



July 17, 2008

VIA FAX AND CERTIFIED MAIL

Larry F. Gottesman
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U.S. Environmental Protection Agency
Records, FOIA and Privacy Branch
Mail Code 2822T
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
FAX: (202) 566-2147

Re: FREEDOM OF INFORMATION ACT REQUEST REGARDING CLOTHIANIDIN

Dear Mr. Gottesman,

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

I. Description of Records Sought

Please produce all records¹ reflecting or relating to all FIFRA section 3 registrations and FIFRA section 18 emergency exemptions for the insecticide clothianidin, including, but not limited to, the following:

- 1) Any petitions for registration or amendment of registration for clothianidin uses, including but not limited to petitions for use on canola, corn, beets, cotton, pome fruit, grape, potato, and sorghum;

¹ The term "records" is used herein to mean anything denoted by the use of that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, all writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored) including, but not limited to, correspondence, minutes of meetings, memoranda, notes, e-mails, notices, facsimiles, charts, tables, presentations, orders, and filings.

- 2) Any correspondence between EPA and the registrants regarding any petitions for registration or amendment of registration;
- 3) Any records relating to EPA's decision to grant or deny any petition for registration or amendment of registration of clothianidin uses;
- 4) Any EPA analysis of the health and environmental effects of clothianidin, including, but not limited to, the following documents:
 - a) Environmental Fate and Effects Division (EFED) risk assessments for clothianidin dated Feb 20, 2003 and Nov 24, 2004, and any other EFED risk assessments for clothianidin;
 - b) An EFED estimated environmental concentrations memo for clothianidin dated July 6, 2004, and any other environmental concentration analysis or assessment for clothianidin;
 - c) A human health risk assessment for clothianidin with respect to residues on pome fruit dated January 6, 2005, and any other human health risk assessment for clothianidin;
- 5) Any submission by the registrant(s) related to a complete worker bee life cycle study for clothianidin;
- 6) Any submission by the registrant(s) related to the evaluation of exposure and effects on queen bees of clothianidin;
- 7) All Data Evaluation Records regarding any submission addressing the effects of clothianidin on pollinators;
- 8) All submissions or requests to EPA regarding the use of clothianidin on beets in Colorado, North Dakota, Oregon, or Wyoming pursuant to FIFRA section 18;
- 9) All submissions or requests to EPA regarding the use of clothianidin on onions in New Jersey pursuant to FIFRA section 18;
- 10) All records relating to or discussing submissions or requests to EPA regarding the use of clothianidin on beets and onions;
- 11) All records submitted to EPA relating to or discussing claimed pest outbreaks or pest emergencies with respect to beets and onions, including but not limited to the beet leafhopper, corn maggot, and onion maggot;
- 12) All records of communications with state agencies, other U.S. government agencies, or foreign governments regarding the health and environmental effects of clothianidin, including effects on pollinators;
- 13) Any documents relating to requests for data waivers for clothianidin;
- 14) Any documents relating to decisions by the Office of Pesticide Programs on any requests for data waivers for clothianidin;
- 15) Any incident reports (including but not limited to submissions filed pursuant to FIFRA § 6(a)(2)) concerning alleged adverse effects of clothianidin, and all documents related to any EPA analysis of such incident reports.

II. Request for a Fee Waiver

NRDC requests that EPA waive the fee that 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); 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 the FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 C.F.R. § 2.107(c)(1)(iii).

A. First 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). Specifically, the requested disclosure would satisfy the four elements identified at 40 C.F.R. § 2.107(l)(2).

The records described in Section I above will shed light on EPA’s regulatory decision to approve the use of the insecticide clothianidin on corn, cotton, apples, pears, grapes, sorghum, potato, and other crops. The records thus concern “the operations or activities of the government.” 40 C.F.R. § 2.107(l)(2)(i).

The tailored requests in this letter are designed to seek important materials that will contribute meaningfully and significantly to public understanding of EPA’s registration of clothianidin, and thus are likely to contribute significantly to the public’s understanding of those activities, *id.* § 2.107(l)(2)(ii), (iv). These records will inform the public on EPA’s decisionmaking process with respect to the relatively recent approval of this pesticide for widespread use in the United States. Currently, there are virtually no records available for public review regarding EPA’s registration decision for clothianidin. This includes the chemical manufacturers’ petitions to approve clothianidin on certain crops and EPA’s decision documents granting that approval under FIFRA. Without access to these records, NRDC and the public have no meaningful way to evaluate whether use of clothianidin will be safe for human health and the environment, as required by law. Disclosure of these records will also “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” 40 C.F.R. § 2.107(l)(2)(iii), because NRDC will disseminate a summary and analysis of newsworthy information conveyed in the requested records.

