

NORTHWEST ENVIRONMENTAL ADVOCATES



April 22, 2013

U.S. Environmental Protection Agency
FOIA and Privacy Branch
1200 Pennsylvania Ave., N.W.
Washington, D.C., 20460

Via E-Mail: hq.foia@epa.gov

Re: **Appeal of Denial of Fee Waiver Request: FOIA No. EPA-R!0-2013-004864**

To whom it may concern:

On March 25, 2013, Northwest Environmental Advocates (NWEA) submitted a Freedom of Information Act (FOIA) request to EPA Region X on behalf of itself and two other organizations, the Idaho Conservation League (ICL) and the Northwest Environmental Defense Center (NEDC). The FOIA request included an extensive request to waive fees. The fee waiver was denied on the basis that NWEA allegedly failed to demonstrate that we “have not expressed a specific intent to disseminate the information to the general public.” This was despite the expressed intent to disseminate the information to the general public for which reason we can only conclude that EPA’s denial of the fee waiver request is a form of harassment and contrary to President Obama’s Executive Order on FOIA. *See* The White House, President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies at <http://www.whitehouse.gov/the-press-office/freedom-information-act>. EPA then declined to evaluate any other aspects of NWEA’s fee waiver but, even so, concluded that an appeal should “address all factors required by EPA’s FOIA Regulations, located at 40 C.F.R. § 2.107(1) in your appeal.” It is our view that it is illogical to both not process our fee waiver in its entirety and to hold us to appeal a decision that has not yet been made. Nonetheless we will do so.

I. General Fee Waiver Appeal

FOIA provides that an agency “shall” waive or reduce its fees “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). Citing legislative history, courts have held that the fee waiver provision is to “be liberally construed in favor of waivers for noncommercial requesters.” *See, e.g., Forest Guardians v. Department of Interior*, 416 F.3d 1173, 1177-78 (10th Cir. 2005); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). One court stated:

Finally, I note that strong policy considerations support a fee waiver in this case. The legislative history discussed in *McClellan, supra* [cites omitted], and other cases demonstrates that Congress intended independent researchers, journalists and public interest watchdog groups to have inexpensive access to government records in order [t]o provide the type of public disclosure believed essential to our society. Moreover, in the 1986 amendments to FOIA, Congress ensured that

when such requesters demonstrated a minimal showing of their legitimate intention to use the requested information in a way that contributes to public understanding of the operations of government agencies, no fee attaches to their request.

Institute for Wildlife Protection v. U.S. Fish and Wildlife Service, 290 F. Supp. 2d 1226, 1232 (2003). Both the Ninth Circuit Court of Appeals and the D.C. Circuit Court of Appeals have stated that the main purpose of the fee-waiver was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” *Judicial Watch, Inc.*, 326 F.3d at 1311; *McClellan Ecological Seepage Situation*, 835 F.2d at 1284.

In this case, NWEA, ICL and NEDC are public interest watchdog groups that use agency records that concern EPA policies and decisions to advocate for, *inter alia*, clean water by participating in the development of national policy through meetings and comment letters; by participating in the development of state water quality programs through advisory committees, comment letters, and other forms of advocacy (e.g., encouraging state legislatures to not overturn water quality standards, participating in public hearings); by participating in the EPA review of aspects of state water quality programs through comment letters and litigation; and by participating in the development of a stronger national base of public participation in the development of strong water quality programs by sharing information in the form of memoranda with other public interest organizations, as well as sharing litigation briefs and formal comment letters, participating in meetings, working one-on-one with other organizations, and posting information and EPA records directly to NWEA’s website.

EPA regulations provide for a fee waiver to be granted when “a FOI Office determines, based on all available information, that disclosure of the requested 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.”¹ Moreover,

To determine whether the first fee waiver requirement is met, FOI Offices will consider the following factors:

- (I) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government.” The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.
- (ii) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of

¹ 40 C.F.R. § 2.107(l)(1).

information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.

