

November 7, 2022

Michal Freedhoff, Assistant Administrator
Office of Chemical Safety and Pollution Prevention
United States Environmental Protection Agency
Mail Code 7101M
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

By pdf attachment filed via Internet portal at: [FOIA.gov](https://www.foia.gov)

FREEDOM OF INFORMATION ACT REQUEST

Re: Request for information pertaining to EPA's denial of Section 21 Petition for Rulemaking Under Toxic Substances Control Act (TSCA) Section 6; Docket No. EPA-HQ-OPPT-2022-0593, expedited processing and waiver of fees.

Dear FOIA Officer:

We, Daniel Galpern and David Bahr, on behalf of Donn J. Viviani, John Birks, Richard Heede, Lise Van Susteren, James E. Hansen, Climate Science, Awareness and Solutions, and Climate Protection and Restoration Initiative ("Requesters"), submit this request for records under the Freedom of Information Act. 5 U.S.C. § 552, *et seq.* As detailed below, requesters seek information in the Agency's custody or control regarding its recent decision to deny their petition for rulemaking submitted under Section 6 of the Toxic Substances Control Act (TSCA), Docket No. EPA-HQ-OPPT-2022-0593. I request that copies of any responsive records (preferably in digital format) be provided rather than being afforded an opportunity to personally inspect them.

Disclosure of the requested information is likely to raise significant questions regarding the lawfulness of the Agency's denial of the TSCA rulemaking petition underlying this request. Public access to the information sought herein may cast doubt about the propriety of Agency conduct and could reasonably be expected to implicate the current federal regulatory context for greenhouse gas ("GHG") emissions and other pollution deriving from manufacture (including production and importation), processing, distribution, use and disposal of fossil fuels. Accordingly, Requesters seek expedited processing of this request as provided by FOIA. 5 U.S.C. § 552(a)(6)(E); 40 C.F.R. § 2.104(f). Finally, Requesters — who have no commercial interest in the records at issue — seek a waiver of all costs and fees associated with this request because disclosure of the requested information will benefit the public interest and thus invokes FOIA's mandatory fee waiver provision. 5 U.S.C. § 552(a)(4)(A)(iii).

THE CONTEXT FOR THIS REQUEST

Requesters seek to ensure the timely phase out of greenhouse gas (“GHG”) pollution within reach of US law.

On June 16, 2022, Requesters petitioned for a determination by the federal Environmental Protection Agency (“EPA” or “the Agency”) that the continuing manufacture, processing, distribution, use and disposal of certain chemicals and mixtures presents *an unreasonable risk of injury to health or the environment*. Such a determination would authorize and compel the Agency to undertake a rulemaking to impose one or more requirements as necessary, until the point that the unreasonable risk is eliminated.

EPA’s obligations to render that determination, and subsequently to commence determined action, stems from the Toxic Substances Control Act¹ (“TSCA,” or “the Act”) and other US law. Timely and effective Agency action under the Act also would partly uphold the nation's relevant obligation under international law. This is so because, pursuant to the United Nations Framework Convention on Climate Change (“UNFCCC”), nations are obliged to “protect the climate system for the benefit of present and future generations of humankind.”²

Consistent with the Paris Agreement to the UNFCCC, the Biden Administration's recent filing with the UNFCCC Secretariat committed the nation to a wide ranging decarbonization effort. Specifically, by that submission, the US committed to reduce net GHG emissions by 50-52 percent below 2005 levels by 2030; to achieve “100 percent carbon pollution-free electricity” by 2035; and “*to exceed* [] a straight-line path to achieve net-zero emissions, economy-wide, by no later than 2050.” (Emphasis added).³

¹ 15 U.S.C.A. §§ 2601 to 2697, as amended by 130 Stat. 448 (June 22, 2016) (the “Frank R. Lautenberg Chemical Safety for the 21st Century Act”).

² UNFCCC, Article 3.1. *See also* the 1972 Rio Declaration on Environment and Development, Principle 7 (“States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command”) at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.II_Declaration.pdf.

³ The United States of America Nationally Determined Contribution: Reducing Greenhouse Gases in the United States: A 2030 Emissions Target, submitted pursuant to Article 4 of the Paris Agreement to the United Nations Framework Convention on Climate Change, April 21, 2021, at pages 3 and 6. Available at: <https://www4.unfccc.int/sites/indcstaging/UploadedDocuments/United%20States%20First%20NDC%20April%202021%20Final.pdf>.

