

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA )  
*ex rel.* SCOTT PRUITT, )  
in his official capacity as Attorney General )  
of Oklahoma; )

STATE OF ALABAMA, )  
by and through LUTHER STRANGE, )  
in his official capacity as Attorney General )  
of Alabama )  
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Case No.

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*ex rel.* ALAN WILSON, in his official )  
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Cheyenne, WY 82002, )

	)
Plaintiffs,	)
v.	)
	)
UNITED STATES ENVIRONMENTAL	)
PROTECTION AGENCY,	)
	)
Defendant.	)

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

Plaintiffs, the States of Oklahoma, Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming, <sup>1</sup> bring this action against Defendant the United States Environmental Protection Agency (“EPA”) to compel compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* As set forth below, under FOIA, the States sought records from EPA concerning the agency’s implementation of a specific federal Clean Air Act (“CAA”) program, 42 USC § 7401 *et seq.*. In violation of FOIA, EPA has denied the States’ request. As grounds therefore, Plaintiffs allege as follows:

**JURISDICTION AND VENUE**

1. The Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. §

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<sup>1</sup> At this time only the Attorney General of Oklahoma is admitted to practice before this Court. On behalf of the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming, the Attorney General of Oklahoma, pursuant to LCvR83.3(c), will be filing with the Court a Motion for Relief from LCvR83.2. Because the Attorney General of Oklahoma is the lead Plaintiff and will be filing all pleadings in this matter, the other State Attorneys General respectfully seek relief from the requirement that they each be required to be admitted *pro hac vice*.

552(a)(4)(A)(vii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

2. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

**PARTIES**

3. Plaintiffs are the State of Oklahoma with an address of 313 NE 21st Street, Oklahoma City, Oklahoma 73105; and the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming. Bill Schuette, Attorney General of Michigan, is bringing this action on behalf of the People of Michigan under Mich. Comp. Law § 14.28, which provides that the Michigan Attorney General may "appear for the people of [Michigan] in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of [Michigan] may be a party or interested." Under Michigan's constitution, the people are sovereign. Mich. Const. art. I, § 1 ("All political power is inherent in the people. Government is instituted for their equal benefit, security, and protection.").

4. Defendant is an agency of the United States Government and is headquartered in the Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington D.C. 20460. Defendant has possession, custody and control of records to which Plaintiffs seek access.

## BACKGROUND

### **I. FOIA AND FEE WAIVER REQUESTS**

5. FOIA requires agencies of the federal government to release requested records to the public unless one or more statutory exemptions apply. *See* 5 U.S.C. § 552(b).6.

6. When making a FOIA request, the requesting party must “reasonably describe such records” requested. 5 U.S.C. § 552(a)(3). EPA’s FOIA regulations state that requesting parties:

should reasonably describe the records [they] are seeking in a way that will permit EPA employees to identify and locate them. Whenever possible, [the requestor] should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, [the requestor] should include any file designations or descriptions for the records [requested]. The more specific [the requestor is] about the records or type of records [requested], the more likely EPA will be able to identify and locate records responsive to [the] request.

40 C.F.R. § 2.102

7. FOIA also mandates fee waiver or reduction when “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.” 5 U.S.C. § 552(a)(4)(A)(iii).

8. Congress intended that the assessment of fees not be a bar to private individuals or public interest groups seeking access to government records. Both FOIA and the legislative history of the relevant FOIA provision call for a liberal interpretation of the fee waiver standard. “Documents shall be furnished without any charge or at a charge

reduced below the fees established . . . 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). (“A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.” 132 Cong. Rec. H9464 (Reps. English and Kindness)).

9. FOIA’s fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005).

10. A recent study found that EPA disproportionately denies fee waiver requests from noncommercial requesters who seek records so as to understand whether EPA is faithfully complying with applicable law. According to the Competitive Enterprise Institute’s (“CEI”) study, 92 percent of the time EPA grants fee waiver requests from noncommercial requesters who are supportive of EPA’s policies and agendas, but denies a majority of fee waiver requests from noncommercial requesters who are critical of EPA. *See EPA Gives Info For Free to Big Green Groups 92% of Time; Denies 93% of Fee Waiver Requests from Biggest Conservative Critic*, Competitive Enterprise Institute, May 14, 2013, <http://cei.org/news-releases/epa-gives-info-free-big-green-groups-92-time-denies-93-fee-waiver-requests-biggest-con>.

## II. THE CLEAN AIR ACT

11. The CAA establishes “a comprehensive national program that makes the States and the Federal Government partners in the struggle against air pollution.” *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). At the same time, the CAA recognizes that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3); *see also id.* § 7407(a) (“Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . .”). Under the CAA, one way that the control of air pollution is achieved is through the States implementation of national ambient air quality standards (“NAAQS”) (CAA §110). The CAA directs EPA’s Administrator to promulgate NAAQS and provides for the adoption of State Implementation Plans (“SIPs”) to achieve and maintain those standards. The “primary” NAAQS prescribe maximum acceptable concentrations of various pollutants in the ambient air, which, “allowing an adequate margin of safety, are requisite to protect the public health.” CAA § 109(b)(1). The statute provides that the primary NAAQS for each targeted pollutant be based on “air quality criteria” that “accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health...which may be expected from the presence of such pollutant in the ambient air, in varying quantities.” CAA § 108(a)(2).

12. EPA must review each NAAQS at least every five years. CAA § 109(d)(1). In conducting each such review, EPA must conduct notice-and-comment rulemaking

pursuant to CAA § 307(d). CAA § 307(d)(1)(A). The adoption of a new or revised NAAQS triggers a standard implementation process in which “[e]ach State shall have the primary responsibility for assuring air quality” within its boundaries “by submitting an implementation plan for such State which will specify the manner in which national primary . . . ambient air quality standards will be achieved and maintained . . . .” CAA § 107(a).

13. In contrast to the NAAQS, the CAA’s Visibility Protection Program is a non-health based program built around the goal, set forth in Section 169A(a)(1) of the CAA, of the “prevent[ing] of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas, which impairment results from manmade air pollution.” Recognizing that visibility impairment does not rise to the same level of public policy concern as dangers to public health, Congress made the visibility improvement goal discretionary. Thus, under Section 169A(f), for purposes of the citizens suit provision of the statute, the national visibility goal “shall not be considered to be a ‘non-discretionary duty’ of the Administrator.”

14. In furtherance of the Section 169A visibility goal, the Visibility Protection Program directs States to develop Regional Haze SIPs to ensure “reasonable progress” is made toward the visibility goal, including satisfying certain requirements for identifying best available retrofit technology (“BART”). *See* 42 U.S.C. § 7491-7492. In 1999, EPA promulgated Regional Haze Rules that require all States to revise their federal CAA SIPs to address visibility in nearby national parks and wilderness areas known as Class I areas.



These rules were the subject of several federal court challenges. See *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), *Center for Energy and Economic Development v. EPA*, 398 F.3d 653 (D.C. Cir. 2005), and *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333, 1338 (D.C. Cir. 2006). In *American Corn Growers* the D.C. Circuit made clear that States have great discretion in setting reasonable progress goals and determining BART. The CAA's "provisions give [] the States broad authority over BART determinations." *American Corn Growers*, 291 F.3d 19.

15. Specifically, Section 169A of the CAA provides that the States shall have the dominant role in making a BART determination, with EPA having only a more limited role. Second, because visibility improvement is an aesthetic goal, the CAA does not make improving visibility conditions in Class I areas paramount above all other competing considerations. Instead, the States are given broad discretion to weigh public interest factors in determining (a) how much progress towards improving visibility they deem to be reasonable and (b) whether particular BART controls, or any BART controls at all, should be imposed on a particular source, based on a balancing of the cost of controls and the visibility improvement benefits that such controls will produce. EPA may not second-guess those State judgments so long as the States' determinations are consistent with Section 169A of the CAA and are reasonable and rationally supported by the State's administrative record reflecting the data and analysis used to come to those determinations.

16. In addition to making and submitting BART determinations to EPA, CAA § 169A(b)(2), requires EPA to issue regulations requiring States containing Class I areas, or States whose emissions may reasonably be anticipated to cause or contribute to visibility impairment in a Class I area, to submit SIPs containing “such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting” the national visibility goal. The amount of progress that is “reasonable” is not defined according to objective criteria, but instead involves a discretionary balancing by the State of public interest factors, specifically “the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements.” CAA § 169A(g)(1).

17. Notably, CAA Section 169A is clear that it is the States, not EPA, that make both the reasonable progress and BART determination decisions. Section 169A(b)(2)(A) specifically provides that both the reasonable progress and the BART determinations are “determined by the State.” Section 169A(g)(2) similarly provides that “in determining [BART], the State” shall weigh the BART factors.

### **III. STATEMENT OF FACTS**

18. On February 6, 2013, the States of Oklahoma, Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming submitted a FOIA request to EPA for records concerning EPA’s negotiations with certain

non-governmental organizations that have led to binding consent decrees that dictate when and how EPA must proceed concerning various States' Regional Haze SIPs. *See* Exhibit 1. The States' FOIA request explained that EPA's practice of settling litigation via consent decrees with certain non-governmental organizations is of great concern because such decrees then define EPA's regulatory approach to State Regional Haze SIPs without the States involvement, yet the States must bear the consequences of EPA's process and implement these regulatory changes. The States expressed concern that EPA's actions were not consistent with the cooperative federalism structure of the CAA or the Regional Haze program.

