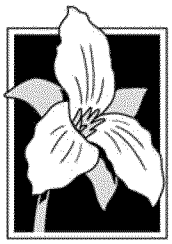
NORTHWEST ENVIRONMENTAL ADVOCATES



November 7, 2019

FREEDOM OF INFORMATION ACT REQUEST

FOIA OFFICER
Region 10
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101

Filed via FOIA Online

Re: **Draft Oregon Variance Rules and Willamette Mercury Variance**

To whom it may concern:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, we are writing to request the disclosure of public documents within the control of your agency. I make this request on behalf of Northwest Environmental Advocates (NWEA).

NWEA is a regional non-profit environmental organization founded in 1969 and dedicated to preserving and protecting natural resources in the Northwest and the nation. NWEA works through advocacy, litigation, and education to protect and restore water and air quality, wetlands and wildlife habitat. NWEA has a long history of interest and involvement in environmental issues in the Northwest and the nation, in particular seeking to use the Clean Water Act programs to restore and maintain water quality for the protection of human health, fish, and wildlife.

This request concerns the Environmental Protection Agency's (EPA) early input and evaluation of the Oregon Department of Environmental Quality's (DEQ) draft changes to its variance rules and a proposed Willamette Basin Multiple Discharger Variance issued for public comment on September 16, 2019. According to the Oregon DEQ, EPA staff Lindsay Guzzo and Rochelle Labiosa participated in the Willamette Basin Mercury Multiple Discharger Variance Advisory Committee that met six times between November 1, 2018 and August 1, 2019. *See* Proposed rulemaking (and related web pages and documents) available on Oregon DEQ's website at https://www.oregon.gov/deq/Regulations/rulemaking/Pages/rmercury2019.aspx.

I. FOIA Request

In answering this request, please consider "documents" to include: reports, memoranda, internal correspondence, including electronic mail or other communications, policy and scientific reports, meeting notes, telephone notes, and summaries of conversations and interviews, computer records, and other forms of written communication, including internal staff memoranda. In your response, please identify which documents correspond to which requests below. This request also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement include any information not contained in the original record.

Additionally, this request is not meant to be exclusive of other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request. This request applies to all described documents whose disclosure is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied), and (ii) explain in full the basis on which non-disclosure is sought. Additionally, if any information or documents are withheld, please explain how EPA reasonably foresees that disclosure would harm an interest protected by a specific FOIA exemption, or how the disclosure of such information or documents is prohibited by law. In the event that you determine that any of the requested documents cannot be disclosed in their entirety, we request that you release any reasonably redacted or segregable material that may be separated and released. Furthermore, for any documents, or portions thereof, that are determined to be potentially exempt from disclosure, we request that you exercise your discretion to disclose the materials, absent a finding that sound grounds exist to invoke an exemption.

Pursuant to this request, please provide all documents prepared or utilized by, in the possession of, or routed through the EPA, from the earliest inception of this proposed rulemaking by Oregon and ending on the date that EPA begins its search pursuant to this request related to the following:

1. Oregon DEQ's proposed changes to its variance rule; and

2. Oregon DEQ's proposed mercury variance for point source dischargers in the Willamette River basin.

II. Form or Format Requested

NWEA hereby requests, pursuant to 5 U.S.C. § 552(a)(3)(B), that the records disclosed pursuant to this FOIA request be released in the format of a CD or DVD rather than, or in addition to, FOIAonline. FOIAonline is seriously defective as it often locks out users for no reason, provides only a slow and inadequate method of downloading files, and presents the released documents in a disorganized mess. Recent attempts to improve the program appear to have only made it worse.

In addition, we request that EPA release color documents in color. FOIA requires that color records maintained in color must be disclosed in color. 5 U.S.C. § 552(a)(3)(B). We also request that EPA provide records without manipulation, that is without splitting the emails and the attachments that originally were attached to each other. As the court held in *Judge Rotenberng Educational Center v. U.S. Food and Drug Administration*, 2019 WL 1296957 (March 21, 2019):

> While emails and their attachments are not *per se* a single record, at a minimum "attachments should reasonably be considered part and parcel of the email by which they were sent" when the email "make[s] explicit reference to, or include[s] discussion of, the missing attachments." *Coffey v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1, 8 (D.D.C. 2017); *see also Am. Oversight v. U.S. Gen. Servs. Admin.*, 311 F. Supp. 3d 327, 340 (D.D. C 2018) ("[E]ven without 'a *per se* rule that an email and its attachment must be treated as a single record,' . . . the attachments to already-produced emails appear manifestly part of the