Requesters agree with President Biden that present and anticipated impacts from global warming and ocean acidification impose an “existential threat” to the United States and other States.⁴ But actual US practice to date under federal law is grossly insufficient; we have scarcely begun to decarbonize, even as the climate and pollution toll imposed on the nation and others mounts. Accordingly, Requesters here have demanded that the Agency render the specific determination, pursuant to TSCA §6, namely that the subject chemical substances and mixtures “present an unreasonable risk of injury to health or the environment.” 15 USC §2605. Indeed, Requesters provided evidence in the Petition, along with material that is otherwise reasonably available to the Agency, to establish that the subject chemicals and mixtures present an imminent and unreasonable risk of serious or widespread injury to health or the environment. TSCA §7, 15 USC 2606.

The aforementioned “unreasonable risk of injury to health or the environment” determination is a prerequisite for EPA to commence rulemaking under TSCA, while the “imminent and unreasonable risk of serious or widespread injury to health or the environment” is a prerequisite for the Agency to take legal action.

One central factual predicate and two legal suppositions undergirded the Rulemaking Petition.

As to the first, in their Petition for Rulemaking, Requesters averred that the atmospheric concentrations of key greenhouse gases, including carbon dioxide (CO₂) and methane (CH₄), are already well into the danger zone and must be dialed back to eliminate their imposition on humanity and nature.

As to the second, under TSCA the Agency is authorized, upon its relevant determination, and within the jurisdiction of the United States, to impose requirements upon appropriate parties (a) to restrict or phase-out the manufacture (including production and importation) and, as warranted, the processing, distribution, use, or disposal, of the subject chemicals and mixtures, and (b) to compel industry to remove and securely sequester legacy GHG emissions.

Notwithstanding having been presented voluminous factual documentation and legal analysis supporting the Petition, the EPA denied the Petition on September 14, 2022. *See, EPA, Toxic Substances Control Act (TSCA) Section 21 Petition for Rulemaking Under TSCA Section 6; Reasons for Agency Response; Denial of Requested Rulemaking*, 87 Fed. Reg. 57665 (Sept. 21, 2022).

This FOIA request is made in furtherance of the initiatives and efforts described herein and there is a time sensitive need for access to the requested records. The public health and environmental advocacy activities to be informed by disclosure of these records are time sensitive; ***time is of the essence*** regarding this request. We therefore ask that you take all steps necessary to provide a prompt response. In this regard, we note that for any request taking longer than ten days to

⁴ Fact Sheet, President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies, The White House, April 22, 2021. Available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-bidensets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-usleadership-on-clean-energy-technologies/>.

process, the Agency must inform the requester “(i) the date on which the agency originally received the request; and (ii) an estimated date on which the agency will complete action on the request.” 5 U.S.C. § 552(a)(7)(B). Accordingly, we ask that you immediately inform us of the date you received this request. We further ask that you provide an estimated date by which we can expect completion of EPA’s response to our FOIA request.

RECORDS REQUEST

Please produce any record, including any spreadsheet, analysis, memorandum, document, or other communication, in electronic format to the extent possible, in EPA’s⁵ possession or control, on which the Agency relied to conclude, or that otherwise supports its position, that:

1. EPA “will achieve,” “through benefits from actions already implemented, as well as future anticipated mitigation efforts” (1) a nationwide “GHG reduction target of 50-52% below 2005 levels by 2030” and (2) “net zero emissions by no later than 2050.” 87 Fed. Reg. 57665, 57670, and
2. The Agency’s exercise of the authorities under TSCA §6(a) “could lead to rulemaking that would not achieve emission reductions more expeditiously or efficiently than those achieved through other nationwide efforts.” *Id.*

The scope of these requests is intended to cover such records in the possession of, generated by, or received by the Agency during the period of June 16, 2022 through the date of search.

For responsive records, Requesters seek all parts and versions of that record, including all versions of spreadsheets and entire email threads and attachments. For the purposes of this request, “record” shall include at least any spreadsheet, assessment, analysis, memorandum, report, publication, or related document regardless of publication status.