19. The February 6, 2013 FOIA request was submitted after EPA denied the States' previous FOIA request for records concerning EPA's practice of entering into consent decrees with non-governmental organizations in cases concerning the implementation of several environmental programs, not just the Regional Haze program. EPA denied the States' previous FOIA request asserting that the request was overbroad and that there was no demonstration that the records would be disseminated to the general public. At the time EPA denied the States' previous FOIA request, EPA advised Oklahoma Deputy Solicitor General Eubanks in a telephone conversation that the States should resubmit FOIA requests for records concerning individual environmental programs and specific cases and that EPA would review those requests.

20. The States' FOIA request makes clear the type, scope and location of the records sought from EPA. Specifically, the States' FOIA request asks for any and all documents sent and/or received by specific EPA offices, including the office of the Administrator, that discuss or in any way relates to:

- (a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy, concerning:
  - i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the CAA, 42 U.S.C. § 7604(a)(2);
  - ii. the course of action to take with respect to any Regional Haze SIP required to be submitted to the EPA pursuant to CAA § 169A for any State;
  - iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP.

"Interested Organizations" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club

- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates

*See Exhibit 1 at 1-3.*

21. Clearly set forth in the States' FOIA request was a fee waiver request based on the fact that the States' request is in the public interest and therefore EPA must waive any applicable fees associated with fully responding to the request. *See* 40 C.F.R. § 2.107(l). The States' FOIA request clearly sets forth that the requested documents will be made available to the public at the University, Federal Depository and State Library systems located in each of the requesting States. *See Exhibit 1 at 5.* Additionally, the States will analyze the data presented in the requested records and will produce a report as part of their ongoing review of EPA's operations. *See id.* The report will be disseminated to others in the States as well as disseminated to the media and Congress as a component of the States' active involvement in "State efforts addressing environmental issues." *See id.* The States' FOIA request averred that none of the requested documents or the resulting report will be used for commercial use or gain. *See id.*

22. By letter dated February 22, 2013, EPA denied the States' fee waiver request, claiming that the States had "not expressed a specific intent to disseminate the information to the general public." *See Exhibit 2 at 1.*

23. On March 15, 2013 the States timely filed their appeal of EPA's denial of the States' fee waiver request. *See Exhibit 3.*

24. By email dated May 2, 2013, EPA stated that it required “a brief extension of time” until May 15, 2013 to complete its review and respond to Oklahoma’s March 15 appeal. *See* Exhibit 4. On May 15, 2013, EPA sent the office of the Attorney General of Oklahoma an email informing Oklahoma that EPA required yet another extension of time until May 31, 2013 to complete its review and issue a determination of whether Oklahoma’s fee waiver request should be granted. *See* Exhibit 5.

25. By letter dated May 31, 2013, EPA denied the States’ FOIA request. *See* Exhibit 6. In its denial letter, EPA claims that the States’ FOIA request “fails to adequately describe the records sought,” and therefore the request was denied. Exhibit 6 at 1. EPA’s denial of the States’ FOIA request is consistent with their apparent protocol to avoid compliance with FOIA by telling requestors that their FOIA request is overbroad. In a recent email exchange disclosed by EPA as a result of a FOIA request, an EPA official advises a Region 6 EPA employee that “standard [EPA] protocol” is to tell all “requestor[s] that they need to narrow their [FOIA] request because it is overbroad.” *See* Exhibit 7 at 6.

26. Further, because EPA denied the States’ FOIA request, EPA refused to act on Oklahoma’s appeal of EPA’s denial of the States’ FOIA fee waiver request asserting that the appeal was moot. *See* Exhibit 6 at 3.

27. The EPA’s May 31, 2013 denial letter constitutes the agency’s final determination. *See* Exhibit 6 at 6. Plaintiff has therefore exhausted all administrative

remedies with EPA and now files this action for judicial review of EPA's determinations, which is proper pursuant to 5 U.S.C. 552(a)(4)(B).

**PLAINTIFFS' CLAIMS FOR RELIEF**

**COUNT ONE  
(Failure to Produce Records)**

28. Plaintiff States re-allege and incorporate by reference all preceding paragraphs.

29. Defendant is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.

30. Plaintiff States properly asked for specific records within the custody and control of EPA. The States' FOIA request was not overbroad. The States' FOIA request stated with specificity the type of records sought in such a way that would "permit EPA employees to identify and locate" the requested records. U.S.C. § 552(a)(3), 40 C.F.R. § 2.102.

31. EPA violated FOIA's mandate to release agency records to the public by failing to release the records as the States specifically requested. U.S.C. §§ 552(a)(3)(A), 552(a)(3)(B).

**COUNT TWO  
(Improper Denial of Fee Waiver Request)**

32. Plaintiff States re-allege and incorporate by reference all preceding paragraphs.

33. Plaintiff States have demonstrated they are entitled to a waiver of fees associated with processing their FOIA request because the information sought in the FOIA

request is in the public interest, will significantly contribute to the public's understanding of the operations and activities of EPA and will not be used to further any commercial interest.

5 U.S.C. § 552(a)(4)(A)(iii), 40 C.F.R. § 2.107(l).

34. EPA violated FOIA and its own regulations when it failed to grant the States' fee waiver request. U.S.C. § 552(a)(4)(A)(ii)-(iii), 40 C.F.R. § 2.107(1)(2) and (3).

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff States respectfully requests that this Court:

1. Order Defendant to immediately process the States' FOIA request;
2. Order Defendant to conduct a thorough search for all responsive records;
3. Order Defendant to promptly disclose the requested records in their entirety and make copies available to the Plaintiff States;
4. Enjoin Defendant from charging the Plaintiff States fees for the processing of their requests;
5. Award Plaintiff States their costs and reasonable attorneys' fees incurred in this action under U.S.C. § 552(a)(4)(E); and
6. Grant such other relief as the Court may deem just and proper.

Date: July 16, 2013.



Respectfully submitted,

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OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA

February 6, 2013

**VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

**FREEDOM OF INFORMATION ACT REQUEST**

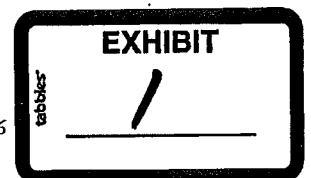
Freedom of Information Officer  
U.S. EPA, Records, FOIA and Privacy Branch  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
Hq.foia@epa.  
**FOIA REQUEST**

Dear Sir or Madam:

This is a request under the Freedom of Information Act (5 U.S.C. § 552, as amended).

By this letter the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming ("Requesting States") are requesting any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2009, to the date of this letter that discuss or in any way relates to:

- (a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy ("Other Organizations"), concerning:
  - i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("CAA"), 42 U.S.C. § 7604(a)(2);



February 6, 2013

Page 2

- ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("SIP") required to be submitted to the U.S. Environmental Protection Agency ("EPA") pursuant to CAA § 169A for any State;
- iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "Subject").

"Interested Organizations" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club
- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates
- Wyoming Outdoor Council
- Greater Yellowstone Coalition

(b) Copies of any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) sent or received by the following EPA offices:

- i. the Office of the Administrator;
- ii. the Office of Environmental Information;
- iii. the Office of General Counsel;
- iv. the Office of Inspector General;

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- v. the Office of International and Tribal Affairs;
- vi. the Office of Research and Development;
- vii. Region 1;
- viii. Region 2;
- ix. Region 3;
- x. Region 4;
- xi. Region 5;
- xii. Region 6;
- xiii. Region 7;
- xiv. Region 8;
- xv. Region 9; or
- xvi. Region 10.

(including receipt by carbon copy or blind carbon copy), regarding the Subject including, but not limited to, documents sent by or received from individuals representing or employed by the Interested Organizations or Other Organizations.

#### **Reason for FOIA Request**

Over the past three years, the EPA has allowed its regulatory agenda to be largely defined by litigation settlements it has entered into with environmental organizations. Specifically, on at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included paying plaintiffs' attorneys' fees) brought under the CAA. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations. Unfortunately, States responsible for implementing many of these regulations have little knowledge of or input in this process, which is not consistent with the cooperative federalism structure of federal environmental law.

Out of the forty-five settlements that have been made public, EPA has paid almost \$1 million in attorneys' fees to these groups, while also committing to develop a suite of sweeping new regulations. One EPA Consent Decree led to the promulgation of EPA's costliest regulation ever - the Mercury Air Toxics Standards (MATS). Other Consent Decrees include obligations that define how and when EPA acts on forty-five individual State Regional Haze SIPs - including the imposition of proposed federal implementation plans ("FIPs").

Many Consent Decrees authorize EPA to act in a way that is not consistent with current law. For example, Regional Haze Consent Decrees allowed EPA to propose combined Regional Haze SIPs/FIPs - something EPA has not done before in administering the CAA.



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This is detrimental to the States and “unwinds” the State and federal partnership contained in the CAA.

