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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

| | |
|---|---|
| FARMWORKER JUSTICE and EARTHJUSTICE,<br><br>Plaintiffs,<br>v.<br><br>U.S. ENVIRONMENTAL PROTECTION AGENCY,<br><br>Defendant. | Case No.<br><br>**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**<br><br>(Freedom of Information Act Case) |

## INTRODUCTION

1. Plaintiffs Farmworker Justice and Earthjustice (together, "Plaintiffs") bring this action to compel the U.S. Environmental Protection Agency ("EPA") to release records that could shed light on EPA's post-inauguration decision to revisit crucial elements of two federal rules safeguarding workers, families, and communities from pesticide poisoning and other injuries related to exposure to pesticides: the Agricultural Worker Protection Standard ("WPS") and Certification of Pesticide Applicators Rule ("CPA Rule"). EPA's failure to release these records is a clear violation of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In addition, EPA's failure deprives the public of important information that could demonstrate the considerable influence the agriculture and pesticide industries, as well as state departments of agriculture closely aligned with these industries, have over EPA's rulemaking decisions, putting our public health and welfare at risk.

2. In December 2017, EPA announced its intention to revise aspects of the WPS and CPA Rule that protect workers, families, and communities from the dangers of harmful pesticides. *See* EPA, Certification of Pesticide Applicators Rule; Reconsideration of Minimum Age Requirements, 82 Fed. Reg. 60,195 (Dec. 19, 2017); EPA, Agricultural Worker Protection Standard; Reconsideration of Several Requirements and Notice about Compliance Dates, 82 Fed. Reg. 60,576 (Dec. 21, 2017).

3. On December 22, 2017, Earthjustice submitted a FOIA request on behalf of itself and Farmworker Justice seeking records pertaining to a November 2017 meeting of EPA's Pesticide Program Dialogue Committee and EPA's post-inauguration communications and meetings with state departments of agriculture and members of the agriculture and pesticide industries. *See* Letter from Jonathan J. Smith, Attorney, Earthjustice, to Nat'l Freedom of Info. Officer, EPA (Dec. 22, 2017) ("FOIA Request" or "Request"), attached as Exhibit 1. The requested records could shed light on the reasoning behind EPA's decision to revisit critical aspects of the WPS and CPA Rule so soon after EPA enacted important revisions to these rules.

4. EPA's response to the FOIA request was due no later than January 24, 2018. Yet January 2018 has come and gone—along with February and March—with no response from EPA. Plaintiffs are entitled to immediate release of the requested records.

## PARTIES

5. Plaintiff FARMWORKER JUSTICE is a 501(c)(3) non-profit organization based in Washington, D.C. that serves migrant and seasonal farmworkers across the United States. Among other activities, Farmworker Justice partners with farmworkers to advocate for better living and working conditions, including adequate protections against exposure to toxic pesticides. To help empower farmworkers to voice their concerns effectively and to educate policymakers and the public at large, Farmworker Justice regularly collects information pertaining to the health and safety of farmworkers—including information obtained through FOIA—and disseminates it to farmworkers and the public through media campaigns, internet advocacy, and other effective communications strategies. As the leading national advocacy organization for migrant and seasonal farmworkers, Farmworker Justice has shared information and provided commentary at numerous conferences, on radio and television, and in major newspapers nationwide.

6. Plaintiff EARTHJUSTICE is a 501(c)(3) non-profit environmental and public health law organization headquartered in this judicial district at 50 California Street, Suite 500, in San Francisco. Among other activities, Earthjustice works with farmworkers, organizations devoted to protecting farmworkers' rights, scientists, and concerned citizens to safeguard children, workers, rural communities, endangered species, and the environment from exposure to dangerous pesticides. Earthjustice uses information about government oversight of pesticides—including information obtained through FOIA—to advocate for more appropriate and stricter pesticide safety regulations on behalf of its partners, supporters, and clients. In addition, Earthjustice disseminates information about pesticides and other threats to public health to its supporters and the public both directly through its website, its email newsletter, and its quarterly print magazine and indirectly by sharing this information with partners and clients who, in turn, distribute the information to their networks of supporters and allies. Earthjustice employs attorneys, communications professionals, lobbyists, and other experts who fight for stronger protection from pesticides for people and the environment before courts, the media, and elected officials in California and Washington, D.C.

7. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY is a federal agency as defined in 5 U.S.C. §§ 551(1) and 552(f)(1). Congress has charged EPA with

preventing unreasonable risk of injury to human health and the environment by controlling the manufacture, distribution, and use of pesticides. On information and belief, EPA has possession or control of the records Plaintiffs seek.

## JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (Federal Question) and 5 U.S.C. § 552(a)(4)(B) (FOIA).

9. Venue is proper in this judicial district pursuant to 5 U.S.C. § 552(a)(4)(B) because Plaintiff Earthjustice has its principal place of business within this district. *See id.* § 552(a)(6)(A)(i).

10. Intradistrict assignment is proper in the Oakland Division because Plaintiffs reasonably believe that this action may be related to *Pineros y Campesinos Unidos del Noroeste v. Pruitt,* No. 17-cv-03434-JSW (N.D. Cal. Mar. 21, 2018) (order granting Plaintiffs' motion for summary judgment), an action that is pending in this division, and because Plaintiff Earthjustice has its principal place of business in San Francisco County. *See* N.D. Cal. L.R. 3-2, 3-12. Plaintiffs intend to file an Administrative Motion to Consider Whether Cases Should be Related after conferring with counsel for EPA.

## FACTUAL BACKGROUND

### *The Agricultural Worker Protection Standard*

11. The Agricultural Worker Protection Standard, promulgated pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, is a federal regulation "intended to reduce the risks associated with occupational pesticide exposure to workers, handlers and their families, and to protect others and the environment from risks of pesticide use in agricultural production." *See* EPA, Agricultural Worker Protection Standard Revisions, 80 Fed. Reg. 67,496, 67,501 (Nov. 2, 2015) ("WPS"). After more than 15 years of study and stakeholder meetings, EPA finalized revisions to the WPS on November 2, 2015—over two decades after the rule was originally promulgated. *Id.* at 67,499.