NRDC has a proven ability to digest and disseminate such information quickly and effectively. In addition to its website (www.nrdc.org) (homepage at Attachment 1), which is updated daily and draws approximately 2.7 million page views and 800,000 visits per month, NRDC has numerous other means to widely disseminate information to the public including numerous and varied publications, educational programs, media initiatives, and public interest litigation.

For example, NRDC publishes a magazine, *OnEarth*, on environmental and public health subjects of current interest, which is read by approximately 450,000 individuals through

subscriptions, sales at newsstands and bookstores, and access free of charge at <http://www.nrdc.org/onearth> (sample issue at Attachment 2). Similarly, NRDC publishes and distributes *Nature's Voice*, a newsletter with information regarding current environmental matters, five times a year to approximately 420,000 members nationwide and online at <http://www.nrdc.org/naturesvoice/default.asp> (sample issue at Attachment 3), as well as other newsletters and alerts. NRDC's *Earth Action* email list has more than 145,000 subscribers who receive biweekly information on urgent environmental issues (sample email at Attachment 4). This information is also made available through NRDC's online Action Center at <http://www.nrdc.org/action/default.asp> (Attachment 5). NRDC sends its *Legislative Watch* bulletin to more than 35,000 people biweekly during Congressional sessions (sample email bulletin at Attachment 6) and publishes the bulletin online at <http://www.nrdc.org/legislation/legwatch.asp> (Attachment 7). *This Green Life* is an electronic newsletter on environmentally sustainable living distributed by email to more than 60,000 subscribers (sample email at Attachment 8) and made available online at <http://www.nrdc.org/thisgreenlife/default.asp> (Attachment 9). NRDC issues press releases, participates in press conferences and interviews with reporters and editorial writers, and has over twenty staff members dedicated to communications work, *see* "Communications" staff list at <http://www.nrdc.org/about/staff.asp> (Attachment 10).

In addition, 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. *See, e.g.*, Attachment 11 (testimony of Gina M. Solomon, M.D., M.P.H., NRDC Senior Scientist, before United States Senate Committee on Environment and Public Works, Feb. 6, 2007), Attachment 12 (transcript, "Climate Change: Experts gauge fallout from G8 nations' nonbinding decision on global warming, E&ETV, *On Point*, July 12, 2005 (featuring NRDC Climate Center Deputy Director Dan Lashof)), Attachment 13 (transcript, "Protest Raised over New Tests of Naval Sonar," National Public Radio, *All Things Considered*, July 24, 2007 (featuring NRDC Marine Mammal Project Director Joel Reynolds)), Attachment 14 (conference panel outline, "Enforcement of Environmental Laws: Equalizing Effect on Compliance Efforts?," 2007 Environmental Law Conference at Yosemite, Oct. 19, 2007 (featuring NRDC Senior Attorney Michael E. Wall)), Attachment 15 (editorial, "California's cool(ing) opportunity," *San Francisco Chronicle*, Apr. 11, 2006 (co-authored by NRDC California Energy Program Director Devra Wang)), and Attachment 16 (publisher's notes to *Saving Energy, Growing Jobs: How Environmental Protection Promotes Economic Growth, Profitability, Innovation and Competition* (Bay Tree Publishing 2007), by NRDC Energy Program Director David B. Goldstein); *see also* Attachments 17-37, discussed below.

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) NRDC obtained through a court-enforced FOIA request records of the operations of Bush Administration's Energy Task Force, headed by Vice President Dick Cheney. It made those records available, along with analysis of selected excerpts and links to the administration's index of withheld documents, on NRDC's website at

<http://www.nrdc.org/air/energy/taskforce/tfinx.asp> (Attachment 17). NRDC's efforts helped to inform the public about an issue that, even before the records' release, had attracted considerable attention. *See, e.g.*, Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times* (Mar. 28, 2002), at A22 (Attachment 18); Bennett Roth, "Houston Energy-Drilling Firm Appears in Documents from Energy Department," *Houston Chronicle* (Apr. 12, 2002) (Attachment 19).