States affected by these non-governmental organization lawsuits are not included as parties in the suits and when affected States try to intervene, EPA and the environmental groups frequently oppose State intervention. For instance, when the State of North Dakota sought to intervene in *Wildearth Guardians v. Jackson* in the U.S. District Court for the Northern District of California (where *Wildearth Guardians* filed its suit), EPA opposed the intervention despite the fact that the case involved how and when EPA should act on North Dakota’s proposed Regional Haze SIP. *Wildearth Guardians v. Jackson*, No. C-09-2453-CW, 2011 U.S. Dist. LEXIS 14378 (N.D. Cal. Dec. 27, 2011) (order denying North Dakota’s intervention).

State Attorneys General from the Requesting States are in the process of evaluating EPA’s alarming practice of relying on Consent Decrees to deny the States their important role as a partner with EPA in implementing federal environmental law. Not only does EPA’s action harm and jeopardize the States’ role as a partner with EPA, but it harms the interests of the citizens of the Requesting States. Our citizens rely on and expect the States to implement federal environmental law. Often, these implementation efforts require the States to design plans to meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. When EPA coordinates with non-governmental organizations regarding how federal environmental law should be applied and implemented in an individual State and excludes the State from that effort the State and its citizens are harmed.

Rather than make individual FOIA requests, the Requesting States are making one request for the release of documents with the Interested Organizations and Other Organizations concerning the Subject. The Requesting States have lobbied, litigated, and publicly commented on federal actions which directly affect their individual State interests and those of their citizens. The requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA’s operations, particularly regarding the quality of the EPA’s activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States.

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA’s operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

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### Fee Waiver Request

The Requesting States request that you waive any applicable fees since disclosure meets the standard for waiver of fees as it is in the public interest. *See* 40 C.F.R. § 2.107(l). Specifically, this request concerns “the operations or activities of the government;” disclosure is “likely to contribute” to an understanding of government operations or activities; disclosure will contribute to “public understanding;” the disclosure is likely to contribute “significantly” to public understanding of government operations and activities; and the States have no commercial interest in disclosure of the documents – the Requesting States’ interest is to facilitate and promote the public interest. 40 C.F.R. § 2.107(2)(i),(iv).

### Reasons for Granting the Fee Waiver Request

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA’s operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

The Requesting States plan to make these documents available to the public at the University, Federal Depository and State Library systems (“Library Systems”) in the respective Requesting States. As these facilities are open to the general public, many people will thereby have access to the information contained in the materials which are the subject of this request. Most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were “established by Congress to ensure that the American public has access to its Government’s information.” <http://www.gpo.gov/libraries/>. As Federal Depositories, these libraries ensure that the agency publications and other information “are highly visible to the public, promoted, and safeguarded.” *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

#### **A. Legal Standard for Fee Waivers**

FOIA’s fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test “should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information

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satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents “shall be furnished without any charge” if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities, 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(l)(2)-(3). EPA’s regulations elucidate further that to be granted fee waiver requests a requester must establish that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As this FOIA Request demonstrates, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

**1. First Factor: The FOIA Request is for Records Concerning EPA’s Operations and Activities.**

The Subject information the Requesting States seek directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(l)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA’s operations and activities related to its implementation and enforcement of the CAA through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the federal environmental program at issue in the lawsuit or administrative action.

In its enforcement of these federal programs through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency’s expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys’ fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the “operations or activities of the government.” 40 C.F.R. § 2.107(l)(2)(i).

**2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA’s Operations or Activities Regarding the CAA and SIPs.**

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In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(l)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the influence of any outside groups on this process, is also important to the public's understanding of the [government]." *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in this FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

**3. Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.**

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(l)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a large number of discrete lawsuits and enforcement actions. *Id.* (holding information in court houses,

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newspaper articles, and affidavits not sufficient to justify denying a fee waiver). The Requesting States will then compile and summarize this information into an easily accessible and readable report for their citizens and distribute copies of the report to Congress and the media.

As detailed above, the Requesting States intend to disseminate the requested information by making the report as well as the underling information publicly available on the Requesting States' websites as well as through the Library Systems of each of the Requesting States. Because the report will be posted on State government websites any American with access to the internet will have access to the report. Accordingly, the report will be available to better inform all U.S. citizens on matters affecting EPA's operations and policy formation. *See Judicial Watch Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (requesting party's concrete plan or specific intent for publication and other dissemination of requested information demonstrates compliance with third factor). Further, the Requesting States stature as representatives of their respective citizens and accountability to their citizens to provide information affecting each State's implementation of the CAA demonstrates that the Requesting States can and will disseminate the requested information to a broad group of interested persons. *See Fed. CURE*, 602 F. Supp. 2d at 204 (stature of largest public advocacy group demonstrated ability to disseminate information to reasonably broad group).

Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

**4. Fourth Factor: The FOIA Request Seeks Information That will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.**

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in many of the federal environmental programs. 40 C.F.R. § 2.107(l)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to

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the level of public understanding existing prior to the disclosure.” 40 C.F.R. § 2.107(l)(2)(iv).

As detailed above, the Requesting States intend to prepare a report on EPA’s decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor, *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the “public’s understanding of EPA decision making will be significantly enhanced by learning about the nature and scope of EPA communication[s]” and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

**B. The Requesting States’ FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.**

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party’s commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(l)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States’ intended use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the Requesting States’ complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(l)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

In light of the ongoing and contentious public policy controversy regarding EPA’s coordination and planning its regulatory agenda with non-governmental organizations, the Requesting States note that time is of the essence in this matter. There is a great need for prompt disclosure so that the released information may more adequately inform public understanding and discussion of EPA’s actions.

In the event that access to any of the requested records is denied, please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that the Requesting States be provided with all

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non-exempt portions which are reasonably segregable. We further request that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination, and in formulating arguments in case an appeal is taken. The EPA's written justification might also help to avoid unnecessary litigation. We of course reserve the right to appeal the withholding or deletion of any information and expect that you will list the office and address where such an appeal can be sent.

If for some reason, the fee waiver request is denied, while reserving my right to appeal such a decision, the Requesting States are willing to pay \$5.00 (five dollars) to cover costs of document search and duplication.

Access to the requested records should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and the requesters may immediately file an administrative appeal.

Finally, the Requesting States ask that all correspondence regarding this FOIA request and all documents produced in response to this request be directed to the Attorney General of the State of Oklahoma.

Thanking you in advance for your prompt reply.

Sincerely,

E. Scott Pruitt  
OKLAHOMA ATTORNEY GENERAL



P. Clayton Eubanks  
DEPUTY SOLICITOR GENERAL  
Office of Oklahoma Attorney General  
(405) 522-8992 Fax (405) 522-0608  
clayton.eubanks@oag.ok.gov



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

February 22, 2013

OFFICE OF  
ENVIRONMENTAL INFORMATION

Mr. P. Clayton Eubanks  
Deputy Solicitor General  
Office of Oklahoma Attorney General  
313 N. E. 21<sup>st</sup> Street  
Oklahoma City, OK 73105

RE: Request Number EPA-HQ-2013-003886

Dear Mr. Eubanks:

This is in response to your request for a waiver of fees in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) seeking a copy of records from the January 1, 2009 to February 6, 2013 regarding the scope and application of the non-discretionary duty to take certain action under the Clear Air Act; the course of action to take with respect to any Regional Haze State Implementation Plan; and other records as described in your request.

We have reviewed your fee waiver justification and based on the information provided, we are denying your request for a fee waiver. You have not expressed a specific intent to disseminate the information to the general public. As a result of you failing to meet the above criteria, accordingly, there is no need to address the remaining prongs of the fee waiver criteria. If the estimated cost exceeds \$25.00 the Office of Air and Radiation will contact you regarding the cost of processing your request and seek an assurance of payment. They will be unable to process your request until they receive your written assurance of payment.

Under the FOIA, you have the right to appeal this determination to the National Freedom of Information Office, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, NW (2822T), Washington, DC 20460 (U.S. Postal Service Only), E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov). Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania



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Mr. P. Clayton Eubanks  
February 22, 2013  
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Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(l) in your appeal. If you have any questions concerning this determination please contact me at (202) 566-1667.

Sincerely,



Larry F. Gottesman  
National FOIA Officer



OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA

March 15, 2013

**VIA US CERTIFIED MAIL  
RETURN RECEIPT REQUESTED,  
FACSIMILE & E-MAIL**

National Freedom of Information Officer  
United States EPA  
FOIA and Privacy Branch  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
Fax: 202-566-2147  
Email: Hq.foia@epa

**Re: FREEDOM OF INFORMATION ACT APPEAL  
Appeal of Fee Waiver Denial Pursuant to 40 C.F.R. § 2.104(j)  
FOIA Request No. EPA-HQ-2013-003886**

Dear Sir or Madam:

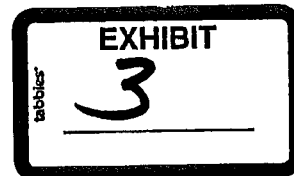
This is a timely appeal of the U.S. Environmental Protection Agency's ("EPA") improper denial of the Oklahoma Attorney General's request for a fee waiver in connection with the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming's ("Requesting States") February 6, 2013, Freedom of Information Act ("FOIA") request No. EPA-HQ-2013-003886. ("FOIA Request"). For the reasons stated in the FOIA Request, the Requesting States ask that this appeal be given expedited review.

**I. BACKGROUND**

As detailed in the FOIA Request, the Requesting States seek any and all documents regarding any consideration, proposal or discussions between the EPA Administrator with any Interested Organization or Other Organizations<sup>1</sup> concerning:

- i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("CAA"), 42 U.S.C. § 7604(a)(2);

<sup>1</sup> Interested Organization and Other Organizations are defined in the Requesting States FOIA Request.