No non-exempt information contained within otherwise responsive records should be withheld as “non-responsive.” *See, e.g., Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 676-79 (D.C. Cir. 2016) (notwithstanding FOIA’s nine exceptions, if a record contains information responsive to a FOIA request, the government must disclose the entire record); *see also Institute for Policy Studies v. U.S. Cent. Intelligence Agency*, 388 F. Supp. 3d 51, 53 (D.D.C. 2019) (“If any of the [non-exempt] information on a page of the document falls within the subject matter of a FOIA request, then that entire page should be included as within the scope of the request.” (Citation omitted)). If we can be of assistance in your development of search query terms, please do not hesitate to contact us.

⁵ This request seeks records in the possession or control of the Environmental Protection Agency and in this regard should be construed to include records your office created or shared with any other entity as well.

This request is not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you, or your office, have destroyed or decide to withhold any documents that could be reasonably construed to be responsive to this request, we ask that you indicate this fact and the reasons therefore in your response.

FEE WAIVER REQUEST

In accordance with 5 U.S.C. § 552(a)(4)(A), and EPA’s implementing regulations, Requesters seek a waiver of all fees associated with providing information responsive to this FOIA request. Requesters have no commercial incentive to seek the requested information and there is a substantial public benefit that will accrue from its disclosure. As noted by the D.C. Circuit, “Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal quotation marks and citations omitted). Federal agencies have waived fees for all of Requesters’s FOIA requests to date.

Under the FOIA, a fee waiver or reduction applies where (1) “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 (2) disclosure “is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

As explained more fully below, this FOIA request satisfies the factors listed in the EPA’s governing regulations for the waiver or reduction of fees as well as requirements of fee waiver under the FOIA statute – that “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)(iii), *see also* 40 C.F.R. § 2.107(l).

THE FOUR PUBLIC INTEREST CRITERIA

According to EPA’s implementing FOIA regulations, the Agency will consider the following four criteria in weighing whether “disclosure of the information is in the public interest”:

1. Whether the subject of the request concerns identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.
2. Whether disclosure of the requested information would be meaningfully informative about government operations or activities to be “likely to contribute” to an increased public understanding of those operation or activities.
3. Whether the disclosure would contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the requester’s individual understanding.
4. Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

40 C.F.R. § 2.107(l)(2)(i-iv).

All four criteria weigh heavily in Requesters' favor.

- 1. The subject of the request must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote. 40 C.F.R. § 2.107(l)(2)(i).**

The EPA Freedom of Information Act Guide expressly concedes that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or activities of the government. There can be no question that this is such a case in the context in which this FOIA request is filed.

- 2. Disclosure of the requested information must be meaningfully informative about government operations or activities to be “likely to contribute” to an increased public understanding of those operation or activities. 40 C.F.R. § 2.107(l)(2)(ii).**

The Freedom of Information Act Guide makes it clear that, in the EPA's view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are “likely to contribute” to an understanding of the Agency's decisions and implementation of FOIA because they are not otherwise in the public domain and are not accessible other than through this FOIA request.

As noted above, the requested information would inform the public about federal efforts, actions and activities pertaining to federal plans, vel non, to reduce GHG pollution and its sources. Requesters have the intent and demonstrated capacity to disseminate the information to a variety of audiences, which will ensure contribution to public understanding in addition to using the information in legislative and legal efforts in furtherance of their work to reduce the impacts of GHG on the environment.

- 3. The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the requester's individual understanding. 40 C.F.R. § 2.107(l)(2)(iii).**

Requesters have the intent and demonstrated capacity to disseminate the information to a variety of audiences, which will ensure “a reasonably broad” contribution to public understanding. Moreover, although “FOIA does not require that a requester be able to reach a ‘wide audience,’” *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1116 (D.C. Cir. 2015), it is noteworthy that Requesters have regularly communicated to wide audiences through the CPR Initiative website (cpreli-mate.org) and media outreach. They have the ability to *digest* the potentially technical information that is responsive to its Request and the intention, as well as the means, to synthesize and *disseminate* this information to the general public. In evaluating this factor, the Agency looks at

the identity of the requester to determine whether it has the capability and intention to understand and disseminate the requested information.⁶

The record of this matter makes clear that Requesters easily satisfy both prongs of this fee waiver element.

In combination, Requesters Hansen, Viviani, Birks, Heede and Van Susteran retain exceptionally substantial scientific and other technical (including policy-related) expertise and also very substantial experience in communicating related information to the public via press releases, newspaper op-ed pieces, media interviews, scientific papers and reports, et al. A summary description of their relevant such expertise and experience is provided at <https://cprclimate.org/about/leadership/>.