12. EPA estimated that the WPS, as revised, would avoid or mitigate up to 73% of annual, reported pesticide poisonings, while also "reduc[ing] chronic health problems among workers and [pesticide] handlers by reducing daily pesticide exposures, and thereby improving the

quality of life throughout their lives, resulting in a lower cost of health care and a healthier society." *Id*. at 67,499, 67,502. EPA acknowledged that those at risk of exposure to pesticides include "vulnerable groups (such as minority and low-income populations, child farmworkers, and farmworker families)." *Id.* at 67,496.

13. In revising the WPS, "EPA [sought] to ensure those who make pesticide use decisions (employers) internalize the effects of their decisionmaking rather than passing on the costs associated with these decisions (risks of pesticide exposure) to others (workers and handlers)." *Id*. at 67,501.

14. Among other improvements, the revised WPS protects child and adolescent farmworkers by imposing for the first time a minimum age requirement of 18 years old for pesticide handlers and workers who enter recently sprayed fields, unless they are working on an establishment that is owned or operated by members of their immediate family. *See* 40 C.F.R. §§ 170.309(c), 170.605(a). EPA recognized that this minimum age requirement is necessary because "adolescents' bodies and judgment are still developing," rendering them both more vulnerable to pesticide exposure and more likely to take risks with pesticides that "put[] themselves, others, and the environment at risk." 80 Fed. Reg. at 67,526.

15. In addition, the WPS requires agricultural employers to provide pesticide use and safety information to farmworkers' "designated representatives." *See* 40 C.F.R. § 170.311(b)(9). This added protection was designed to provide farmworkers with "more access to information related to pesticides used in their workplace," given that "a significant number of workers and handlers face disadvantages that can reasonably be expected to make them hesitant to ask their employers for information relating to their pesticide exposure." 80 Fed. Reg. at 67,512–13. To illustrate the need for the designated representative requirement, EPA referenced a comment "describ[ing] a situation where a farmworker advocacy organization requested [pesticide use and safety] information from an employer on behalf of two ill workers, but their request was denied because the workers themselves did not make the request." *Id.* at 67,512.

16. The WPS also establishes an "application exclusion zone" requirement to reduce farmworkers' and bystanders' exposure to pesticides through "drift or direct spray events." *Id.* at

67,524; *see* 40 C.F.R. § 170.505(b). This requirement directs pesticide applicators to immediately suspend application if an unauthorized individual enters the application exclusion zone, "essentially a horizontal circle surrounding the application equipment that moves with the application equipment." 80 Fed. Reg. at 67,522. EPA explained that the application exclusion zone requirement is necessary because avoidable drift and direct spray events had continued to occur under the prior rule, and EPA's evaluations of pesticide safety "presume that no workers or other persons are being sprayed directly." *Id.* at 67,524.

***Certification of Pesticide Applicators Rule***

17. The Certification of Pesticide Applicators Rule, promulgated pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, establishes training and certification requirements to ensure that workers know how, when, and where to handle and apply the most toxic pesticides on the market—called restricted use pesticides ("RUPs"). *See* EPA, Certification of Pesticide Applicators, 82 Fed. Reg. 952 (Jan. 4, 2017) ("CPA Rule"). EPA finalized revisions to the CPA Rule in January 2017, after a multi-year process that included extensive stakeholder review and input from interested parties, and following a number of incidences of serious harm—including deaths—resulting from the improper application of RUPs in agricultural fields and homes. *See, e.g.*, *id.* at 963.

18. EPA noted that several factors prompted its decision to revise the CPA Rule, including "[t]he changing nature of pesticide labeling, risks associated with specific methods for applying pesticides, adverse human health and ecological incidents, inadequate protections for noncertified applicators of RUPs, an uneven regulatory landscape, and outdated and obsolete provisions in the rule related to the administration of certification programs by Tribes and Federal agencies." *Id*. at 962.

19. As currently enacted, the CPA Rule provides much needed and long overdue protections for those at greatest risk of exposure to RUPs, including but not limited to a "minimum age requirement" for applicators of RUPs. *Id.* at 952; *see also* 998 ("[T]he final rule prohibits persons under 18 years old from becoming certified to apply RUPs").

20. According to EPA, the revised CPA Rule could prevent up to 1,000 acute illnesses each year. *See* EPA, *Revisions to EPA's Certification of Pesticide Applicators Rule*, (2016), https://www.epa.gov/sites/production/files/2016-12/documents/cert_final_rule_factsheet_0.pdf.

***EPA's Decisions to Revisit Important Pesticide Safety Protections***

21. On December 19, 2017, EPA published a notice in the Federal Register, announcing that "it ha[d] initiated a rulemaking process to revise the minimum age requirements in the Certification of Pesticide Applicators rule." *See* 82 Fed. Reg. at 60,195. At this time, the revisions had not yet gone into effect: after the inauguration, EPA delayed the effective date of the CPA Rule five times, pushing back the initial effective date of March 6, 2017 to May 22, 2018. *But see Pineros y Campesinos Unidos del Noroeste v. Pruitt,* No. 17-cv-03434-JSW (N.D. Cal. Mar. 21, 2018) (order granting Plaintiffs' motion for summary judgment) (vacating five rules that purported to delay the CPA Rule's effective date and declaring that the CPA Rule went into effect on March 6, 2017). Nevertheless, EPA "determined that further consideration of [CPA Rule's] minimum age requirements [wa]s warranted," based on comments received in response to its solicitation for information about "regulations that may be appropriate for repeal, replacement or modification as part of the President's Regulatory Reform Agenda efforts." 82 Fed. Reg. at 60,196. EPA also explained that "comments on the minimum age requirements in the certification rule . . . were discussed at the November 2, 2017, meeting of the Office of Pesticide Program's Federal Advisory Committee, the Pesticide Program Dialogue Committee (PPDC)." *Id.*