> 'communications' between GSA and the PTT and, absent any agency explanation why not, 'belong together.'" (quoting *Coffey*, 277 F. Supp. 3d at 8; *Parker v. U.S. Dep't of Justice, Office of Prof'l Responsibility*, 278 F. Supp. 3d 446, 452 (D.D.C. 2017))); *New Orleans Workers' Ctr. for Racial Justice v. U.S. Immigration & Customs Enf't,* No. 15-431 (RBW), 2019 WL 1025864, at * 11 (D.D.C. Mar. 4, 2019) ("'[A]ttachments should reasonably be considered part and parcel of the email by which they were sent' if 'the emails ... make explicit reference to, or include discussion of, the [ ] attachments.'" (quoting *Coffey*, 277 F. Supp. 3d at 8)); *Families for Freedom v. U.S. Customs & Border Prot.*, No. 10-cv-2705, 2011 WL 4599592, at *5 (S.D.N.Y. Sep. 30, 2011) (rejecting agency's separation of emails and attachments because "[t]he attachments can only be fully understood and evaluated when read in the context of the emails to which they are attached. That is the way they were sent and the way they were received. It is also the way in which they should be produced"). More than that, ubiquitous email practices suggest that agencies will struggle to justify separating an email and its attachments into multiple records. Of course, from time to time emails are sent with the wrong attachment, but in the ordinary course an attachment is included with the email because it relates to the body of the email. Though not a *per se* rule, ordinary practice leaves very little wiggle room in generally requiring an email with attachments to be kept together as a single record.

And, as the court in *Parker*, cited above, stated:

> D.C. Circuit recently held in *AILA* that "if the government identifies a record as responsive to a FOIA request," it cannot "redact particular information within the responsive record on the basis that the information is non-responsive." 830 F.3d at 677. In other words, a single record cannot be split into responsive and non-responsive bits. If the Casey Letter and its attachment are one record-i.e. , "a unit"-then FOIA requires disclosure of both together. *Id.*
>
> The key is understanding what it means to be a single "record." While FOIA "provides no definition of the term 'record,'" agencies "in effect define a 'record' when they undertake the process of identifying records." *Id.* at 678 (emphasis added); *see McGehee v. CIA*, 697 F.2d 1095, 1108 (D.C. Cir. 1983). In an expansive bureaucracy, documents and information will not always fall into discrete sets. When collecting these materials together, an agency might combine pages into one document (e.g. , a set of handwritten notes) or split others into multiple parts (e.g. , a compendium of memoranda). "[T]he dispositive point is that, once an agency itself identifies a particular document or collection of material-such as a chain of emails-as a responsive 'record,'" then it must produce the whole, absent other statutory exemptions that allow redactions. *AILA*, 830 F.3d at 678. Courts may then review that determination.

278 F. Supp. 3d 451.

III. <u>Fee Waiver Request</u>

We hereby request a waiver of fees for costs incurred in locating and duplicating these materials, pursuant to 5 U.S.C. § 552(a)(4)(iii), because disclosure "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." Following is a response to the fee waiver requirements set out in 40 C.F.R. § 2.107(l)(1) and (l)(2)(i)-(ii).

As is discussed further below, NWEA has been or is involved in litigation regarding various aspects of the Clean Water Act implementation in Oregon, Washington, Idaho, and nationally including water quality standards, TMDLs, NPDES permits, and nonpoint source control. A variance is a form of water quality standard. Use of information sought through FOIA is a recognized public use and benefit under FOIA's fee waiver standard. Courts have long recognized that the use of such laws to further the public interest through challenges to agency action may actually represent some of the highest and best application of public access laws. For example, the Ninth Circuit has ruled that a FOIA requester established a *prima facie* justification for a fee waiver when "[i]n particular, they made it clear to [the agency] that they meant to challenge publicly the scientific basis for the western pond turtle listing denial." *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d. 53, 55 (9th Cir.1997); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975) (evidence of prior litigation interest does not decrease right of access under FOIA). Indeed, almost 30 years ago, the federal court for the District of Columbia, citing Supreme Court precedent, ruled that "[l]itigation to seek redress of violation of law is a right established by the first amendment . . . and restrictions thereupon are subject to strict scrutiny." *Idaho Wildlife Fed'n v. U.S. Forest Serv.*, Civ. No. 82-1206 (D.D.C. July 21, 1983) (citing *NAACP v. Button*, 371 U.S. 415 (1962)), Slip Op. at 7. In that case, the court rejected the Forest Service's denial of a fee waiver request because it relied on a regulation that proscribed such waivers whenever the information was "sought for use in litigation against the federal government." *Id.* at 3. The court ruled that such a proposition is "untenable" because:

> The concept of the "private attorney general" is well-established, and certainly had its genesis in the environmental field. Indeed, when private litigation against a government agency vindicates a significant public policy and creates widespread benefit, policy en-courages such litigation by awarding the plaintiff attorney's fees and costs.