In the instant matter, Petitioners' relevant expertise and ability to convey relevant scientific, technical and policy-relevant information is amply demonstrated by a review of their June 16, 2022 submission to the Agency. *See Petition to EPA to Phase Out Greenhouse Gas Pollution to Restore and Stable and Healthy Climate*. Part I of which concerns the relevant law and policy, and Part II of which concerns the relevant science. Both parts are readily available and hereby incorporated by reference from <https://cprclimate.org/about/actions-campaigns/petition-to-epa/>.

In addition, individual requesters serve variously as members of the Board of Directors (Viviani, Birks and Van Susteran) and Board of Advisors (Hansen, Heede) of the Climate Protection and Restoration Initiative, a non-profit, public interest organization that is among the requesters herein. Undersigned attorney Dan Galpern, in addition to running his own law firm, serves as the General Counsel and Executive Director of that organization. Through CPR Initiative's activities and website, Requesters communicate with the public. This includes through op-ed pieces, videos or other media that are republished at CPR Initiative's website for the general public. *See*: <https://cprclimate.org/access/videos/>. It includes, as well, press releases and webinars that CPR Initiative has sponsored. *See*, for example, the partial archive maintained <https://us5.campaign-archive.com/home/?u=92664c1bad484e654d3807408&id=8d0c7e501b>.

It includes, as well, op-ed pieces and articles featuring CPR Initiative's policy-related advocacy that the group has reprinted (with permission) on its website. *See*, for instance, <https://cprclimate.org/the-environmental-statute-that-can-save-the-world/> (reprinting a recent Washington Monthly op-ed by Galpern); <https://cprclimate.org/whats-bidens-next-move-on-climate/> (reprinting a January 2022 American Spectator article by former EPA General Counsel E. Donald Elliott on CPR Initiative's advocacy efforts); <https://cprclimate.org/what-climate-levers-are-left-to-pull/> (reprinting an article by the writer Bill McKibben based on his November 2021 interview of Galpern at the COP26 meeting in Glasgow); and <https://cprclimate.org/biden-should-impose-a-carbon-fee-immediately/> (reprinting a June 2021 Boston Globe op-ed by Hansen and Galpern).

⁶ 40 C.F.R. § 2.107(l)(2)(iii).

It includes, as well, Requesters’ ability and recent experience in co-sponsoring and participating in CPR Initiative’s first public hearing on the subject: *What more should the United States Do on Climate?* See <https://cprclimate.org/boulder-colorado-hearing-nov-1-2022/>.

4. Disclosure must be “likely to contribute ‘significantly’ to public understanding of government operations or activities” by adding new information to the public’s understanding of the agency’s operations or activities. 40 C.F.R. § 2.107(l)(2)(iv).

The fourth factor asks whether disclosure of the requested information will increase the current level of public knowledge or understanding, or whether it is merely duplicative of information already in the public sphere.⁷ To Requesters’ knowledge, the information they seek is neither references or sources in EPA’s September 2022 rejection letter, nor otherwise publicly available. The contribution to public understanding is particularly significant here, where highly technical information is requested, Requesters have the ability and intent to digest and disseminate it, and it is not otherwise available in the public sphere.⁸ Therefore, the information requested will significantly enhance the public’s understanding of the efficacy and prospect for EPA’s GHG-related activities to meet, or fail to meet, the United States Nationally Determined Contribution to combatting dangerous climate change. Requesters therefore satisfy this fee waiver threshold as well.

THE TWO COMMERCIAL INTEREST CRITERIA

Requesters are entitled to a fee waiver because the requested information is not sought to further their commercial interests. They have presented facts supporting this waiver request that easily satisfy the two commercial interest factors in the Agency’s regulations.

1. Whether the requester has a commercial interest that would be furthered by the requested disclosure. (40 C.F.R. § 2.107(l)(3)(i)).

The Requesters have no direct commercial interest in this request. Rather, they intend to shed light on government activities pertaining to GHG. Therefore, this factor tips completely in favor of a waiver of fees.

2. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.” (40 C.F.R. § 2.107(l)(3)(ii)).

Because Requesters have no direct commercial interest in the requested records, the public

⁷ 40 C.F.R. § 2.107(l)(2)(iv).