22. On December 21, 2017, EPA published a notice in the Federal Register, announcing that "it ha[d] initiated a rulemaking process to revise certain requirements in the Agricultural Worker Protection Standard," including the minimum age requirement, the designated representative requirement, and the application exclusion zone requirement. *See* EPA, Agricultural Worker Protection Standard; Reconsideration of Several Requirements and Notice about Compliance Dates, 82 Fed. Reg. 60,576, 60,576 (Dec. 21, 2017). EPA "determined that further consideration of" these WPS protections was warranted based on comments received in response to its solicitation for information about "regulations that may be appropriate for repeal, replacement or modification as part of the President's Regulatory Reform Agenda efforts." *Id.* EPA also explained that the WPS's

"requirements for minimum age, designated representative, and application exclusion zone . . . were discussed at the November 2, 2017, meeting of the Office of Pesticide Program's Federal Advisory Committee, the Pesticide Program Dialogue Committee (PPDC)." *Id.*

23. According to the Trump Administration's Unified Agenda for Regulatory and Deregulatory Actions, EPA intends to release proposed revisions to the WPS and CPA Rule for public comment in September 2018. *See* Office of Mgmt. & Budget, Exec. Office of the President, RIN Data – RIN 2070-AK43 (Pesticides; Agricultural Worker Protection Standard; Reconsideration of Several Requirements), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=2070-AK43 (last accessed Apr. 6, 2018); Office of Mgmt. & Budget, Exec. Office of the President, RIN Data – RIN 2070-AK37 (Pesticides; Certification of Pesticide Applicators Rule; Reconsideration of the Minimum Age Requirements), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=2070-AK37 (last accessed Apr. 6, 2018).

## LEGAL BACKGROUND

24. FOIA requires that "each agency . . . shall make . . . records promptly available to any person" upon receipt of a proper request, unless certain narrow exemptions to disclosure apply. 5 U.S.C. § 552(a)(3)(A).

25. Specifically, an agency must determine whether to comply with a properly submitted FOIA request within 20 business days of receipt and must immediately notify the requester of its determination, along with the underlying reasons. *Id.* § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a) ("EPA offices will respond to requests no later than 20 working days from the date the request is received."). If an agency determines not to comply with a properly submitted request, it must inform the requester of the right to appeal that adverse determination to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa).

26. In "unusual circumstances," an agency may extend the 20-day deadline for responding to a FOIA request for no more than 10 additional business days by written notice to the requester. *Id.* § 552(a)(6)(B)(i); *see id.* § 552(a)(6)(B)(iii) (defining "unusual circumstances"). This written notice must set forth the unusual circumstances justifying the extension and specify the date on which the agency will determine whether to comply with the request. *Id.*; *see* 40 C.F.R.

§ 2.104(d) ("When the statutory time limits for processing a request cannot be met because of 'unusual circumstances,' . . . and the time limits are extended on that basis, you will be notified in writing, as soon as practicable, of the unusual circumstances and of the date by which processing of the request should be completed.").

27. If an agency fails to notify a FOIA requester before the statutory deadline of its determination about whether it will comply with a properly submitted request, the requester is deemed to have exhausted his or her administrative remedies and may immediately seek review in an appropriate district court. 5 U.S.C. §§ 552(a)(6)(C)(i), 552(a)(4)(B); *see* 40 C.F.R. § 2.104(a) ("If EPA fails to respond to your request within the 20 working day period . . . you may seek judicial review to obtain the records without first making an administrative appeal."). If the agency is exercising due diligence in responding to the request and "exceptional circumstances" apply, the court may retain jurisdiction and allow the agency additional time to respond. 5 U.S.C. § 552(a)(6)(C)(i). A delay resulting from a "predictable agency workload of [FOIA] requests" generally does not qualify as an exceptional circumstance. *Id.* § 552(a)(6)(C)(ii).

**PLAINTIFFS' FOIA REQUEST AND EPA'S FAILURE TO RESPOND**

28. To obtain more information about the reasoning behind EPA's decisions to revisit and likely weaken crucial protections in the WPS and CPA Rule, on December 22, 2017, Plaintiffs submitted a FOIA Request to EPA through the agency's "FOIAonline" application and by email. As relevant here, the FOIA Request sought "[u]nredacted copies of all notes taken by any EPA staff present at Session 7 ("Worker Protection Standard Final Rule") and/or Session 9 ("Certification of Pesticide Applicators Proposed Rule") of the November 2017 PPDC Meeting, such staff including but not limited to Nancy Beck, Richard P. Keigwin, Charlotte Bertrand, and Dea Zimmerman." Ex. 1 at 1. The Request also sought

> Any emails, calendar entries, correspondence, and government records reflecting meetings or planned meetings from January 20, 2107 to [December 22, 2017] between (1) EPA Administrator Scott Pruitt; (2) EPA Chief of Staff Ryan Jackson; (3) EPA Acting Principal Deputy Assistant Administrator Charlotte Bertrand; (4) EPA Office of Chemical Safety and Pollution Prevention Deputy Assistant Administrator Nancy Beck; (5) EPA Office of Chemical Safety and Pollution Prevention Acting Assistant Administrator Wendy Cleland-Hamnett; (6)

former EPA contractor Michael L. Dourson; (7) EPA Office of Pesticide Programs Director Richard P. Keigwin; and/or (8) EPA Certification of Work Protection Branch Chief Kevin Keaney with the employees, member officials or contractors of the following entities, or entities who have been represented by the following entities within the past 5 years:

a. The American Farm Bureau Federation
b. The National Association of State Departments of Agriculture ("NASDA")
c. Association of American Pesticide Control Officials ("AAPCO")
d. CropLife America
e. National Council of Agricultural Employers ("NCAE")
f. National Agricultural Aviation Association ("NAAA")
g. Oregonians for Food and Shelter
h. State-based Farm Bureau associations
i. State departments of agriculture[.]