(2) NRDC obtained through a FOIA request a memorandum by ExxonMobil advocating the replacement of a highly respected atmospheric scientist, Dr. Robert Watson, as the head of the Intergovernmental Panel on Climate Change. NRDC used this memorandum to help inform the public about what may have been behind the decision by the Bush Administration to replace Dr. 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," (April 3, 2002) (Attachment 20); Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times* (April 4, 2002), at A19 (Attachment 21).

(3) NRDC incorporated information obtained through FOIA into a 2005 report, published and provided free of charge at NRDC's website, *see* <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*. *See* NRDC, *Sounding the Depths II* (Nov. 2005) (update to 1999 report) (Attachment 22). 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," National Public Radio, *All Things Considered*, July 24, 2007 (transcript at Attachment 13).

(4) 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* (March/April 2004) (Attachment 23).

(5) NRDC has used White House documents obtained through FOIA to inform the public about EPA's failures to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See* <http://www.nrdc.org/health/pesticides/natrazine.asp> (Attachment 24); *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) (Attachment 25).

(6) NRDC has obtained through FOIA information on the levels of arsenic in drinking water supplies across the country. NRDC incorporated much of the information into a report, *Arsenic and Old Laws* (2000), printed and made available online through

NRDC's website, *see* <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp> (Attachment 26), and provided analysis describing its significance and guiding 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) (Attachment 27).

(7) In 2000, NRDC used information obtained through FOIA to publish a report analyzing the impacts of manure pollution from large livestock feedlots on human health, fish and wildlife. *See* NRDC, *Spills & Kills* (Aug. 2000) (Attachment 28).

(8) In 1999, NRDC obtained through FOIA a Defense Department document, *History of the Custody and Deployment of Nuclear Weapons: July 1945 through September 1977*. The document attracted significant press attention once it was disclosed. *See, e.g.*, Walter Pincus, "Study Says U.S. Secretly Placed Bombs; Cold War Deployments Affected Mostly Allies," *Washington Post* (Oct. 20, 1999) at A3 (Attachment 29). One of NRDC's nuclear scientists, Robert Norris, published a detailed analysis of this document explaining its significance to the public. Robert S. Norris, William M. Arkin, and William Burr, "Where They Were," *Bulletin of Atomic Scientists* (Nov/Dec 1999) (Attachment 30).

(9) In 1996, NRDC obtained through FOIA test results regarding lead levels in the District of Columbia's drinking water supplies. NRDC made the test results public along with analysis explaining the significance of the results. *See* D'Vera Cohn, "Tap Water Safeguards Still Stalled; City Failed to Tell Some Residents of Excess Lead Contamination," *Washington Post* (Apr. 18, 1996) at J1 (Attachment 31).

(10) In 1989, NRDC obtained through FOIA testimony, previously suppressed by the first Bush administration, by federal experts who opposed oil drilling off the coasts of California and Florida. *See* Larry Liebert, "Oil Testimony Reportedly Quashed; Environmentalists say Federal Experts Pressured by Bush," *Orange County Register* (Oct. 5, 1989) at A6 (Attachment 32).

(11) In 1988, NRDC obtained through FOIA a report by the U.S. Fish and Wildlife Service that declared that the government's review of offshore oil drilling in Northern California was incomplete and overly optimistic. Reagan Administration officials had tried to keep the report secret and then repudiated it upon its release. *See* Eric Lichtblau, "Federal Report Blasts Offshore Oil Studies," *L.A. Times* (June 4, 1988) at A32 (Attachment 33).

(12) In 1982, NRDC obtained through a FOIA request an EPA memorandum stating that most air pollution monitors have repeatedly underestimated levels of toxic lead in the air. NRDC used the memorandum to inform the public about the consequences of EPA's proposal to relax restrictions on lead in gasoline. *See* Sandra Sugawara, "Lead in Air is Undermeasured, EPA Section Chief's Memo Says," *Washington Post* (July 11, 1982) at A6 (Attachment 34).