⁸ *Federal Cure v. Lappin*, 602 F.Supp.2d, 197, 205 (D.D.C. 2009) (explaining that any dissemination of “highly technical” information where none is currently available, will enhance public’s understanding of it).

interest is greater than any commercial interest. It is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to the public’s understanding of the degree to which the Executive Branch is making good on its federal and international commitments to protect the US public and the planet from dangerous climate change.

Because the public will be the primary beneficiary of this requested information, please waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4).

EXPLANATION OF ANY WITHHOLDING DECISION

In 2016, Congress added an additional requirement by amending the FOIA to codify a “foreseeable harm” standard into the Act. *See* FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538; *Rosenberg v. Dep’t of Def.*, 342 F. Supp. 3d 62, 72 (D.D.C. 2018). The amended FOIA now provides that an agency shall withhold information “*only if* . . . the agency reasonably foresees that disclosure would harm an interest protected by” a FOIA exemption or “disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A) (emphasis added). As a result of this amendment, EPA must “release a record—even if it falls within a FOIA exemption—if releasing the record would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law.” *Rosenberg*, 342 F. Supp. at 3d at 73. “Congress adopted the FOIA Improvement Act in part out of ‘concerns that some agencies [were] overusing FOIA exemptions that allow, but do not require, information to be withheld from disclosure.’ S. REP. NO. 4, 114th Cong., 1st Sess. 2 (2015); *see also* H.R. REP. NO. 391, 114th Cong., 2d Sess. 9 (2016) (‘[T]here is concern that agencies are overusing these exemptions to protect records that should be releasable under the law.’).” *Reporters Comm. for Freedom of Press v. Fed. Bureau of Investigation*, No. 20-5091, Slip Op. at 27 (D.C. Cir, July 2, 2021). “Congress added the distinct foreseeable harm requirement to foreclose the withholding of material unless the agency can ‘articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld.’” *Id.* As you formulate your response to this request, please keep in mind the congressional intent that “[a]gencies cannot rely on ‘mere speculative or abstract fears, or fear of embarrassment’ to withhold information. S. REP. NO. 4, at 8. Nor may the government meet its burden with ‘generalized assertions[.]’” *Id.* (quoting *Machado Amadis v. Department of State*, 971 F.3d 364, 371 (D.C. Cir. 2020)) (internal punctuation deleted)).

Notwithstanding FOIA’s foreseeable harm standard, should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for Requesters to appeal the denial. To comply with legal requirements, the following information must be included:

Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and

Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to Requesters as required by 5 U.S.C. § 552(b).

Finally, even if you ultimately conclude that the requested records are exempt from mandatory disclosure under FOIA, we request that you disclose them nevertheless, pursuant to the Agency’s powers of discretionary release under the FOIA. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (reasoning that application of agency FOIA policies may require “some balancing and accommodation,” and noting that “Congress did not design the FOIA exemptions to be mandatory bars to disclosure”); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) (observing that “FOIA’s exemptions simply permit, but do not require, an agency to withhold exempted information”). In this regard, it is well settled that agencies may make “discretionary disclosures” of exempt information, as a matter of their administrative discretion, where he is not otherwise prohibited by law from doing so. *See, e.g., CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1334 n.1 (D.C. Cir. 1987) (explaining that agency’s FOIA disclosure decision can “be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions.”); *see also FOIA Update, Vol. VI, No. 3*, at 3 (“OIP Guidance: Discretionary Disclosure and Exemption 4”) (“[A]gencies generally have discretion under the Freedom of Information Act to decide whether to invoke applicable FOIA exemptions.”). Discretionary disclosure in this instance would serve the public interest of educating citizens regarding the operations and activities of the Agency regarding the NLG export and pipeline location issues that are the subject of this request.

CONCLUSION

For the foregoing reasons, Requesters respectfully request that EPA promptly provide the requested information and waive any fees associated with that response. Please do not hesitate to let us know if we can help you in your efforts to publicly disclose the important information contained in the requested documents. We stand ready to answer any questions you may have.

Under penalty of perjury, we hereby affirm that the foregoing is true and correct to the best of our knowledge and belief.

Sincerely,

s/ Daniel M Galpern

Daniel Galpern, Owner and Chief Counsel, and

s/ David Bahr

Of Counsel

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