Ex. 1 at 1–2.[1] Plaintiffs requested that EPA waive the search and production fees. *Id.* at 2.

29. Each of the entities included in the FOIA Request advocated for the delay and/or revocation of the WPS and CPA Rule. For example, a number of these groups submitted comments supporting EPA's proposed delay in implementing the revised CPA Rule. *See, e.g.*, Regulations.gov, *Certification of Pesticide Applicators Rule Revision (40 C.F.R. § 171): Docket ID EPA-HQ-OPP-2011-0183* (June 6, 2017), https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=EPA-HQ-OPP-2011-0183 (last accessed Apr. 17, 2018) (including separate comments from the American Farm Bureau Federation, the National Association of State Departments of Agriculture, CropLife America, the National Agricultural Aviation Association, and multiple state departments of agriculture). The American Farm Bureau Federation and the National Association of State Departments of Agriculture filed petitions to delay the start dates of the revised WPS and CPA Rule. *See* American Farm Bureau Federation, *Farm Bureau, NASDA Seek Delay of Unlawful EPA Rule* (Dec. 22, 2016), https://www.fb.org/newsroom/farm-bureau-nasda-seek-delay-of-unlawful-epa-rule; Logan Hawkes,

[1] Plaintiffs also requested an unredacted transcript and audio recording of the PPDC meeting that took place on November 1 and 2, 2017. Ex. 1 at 1. However, because EPA subsequently made an adequate transcript available—as required under Federal Advisory Committee Act, 5 U.S.C. § 11—Plaintiffs are no longer pursuing this aspect of the FOIA Request.

*EPA Puts the Brakes on CPA Worker Protection Rule: Move Draws Pro and Con Responses*, Sw. Farm Press (May 16, 2017), http://www.southwestfarmpress.com/crop-protection/epa-puts-brakes-cpa-worker-protection-rule-move-draws-pro-and-con-responses. Oregonians for Food and Shelter attended a meeting with EPA's Office of Pesticide Policy in December 2017, during which the possibility of changes to WPS was discussed. *See* Paul Shukovsky, *EPA to Consider Reducing Farmworker Pesticide Protections*, Bloomberg BNA, (Dec. 13, 2017), https://www.bna.com/epa-consider-reducing-n73014473148/. And CropLife America, a trade association run by pesticide companies including Dow AgroSciences and Bayer CropScience, met with EPA Administrator Scott Pruitt to "acknowledge the many actions taken already to correct recent regulatory overreach." *See* Eric Lipton & Lisa Friedman, *E.P.A. Chief's Calendar: A Stream of Industry Meetings and Trips Home*, N.Y. Times (Oct. 3, 2017), https://www.nytimes.com/2017/10/03/us/politics/epa-scott-pruitt-calendar-industries-coal-oil-environmentalists.html.

30. On December 22, 2017, EPA confirmed receipt of the FOIA Request and assigned the Request tracking number EPA-HQ-2018-002879. *See* E-mail from foia_hq@epa.gov to Jonathan J. Smith, Earthjustice (Dec. 22, 2017, 5:47 PM EST), attached as Exhibit 2.

31. On January 17, 2018, in response to Plaintiffs' request for a fee waiver, EPA informed Plaintiffs' counsel that the FOIA Request "does not reach the minimum billable amount [and], therefore, no charges are associated in processing [the Request]." *See* Letter from Larry F. Gottesman, EPA, to Jonathan J. Smith, Earthjustice, 1 (Jan. 17, 2018), attached as Exhibit 3. In the same communication, EPA promised that "[t]he Office of the Administrator will be responding to your information request." *Id.*

32. On March 5, 2018—nearly 50 working days after Plaintiffs submitted the FOIA Request and 29 working days after the expiration of the statutory deadline for EPA's response—Plaintiffs' counsel sent an e-mail to EPA inquiring about the status of the Request. *See* E-mail from Jonathan J. Smith, Earthjustice, to Larry F. Gottesman, EPA, 1 (Mar. 5, 2018, 4:12 PM EST), attached as Exhibit 4. Plaintiffs' counsel subsequently called and emailed EPA in an effort to determine the status of the Request, but to date, Plaintiffs have not received any response from EPA.

33. EPA's response to Plaintiffs' FOIA Request was due 20 working days after receipt—that is, no later than January 24, 2018. To date, EPA has not notified Plaintiffs of its determination as to whether it intends to comply with the FOIA Request or of the reasons for that determination, and it has not yet released any responsive records. *See* FOIAonline, Request Details: Tracking Number: EPA-HQ-2018-002879, https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28177f17d (last visited Apr. 16, 2018), attached as Exhibit 5.

34. Plaintiffs reasonably believe that non-exempt records responsive to the FOIA Request may relate to EPA's decision to revise and likely weaken crucial protections in the WPS and CPA Rule. EPA intends to release these revisions for public comment in September 2018. *See* ¶ 23, *supra*. Accordingly, recognizing that resolution of this matter may take several months, Plaintiffs respectfully request that this Court order EPA to release the requested records to Plaintiffs within 20 business days of the Court's Order. Ordering EPA to release the requested records within 20 days—the period of time Congress deemed generally sufficient for responding to requests under FOIA—is necessary to ensure that Plaintiffs have sufficient time to examine, analyze, and—as necessary—confer with the agency regarding those records, so that Plaintiffs may rely on them in commenting on the forthcoming proposed revisions of the WPS and CPA Rule.

**CLAIM FOR RELIEF**

35. Under FOIA, Plaintiffs have a statutory right to obtain all non-exempt records responsive to their request.

36. EPA failed to respond to Plaintiffs' request within 20 days: to date, it has not notified Plaintiffs of its determination as to whether it intends to comply with Plaintiffs' properly submitted FOIA request, in violation of FOIA, 5 U.S.C. § 552(a)(6)(A)(i).

