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times*, Mar. 28, 2002, at A22 (Att. 34).

(7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002 (Att. 35); Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19 (Att. 36).

(8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at http://www.nrdc.org/water/drinking/arsenic/aolinx.asp (Att. 37). The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; *see also* Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report) (Att. 38).[3]

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons.

Furthermore, NRDC has a demonstrated interest in contributing to the public's understanding of EPA's registration of Enlist Duo, and of the health risks posed by the herbicide and its active ingredients. *See, e.g.*:

- Sylvia Fallon, From Bad to Worse? - NRDC Tells EPA to Oppose New Enlist Duo Pesticide, Swtichboard NRDC Staff Blog (July 1, 2014), http://switchboard.nrdc.org/blogs/sfallon/from_bad_to_worse_-_nrdc_tells.html (Ex. H)
- Kristi Pullen, Question Answered – EPA Approves Enlist Duo, Switchboard NRDC Staff Blog (Oct. 15, 2014), http://switchboard.nrdc.org/blogs/kpullen/question_answered_epa_approves.html (Ex. I).
- Press Release, NRDC, NRDC Sues EPA to Block New Pesticide That Threatens Monarch Butterflies, Human Health (Oct. 14, 2014), http://www.nrdc.org/media/2014/141015a.asp (Ex. J)
- Sylvia Fallon, The Fight Widens: NRDC Challenges the Approval of the Pesticide Combination Enlist Duo in Nine More States, Switchboard NRDC Staff Blog (Apr. 20, 2015), http://switchboard.nrdc.org/blogs/sfallon/the_fight_widens_nrdc_challeng.html (Ex. K)
- Sylvia Fallon, EPA Asks to Take Next Generation Pesticide Enlist Duo off the Market, Switchboard NRDC Staff Blog (Nov. 25, 2015), http://switchboard.nrdc.org/blogs/sfallon/epa_asks_to_take_next_generati.html (Ex. L)

Based on the forgoing, the requested records disclosure is likely to contribute to the public's understanding of the subject.

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[3] There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. *See, e.g.*, Felicity Barringer, "Science Panel Issues Report on Exposure to Pollutant," *N.Y. Times*, Jan. 11, 2005 (Att. 39); Katharine Q. Seelye, "Draft of Air Rule is Said to Exempt Many Old Plants," *N.Y. Times*, Aug. 22, 2003 (Att. 40); Don Van Natta, Jr., "E-Mail Suggests Energy Official Encouraged Lobbyist on Policy," *N.Y. Times*, Apr. 27, 2002 (Att. 41).

4. Significance of the contribution to public understanding

The records requested shed light on matters of considerable public interest and concern: the potential harmful synergistic effects between glyphosate and 2,4-D in Enlist Duo; the human health risks, including cancer risk, posed by Enlist Duo, glyphosate, and 2,4-D; EPA's recent decision to seek voluntary remand and vacatur of its registration of Enlist Duo; and the influence that Dow and other outside persons/entities have exerted over EPA's registration of Enlist Duo and the agency's assessment of the human health risks posed by the herbicide and its active ingredients. As reflected in the examples below, there is substantial public interest in these subjects:

