April 10, 2017

Via FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667

Re: Freedom of Information Act Request for Records of EPA Administrator's Role in Litigation in which Oklahoma is a Party

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable Environmental Protection Agency (EPA) regulations at 40 C.F.R. §§ 2.100-2.406.

I. Description of Records Sought

This request seeks records that illustrate Administrator Scott Pruitt's participation in, or recusal from, any litigation—or other particular matter involving specific parties—in which both EPA and the State of Oklahoma are parties. These cases include at least the following:

- West Virginia v. EPA (D.C. Cir., filed Oct. 2015), lead case no. 15-1363
- In re: DOD & EPA Final Rule: Clean Water Rule (6th Cir., filed July 2015), lead case no. 15-3751
- National Ass'n of Manufacturers v. DOD, et al. (S. Ct., cert granted January 13, 2017), case no. 16-299
- State of West Virginia, et al. v. EPA, et al. (D.C. Cir., filed July 2016), lead case no. 15-1381
- State of North Dakota v. EPA (D.C. Cir., filed Nov. 2015), lead case no. 15-1381
- American Petroleum Institute, et al. v. EPA (D.C. Cir., filed Aug. 2016), lead case no. 13-1108
- State of Oklahoma ex rel. E. Scott Pruitt v. EPA, et al. (Northern Dist. OK, filed July 2015), on appeal *sub nom.* State of Oklahoma ex rel. Mike Hunter v. EPA, et al. (10th Cir.), lead case no. 16-5038

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- Murray Energy Corporation v. EPA (D.C. Cir., filed June 2016), lead case no. 16-1127
- Murray Energy Corporation v. EPA (D.C. Cir., filed Oct. 2015), lead case no. 15-1385
- Walter Coke Inc. v. EPA (D.C. Cir., filed Aug. 2015), lead case no. 15-1166
- State of Wyoming v. EPA, et al. (10th Cir., filed Jan. 2015), lead case no. 14-9512
- Public Service Company of Oklahoma, d.b.a. AEP v. EPA (D.C. Cir., filed Feb. 2012), lead case no. 12-1023.

Please produce the following records that are in EPA's possession, custody or control:[1]

1. Any records indicating whether Administrator Pruitt has participated in any of these cases;
2. Any records indicating whether Administrator Pruitt sought a waiver from any agency ethics official to participate in any of these cases, and any records indicating whether the waiver was granted;
3. Any records indicating the steps, if any, EPA took to shield Administrator Pruitt from involvement in any of these cases; and
4. Any records indicating the names of EPA staff who have participated in any of these cases since January 20, 2017.

In this request, the term "records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, social media posts, text messages, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters.

This request specifically seeks responsive records in or on the personal computers, cellphones or other devices, or personal email accounts used by EPA staff if used for any government purpose.

[1] NRDC previously submitted a FOIA request for documents under tracking number EPA-HQ-2017-004617 on March 6, 2017. Though that request differed from this one in scope, to the extent any of the records requested here overlap with those provided under that tracking number, EPA need not provide those records a second time pursuant to this request. Please contact us with any questions relating to this potential overlap.

II. Request for a Fee Waiver

NRDC requests that EPA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. §2.107(l)(1). The requested disclosure would meet both of these requirements.

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

1. Subject of the request

The records requested here relate to whether EPA Administrator Scott Pruitt is participating in ongoing litigation to which both EPA and Pruitt's former client, Oklahoma, are parties, and who at EPA is directing or participating in the agency's litigation decisions. The requested records thus directly concern "the operations or activities of the government." 40 C.F.R. § 2.107(l)(2)(i).

2. Informative value of the information to be disclosed

The requested records are "likely to contribute to" the public's understanding of government operations and activities. 40 C.F.R. § 2.107(l)(2)(ii). The public does not currently possess any information regarding Administrator Pruitt's participation in, or recusal from, pending litigation in which both the State of Oklahoma and EPA are parties. The public does not know who at EPA is directing or participating in EPA's litigation decisions. The public does not know whether, in accordance with Pruitt's ethics agreement and relevant ethics rules, he has been recused from such litigation or has been granted a waiver to participate. *See* Letter from E. Scott Pruitt to Kevin S. Minoli (Jan. 3, 2017),[2] and 5 C.F.R. § 2635.502.

There is more than a reasonable likelihood that these records have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006). Administrator Pruitt's prior litigation against EPA was a focus of much of the

[2] https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/C3B4C444EB20D1FD852580C1002C7A75/$FILE/Pruitt,%20Edward%20Scott%20%20%20finalAMENDEDEA.pdf (last visited April 5, 2017).