Id. at 8 (citation omitted). The court noted that the Idaho Wildlife Federation "is a non-profit organization which states that its purpose in litigation against the Forest Service is to ensure compliance with environmental laws" and that "such activity would appear to be of the type generally considered to be public interest." *Id.* Because policy-based disputes with agencies, as well as administrative challenges, "cannot be done completely without the ability to seek judicial review," the court enjoined the Forest Service's broad-brush rejection of fee waiver requests simply because they might interfere with an agency's unfettered pursuit of its agenda. *Id.* at 8-9. Indeed, litigation to enforce federal laws is an essential function of organizations, such as and including NWEA, which act in a watchdog capacity.

A. Whether the subject of the requested records concerns "the operations or activities of the government."

This request concerns analysis of Oregon's proposed variance rules as they were in the process of being contemplated and drafted and input EPA gave Oregon prior to, during the advisory committee process, and during the public comment period. EPA's actions and inactions pertaining to this proposed rule concern the operations of the government because it is a form of

guidance to Oregon on how to lessen the stringency of its water quality standards and involves EPA's interpretation of its own regulations. Therefore, this fee waiver request involves records that are readily identifiable as limited to "the operations or activities of the government," specifically in this instance the operations and activities of the U.S. EPA to oversee and guide the aforementioned water quality standards programs of the Clean Water Act.

B. Whether the disclosure is "likely to contribute" to an understanding of government operations or activities.

EPA participated in helping Oregon to develop its rule proposal. Without access to records to demonstrate how EPA helped with this process and how it interpreted its own regulations in the context of the state proposal, the public has no way of knowing why Oregon has proceeded in the way that it has and whether it is EPA's view that Oregon's proposal complies with the requirements of federal laws. Similarly, without access to these records, NWEA cannot evaluate precisely what EPA's views are with regard to the Oregon proposal.

Release of the requested records will allow the public to understand how EPA participated in the development of this proposed rule, what EPA understand the proposed rule to mean, and whether EPA considers the proposed rule in compliance with federal law. To the best of our knowledge, EPA has not provided any of these documents to the public nor has made them available on its website. Therefore, there is no other way to obtain this information on EPA actions other than through use of the FOIA. For this reason, reviewing records pertaining to EPA's having helped to develop this proposed rule and to have had input into it over a period of time will be "meaningfully informative" and is therefore likely to contribute to an understanding of EPA's views on the Oregon proposal. Having such information is also "meaningfully informative" in that it ensures NWEA and other organizations do not engage in frivolous or unfounded litigation.

C. Whether disclosure of the requested information will contribute to "public understanding."

Disclosure of the requested records to NWEA will contribute to public understanding because the organization has expertise in this subject area of the records, an intention to disseminate the information obtained, and the connections with organizations and individuals across the country who are most likely to use the information contained within the records. NWEA has a track record of working with a broad range of people, to assist them by conveying our understanding of EPA policies and provide EPA documents. NWEA is known for being generous with its time and information, despite its extremely limited resources. At a minimum, the audience for the information that NWEA has requested is environmental, recreational, fishing, tribal, and health organizations who are concerned about the use of water pollution trading and its potential to undermine the federal regulatory structure established by water quality standards and NPDES permits, as well as total maximum daily loads. In the past, NWEA has shared similar information with state agencies, federal employees, tribal governments, as well as representatives of municipal and industrial dischargers. NWEA will continue to share such records as well as information analyzed from records with this same list of interests.

In addition to using its relationships and networks with environmental organizations and environmental attorneys across the country, NWEA will also disseminate the records and/or its analysis of the records through the following means, as appropriate: through the internet from its website, through social media platforms such as Facebook and Twitter, through commentary to

the press, through public forums in which it participates, in its newsletters, through emails to networks of organizations, and through formal public comments and other formal documents, such as petitions, prepared for agencies.

NWEA's investigation and evaluation of the records will be made available to other parties after it has been completed. NWEA will use the records requested to evaluate the quality of EPA decision-making and to better facilitate public participation in state and EPA processes during triennial reviews, 303(d) list and TMDL development, NPDES permit issuances, and nonpoint source control rulemakings and other administrative activities, all of which occur regularly. NWEA's dissemination of the records and of its own evaluation of the records will educate the public and advance public understanding of EPA's decision-making. Thus, the release of these records will significantly contribute to the public's understanding and oversight of EPA's decision-making under the CWA.