- (iii) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to “public understanding.” The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.
- (iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. FOI Offices will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is “important” enough to be made public.²

II. Specific Fee Waiver Grounds

A. Intent to Disseminate

EPA's denial of this fee waiver request is entirely unfounded. The original fee waiver request did, in fact, state an intent to disseminate the information sought. First, the request itself was made on behalf of three organizations, working in three states, whose staff and members are members of the general public. Second, the fee waiver request stated that the requestors have “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.” FOIA request at 4. The request also established both an implied and explicit intent to disseminate the information by saying that

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, fishing, tribal, and health organizations across the country which are interested in ensuring that water quality standards are sufficiently protective of human health, fish, and wildlife. In addition, 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 records as well as information analyzed from

² 40 C.F.R. § 2.107(l)(2)(i)-(ii)

records with this same list of interest holders. NWEA has already shared information about water quality trading with organizations in Oregon and Washington and across the country as well as through its participation on a recent standing-room only panel at the Public Interest Environmental Law Conference sponsored by the University of Oregon Law School. ICL and NEDC have similar interests in permitting issues and similar capacity to disseminate information to a wide variety of other interested parties and the public.

In addition to using their relationships and networks with environmental organizations and environmental attorneys across the country, the requestors will also disseminate the records and/or its analysis of the records through the following means: through the internet from their websites, through commentary to the press, through public forums in which they participate, in their newsletters, through emails to networks of organizations, and through formal public comments and other formal documents prepared for agencies. For example, on March 15, 2013, NWEA sent EPA Region X a letter discussing two topics of concern relating to water quality credit trading and its consistency with EPA regulations. This letter has been circulated to concerned citizens in the basin where the featured trade took place as well as to organizations in the region and across the country. It has been posted on NWEA's website.

The requestors' investigation and evaluation of the records will be made available to many other parties after it has been completed. The requestors 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, TMDL development, and permit issuances, all of which occur regularly. The requestors' dissemination of the records and of their own evaluation of the records will educate the public and advance public understanding of EPA's guidance and regulations insofar as they affect permitting and water quality credit trading. Thus, the release of these records will significantly contribute to the public's understanding and oversight of EPA's decision-making under the Clean Water Act.

NWEA, ICL, and NEDC have both the ability to interpret and to disseminate the records and/or information from this request because of their participation in all regulatory processes that take place under the Clean Water Act. The requestors have the expertise to evaluate this information and are able to disseminate the information from the records, or the records themselves, directly and indirectly with public interest organizations involved in state water credit trading and related regulatory activities through emails, phone calls, meetings, list serves specifically devoted to communications between public interest organizations, and through their websites.

Id. at 4 (emphasis added). Given that this request explicitly states an intent to disseminate the information to the general public, we are at a loss as to understand what EPA is particularly driving at. Does EPA consider none of the people and organizations mentioned above to be the "general public"? Or can EPA not actually read? What more can EPA ask than that NWEA, ICL, and NEDC assert an intention to disseminate the documents? We surely cannot disseminate that which we do not yet possess.

Third, NWEA has already been approached by a number of reporters, based on its letter to EPA concerning Oregon water quality credit trading programs, reporters with whom we now assert a specific intent to share the information received in addition to the general intent we previously asserted.

Finally, NWEA has already demonstrated an intent to disseminate the information by establishing on its website a location for the documents when they are released. *See* Northwest Environmental Advocates, *Water Quality Trading: Innovation or Hoax?* at <http://northwestenvironmentaladvocates.org/water-quality-trading-innovation-or-hoax/>. In fact, not only has a location for the documents been created but documents released by the Idaho Department of Environmental Quality have already been posted on that website. *See* Index of /nweafiles/WQ_Trading/download_1 at http://northwestenvironmentaladvocates.org/nweafiles/WQ_Trading/download_1/.

B. Whether the subject of the requested records concerns “the operations or activities of the government.”

This request concerns guidance related to trading water quality credits in three states. Trading is a way for NPDES permittees to meet water quality-based effluent limits in lieu of pollution controls. As such it implicates the meaning of water quality standards, the meaning of NPDES permit regulations and the Clean Water Act, as well as findings in Total Maximum Daily Loads (TMDLs) and various nonpoint source programs. EPA has prepared national guidance on how water quality trading might occur. EPA has participated in a process with other state and federal agencies and non-profit organizations that seeks to create additional or superseding guidance which affects how water quality standards and TMDLs will be met in the three states. This request concerns the “the operations or activities of the government” because it concerns EPA’s participation in, evaluation of, and involvement with three states’ trading programs and potentially regional guidance on the same subject. 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.

C. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.