37. EPA failed to make all non-exempt responsive records promptly available to Plaintiffs, in violation of FOIA, 5 U.S.C. § 552(a)(3)(A).

## REQUEST FOR RELIEF

Plaintiffs respectfully request that this Court enter an Order:

1. Declaring that EPA violated FOIA by failing to notify Plaintiffs of its determination about whether to comply with Plaintiffs' properly submitted FOIA request, along with the reasons for that determination, before the statutory deadline;

2. Declaring that EPA violated FOIA by failing to make the requested records promptly available to Plaintiffs;

3. Ordering EPA to release the requested records to Plaintiffs within 20 business days of the Court's Order;

4. Retaining jurisdiction over this case to rule on any assertion by EPA that certain responsive records are exempt from disclosure;

5. Ordering EPA to produce an index identifying any records or parts thereof that it determines to be exempt from disclosure, along with the specific exemption applied, should EPA determine that certain responsive records are exempt from disclosure;

6. Awarding Plaintiffs their reasonable costs and attorneys' fees; and

7. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

DATED: April 17, 2018

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# Exhibit 1

EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

December 22, 2017

By Email and FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Email: **hq.foia@epa.gov**

**Re:** Freedom of Information request for information related to Agricultural Worker Protection Standard

Dear Freedom of Information Officer:

On behalf of itself and Farmworker Justice, Earthjustice submits this request for records in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

In accordance with FOIA, please provide us with all of the following records:

1) An unredacted copy of the full transcript of the Pesticide Program Dialogue Committee meeting that took place November 1–2, 2017 ("November 2017 PPDC Meeting" or "Meeting"), including but not limited to transcripts of all sessions, public comment periods, breaks, and introductory or closing remarks during the meeting;

2) An unredacted copy of the full audio recording of the November 2017 PPDC Meeting, including but not limited to recordings of all sessions, public comment periods, breaks, and introductory or closing remarks during the meeting;

3) Unredacted copies of all notes taken by any EPA staff present at Session 7 ("Worker Protection Standard Final Rule") and/or Session 9 ("Certification of Pesticide Applicators Proposed Rule") of the November 2017 PPDC Meeting, such staff including but not limited to Nancy Beck, Richard P. Keigwin, Charlotte Bertrand, and Dea Zimmerman; and

4) Any emails, calendar entries, correspondence, and government records reflecting meetings or planned meetings from January 20, 2017 to the date of this request between (1) EPA Administrator Scott Pruitt; (2) EPA Chief of Staff Ryan Jackson; (3) EPA Acting Principal Deputy Assistant Administrator Charlotte Bertrand; (4) EPA Office of Chemical Safety and Pollution Prevention Deputy Assistant Administrator Nancy Beck; (5) EPA Office of Chemical Safety and Pollution Prevention Acting Assistant Administrator Wendy Cleland-Hamnett; (6) former EPA contractor Michael L. Dourson; (7) EPA Office of Pesticide Programs Director Richard P. Keigwin; and/or (8) EPA Certification of Worker Protection Branch Chief Kevin Keaney with the employees,

members, officials or contractors of the following entities, or entities who have been represented by the following entities within the past 5 years:

a. The American Farm Bureau Federation
b. The National Association of State Departments of Agriculture ("NASDA")
c. Association of American Pesticide Control Officials ("AAPCO")
d. CropLife America
e. National Council of Agricultural Employers ("NCAE")
f. National Agricultural Aviation Association ("NAAA")
g. Oregonians for Food and Shelter
h. State-based Farm Bureau associations
i. State departments of agriculture

The use of the word "record" above includes, but is not limited to, documents in all forms (including electronic), information, emails, faxes, letters, comments, reports, summaries of telephone conversations, handwritten notes, meeting minutes, or any other materials.

The use of the word "unredacted" above means that we are seeking full disclosure of all information in the requested record. In the event that you determine that you can disclose only some of the information contained in a record that falls within the scope of this request, please provide us with a copy of the record with only the information that you have determined to be properly treated as confidential redacted.

## FEE WAIVER REQUEST

Pursuant to 5 U.S.C. § 552, we request a fee waiver because "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." 40 C.F.R. § 2.107(l)(1). As demonstrated below, all of the four factors related to the first fee waiver requirement, as specified in EPA's FOIA regulations at 40 C.F.R. § 2.107(l)(2)(i)–(iv), weigh in favor of granting our fee waiver request.

### *Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government.*

The subject matter of the requested records concerns "identifiable operations or activities of the Federal government," 40 C.F.R. § 2.107(l)(2)(i), insofar as the requests relate to a public meeting of a Federal Advisory Committee pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2, and correspondence and meetings between EPA and its stakeholders.

### *Factor 2: Disclosure of the Requested Records is Likely to Contribute to Public Understanding of Government Operations or Activities.*

Disclosure of the requested records is "likely to contribute" to an "increased public understanding," 40 C.F.R. § 2.107(l)(2)(ii), of government operations or activities because such disclosure will enable the requesters and the public to understand the issues and comments raised during a Federal Advisory Committee public meeting, whether EPA officials have held private meetings on related issues, and how those private meetings may have influenced shifts in EPA policy. These issues include EPA's plans to revise the Worker Protection Standard Final Rule, 80 Fed. Reg. 67,496 (Nov. 2, 2015), and

the Certification of Pesticide Applicators Final Rule, 82 Fed. Reg. 952 (Jan. 4, 2017). This information is not already accessible through EPA's website. *See* Factor 4, below.

***Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in the Government's Regulation of Pesticides and their Application.***

Disclosure will "contribute to the understanding of a reasonably broad audience of persons interested in" learning about the Government's efforts to ensure that pesticides are applied in a manner that is protective of human health. Each of the requesting organizations has the ability and intent to convey information obtained through this request to the public.