NWEA has both the ability to interpret and to disseminate the records and/or information from this request because of its participation in all regulatory processes that take place under the CWA. NWEA has the expertise to evaluate this information and is able to disseminate the information from the records, or the records themselves, directly and indirectly with public interest organizations interested in water pollution through emails, phone calls, meetings, list serves specifically devoted to communications between public interest organizations, and through its website and social media, as well as in formal communications with state and federal public agencies.

D. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Courts have held that the factor of whether the disclosure will contribute "significantly" to the public understanding is satisfied where the information requested is new, would supplement information currently available to the public, or add to the public oversight of the government's activities. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987); *Judicial Watch of Florida v. U.S. Justice Dept.*, 1998 U.S. Dist. LEXIS 23441, at *8 (D.D.C. 1998). The requested information has not, to the best of NWEA's knowledge, been released to the public and, therefore, qualifies as new. *Or. Natural Desert Ass'n v. U.S. Dept. of Interior*, 24 F. Supp. 2d 1088, 1095 (D. Or. 1998) (finding that information supporting a Bureau of Land Management NEPA analysis, but which had not been released publicly, was new for the purposes of FOIA fee waiver). EPA's website contains none of the requested information. Moreover, there is no way, short of a FOIA request, to ensure that all the publically available documents are the universe of documents pertaining to this subject matter.

Where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, a court held that the group had met the dissemination prong of the public interest test:

> Other courts have found requestors' statements of intent to disseminate requested information through newsletters, popular news outlets and presentations to the public interest groups, government agencies and the general public sufficient to entitle an organization to a fee waiver . . . . Therefore, in light of [Western Watersheds Project's] statements, the Court finds that WWP adequately detailed

> its ability and intent to publicize the disclosed information to more than just a narrow segment of the public. Moreover, the Court finds that if it adopted the BLM's position [that WWP would only disseminate information to a narrow audience], it would set the bar for fee waivers impermissibly high, especially in light of Congress' intent to have the fee waiver liberally construed.

Western Watersheds Project v. BLM, 318 F. Supp. 2d 1036 (2004). Moreover, courts have held that if it is a "close call" as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non commercial entity should be given the benefit of the doubt and be granted the fee waiver. *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10th Cir. 2005). Likewise, the court in *Southern Utah Wilderness Allliance v. BLM*, 402 F. Supp 82 (2005) held that an organization's statements describing how it has commented on similar issues in federal proceedings and issued a report on a similar matter was sufficient to show it had the expertise and ability to disseminate the requested information. And, as in some of the fee waiver requests addressed in this appeal, the records concern agency inaction, a court has found that a requestor's statements concerning the agency's failure to meet statutory requirements and how the requested records would shed light on those failures was sufficient to demonstrate that the request would make a significant contribution to the public understanding. *Physicians Comm. for Responsible Medicine v. Dept. of Health and Human Serv.*, 480 F.Supp.2d 119, 122-23 (D.D.C. 2007).

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA to oversee the activities of EPA in light of its actions and inactions pursuant to the CWA and in support of CWA goals. It will also contribute to the ability of NWEA and others to oversee the activities of the EPA, with regard to regulatory actions that are intended to ensure that such standards are met. As discussed above, NWEA participates in state rulemaking, in EPA review of state rulemaking, in NPDES permitting actions and programs, and the issuance of TMDLs and 303(d) lists, and in litigation. NWEA also participates in matters of EPA national policy, in areas such as standards and TMDLs. It also shares documents and information with other organizations that engage in those activities. NWEA will also disseminate the information to organizations through listserves, websites, meetings, memoranda, and direct sharing of the records as appropriate. Only by understanding the EPA's actions and inactions can NWEA meaningfully participate in its public oversight watchdog function and assist other organizations to do the same.

E. Commercial interests.

Where a court has found the request to be primarily in the requestor's commercial interest, there has been specific and clear evidence of that interest. *See, e.g.*, *VoteHemp, Inc. V. DEA*, 237 F. Supp 55 (2002)(VoteHemp's website contained links to commercial interests and the requestor's mission included business promotion). There is no such concern here. NWEA has no commercial interest in the requested records. NWEA has no mechanism to obtain funds from the use of the records, does not promote the records or analysis of them as a commercial concern, and its website contains no links to commercial interests. NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Northwest and across the country. Therefore, the considerations of 40 C.F.R. § 2.107(l)(1) with regard to the possible commercial interests of NWEA do not apply because NWEA has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis it may perform on the records sought.

In conclusion, for the reasons set forth above and in the additional materials filed herewith, Northwest Environmental Advocates is clearly entitled to receive a public interest fee waiver for this FOIA request.

We look forward to your response. Please feel free to contact me at 503/295-0490 or by email at nbell@advocates-nwea.org if you have any questions about how to respond to this request.

Sincerely,

Nina Bell
Executive Director