- Press Release, Envtl. Working Grp., Citing Health Risks, Doctors and Scientists Urge Congress to Reject Potent Herbicide Mix for Genetically Engineered Crops (July 23, 2014) http://www.ewg.org/release/citing-health-risks-doctors-and-scientists-urge-congress-reject-potent-herbicide-mix (Ex. M)
- The Times Editorial Bd., Editorial, Escalating the Weed Wars, *Los Angeles Times*, Sept. 29, 2014, *available at* http://www.latimes.com/opinion/editorials/la-ed-gmo-food-20140930-story.html (Ex. N)
- EPA, Response to Public Comments Received Regarding New Uses of Enlist Duo on Corn and Soybeans (Oct. 14, 2014) (noting that EPA received 417,301 public comments in response to its initial proposal to register Enlist Duo) (Ex. O).
- EPA, Response to Public Comments Received Regarding EPA Endangered Species Assessment for 2,4-D Choline Salt in Arkansas, Kansas, Louisiana, Minnesota, Missouri, Mississippi, Nebraska, Oklahoma, Tennessee, and North Dakota 2 (Mar. 31, 2015) (noting that EPA received an additional 34, 526 public comments in response to expand the registration for Enlist Duo) (Ex. C).
- Daniel Cressey, Widely Used Herbicide Linked to Cancer, *Nature*, Mar. 24, 2015, *available at* http://www.nature.com/news/widely-used-herbicide-linked-to-cancer-1.17181 (Ex. P)
- Envtl. Working Grp., EPA Approves GMO Weed Killer Enlist Duo in Nine More States, Ecowatch.com (Apr. 2, 2015), http://ecowatch.com/2015/04/02/epa-approves-enlist-duo/ (Ex. Q)
- Center for Food Safety, Glyphosate and Cancer Risk: Frequently Asked Questions (May 2015), http://www.centerforfoodsafety.org/files/glyphosate-faq_64013.pdf (Ex. R)
- Carey Gillam, WHO Unit Finds 2,4-D Herbicide 'Possibly' Causes Cancer in Humans, *Reuters* (June 24, 2015), http://www.reuters.com/article/un-herbicides-2-4-d-idUSL1N0Z815P20150624 (Ex. S)
- Dan Charles, Busted: EPA Discovers Dow Weedkiller Claim, Wants It off the Market, *NPR* (Nov. 25, 2015), http://www.npr.org/sections/thesalt/2015/11/25/457393114/busted-epa-discovers-dow-weedkiller-claim-wants-it-off-the-market (Ex. T)
- Patricia Callahan, EPA Tosses Aside Safety Data, Says Dow Pesticide for GMOs Won't Harm People, *Chicago Tribune*, Dec. 8, 2015, *available at* http://www.chicagotribune.com/news/watchdog/ct-gmo-crops-pesticide-resistance-met-20151203-story.html (Ex. G).

Public understanding of these matters would be significantly enhanced by disclosure of the requested records. Disclosure would help the public to more effectively evaluate the risks posed by synergistic interactions between the glyphosate and 2,4-D in Enlist Duo; the integrity of the process through which EPA registered Enlist Duo and assessed the health risks posed by glyphosate and 2,4-D; and the extent to which Dow has influenced EPA's evaluation and registration of Enlist Duo. Disclosure would also help the public to better understand and evaluate why EPA initially registered Enlist Duo despite lacking critical information about synergistic effects between glyphosate and 2,4-D; EPA's position on the cancer risk posed by glyphosate and 2,4-D, in light of the IARC's recent findings; and the agency's reasons for subsequently requesting voluntary remand and vacatur of Enlist Duo.

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" *Rossotti*, 326 F.3d at 1312 (internal citation omitted); *see Natural Res. Def. Council v. United States Envtl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the regulation and environmental impacts of pesticides. As noted at Part II.A, any work done by EPA on the registration of Enlist Duo relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the synergistic effects of the active ingredients in Enlist Duo and associated threats to human health and the environment. It will also contribute substantially to the public's understanding of the regulatory process through which EPA registered, evaluated, and continues to evaluate Enlist Duo.

C. NRDC Is a Media Requester

Even if EPA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and EPA's FOIA regulations, 40 C.F.R. § 2.107(c)(1)(iii); *see also* 40 C.F.R. § 2.107(b)(6) (defining "[r]epresentative of the news media"). A representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 42) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described earlier in this request, NRDC publishes a bimonthly digital magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. NRDC also publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. *See* 40 C.F.R. § 2.107(b)(6) ("Examples of news media include . . . publishers of periodicals."). NRDC maintains a significant additional communications presence on the internet through its staff blogging site, "Switchboard," which is updated daily and features more than 250 bloggers writing about current environmental issues, and through daily news messaging on "Twitter" and "Facebook." *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that "as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities"). The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs approximately forty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements "are regularly granted news representative status." *Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union).[4]

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC's publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured in its *OnEarth* magazine, newsletters, blogs, and other NRDC-operated media outlets. *See Cause of Action v. Fed. Trade Comm'n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it "distributes work to an audience and is especially organized around doing so"). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

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[4] To be a representative of the news media, an organization need not *exclusively* perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media. This country has a long history, dating back to its founding, of news organizations engaging in public advocacy.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. *See* 40 C.F.R. § 2.107(l)(4). Please contact me before doing anything that would cause the fee to exceed $100. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions.

Thank you.

Sincerely,

/s/ Margaret T. Hsieh

Margaret T. Hsieh
Attorney
Natural Resources Defense Council, Inc.
40 W. 20th St.
New York, NY 10011

Enclosures (submitted via FOIAonline):

Attachments 1 through 42 (single .pdf file)
Exhibit(s) A through T (single .pdf file)