Earthjustice has "expertise" related to regulation of pesticides and the "ability and intention to convey this information to the public." 40 C.F.R. § 2.107(l)(2)(iii). In particular, Earthjustice is a national nonprofit environmental law firm, which has made safeguarding the environment, workers, and the health of endangered species from pesticide exposures one of its top priorities. Earthjustice has developed expertise in this area. In order to further its work to protect against the dangers of pesticide exposures, Earthjustice has brought numerous lawsuits, represented amici in other lawsuits, and filed several petitions with EPA. *See, e.g., Pineros y Campesinos Unidos del Noroeste v. Pruitt*, No. 3:17-cv-03434 (filed June 14, 2017 N.D. Cal.) (representing plaintiffs in challenge to delay of certified pesticide applicator rule); *Dow Agrosciences LLC v. National Marine Fisheries Service*, 414 Fed. Appx. 514 (4th Cir. 2011) (represented amici in defense of National Marine Fisheries Service's biological opinion that pesticide manufacturers' insecticides would destroy or harm Pacific salmonids and their habitat); *Northwest Coalition for Alternatives to Pesticides v. U.S. E.P.A.*, 544 F.3d 1043 (9th Cir. 2008) (represented plaintiffs in case seeking review of EPA order denying objections raised to tolerances established for seven pesticides used mostly on fruit and vegetable crops); *United Farm Workers v. Administrator*, slip op., 2010 WL 1293342 (March 31, 2010 N.D. Cal.) (represented plaintiffs in challenge to EPA's re-registration of pesticide chlorpyrifos); Because of its expertise in this area, Earthjustice is well-prepared to evaluate the requested records once they are received. In addition, Earthjustice has mechanisms in place to share information obtained from the requested records with the general public and with other interested organizations, such as through its advocacy campaign devoted to the issue of pesticides. *See* https://earthjustice.org/advocacy-campaigns/pesticides.

Earthjustice can review the information it receives, analyze it, and either write an entry for the Earthjustice website (which receives approximately 830,000 page views per month), highlight the information in a monthly email newsletter (with an average of 200,000 views), or write an article for publication in the Earthjustice quarterly print magazine (which has a circulation of approximately 100,000 people). Further, Earthjustice has collaborated with a large number of farmworker groups in the past, like farmworker unions and advocacy organizations, and can disseminate the information to these interested groups. Finally, Earthjustice's full-time health campaigner can disseminate newsworthy information obtained from this request to the media, and Earthjustice's full-time health lobbyist can provide relevant information obtained from this request to elected officials in Washington.

Disclosure of these records to Farmworker Justice 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 Farmworker Justice's core mission is the promotion and protection of farmworker rights primarily through the dissemination of information to farmworkers, their advocates, and the public at large.

Farmworker Justice is a non-profit organization that serves migrant and seasonal farmworkers in the United States. It strives to improve farmworkers' living and working conditions through the dissemination of information to worker advocates, government representatives, the general public and the workers themselves. Farmworker Justice has established itself as a trusted source of clear, reliable information, data, and analysis on farmworker issues for the national and regional media. Farmworker Justice's goal is to expand and improve media coverage of farmworker issues, thus broadening public understanding of farmworker health, labor and immigration policy. In addition to media coverage, Farmworker Justice disseminates information through policy reports and briefs, newsletters, email list-serves, and presentations at conferences. Farmworker Justice also posts information on its website, https://www.farmworkerjustice.org/, which averages 12,000 visitors per month. Farmworker Justice also has a blog, https://www.farmworkerjustice.org/fj-blog/, which receives about 1,500 visits a month. In addition to its own publications, Farmworker Justice contributes articles to the publications of other organizations, including those whose mission involves public health, immigrant rights, and civil rights.

Farmworker Justice has greatly expanded its capacity for communications and outreach in the last several years, and has brought greater awareness of important issues to farmworker communities and to the general public. Farmworker Justice is the leading national advocacy organization for migrant and seasonal farmworkers. Its opinion is highly sought for news stories on farmworkers' occupational and environmental health, as well as U.S. immigration and labor policy. Farmworker Justice staff speak at numerous conferences to disseminate information on these issues, including the American Occupational Health Conference of the American College of Occupational and Environmental Medicine, the Workers Injury Law and Policy Group annual conference, meetings of the National Hispanic Leadership Agenda, and national and regional farmworker health conferences. Farmworker Justice has been quoted in major newspapers such as the *New York Times*, the *Washington Post*, the *Chicago Tribune*, the *Los Angeles Times*, the *Dallas Morning News*, the *Wall Street Journal*, and by the Associated Press, as well as numerous regional newspapers and their websites; and Farmworker Justice President Bruce Goldstein has appeared on CNN News, Fox News, C-Span and National Public Radio.

In sum, disclosure of the requested documents is "likely to contribute significantly to public understanding" of EPA's activities concerning pesticide registrations and labeling requirements, 5 U.S.C. §552(a)(4)(iii), because Earthjustice and Farmworker Justice intend to analyze the information in the released records and to disseminate it to other interested organizations and to the broader public, through one or more of the many communication channels referenced above.

***Factor 4: The Contribution to Public Understanding of Government Operations or Activities Will Be Significant.***

The public understanding of the November 2017 PPDC Meeting and related meetings, "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv). There is currently disagreement about the comments and conclusions made in the November 2017 PPDC Meeting. For example, reporters noted that "PPDC members seemed to be in broad agreement" that the minimum age provisions of the Worker Protections Standards Revisions were necessary and justified, and U.S. Senator Tom Udall similarly found that "[t]here was consensus from stakeholders [at the Meeting] that the minimum age for pesticide application should be 18." *See, e.g.*, Steve Davies, *EPA's Fiddling with Pesticide Rules Could Imperil Funding*, AgriPulse, Dec. 19, 2017, https://www.agri-pulse.com/articles/10385-epas-fiddling-with-pesticide-rules-could-imperil-funding. In contrast, EPA

claimed that participants at the Meeting expressed an interest in "letting states determine a minimum age for agricultural handlers that meets the needs of the local rural economy." *Id.* The release of the full and accurate transcript, recording, and notes of the November 2017 PPDC Meeting will help put these conflicting characterizations to rest and contribute significantly to the public understanding of government operations. In addition, information about EPA officials' meetings with agriculture industry representatives will also contribute significantly to the public understanding of EPA's proposal to further revise the Worker Protection Standards and Certification of Pesticide Applicators rules.

