October 25, 2017

<u>Via FOIA Online:</u>

National FOIA Officer
U.S. EPA Headquarters

Re: FOIA Request for "Deadline Board" reflecting EPA deadlines

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 at 40 C.F.R. §§ 2.100–2.406.

I. Requested Records and Disclosure Method

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

1. The "deadline board" referenced by EPA Acting General Counsel Kevin Minoli in the October 19, 2017 E & E Article entitled "Pruitt directive changing agency legal approach — official" (Exhibit A to this letter).

Please either email responsive records to me at jknicley@nrdc.org, or upload those records to FOIA Online. If you determine that any of the records I've described above are already publicly available, please let me know where to find them.

II. Request for a Fee Waiver

NRDC requests that EPA waive any fee it would otherwise charge for searching for and producing the requested records. 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). As I explain below, NRDC's requested disclosure meets both requirements. NRDC is also "a representative of the news media" entitled to fee reduction. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 40 C.F.R. § 2.107(c)(1)(iii).

Please disclose the records requested above regardless of your decision on whether to waive or reduce fees. To expedite disclosure, NRDC will, if necessary and under protest,

---

[1] "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes both electronic records as well as physical charts, tables, or other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored).

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 $50.

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here is "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 records requested here set forth "specific deadlines" that, according to EPA's Acting General Counsel Kevin Minoli, "are going to be met" by EPA. *See* Ex. A at 2. Minoli stated that this "deadline board" is "part of EPA's strategic plan under the Trump administration is to hit statutory deadlines." *Id.* The requested records thus directly concern "the operations or activities of the government." 40 C.F.R. § 2.107(*l*)(2)(i).

2. Informative value of the records 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 does not currently possess a comprehensive accounting of statutory, administrative, or judicial deadlines that EPA is obligated to meet. Nor does the public currently possess a list of those "specific deadlines" that EPA has deemed significant enough to include on a formal "deadline board" and on which the agency presumably is focusing its work. There is more than a reasonable likelihood that these records have informative value to the public because they will highlight the obligations that EPA has pledged "are going to be met" during the current administration, and thus provide insights into EPA's agenda in the coming years. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

3. Likely contribution to public understanding

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). Even if NRDC were not a media requester, its expertise in environmental and public health issues, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—show 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 accordingly 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's more than three million members and online activists are "a broad audience of persons interested in the subject" of EPA's agenda and compliance with statutory obligations related to protecting public health and the environment, 40 C.F.R. § 2.107(*l*)(2)(iii). When this group is combined with the other audiences for the numerous publications and other platforms to which NRDC contributes, the likely audience of interested persons to be reached is certainly "reasonably broad." *Id.*

NRDC can disseminate newsworthy information collected through this FOIA request to its members, online activists and other members of the public through many channels, free of charge. As of summer 2017, these channels include:

- NRDC's website, http://www.nrdc.org (sample homepage at Att. 1), is updated daily, features blogs by NRDC's scientific, legal, and other staff experts, and draws approximately 1.3 million page views and 510,000 unique visitors per month.
- NRDC's Activist email list includes more than three million members and online activists who receive regular communications on urgent environmental issues. (sample at Att. 7) This information is also made available through NRDC's online Action Center at https://www.nrdc.org/actions (Att. 8).
- NRDC updates and maintains several social media accounts with tens to hundreds of thousands of followers. Its major accounts include Facebook (906,992 followers) (Att. 2), Twitter (271,551 followers) (Att. 3), Instagram (108,315 followers) (Att. 4), YouTube (Att. 5), and LinkedIn (Att. 6).
- NRDC also is a regular contributor to Medium (1,478 followers) (Att. 9) and the Huffington Post (Att. 10).

NRDC staff also write papers and reports; provide legislative testimony; present at conferences; direct and produce documentary films; and contribute to national radio, television, newspaper, magazine and web stories and academic journals. Some examples of these contributions include:

- Article, "The Bipartisan Fight for Quieter Oceans," *Atlantic Monthly*, July 5, 2017 (quoting NRDC Marine Mammal Protection Program Director Michael Jasny) (Att. 12);
- Documentary, *Sonic Sea* (2016), featured on the Discovery Channel (directed and produced by NRDC Deputy Director of Communications Daniel Hinerfeld) (Att. 13);
- 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. 14);
- 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. 15); *see also* "Saving Water in California," *N.Y. Times*, July 9, 2014 (discussing the report's estimates) (Att. 16);