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- ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("SIP") required to be submitted to the U.S. Environmental Protection Agency ("EPA") pursuant to CAA § 169A for any State;
- iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "Subject").

A copy of the FOIA Request is attached hereto and incorporated by reference as Attachment A.

In its February 22, 2013 denial letter, EPA claims that the Requesting States' fee waiver request must be denied because "you have not expressed a **specific intent** to disseminate the information to the general public." A copy of EPA's Fee Waiver Denial is attached hereto and incorporated by reference as Attachment B. Respectfully, EPA asserted basis for denial of the Requesting States' fee waiver request is wholly without merit. In their FOIA Request the Requesting States make numerous statements that the documents requested from EPA will be disseminated to the general public.

- "The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report...The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues." FOIA Request at p. 5.
- "The Requesting States plan to make [the EPA] documents available to the public at the University, Federal Depository and State Library systems [ ] in the respective Requesting States. As these facilities are open to the **general public**, many people will thereby have access to the information contained in the materials which are the subject of this request." (emphasis added). FOIA Request at p. 5.

Because the information sought in the FOIA Request is in the public interest, will significantly contribute to the public's understanding of the operations and activities of EPA and will not be used to further any commercial interest, the Requesting States properly sought a fee waiver pursuant to 40 C.F.R. § 2.107(l). *See also generally* 5 U.S.C. § 552(a)(4)(A)(iii).

As set forth below, EPA's denial of the Requesting States' fee waiver request is factually incorrect and legally contrary to FOIA, EPA's own regulations, and case law interpreting and applying fee waiver regulations. Accordingly, the Requesting States request the immediate reversal of EPA's denial of the fee waiver request and that EPA be instructed to proceed forthwith in processing the FOIA Request.

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## **II. THE REQUESTING STATES ARE ENTITLED TO A FEE WAIVER FOR THE FOIA REQUEST**

### **A. The Requesting States' Purpose And Intent For The Requested Information**

Over the past three years EPA has allowed its regulatory and policy agenda to be largely defined by litigation settlements it has entered into with non-governmental organizations. On at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included the payment of plaintiffs' attorneys' fees) brought under the CAA and other environmental statutory programs. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations or whether to approve certain permit applications. Unfortunately, States responsible for implementing many of these regulations and permit programs have little knowledge of or input in the litigation or settlement process.

The effective exclusion of the States from these litigation or administrative proceedings is directly inconsistent with the cooperative federalism approach to implementing many of the environmental programs created under the CAA. In implementing these federal environmental programs, States often must design plans that meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. However, these State efforts and plans are effectively superseded when EPA enters into negotiated settlements with non-governmental organizations alone that dictate how federal environmental law should be applied and implemented in an individual State. When the States' important role as a partner with EPA in implementing federal environmental programs is ignored, the States and their important sovereign interests are impaired, as are the rights of their citizens who rely on and expect the States to implement the federal environmental laws—not EPA along with non-governmental organizations.

The Requesting States seek the Subject information so that they may: understand and make public EPA's decision-making process in negotiating and entering into litigation settlements; utilize the Subject information to inform the preparation and participation in the public comment process on negotiated settlements between EPA and non-governmental organizations; utilize the Subject information to determine the extent to which the cooperative federalism principles embodied in the environmental programs, such as the CAA, are being eroded by these negotiated settlements; and use the Subject information to inform and educate the general public, and State and federal lawmakers on the importance of cooperative federalism and why the States should continue to have the lead role in implementing federal environmental programs.

As fully explained in the FOIA Request, the Requesting States will analyze the information presented in the released documents and our staff of experts will produce a report as

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part of our review of EPA's operations. The report will be disseminated to the general public by being posted on State government websites as well as to the media and all members of Congress. Further, the underlying Subject information and the report will be made available to the public at the University, Federal Depository and State Library systems ("Library System") in the respective Requesting States. With the posting of the report on the States' websites and making the report available in the Library System, millions of people throughout the United States will have access to the Subject information and resulting report.

Additionally, most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were "established by Congress to ensure that the American public has access to its Government's information." <http://www.gpo.gov/libraries/>. As Federal Depositories, these libraries ensure that the agency publications and other information "are highly visible to the public, promoted, and safeguarded." *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

#### B. Legal Standard for Fee Waivers

FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents "shall be furnished without any charge" if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(l)(2)-(3). EPA's regulations elucidate further that to be granted fee waiver requests it must be established that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As the FOIA Request demonstrates and this appeal further explains, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

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**1. First Factor: The FOIA Request is for Records Concerning EPA's Operations and Activities.**

As detailed in the FOIA Request, the Subject information the Requesting States seek disclosure of directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(l)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA's operations and activities related to its implementation and enforcement of the CAA's Regional Haze program through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the CAA.

In its enforcement of the CAA through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency's expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; see also *Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys' fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the "operations or activities of the government." 40 C.F.R. § 2.107(l)(2)(i).

**2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA's Operations or Activities Regarding the CAA and SIPs.**

In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(l)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process**, is also important to the public's understanding of the [government]. *Forest Guardians*, 416 F.3d at 1179-80, (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize

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the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong, 602 F. Supp. 2d at 202-03. As explained in its FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

**3. Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.**

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(l)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a number of discrete administrative proceedings and lawsuits. *Id.* (holding information in court houses, newspaper articles, and affidavits not sufficient to justify denying a fee waiver). The Requesting States will then compile and summarize this information into an easily accessible and readable report for their citizens and distribute copies of the report to the general public, Congress and the media.

As detailed above, the Requesting States will disseminate the requested information to the general public by making the report as well as the underlying information publicly available on the Requesting States' websites as well as through the Library Systems of each of the Requesting States. Because the report will be posted on State government websites any American with access to the internet will have access to the report. Accordingly, the report will be available to better inform all U.S. citizens on matters affecting EPA's operations and policy formation. *See Judicial Watch Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (requesting party's concrete plan or specific intent for publication and other dissemination of requested information demonstrates compliance with third factor). Further, the Requesting States' stature as representatives of their respective citizens and accountability to their citizens to provide information affecting each State's implementation of the CAA demonstrates that the Requesting States can and will disseminate the requested information to a broad group of interested persons. *See Fed. CURE*, 602 F. Supp. 2d at 204 (stature of largest public advocacy group demonstrated ability to disseminate information to reasonably broad group).

Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide

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invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

**4. Fourth Factor: The FOIA Request Seeks Information That Will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.**

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in the CAA. 40 C.F.R. § 2.107(I)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to the level of public understanding existing prior to the disclosure." 40 C.F.R. § 2.107(I)(2)(iv).

As detailed above, the Requesting States will prepare a report on EPA's decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the "public's understanding of EPA decision-making will be significantly enhanced by learning about the nature and scope of EPA communication[s]" and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

**C. The Requesting States' FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.**

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party's commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(I)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States' use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the



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Requesting States' complete lack of commercial interest in the requested information, 40 C.F.R. § 2.107(l)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

### III. CONCLUSION

The Requesting States are entitled to a fee waiver because the information sought will benefit the public's understanding as to how environmental laws are being manipulated to usurp the authority of States via Consent Decrees between EPA and non-governmental organizations—negotiations that leave the affected State or States entirely out of the process. The impact of these EPA settlements on current and future environmental policy is significant and impacts all Americans who are either directly or indirectly affected by EPA regulation and policy. Further, the Requesting States are making the Subject information available to the public and receive absolutely no financial benefit from the information. As such, the Requesting States respectfully request that EPA's fee waiver denial be reversed and that all fees related to responding to the FOIA Request be waived, and that EPA respond to the Requesting States' FOIA Request.

Sincerely,



P. Clayton Eubanks  
Deputy Solicitor General

PCE:csn  
Attachments



OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA

February 6, 2013

VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

FREEDOM OF INFORMATION ACT REQUEST

Freedom of Information Officer  
U.S. EPA, Records, FOIA and Privacy Branch  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
Hq.foia@epa.  
FOIA REQUEST

Dear Sir or Madam:

This is a request under the Freedom of Information Act (5 U.S.C. § 552, as amended).

By this letter the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming ("Requesting States") are requesting any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2009, to the date of this letter that discuss or in any way relates to:

(a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy ("Other Organizations"), concerning:

- i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("CAA"), 42 U.S.C. § 7604(a)(2);

ATTACHMENT "A"

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- ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("SIP") required to be submitted to the U.S. Environmental Protection Agency ("EPA") pursuant to CAA § 169A for any State;
- iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "Subject").

"Interested Organizations" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club
- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates
- Wyoming Outdoor Council
- Greater Yellowstone Coalition

(b) Copies of any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) sent or received by the following EPA offices:

- i. the Office of the Administrator;
- ii. the Office of Environmental Information;
- iii. the Office of General Counsel;
- iv. the Office of Inspector General;

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- v. the Office of International and Tribal Affairs;
- vi. the Office of Research and Development;
- vii. Region 1;
- viii. Region 2;
- ix. Region 3;
- x. Region 4;
- xi. Region 5;
- xii. Region 6;
- xiii. Region 7;
- xiv. Region 8;
- xv. Region 9; or
- xvi. Region 10.