coverage of his nomination. *See, e.g.,* Brady Dennis, "Scott Pruitt, longtime adversary of EPA, confirmed to lead the agency," *Washington Post* (Feb. 17, 2017); Coral Davenport, "Senate Confirms Scott Pruitt as E.P.A. Head," *New York Times* (Feb. 17, 2017). Likewise, how former Oklahoma Attorney General and now EPA Administrator Pruitt would handle his involvement in litigation – like the cases that are the subject of this request – in which Oklahoma is a party opposing EPA was the subject of significant interest from Senators and public interest groups. *See, e.g.*, Letter from Senator Edward Markey et al. to Attorney General Scott Pruitt (Feb. 16, 2017), available at http://www.markey.senate.gov/imo/media/doc/Pruitt%20recusal%20letter%2002.16.17.pdf (visited Mar. 7, 2017); Letter from Senator Tom Carper et al. to Administrator Pruitt (March 21, 2017), available at https://www.epw.senate.gov/public/_cache/files/0b1700be-0108-43bf-9dbd-558334de610a/carper-leads-call-for-pruitt-to-address-conflict-of-interest-in-clean-water-rule-review.pdf (visited April 5, 2017); Letter from Noah Bookbinder, Executive Director, Citizens for Responsibility & Ethics in Washington, to Kevin Minoli, Principal Deputy General Counsel & Designated Agency Ethics Officer, U.S. EPA (Jan. 17, 2017), available at http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/01/17183250/Letter-to-EPA-ethics-counsel-re-Pruitt-FINAL.pdf (visited Mar. 7, 2017).

Disclosure of the requested records would meaningfully inform public understanding with respect to a topic of public interest. The records requested are not currently in the public domain.

3. Contribution to an understanding of the subject by the public is likely to result from disclosure.

NRDC's extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are "a broad audience of persons interested in

the subject" of Administrator Pruitt and his successive roles as an opponent and leader of EPA, and specifically his role in litigation that was brought by his former client against the agency. 40 C.F.R. § 2.107(l)(2)(iii). When combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 40 C.F.R. § 2.107(l)(2)(iii). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. These include, but are not limited to the following:

- NRDC's website, available at http://www.nrdc.org, is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. This information is also made available through NRDC's online Action Center at https://www.nrdc.org/actions.
- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at http://www.nrdc.org/newsletter.
- NRDC updates and maintains several social media accounts: Facebook (565,530 followers), Twitter (195,426 followers), Instagram (37,868 followers), YouTube (19,518 subscribers), and LinkedIn (9,108 followers). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post; and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, "The requirement to rebuild US fish stocks: Is it working?" *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell);
- Issue brief, "The Untapped Potential of California's Water Supply: Efficiency, Reuse, and Stormwater," June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann); *see also* "Saving Water in California," *N.Y. Times*, July 9, 2014 (discussing the report's estimates);
- Article, "Waves of phony charges over new clean water safeguards," *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner);
- Article, "Don't Buy the Smear of the EPA," *L.A. Times,* June 3, 2014 (by NRDC President Frances Beinecke);
- Transcript, "Conservationists Call For Quiet: The Ocean Is Too Loud!" Nat'l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny);
- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012;
- Article, "Is there a 'proper level' of compliance with environmental law?" *Trends: ABA Section of Environment, Energy, and Resources Newsletter,* Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall);
- NRDC Document Bank, http://docs.nrdc.org/.

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

(1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are "generally recognized as safe". *See also* Kimberly Kindy, "Are secret, dangerous ingredients in your food?" *Wash. Post*, Apr. 7, 2014 (discussing NRDC's report).

(2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA's part to ensure the safety of

these drug additives. *See also* P.J. Huffstutter and Brian Grow, "Drug critic slams FDA over antibiotic oversight in meat production," *Reuters*, Jan. 27, 2014 (discussing NRDC's report).

(3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA's decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, http://www.nrdc.org/health/atrazine/files/atrazine10.pdf (Apr. 2010) (update to 2009 report); *see also* William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?" *Harper's Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC).

(4) NRDC incorporated information obtained through FOIA into a report, available at http://www.nrdc.org/wildlife/marine/sound/contents.asp, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report). The report also relied upon and synthesized information from other sources. After the report's publication, the sonar issue continued to attract widespread public attention. *See, e.g.*, "Protest Raised over New Tests of Naval Sonar," Nat'l Pub. Radio, *All Things Considered*, July 24, 2007.

(5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004.

(6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration's Energy Task Force, along with analysis of selected excerpts and links to the administration's index of withheld documents. NRDC's efforts cast light on an issue of considerable public interest. *See, e.g.*, Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times*, Mar. 28, 2002, at A22.

(7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002; Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19.

(8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at http://www.nrdc.org/water/drinking/arsenic/aolinx.asp. The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; *see also* Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report).

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

4. Significance of the contribution to public understanding

The requested records are critical to understanding matters of considerable public interest and concern: the EPA Administrator's role in pending litigation in which his former client, the State of Oklahoma, is adverse to the agency he now leads; who at EPA is participating in such litigation on behalf of the agency; and whether Administrator Pruitt has been effectively shielded from these cases pursuant to governing ethics regulations and his ethics commitments. The requested records will shed significant light on these issues.

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" *Rossotti*, 326 F.3d at 1312 (internal citation omitted); *see Natural Res.*

Def. Council v. United States Envtl. Prot. Agency, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the subject of this request. As noted above, the subject of this request is a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the underlying subject matter.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. *See* 40 C.F.R. § 2.107(l)(4). **But please contact me before doing anything that would cause the fee to exceed $250.** NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines).

If EPA concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions. Thank you.

Sincerely,

Catherine Rahm

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