- Congressional testimony, 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. 17);
- Conference brochure, "World Business Summit on Climate Change," May 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 18);

NRDC's legal, scientific, and other experts have a history of using information obtained through FOIA requests 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. For example:

1. NRDC recently obtained through FOIA and publicized emails between the Trump transition team and industry officials regarding reversal of Obama-era preliminary restrictions on the proposed Pebble Mine. This cast light on an issue of considerable public interest. *See, e.g.*, Kevin Bogardus and Dylan Brown, "'Homework assignment' — how Pebble lobbied Trump's EPA," *E&E News*, June 8, 2017 (Att. 30).

2. In April 2014, NRDC used FOIA documents to prepare a report on potentially unsafe chemicals added to food, without FDA oversight or public notification. The report, *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. 28). *See also* Kimberly Kindy, "Are secret, dangerous ingredients in your food?" *Wash. Post*, Apr. 7, 2014 (discussing report) (Att. 29).

3. NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. NRDC used these documents to publish a January 2014 report, titled *Playing Chicken with Antibiotics*, that reveals decades of FDA hesitancy 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 report) (Att. 27).

4. NRDC has used White House documents obtained through FOIA and 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. *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.24). *See also* William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?" *Harper's Magazine*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 25).

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. Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 23).

6. Through FOIA, NRDC obtained an ExxonMobil memorandum 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. 21). *See also* Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19 (Att. 22).

7. Through FOIA and other sources, NRDC obtained information on levels of arsenic in drinking water nationwide and used it in a report, *Arsenic and Old Laws* (2000) (Att. 19). The report explained how interested members of the public could 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's report) (Att. 20).

In short, NRDC has proven its ability to digest, synthesize, and quickly disseminate to a broad audience newsworthy information gleaned through FOIA requests like this one.

4. Significance of the contribution to public understanding

The records requested here shed light on a matter of considerable public interest and concern: EPA's prioritization of and work to comply with statutory, regulatory, and judicial mandates relating to the protection of public health and the environment. Public understanding of the binding deadlines EPA is under and is working to meet would be significantly enhanced by disclosure of the agency's "deadline board" and the "specific deadlines" listed therein. Disclosure would help the public to more effectively evaluate EPA's regulatory agenda, and to better understand and evaluate EPA's actions (or inaction) in response to statutory, administrative, and judicial mandates and deadlines.

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure of the requested records 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 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; it uses information obtained under FOIA for its own public-information and advocacy purposes, and does not resell this information. "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 EPA's "deadline board," those deadlines it deems important enough to include on the "board," and those deadlines that are either not included or have been missed by the agency. As noted at Part II.A, any EPA work on identifying and prioritizing statutory, administrative, and judicial deadlines for agency action relate to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of EPA's obligations, regulatory agenda, and associated threats to human health and the environment.

C. NRDC Is a Media Requester

Even if NRDC were not entitled to a public interest waiver of all costs and fees, it would be 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 id.* § 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. 11) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. For example, NRDC publishes original reporting of environmental news stories on its website, http://www.nrdc.org. Previously, NRDC published stories like these in its 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. As explained in Part II.A, NRDC also publishes a regular newsletter for its more than three million members and online activists. *See* 40 C.F.R. § 2.107(b)(6) ("Examples of news media include . . . publishers of periodicals."). NRDC also maintains a significant additional communications presence through its staff blogs on www.nrdc.org, which are updated regularly and feature writing about current environmental issues, through daily news messaging on "Twitter" and "Facebook," and through content distributed to outlets such as Medium. *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"). These and the other communications channels referenced earlier in this letter routinely include information about current events of interest to the readership and the public. NRDC employs more than fifty specialized communications staff, including accomplished journalists and editors, and numerous other advocates able to disseminate, through these and other channels, newsworthy information acquired through FOIA.

Organizations with NRDC's characteristics "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); *see also 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").

III. Conclusion

Thank you for your help. Please call or email me with questions.

Sincerely,

/s/ Jared E. Knicley

Staff Attorney
Natural Resources Defense Council, Inc.
1152 15th St. NW, Suite 300
Washington, DC 20005
202.513.6242
jknicley@nrdc.org

Encls.:
Exhibit A (E & E article) (single .pdf file)
Attachments 1 through 30 (single .pdf file)