(including receipt by carbon copy or blind carbon copy), regarding the Subject including, but not limited to, documents sent by or received from individuals representing or employed by the Interested Organizations or Other Organizations.

#### Reason for FOIA Request

Over the past three years, the EPA has allowed its regulatory agenda to be largely defined by litigation settlements it has entered into with environmental organizations. Specifically, on at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included paying plaintiffs' attorneys' fees) brought under the CAA. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations. Unfortunately, States responsible for implementing many of these regulations have little knowledge of or input in this process, which is not consistent with the cooperative federalism structure of federal environmental law.

Out of the forty-five settlements that have been made public, EPA has paid almost \$1 million in attorneys' fees to these groups, while also committing to develop a suite of sweeping new regulations. One EPA Consent Decree led to the promulgation of EPA's costliest regulation ever - the Mercury Air Toxics Standards (MATS). Other Consent Decrees include obligations that define how and when EPA acts on forty-five individual State Regional Haze SIPs - including the imposition of proposed federal implementation plans ("FIPs").

Many Consent Decrees authorize EPA to act in a way that is not consistent with current law. For example, Regional Haze Consent Decrees allowed EPA to propose combined Regional Haze SIPs/FIPs - something EPA has not done before in administering the CAA.

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This is detrimental to the States and “unwinds” the State and federal partnership contained in the CAA.

States affected by these non-governmental organization lawsuits are not included as parties in the suits and when affected States try to intervene, EPA and the environmental groups frequently oppose State intervention. For instance, when the State of North Dakota sought to intervene in *Wildearth Guardians v. Jackson* in the U.S. District Court for the Northern District of California (where *Wildearth Guardians* filed its suit), EPA opposed the intervention despite the fact that the case involved how and when EPA should act on North Dakota’s proposed Regional Haze SIP. *Wildearth Guardians v. Jackson*, No. C-09-2453-CW, 2011 U.S. Dist. LEXIS 14378 (N.D. Cal. Dec. 27, 2011) (order denying North Dakota’s intervention).

State Attorneys General from the Requesting States are in the process of evaluating EPA’s alarming practice of relying on Consent Decrees to deny the States their important role as a partner with EPA in implementing federal environmental law. Not only does EPA’s action harm and jeopardize the States’ role as a partner with EPA, but it harms the interests of the citizens of the Requesting States. Our citizens rely on and expect the States to implement federal environmental law. Often, these implementation efforts require the States to design plans to meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. When EPA coordinates with non-governmental organizations regarding how federal environmental law should be applied and implemented in an individual State and excludes the State from that effort the State and its citizens are harmed.

Rather than make individual FOIA requests, the Requesting States are making one request for the release of documents with the Interested Organizations and Other Organizations concerning the Subject. The Requesting States have lobbied, litigated, and publicly commented on federal actions which directly affect their individual State interests and those of their citizens. The requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA’s operations, particularly regarding the quality of the EPA’s activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States.

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA’s operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

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### Fee Waiver Request

The Requesting States request that you waive any applicable fees since disclosure meets the standard for waiver of fees as it is in the public interest. *See* 40 C.F.R. § 2.107(l). Specifically, this request concerns “the operations or activities of the government;” disclosure is “likely to contribute” to an understanding of government operations or activities; disclosure will contribute to “public understanding;” the disclosure is likely to contribute “significantly” to public understanding of government operations and activities; and the States have no commercial interest in disclosure of the documents – the Requesting States’ interest is to facilitate and promote the public interest. 40 C.F.R. § 2.107(2)(i),(iv).

### Reasons for Granting the Fee Waiver Request

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA’s operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

The Requesting States plan to make these documents available to the public at the University, Federal Depository and State Library systems (“**Library Systems**”) in the respective Requesting States. As these facilities are open to the general public, many people will thereby have access to the information contained in the materials which are the subject of this request. Most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were “established by Congress to ensure that the American public has access to its Government’s information.” <http://www.gpo.gov/libraries/>. As Federal Depositories, these libraries ensure that the agency publications and other information “are highly visible to the public, promoted, and safeguarded.” *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

#### **A. Legal Standard for Fee Waivers**

FOIA’s fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test “should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information

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satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents “shall be furnished without any charge” if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(l)(2)-(3). EPA’s regulations elucidate further that to be granted fee waiver requests a requester must establish that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As this FOIA Request demonstrates, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

**1. First Factor: The FOIA Request is for Records Concerning EPA’s Operations and Activities.**

The Subject information the Requesting States seek directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(l)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA’s operations and activities related to its implementation and enforcement of the CAA through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the federal environmental program at issue in the lawsuit or administrative action.

In its enforcement of these federal programs through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency’s expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys’ fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the “operations or activities of the government.” 40 C.F.R. § 2.107(l)(2)(i).

**2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA’s Operations or Activities Regarding the CAA and SIPs.**

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In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(l)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process**, is also important to the public's understanding of the [government]. *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in this FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

**3. Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.**

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(l)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a large number of discrete lawsuits and enforcement actions. *Id.* (holding information in court houses,



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newspaper articles, and affidavits not sufficient to justify denying a fee waiver). The Requesting States will then compile and summarize this information into an easily accessible and readable report for their citizens and distribute copies of the report to Congress and the media.

As detailed above, the Requesting States intend to disseminate the requested information by making the report as well as the underlying information publicly available on the Requesting States' websites as well as through the Library Systems of each of the Requesting States. Because the report will be posted on State government websites any American with access to the internet will have access to the report. Accordingly, the report will be available to better inform all U.S. citizens on matters affecting EPA's operations and policy formation. *See Judicial Watch Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (requesting party's concrete plan or specific intent for publication and other dissemination of requested information demonstrates compliance with third factor). Further, the Requesting States' stature as representatives of their respective citizens and accountability to their citizens to provide information affecting each State's implementation of the CAA demonstrates that the Requesting States can and will disseminate the requested information to a broad group of interested persons. *See Fed. CURE*, 602 F. Supp. 2d at 204 (stature of largest public advocacy group demonstrated ability to disseminate information to reasonably broad group).

Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

**4. Fourth Factor: The FOIA Request Seeks Information That will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.**

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in many of the federal environmental programs. 40 C.F.R. § 2.107(l)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to

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the level of public understanding existing prior to the disclosure.” 40 C.F.R. § 2.107(l)(2)(iv).

As detailed above, the Requesting States intend to prepare a report on EPA’s decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the “public’s understanding of EPA decision making will be significantly enhanced by learning about the nature and scope of EPA communication[s]” and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

**B. The Requesting States’ FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.**

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party’s commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(l)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States’ intended use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the Requesting States’ complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(l)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

In light of the ongoing and contentious public policy controversy regarding EPA’s coordination and planning its regulatory agenda with non-governmental organizations, the Requesting States note that time is of the essence in this matter. There is a great need for prompt disclosure so that the released information may more adequately inform public understanding and discussion of EPA’s actions.

In the event that access to any of the requested records is denied, please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that the Requesting States be provided with all

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non-exempt portions which are reasonably segregable. We further request that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination, and in formulating arguments in case an appeal is taken. The EPA's written justification might also help to avoid unnecessary litigation. We of course reserve the right to appeal the withholding or deletion of any information and expect that you will list the office and address where such an appeal can be sent.

If for some reason, the fee waiver request is denied, while reserving my right to appeal such a decision, the Requesting States are willing to pay \$5.00 (five dollars) to cover costs of document search and duplication.

Access to the requested records should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and the requesters may immediately file an administrative appeal.

Finally, the Requesting States ask that all correspondence regarding this FOIA request and all documents produced in response to this request be directed to the Attorney General of the State of Oklahoma.

Thanking you in advance for your prompt reply.

Sincerely,

E. Scott Pruitt  
OKLAHOMA ATTORNEY GENERAL



P. Clayton Eubanks  
DEPUTY SOLICITOR GENERAL  
Office of Oklahoma Attorney General  
(405) 522-8992 Fax (405) 522-0608  
clayton.eubanks@oag.ok.gov

**SENDER: COMPLETE THIS SECTION**

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1. Article Addressed to:

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 US EPA Rec, FOIA  
 1200 Pennsylvania, NW  
 Washington, DC (20501)  
 20460

2. Article Number

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

February 22, 2013

OFFICE OF  
ENVIRONMENTAL INFORMATION

Mr. P. Clayton Eubanks  
Deputy Solicitor General  
Office of Oklahoma Attorney General  
313 N. E. 21<sup>st</sup> Street  
Oklahoma City, OK 73105

RE: Request Number EPA-HQ-2013-003886

Dear Mr. Eubanks:

This is in response to your request for a waiver of fees in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) seeking a copy of records from the January 1, 2009 to February 6, 2013 regarding the scope and application of the non-discretionary duty to take certain action under the Clear Air Act; the course of action to take with respect to any Regional Haze State Implementation Plan; and other records as described in your request.

We have reviewed your fee waiver justification and based on the information provided, we are denying your request for a fee waiver. You have not expressed a specific intent to disseminate the information to the general public. As a result of you failing to meet the above criteria, accordingly, there is no need to address the remaining prongs of the fee waiver criteria. If the estimated cost exceeds \$25.00 the Office of Air and Radiation will contact you regarding the cost of processing your request and seek an assurance of payment. They will be unable to process your request until they receive your written assurance of payment.