EPA and three states are participating in a process with two vested interest parties which is closed to all other parties with different interests. Therefore there is no mechanism by which the public can gain insight into EPA’s input into states’ trading policies or to ascertain how other parties, including the three states, are seeking to influence EPA government operations and activities. As this CIG grant was apparently intended to exclude the public or other non-vested parties’ involvement, release of the records will most certainly contribute to an understanding of the development of EPA regional policies on water quality trading. In addition, as EPA issues NPDES permits in Idaho, the records sought will elucidate the rationale behind the agency’s decisions in that state. As EPA approves TMDLs in all three states, and maintains veto power over NPDES permits in Oregon and Washington, release of the records will allow an understanding of how trading policies in the states are implemented and how these regulatory activities are or are not consistent with existing trading policies and developing guidance. In order that the requestors may evaluate EPA’s ongoing involvement in the development of state trading guidance and implied or explicit regional trading guidance, NWEA, ICL, and NEDC need access to the records that demonstrate EPA’s policies, evaluation, and conclusions. This

will assist the requestors to evaluate whether EPA's involvement is consistent with the Clean Water Act, EPA's implementing regulations, and national guidance, and if are in the public interest. For this reason, reviewing records of EPA's action and rationale will be "meaningfully informative" and therefore likely to contribute to an understanding of EPA's position on water quality credit trading and its intersection with other regulatory provisions.

Having such information is "meaningfully informative" in that it ensures NWEA, ICL, and NEDC do not engage in frivolous or unfounded litigation, that the requestors can help the public understand what is or is not happening to ensure the consistency of all regulatory programs. Having this information will also assist NWEA, ICL, and NEDC in their participation in reviewing proposed trading projects in the three states.

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

Disclosure of the requested records to NWEA, ICL, and NEDC will contribute to public understanding because the three organizations have 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 people as far away from Oregon as the State of Florida to assist them by conveying our understanding of EPA policies. 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, fishing, tribal, and health organizations across the country which are interested in ensuring that water quality standards are sufficiently protective of human health, fish, and wildlife. In addition, 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 records as well as information analyzed from records with this same list of interest holders. NWEA has already shared information about water quality trading with organizations in Oregon and Washington and across the country as well as through its participation on a recent standing-room only panel at the Public Interest Environmental Law Conference sponsored by the University of Oregon Law School. ICL and NEDC have similar interests in permitting issues and similar capacity to disseminate information to a wide variety of other interested parties and the public.

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E. 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 the requestors knowledge, been released to the public and, therefore, qualifies as new. *Oregon Natural Desert Ass'n v. U.S. Dept. of Interior*, 24 F. Supp. 2d 1088, 1095 (D. Ore. 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).

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 Alliance 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 Committee for Responsible Medicine v. Dept. of Health and Human Services*, 2007 U.S. Dist. LEXIS 20855.

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA, ICL, and NEDC to oversee the activities of the EPA and its interactions with state regulatory agencies. In general, such organizations need to understand how and why a government has adopted various policies, whether formally or informally, or has chosen not to adopt a consistent policy, in order to review, comment on, and question the application of those policies in EPA actions and inactions and in state actions. As discussed above, NWEA, ICL, and NEDC participate in state rulemaking, in EPA review of state rulemaking, in permitting actions and the issuance of TMDLs, and in litigation.

This request seeks records concerning EPA's involvement in the development of state water quality credit trading policies for three states, a process in which some vested interests are involved but all other members of the public and representatives of other interests are excluded. Obtaining the requested records will allow NWEA, ICL, and NEDC to understand EPA's policy or policies and take appropriate action to ensure the requirements of the Clean Water Act are met in Oregon, Idaho, and Washington. Only by understanding the EPA's interpretation of its own regulations and guidance can the requestors meaningfully participate in their public oversight watchdog function. The requestors will also disseminate the information to organizations they work with across the country through listserves, websites, meetings, memoranda, and direct sharing of the records. This issue is likely to be of interest to journalists who have covered the use of water quality credit trading.

F. 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. It has no mechanism to obtain funds from the use of the records, it does not promote the records as a commercial concern, and its website contains no links to commercial interests. Rather, NWEA, NEDC and ICL are non-profit public interest environmental advocacy organizations working to protect public health and the environment in the Pacific 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 the requestor do not apply because NWEA, ICL, and NEDC have no commercial interest and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis that we

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may perform on the records sought.

Conclusion

In conclusion, for the reasons set forth above and in the additional materials filed herewith, NWEA, NEDC, and ICL are clearly entitled to receive a public interest fee waiver for the above-listed FOIA request and hereby seek a reversal of the fee waiver denial made on April 12, 2013.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell", with a large, stylized flourish at the end.

Nina Bell
Executive Director