In addition, the second fee waiver requirement – that the request "is not primarily in the commercial interest of the requester," 40 C.F.R. § 2.107(l)(1) – is also met here. Each of the requesting organizations is a 501(c)(3) nonprofit organization and does not have any "commercial interest that would be furthered by the requested disclosure" of information. 40 C.F.R. § 2.107(l)(3)(i). Indeed, Requesters' sole interest in obtaining the requested information is to broaden public understanding of the statements made at the November 2017 PPDC Meeting and the related meetings of EPA officials.

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify and inform us of the basis for your decision.

**INSTRUCTIONS FOR RECORD DELIVERY**

To the extent that the requested records are available in a readily accessible electronic format, we would prefer to receive the documents electronically, either by email or on a CD. If electronic copies are unavailable, we will accept paper copies. Please send records to Jonathan Smith at jjsmith@earthjustice.org or mail them to:

Jonathan J. Smith, Esq.
Earthjustice
48 Wall St., 19th Floor
New York, NY 10005

As FOIA requires, we expect your response within twenty working days of your receipt of this request. In the event that you have any questions concerning the type of materials we are interested in receiving, please contact me by email or by telephone at 212-845-7379.

Thank you for your assistance in this matter.

Sincerely,

Jonathan J. Smith

# Exhibit 2

**From:** foia_hq@epa.gov
**To:** Jonathan J. Smith
**Subject:** FOIA Request EPA-HQ-2018-002879 Submitted
**Date:** Friday, December 22, 2017 5:47:48 PM

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This message is to confirm your request submission to the FOIAonline application: View Request. Request information is as follows:

- Tracking Number: EPA-HQ-2018-002879
- Requester Name: Jonathan J. Smith
- Date Submitted: 12/22/2017
- Request Status: Submitted
- Description: Please see attached document Please provide us with all of the following records: 1) An unredacted copy of the full transcript of the Pesticide Program Dialogue Committee meeting that took place November 1–2, 2017 ("November 2017 PPDC Meeting" or "Meeting"), including but not limited to transcripts of all sessions, public comment periods, breaks, and introductory or closing remarks during the meeting; 2) An unredacted copy of the full audio recording of the November 2017 PPDC Meeting, including but not limited to recordings of all sessions, public comment periods, breaks, and introductory or closing remarks during the meeting; 3) Unredacted copies of all notes taken by any EPA staff present at Session 7 ("Worker Protection Standard Final Rule") and/or Session 9 ("Certification of Pesticide Applicators Proposed Rule") of the November 2017 PPDC Meeting, such staff including but not limited to Nancy Beck, Richard P. Keigwin, Charlotte Bertrand, and Dea Zimmerman; and 4) Any emails, calendar entries, correspondence, and government records reflecting meetings or planned meetings from January 20, 2017 to the date of this request between (1) Scott Pruitt; (2) Ryan Jackson; (3) Charlotte Bertrand; (4) Nancy Beck; (5) Wendy Cleland-Hamnett; (6) former EPA contractor Michael L. Dourson; (7) Richard P. Keigwin; and/or (8) Kevin Keaney with the employees, members, officials or contractors of the following entities, or entities who have been represented by the following entities within the past 5 years: a. The American Farm Bureau Federation b. The National Association of State Departments of Agriculture ("NASDA") c. Association of American Pesticide Control Officials ("AAPCO") d. CropLife America e. National Council of Agricultural Employers ("NCAE") f. National Agricultural Aviation Association ("NAAA") g. Oregonians for Food and Shelter h. State-based Farm Bureau associations i. State departments of agriculture

# Exhibit 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 17 2018

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. Jonathan J. Smith
Earthjustice
48 Wall Street
19th Floor
New York, NY 10005

RE: Request Number EPA-HQ-2018-002879

Dear Mr. Smith:

This is in response to your fee waiver request in connection with the above referenced Freedom of Information Act request.

Based on the information provided in your request, we have determined your request does not reach the minimum billable amount, therefore, no charges are associated in processing your request. The Office of the Administrator will be responding to your information request.

If you have any questions concerning this determination, please contact me at (202) 566-1667.

Sincerely,

Larry F. Gottesman
National FOIA Officer

# Exhibit 4

| | |
|---|---|
| **From:** | Jonathan J. Smith |
| **To:** | "Gottesman.larry@Epa.gov" |
| **Cc:** | "newton.jonathan@epa.gov"; "Lewis.monica@Epa.gov"; Eve C. Gartner; Hannah Chang; Andrea Delgado; "hq.foia@epa.gov" |
| **Subject:** | Response for FOIA Request EPA-HQ-2018-002879 |
| **Date:** | Monday, March 05, 2018 4:12:01 PM |
| **Attachments:** | 2017-12-22 FOIA Request to EPA re PPDC Meeting.pdf<br>FW Ltr JSmith 002879.pdf |