Under the FOIA, you have the right to appeal this determination to the National Freedom of Information Office, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, NW (2822T), Washington, DC 20460 (U.S. Postal Service Only), E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov). Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania

ATTACHMENT "B"

Mr. P. Clayton Eubanks  
February 22, 2013  
Page 2

Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(l) in your appeal. If you have any questions concerning this determination please contact me at (202) 566-1667.

Sincerely,



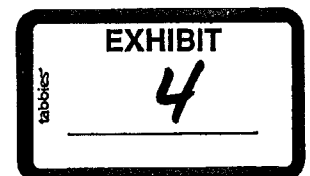
Larry F. Gottesman  
National FOIA Officer

Dear Mr. Eubanks:

I am writing in regard to the above-referenced fee waiver appeal. My office is in receipt of your appeal file and is currently reviewing it for a response. We require a brief extension of time to complete the process of reviewing and finalizing the response. We expect to provide you with a determination on or before May 15, 2013. Thank you for your patience, and please contact me if you have any questions concerning your appeal.

Sincerely,

Lynn Kelly  
Attorney-Advisor  
U.S. Environmental Protection Agency  
General Law Office  
Office of General Counsel  
(202) 564-3266  
Office # 7426V





RE: Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Kelly, Lynn

to:

Clayton.Eubanks@oag.ok.gov

05/15/2013 03:10 PM

Hide Details

From: "Kelly, Lynn" <Kelly.Lynn@epa.gov>

To: "Clayton.Eubanks@oag.ok.gov" <Clayton.Eubanks@oag.ok.gov>,

History: This message has been forwarded.

Mr. Eubanks:

I am writing with an update about the status of the above-referenced fee waiver appeal. My office is reviewing your appeal file, however we require one additional extension of time to complete the process of finalizing the response. We expect to provide you with a determination on or before May 31, 2013. Thank you again for your continued patience, and please contact me if you have any questions concerning your appeal.

Sincerely,

Lynn Kelly  
Attorney-Advisor  
U.S. Environmental Protection Agency  
General Law Office  
Office of General Counsel  
(202) 564-3266  
Office # 7426V

---

**From:** Clayton.Eubanks@oag.ok.gov [mailto:Clayton.Eubanks@oag.ok.gov]  
**Sent:** Thursday, May 02, 2013 11:23 AM  
**To:** Kelly, Lynn  
**Subject:** Re: Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Thank you.

P. Clayton Eubanks  
Deputy Solicitor General  
Office of the Attorney General of Oklahoma  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
Tel: (405) 522-8992  
Fax: (405) 522-0085  
[clayton.eubanks@oag.ok.gov](mailto:clayton.eubanks@oag.ok.gov)

From: "Kelly, Lynn" <Kelly.Lynn@epa.gov>  
To: "[clayton.eubanks@oag.ok.gov](mailto:clayton.eubanks@oag.ok.gov)" <[clayton.eubanks@oag.ok.gov](mailto:clayton.eubanks@oag.ok.gov)>,  
Date: 05/02/2013 10:20 AM  
Subject: Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)







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

MAY 31 2013

OFFICE OF  
GENERAL COUNSEL

Mr. P. Clayton Eubanks  
Deputy Solicitor General  
Office of Oklahoma Attorney General  
313 N.E. 21<sup>st</sup> Street  
Oklahoma City, OK 73105

Re: Freedom of Information Act Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Dear Mr. Eubanks:

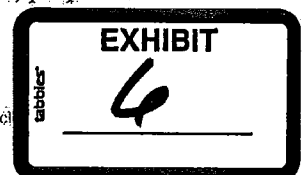
I am responding to your March 15, 2013 fee waiver appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. You appealed the February 22, 2013 decision of Larry Gottesman of the U.S. Environmental Protection Agency ("EPA" or "Agency") to deny your request for a fee waiver ("initial fee waiver denial"). You seek a waiver of all fees associated with your FOIA request for documents related to consideration, proposal, or discussion of three subjects related to the Clean Air Act ("CAA") with non-governmental organizations whose purpose may include environmental or natural resource advocacy and policy. You requested a waiver of all fees associated with processing your request, and stated you were willing to pay \$5.00 (five dollars) in the event your fee waiver was denied.

On February 22, 2013, Mr. Gottesman, the EPA's National FOIA Officer, denied your request for a fee waiver finding that you had failed to express specific intent to disseminate the information to the general public, thus failing to demonstrate that your request is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter.

I have carefully considered your request for a fee waiver, EPA's initial fee waiver denial, and your appeal. For the reasons set forth below, I have concluded that you do not have a proper request pending before the Agency, and therefore your appeal of the denial of a waiver of fees is moot.

#### Analysis

In reviewing your February 6, 2013 FOIA request in order to process your fee waiver appeal, this office has determined that your initial request fails to adequately describe the records sought, as required by the FOIA and by EPA's regulations. 5 U.S.C. § 552(a)(3); 40 C.F.R. § 2.102(c). You seek records "which discuss or in any way relate to" any "consideration, proposal,



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or discussion with "Interested Organizations" or any "Other Organizations" on three broad topics related to the Clean Air Act. Request at 1. At least one category of your request (records described in paragraph (a)(i)) is almost identical to a request that was previously denied by EPA as improper on September 14, 2012. While you have tailored the subject matter of the next two categories of records you are seeking ((a)(ii) and (a)(iii)) by focusing only on Regional Haze State Implementation Plans ("SIPs"), you have not provided enough information to permit an employee reasonably familiar with the subject matter to identify the records you are seeking. This is because despite reducing the provided list of "Interested Organizations" from eighty to seventeen, you are still requesting documents related to any communication between EPA and "Other Organizations" which you broadly define as "any other non-governmental organization, including citizen organizations whose purpose or interest may include environmental or natural resource advocacy and policy." Request at 1. This qualifying statement about requesting records from "Other Organizations" effectively re-incorporates the sixty-three excluded organization from the list in your original request, as well as numerous other unnamed organizations, and would require EPA staff to also search for and determine the organizational mission of any 3<sup>rd</sup> party that may have had a communication with the Agency on topics under the CAA. Broad, sweeping requests lacking specificity are not sufficient. American Fed. of Govt Employees v. Dep't of Commerce, 632 F.Supp. 1272, 1277 (D.D.C.1986). Additionally, requests for documents which "refer or relate to" a subject are routinely "subject to criticism as overbroad since life, like law, is 'a seamless web,' and all documents 'relate' to all others in some remote fashion." Massachusetts v. Dep't of Health & Human Servs., 727 F.Supp. 35, 36 n.2 (D.Mass. 1989).

Additionally, paragraph (b) of your request is nearly identical to the request previously denied by EPA as an improper request on September 14, 2012. Instead of requesting "all documents" that in any way relate to the three broad categories of your request from every single headquarters and regional EPA office, you have requested records from sixteen different offices instead of twenty-one. Request at 2-3. You are requesting all documents sent or received by staff in sixteen EPA offices on three general subjects, for a period of almost four and a half years. Such "all documents" requests have been found by courts to be improper. See, Dale v. IRS, 238 F.Supp 2d 99, 104 (D.D.C. 2002); Mason v. Callaway, 554 F.2d 129, 131 (4th Cir.1977). By way of comparison, a recent District of Columbia decision found that a similar request that amounted to a request for all internal emails of 25 individuals over a two year period failed to reasonably describe the records sought, and was unreasonably burdensome. Hainey v. U.S. Dep't of Interior, No. 11-1725 (2013 WL 659090 (D.D.C.)). The court found that the burden of amassing this volume of information, in addition to the time needed to review the records, conflicted with settled case law that "an agency need not honor a [FOIA] request that requires 'an unreasonably burdensome search'" and that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors." Id. At \*8-9 (internal citations omitted).

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For the reasons stated above, I have determined that your request does not reasonably identify the records you are seeking. Because this is your second attempt at submitting a properly formulated request, I will take this opportunity to indicate how your request might be modified to reasonably identify the records you are seeking. In order to reasonably identify the records you are seeking, you should identify the records with particular specificity. EPA regulations state that "whenever possible you should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter" and also that "[t]he more specific you are about the records or type of records you want, the more likely EPA will be able to identify and locate records responsive to your request." 40 C.F.R. § 2.103(c). Often this is accomplished by providing key words which employees may use to easily search for and determine if there are responsive records. For example, should you limit your request to records communicating with any *specifically identified* organization AND referencing settlement relating to the three subject areas you identify, your request would enable EPA staff familiar with the subject area to search for and locate any responsive records.

Because I have determined that you do not have a proper request pending before the Agency, your appeal of EPA's initial denial of a fee waiver for your request is moot, and I am closing your appeal file. Although I need not address the merits of your fee waiver request and appeal at this time, I have included the following discussion in order to assist you in submitting any properly formulated request for records and a waiver of fees.

#### **Fee Waiver Discussion**

The statutory standard for evaluating fee waiver requests is whether "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 [Federal] government; and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

EPA's regulations at 40 C.F.R. § 2.107(l)(2) and (3) establish the same standard. EPA must consider four conditions to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns the operations or activities of the Federal government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether the disclosure is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter; and (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). EPA must consider two conditions to determine whether a request is primarily in the commercial interest of the requester: (1) whether the requester has a commercial interest that would be furthered by the requested documents; and (2) whether any such commercial interest outweighs the public interest in disclosure. 40 C.F.R. § 2.107(l)(3).