Disclosure of the requested documents is “likely to contribute significantly to public understanding” of EPA’s activities concerning clothianidin, 5 U.S.C. § 552(a)(4)(iii), because NRDC intends to disseminate information in the released records, and its analysis of such records, to its membership and to the broader public, through one or more of the many communications channels referenced above. 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. For example, information NRDC obtained through FOIA requests resulted in the following articles, in addition to those referenced above: Felicity Barringer, “Science Panel Issues Report on Exposure to Pollutant,” *New York Times* (Jan. 11, 2005) (Attachment 35); Katharine Q. Seelye, “Draft of Air Rule is Said to Exempt Many Old Plants,” *New York Times* (Aug. 22, 2003) (Attachment 36); Don Van Natta, Jr., “E-Mail Suggests Energy Official Encouraged Lobbyist on Policy,” *New York Times* (Apr. 27, 2002) (Attachment 37).

Clothianidin is an insecticide of increasing concern to the public, especially for potentially harmful impacts on bees and other pollinators. The New York State Department of Environmental Conservation denied an application to register four pesticide products containing clothianidin in July 2007, in part because of concern for harm to pollinators. (Attachment 38). Pollinators play a crucial role in ensuring the abundance of the food supply, and contribute tens of billions of dollars of value to agriculture. The public therefore has a particular interest in the basis for EPA’s decision to register clothianidin under FIFRA.

NRDC filed more than a dozen similar FOIA requests between July and November 2002, with respect to the pesticides azoxystrobin, bifenthrin, diflubenzuron, halosulfuron, halosulfuron-methyl, imidacloprid, indoxacarb, mesotrione, propiconazole, sulfentrazone, thiophanate, triflumizole, and zeta-cypermethrin. EPA granted NRDC a fee waiver for all of these prior FOIA requests. NRDC files this FOIA request only after attempting unsuccessfully to obtain the clothianidin documents from EPA without being required to file a formal request.

B. Second 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). NRDC is a not-for-profit organization with no commercial interest. 40 C.F.R. § 2.107(l)(3)(i). “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted).

The FOIA fee waiver provision was amended in 1986 to make fee waivers easier to obtain, particularly for non-commercial requesters. 132 Cong. Rec. S14,298 (Sept. 30, 1986) (the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters”) (Sen. Leahy). According to Senator Leahy, one of the principal architects of the legislation, the main purpose of the fee waiver amendment 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.” 132 Cong. Rec. S16,496 (Oct. 15, 1986) (Sen. Leahy). Courts have repeatedly cited this statement of Senator Leahy as authoritative evidence of the legislative intent behind the

FOIA fee waiver provision. *See, e.g., Judicial Watch*, 326 F.3d at 1315; *Cnty. Legal Servs. v. U.S. Dep't of Housing & Urban Dev.*, 405 F. Supp. 2d 553, 555 (E.D. Pa. 2005); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 856 (D. Colo. 1994).

NRDC's interest in obtaining the requested materials is to serve the public interest by disclosing presently non-public information about the basis of EPA's decision to register the insecticide clothianidin for use in the United States.

III. Willingness to Pay Fees Under Protest

Please provide the records above irrespective of the status and outcome of your evaluation of NRDC's fee category assertion and fee waiver request. In order to prevent delay in EPA's provision of the requested records, NRDC states that it will, if necessary and under protest, pay fees in accordance with 40 C.F.R. § 2.107(c)(1)(iv), (c)(2), and (d). Please consult with me, however, before undertaking any action that would cause the fee to exceed three hundred dollars. Such payment will not constitute any waiver of NRDC's right to seek administrative and judicial review of any denial of its fee waiver request or rejection of its fee category assertion.

IV. Conclusion

I trust that, in responding to this request, EPA will comply with all relevant deadlines and other obligations set forth in FOIA and EPA's regulations. *See, e.g.,* 40 C.F.R. § 2.014(a)-(d), (f).

Please produce the records above by sending them to me at 1200 New York Ave., NW, Suite 400, Washington DC, 20005. Please produce them on a rolling basis; at no point should EPA's search for – or deliberations concerning – certain records delay the production of others that EPA has already retrieved and elected to produce.

In the event EPA concludes that some of the records requested above may already be publicly available, I will be happy to discuss those conclusions in an effort to narrow the scope of this request. Please do not hesitate to call or email me with questions.

Thank you for your prompt attention to this request.

Sincerely,



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Enclosures (by certified mail)