Dear Mr. Gottesman,

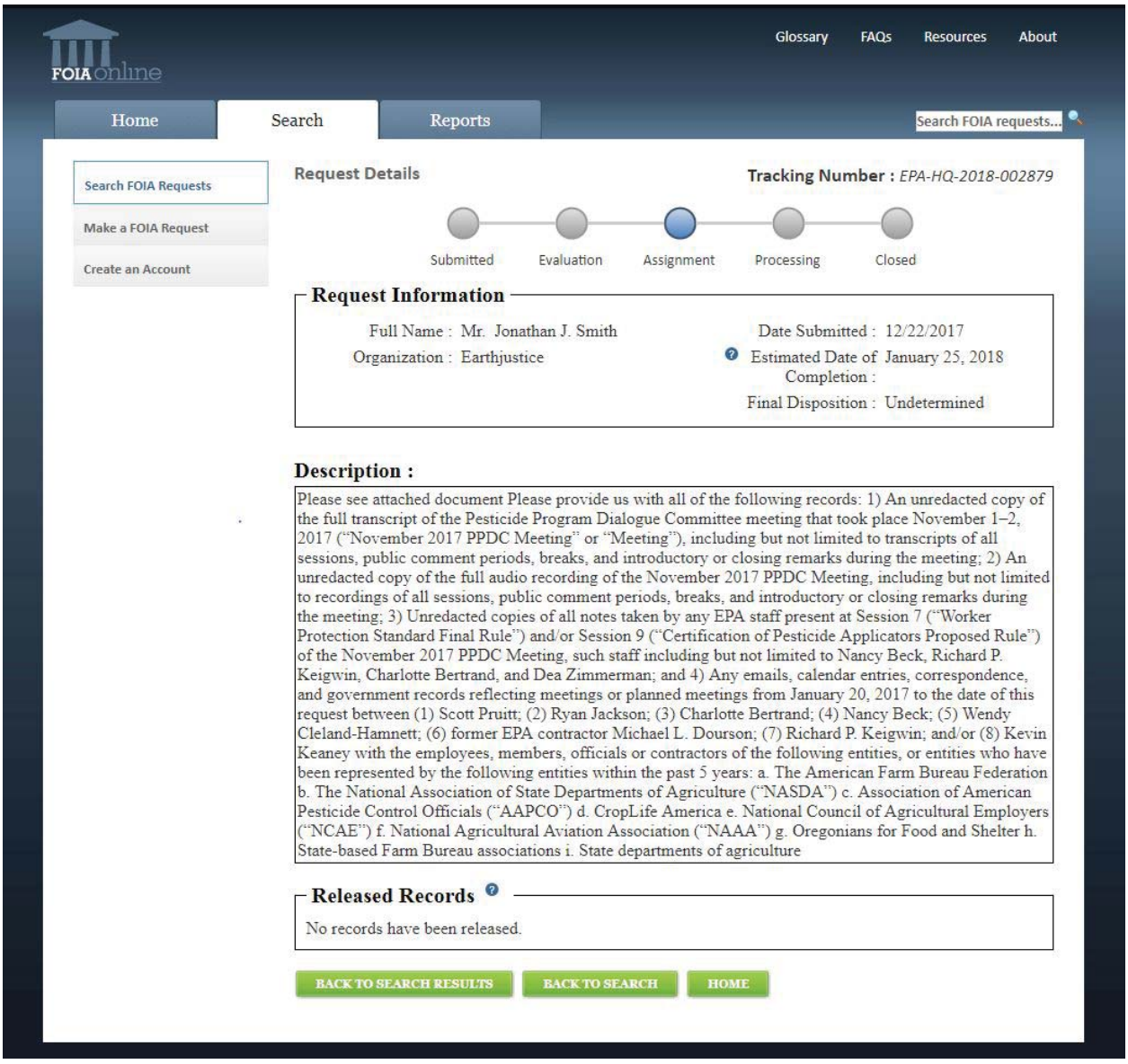
I'm writing to follow up on FOIA Request EPA-HQ-2018-002879, submitted Dec. 22, 2017 (attached here, along with related fee waiver determination). The due date for this FOIA was Jan. 25, 2018, but we have yet to receive a response to the request, and no such response appears on FOIAonline. Aside from the fee waiver determination, we have received no communications about this request.

Please provide a response to the request, and let us know when we should expect that response.

Best,
Jonathan Smith


Jonathan J. Smith
Senior Associate Attorney
Earthjustice Northeast Office
48 Wall Street, 19th Floor
New York, NY 10005
T: 212-845-7379 (direct)
F: 212-918-1556
earthjustice.org


# Exhibit 5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Make a FOIA Request
Create an Account
Request Details
Tracking Number : EPA-HQ-2018-002879
Submitted
Evaluation
Assignment
Processing
Closed
Request Information
Full Name : Mr. Jonathan J. Smith
Organization : Earthjustice
Date Submitted : 12/22/2017
Estimated Date of Completion : January 25, 2018
Final Disposition : Undetermined
Description :
Please see attached document Please provide us with all of the following records: 1) An unredacted copy of the full transcript of the Pesticide Program Dialogue Committee meeting that took place November 1–2, 2017 ("November 2017 PPDC Meeting" or "Meeting"), including but not limited to transcripts of all sessions, public comment periods, breaks, and introductory or closing remarks during the meeting; 2) An unredacted copy of the full audio recording of the November 2017 PPDC Meeting, including but not limited to recordings of all sessions, public comment periods, breaks, and introductory or closing remarks during the meeting; 3) Unredacted copies of all notes taken by any EPA staff present at Session 7 ("Worker Protection Standard Final Rule") and/or Session 9 ("Certification of Pesticide Applicators Proposed Rule") of the November 2017 PPDC Meeting, such staff including but not limited to Nancy Beck, Richard P. Keigwin, Charlotte Bertrand, and Dea Zimmerman; and 4) Any emails, calendar entries, correspondence, and government records reflecting meetings or planned meetings from January 20, 2017 to the date of this request between (1) Scott Pruitt; (2) Ryan Jackson; (3) Charlotte Bertrand; (4) Nancy Beck; (5) Wendy Cleland-Hamnett; (6) former EPA contractor Michael L. Dourson; (7) Richard P. Keigwin; and/or (8) Kevin Keaney with the employees, members, officials or contractors of the following entities, or entities who have been represented by the following entities within the past 5 years: a. The American Farm Bureau Federation b. The National Association of State Departments of Agriculture ("NASDA") c. Association of American Pesticide Control Officials ("AAPCO") d. CropLife America e. National Council of Agricultural Employers ("NCAE") f. National Agricultural Aviation Association ("NAAA") g. Oregonians for Food and Shelter h. State-based Farm Bureau associations i. State departments of agriculture
Released Records
No records have been released.
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