Finally, the Agency considers fee waiver requests on a case-by-case basis. Judicial Watch, Inc. v. DOJ, 185 F. Supp. 2d 54, 60 (D.D.C. 2002). Whether a requester may have

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EPA-HQ-2013-004583  
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received a fee waiver in the past is not relevant for a subsequent request.

### Public Interest Prong of the Fee Waiver Test

A requester seeking a fee waiver bears the burden of showing that the disclosure of the responsive documents is in the public interest and is not primarily in the requester's commercial interest. See Judicial Watch, Inc., 185 F. Supp. 2d at 60; Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988). Conclusory statements or mere allegations that the disclosure of the requested documents will serve the public interest are not sufficient to meet the burden. See McClellan Ecological Seepage Situation, 835 F.2d at 1285; Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003). The requester must therefore explain with reasonable specificity how disclosure of the requested information is in the public interest by demonstrating how such disclosure is likely to contribute significantly to public understanding of government operations or activities. Larson, 843 F.2d at 1483. Furthermore, if the circumstances surrounding this request (e.g., the content of the request, the type of requester, the purpose for which the request is made, the requester's ability to disseminate the information to the public) clarify the point of the request, the requester must set forth these circumstances. See Larson, 843 F.2d at 1483.

### Elements 2 and 4

I will discuss the second and fourth factors of the public interest prong at the same time. The second factor to consider is the informative value of the documents to be disclosed. 40 C.F.R. § 2.107(l)(2)(ii). The requested documents must be "meaningfully informative about government operations or activities in order to be 'likely to contribute' to an increased public understanding of those operations or activities." 40 C.F.R. § 2.107(l)(2)(ii). The disclosure of information already in the public domain would have no informative value since it would not add to the public's understanding of government. Id. The fourth factor to consider is how the disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv). Disclosure of the information should significantly enhance the public's understanding of the subject in question as compared to the level of public understanding prior to disclosure. Id.

In support of your request, you generally state that "[t]he requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States." Request at 4. You also state that "disclosure 'is likely to contribute' to an understanding of government operations or activities'" and "disclosure is likely to contribute 'significantly' to public understanding of government operations and activities" (repeating the regulatory

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standard). Request at 5. These general statements are typically insufficient to support a waiver of fees. Judicial Watch Inc. v. DOJ, 185 F.Supp 2d 54, 61-62 (D.D.C. 2002). You also state that "the public currently has no access to the requested Subject information," however information about the Clean Air Act, Regional Haze, and the public comment process around negotiated settlements is available on the Agency's program website<sup>1</sup> as well as on the websites of the Regional Planning Organizations' and States' sites. Request at 8; Appeal at 7.

Your less generalized statements in support of factors two and four also fail to demonstrate that your request satisfies the standard established by these elements. You state that your request seeks "information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest," that will help "understand and make public EPA's decision-making process in negotiating and entering into litigation settlements," and will educate the public on "the importance of cooperative federalism and why the States should continue to have the lead role in implementing federal environmental programs." Request at 7; Appeal at 3. As compared to the broad categories of your request, there is no clear nexus between the records requested and the areas of education identified above. For example, your request is in no way limited to communications with non-governmental organizations, or to discussions about cooperative federalism. Numerous records you have requested will not shed any light on these subjects, and you have not explained how all of the requested records will meaningfully inform the public about these stated topics.

### Element 3

Additionally, the requester seeking a fee waiver must also demonstrate that the disclosure of the requested documents will likely contribute to the public understanding, *i.e.*, the understanding of "a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 40 C.F.R. § 107(1)(2)(iii). The requester's expertise in the subject area and his or her "ability and intention to effectively convey information to the public will be considered." *Id.* A requester must express a specific intent to publish or disseminate the requested information, and identify a specific increase in public understanding that would result from such dissemination. Judicial Watch, Inc. v. DOJ, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). A requester who does not provide specific information regarding a method of disseminating requested information will not meet the third factor, even if the requester has the ability to disseminate information. Judicial Watch, Inc. V. DOJ, 122 F. Supp. 2d 13, 18-19 (D.D.C. 2000).

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<sup>1</sup>See, e.g. <http://www.epa.gov/airquality/visibility/program.html>;  
<http://www.epa.gov/airquality/visibility/actions.html>.

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You state that the "Requesting States" will compile and summarize the requested records into a report that will be distributed to the general public, the media, and Congress. Appeal at 6. You also state that the report will be available state libraries and web sites. Id. These general statements do not provide enough information to demonstrate a tangible or cognizable plan to disseminate the information. See, Van Fripp v. Parks, 2000 U.S. Dist. LEXIS 20158, \*20 (D.D.C. Mar. 16, 2000) ("Obtaining placement in a library is, at best, a passive method of distribution that does not discharge the plaintiff's affirmative burden to disseminate information."). While it is possible that a report written using information obtained from the Agency could be informative, these general statements about passive methods of distribution, especially when unaccompanied by details about the authorship of a report by the staff of thirteen different state governments or about the intended audience, fails to demonstrate a specific intent to publish or disseminate the requested information.

This discussion above is being provided to you in order to assist you in understanding the Agency's obligations to evaluate fee waiver requests using the standards contained in EPA's regulations and the FOIA. Should you choose to submit a new request, please feel free to contact the Agency's FOIA Office for information about what you may provide in order to submit a proper request, and to provide the information necessary for the Agency to evaluate a request for a fee waiver.

### **Conclusion**

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, [ogis@nara.gov](mailto:ogis@nara.gov); telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Mr. P. Clayton Eubanks  
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Please call Lynn Kelly at 202-564-3266 if you have any questions regarding this determination.

Sincerely,

A handwritten signature in black ink, appearing to read "K Miller", written over a horizontal line.

Kevin M. Miller  
Assistant General Counsel  
General Law Office

cc: HQ FOI Office

From: Al Armendariz  
To: Layla Mansuri  
Subject: Re: FOIA requests for the NM and OK FIPs  
Date: 01/20/2011 08:07 PM

---

Thanks.

Al

---

Al Armendariz  
Regional Administrator  
U.S. EPA  
Region 6  
armendariz.al@epa.gov  
office: 214-665-2100  
twitter: @al\_armendariz  
▼ Layla Mansuri

----- Original Message -----

From: Layla Mansuri  
Sent: 01/20/2011 04:30 PM CST  
To: Al Armendariz; Chrissy Mann; Lawrence Starfield; Javier Balla  
Cc: Carrie Clayton  
Subject: FW: FOIA requests for the NM and OK FIPs  
FYI.

----- Forwarded by: Layla Mansuri/R6/USEPA/US on 01/20/2011 04:29 PM -----

From: Agustin Carbo-Lugo/R6/USEPA/US  
To: Layla Mansuri/R6/USEPA/US@EPA  
Date: 01/20/2011 04:11 PM  
Subject: Re: FW: FOIA requests for the NM and OK FIPs

---

Layla,

After talking to Joe Kordzi, we have decided to request additional time for both NM and OK's FOIAs. I am requesting an additional time of 30 days from today. Still have no reply from the attorneys. We are only limiting the scope for the OK FOIA, for questions 3 and 4. You may want to wait until I receive confirmation on this one. Most of NM's requests are already in the docket for the NPRM. We decided to continue uploading in the box all the emails related just to the San Juan Generating Station (as stated in the request).

Hope this helps :)

Agustin F. Carbo-Lugo  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 6





1445 Ross Ave. (6-RC-M)  
Dallas, TX 75202  
Tel: (214) 665-8037  
Fax: (214) 665-2182

-----Layla Mansuri/R6/USEPA/US wrote: -----  
To: Agustin Carbo-Lugo/R6/USEPA/US@EPA  
From: Layla Mansuri/R6/USEPA/US  
Date: 01/20/2011 04:01PM  
Cc: Chrissy Mann/R6/USEPA/US@EPA, Leticia  
Lane/R6/USEPA/US@EPA, Yerusha Beaver/R6/USEPA/US@EPA  
Subject: Re: Fw: FOIA requests for the NM and OK FIPs

Agustin:

Hi. Just following up.

I have a couple of questions:

1. What are the current deadlines?
2. Was there any narrowing to the requests? Is this in the works?

Thanks.  
Layla

Agustin Carbo-Lugo---01/18/2011 10:11:57 AM---Layla, I'll be helping  
PD with both FOIA requests. In December we requested an extension  
of time on

From: Agustin Carbo-Lugo/R6/USEPA/US  
To: Layla Mansuri/R6/USEPA/US@EPA  
Date: 01/18/2011 10:11 AM  
Subject: Fw: FOIA requests for the NM and OK FIPs

---

Layla,

I'll be helping PD with both FOIA requests. In December we  
requested an extension of time on the OK FOIA and it appears it was  
granted. This morning I had a meeting with PD and we will be  
requesting to narrow the scope of the request. I should have more  
information this afternoon. I'll get back to you.

Agustin F. Carbo-Lugo  
Office of Regional Counsel

U.S. Environmental Protection Agency, Region 6  
1445 Ross Ave. (6-RC-M)  
Dallas, TX 75202  
Tel: (214) 665-8037  
Fax: (214) 665-2182  
----- Forwarded by Agustin Carbo-Lugo/R6/USEPA/US on 01/18/2011  
10:07 AM -----

From: Lucinda Watson/R6/USEPA/US  
To: Suzanne Smith/R6/USEPA/US@EPA, Ben Harrison/R6/USEPA/US@EPA  
Cc: Agustin Carbo-Lugo/R6/USEPA/US@EPA, Yerusha  
Beaver/R6/USEPA/US@EPA, Carrie Thomas/R6/USEPA/US@EPA  
Date: 01/13/2011 04:40 PM  
Subject: Re: Fw: FOIA requests for the NM and OK FIPs

OGC (Kevin and Geoff) and I think we need to assign Agustin and Yerusha to handle the FOIA coordination for the NM and OK FIPs documents.

It is my understanding that Joe worked with Richard Wessels and is getting the LotusNotes links prepared for R6, RTP, and DC.

But we believe that we need a lawyer, e.g., Agustin, to call the requestors and narrow the scope. Agustin also could work with Joe to get the time estimates and work with whomever in RTP and DC to get their time estimates. Agustin and Joe could draft now the letter suspending the request until we get a sufficient fee commitment. Since it will be Agustin's first huge FOIA assignment, I am sure he will need to turn to Yerusha for assistance.

OGC is willing to offer any legal assistance from their FOIA experts since much of the information concerns business information, contractor information, although I feel like Paul already has explained EPA's position on these materials and PD seems to understand.

FOIA Exemption (b)(5) - Deliberative Process Privilege

Re: Fw: FOIA requests for the NM and OK FIPs

Re: Fw: FOIA requests for the NM and OK FIPs

Carrie Thomas to: Lucinda Watson 01/13/2011 02:48 PM

Cc: Agustin Carbo-Lugo, Suzanne Smith, Yerusha Beaver

---

Hi Lucinda,  
I agree with Geoff's comments.

For the original QF/FP FOIA, we did suspend the request in writing until we were able to get a sufficient fee commitment from the requestor (\$10,000 for the R6 response). We suggested that amount based on a cost estimate after we asked everyone with responsive documents to guess how long it would take them to respond. We are continuing to send rolling responses until we hit that amount, which we are very close to doing. We are also going to contact the requestor to ask if they would like to commit additional fees to cover the remainder of the response and a denial log of what we are withholding and why.

We also asked the requestor to narrow the scope, but they were under no obligation to do so. They did, in fact, narrow it slightly (hence the list of excluded records in the instructions e-mail).

Yerusha - correct me if I've misstated anything. Thanks,

Carrie K. Thomas  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 6  
1445 Ross Ave. (6-RC-M)  
Dallas, TX 75202  
Tel: (214) 665-7121  
Fax: (214) 665-2182

NOTICE: This communication may contain privileged or other confidential information. If you are not the intended recipient, or believe you have received this communication in error, please delete the copy you received, and do not print, copy, re-transmit, disseminate or otherwise use the information. Thank you.

Lucinda Watson---01/13/2011 12:49:49 PM---For the QF/FP FOIA, did we first contact them to try to narrow the request? Next, did we send

a: let

From: Lucinda Watson/R6/USEPA/US  
To: Carrie Thomas/R6/USEPA/US@EPA, Suzanne Smith/R6/USEPA/US@EPA  
Cc: Agustin Carbo-Lugo/R6/USEPA/US@EPA  
Date: 01/13/2011 12:49 PM  
Subject: Fw: FOIA requests for the NM and OK FIPs

---

For the QF/FP FOIA, did we first contact them to try to narrow the request?  
Next, did we send a letter suspending our response until they agreed to pay the estimated amount?

Of course, I cannot figure out how we would have an estimate until everyone has finished their search for responsive documents?

Bottom line - how do I answer OGC's e-mail so we sound like we know what we are doing?

----- Forwarded by Lucinda Watson/R6/USEPA/US on 01/13/2011 12:47 PM -----

Re: Fw: FOIA requests for the NM and OK FIPs

Geoffrey Wilcox to: Joe Kordzi 01/12/2011 05:22 PM

Cc: Lea Anderson, Todd Hawes, Kevin McLean, Lucinda Watson, Agustin Carbo-Lugo

---

PRIVILEGED COMMUNICATION

Joe:

Let's have a chat about this topic.

Unless something has changed, my understanding is that there are some standard protocols we usually follow in such FOIA requests.

One of the first steps is to alert the requestor that they need to narrow their request because it is overbroad, and secondarily that it will probably cost more than the amount of \$ they agreed to pay.

Unless and until they respond to that, and tell us they will pay more, we usually tell them in writing that we are suspending our response to their request until they get back to us.

Lucinda and Augustin may have more recent experience than me in dealing with such things.

If not, we may want to call one of the OGC FOIA gurus for a consultation. **FOIA Exemption (b)(5) - Deliberative Process Privilege**

G

Joe Kordzi---01/12/2011 04:09:20 PM---yes thanks - I've called Mr. Orkin to inform him I think the bill would exceed \$500. He hasn't resp.

From: Joe Kordzi/R6/USEPA/US  
To: Lea Anderson/DC/USEPA/US@EPA  
Cc: Geoffrey Wilcox/DC/USEPA/US@EPA, Todd Hawes/RTP/USEPA/US@EPA  
Date: 01/12/2011 04:09 PM  
Subject: Re: Fw: FOIA requests for the NM and OK EIPs

yes thanks - I've called Mr. Orkin to inform him I think the bill would exceed \$500. He hasn't responded yet.

Regards,

Joe

"... and miles to go before I sleep!"  
-- Robert Frost

Lea Anderson--01/12/2011 02:13:06 PM--Joe, I assume (hopefully) that we are at least charging the requestor for our search time? Please.

From: Lea Anderson/DC/USEPA/US  
To: Joe Kordzi/R6/USEPA/US@EPA  
Cc: Geoffrey Wilcox/DC/USEPA/US@EPA, Todd Hawes/RTP/USEPA/US@EPA  
Date: 01/12/2011 02:13 PM  
Subject: Re: Fw: FOIA requests for the NM and OK RFPs

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Joe,  
I assume (hopefully) that we are at least charging the requestor for our search time? Please let me know if I should keep track of the time spend on the search.

thanks,  
Lea

M. Lea Anderson  
EPA Office of General Counsel  
Phone: (202) 564-5571

Joe Kordzi--01/12/2011 01:58:30 PM--Welcome to my FOIAs. I will separately send you some Lotus Notes buttons and instructions so you ca

From: Joe Kordzi/R6/USEPA/US  
To: Geoffrey Wilcox/DC/USEPA/US@EPA, Lea Anderson/DC/USEPA/US@EPA, Todd Hawes/RTP/USEPA/US@EPA

Date: 01/12/2011 01:58 PM

Subject: Fw: FOIA requests for the NM and OK FIPs

---

Welcome to my FOIAs. I will separately send you some Lotus Notes buttons and instructions so you can load your emails.

Regards,

Joe

" ... and miles to go before I sleep."  
-- Robert Frost

----- Forwarded by Joe Kordzi/R6/USEPA/US on 01/12/2011 12:52 PM -----

From: Joe Kordzi/R6/USEPA/US

To: R6-6PD-L

Cc: Lucinda Watson/R6/USEPA/US@EPA, Agustin Carbo-Lugo/R6/USEPA/US@EPA

Date: 01/04/2011 11:19 AM

Subject: FOIA requests for the NM and OK FIPs

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Enclosed are two extensive FOIA requests. The first one is related to our just proposed NM regional haze SIP-FIP, and mainly concerns the San Juan Generating Station. The second one basically requests everything we have concerning the OK regional haze SIP-FIP which we are currently working on. [REDACTED]

[REDACTED] I looked into getting drop boxes set up for you to submit your emails, but balked at the 33 page set of instructions that accompanied it, and the lack of an easy, workable way to get those emails to the requestor, so we will do it the old fashioned way. If you have anything that is responsive, pls print it off and give it to me. If that includes documents, pls put them on a CD and name them in such a way the requestor will know which email they go with. I cannot provide guidance on what can be released. According to ORC, we should have all taken that training and are apparently on our own. I'm sorry for not starting this earlier, but I was busy with the FIPs and my efforts to get clarification/help on this didn't work out.

1. The due date for the NM FOIA was 12/30/10. This is the second FOIA on this subject from the same person. A request has been made to get an extension, but as before, the requestor has not been responsive to that request. I think much of what is requested will actually be in the docket in a day or so. However, you may have emails that are responsive.

2. The due date for the OK regional haze SIP-FIP has been extended to 1/15/11, but the requestor expected we would do a rolling submittal, that for the reasons outlined above, didn't work out. Therefore, pls also assume we are also late on this one as well. Because we have not yet proposed our decision on this action, I expect much of what is requested will not be able to be released, but that is for you to decide. Here is something that may help:  
[foia.navy.mil/Exemptionb5Slides.ppt](http://foia.navy.mil/Exemptionb5Slides.ppt)

**Pls have everything to me by noon, 1/11/11. If that's not possible, pls let me know ASAP.**

[attachment "SJGS FOIA.pdf" deleted by Lea Anderson/DC/USEPA/US]  
[attachment "OK SIP-FIP FOIA.pdf" deleted by Lea Anderson/DC/USEPA/US]

Regards,

Joe

"... and miles to go before I sleep."  
-- Robert Frost