April 22, 2020

*Via FOIAONLINE*

Regional Freedom of Information Officer
U.S. EPA, Region 7
11201 Renner Boulevard
Lenexa, KS 66219

**Re: Region 7 Communications Regarding Statewide, Regional, or National Regulatory or Enforcement Flexibility Policies**

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, as amended ("FOIA"), and the U.S. Environmental Protection Agency ("EPA") regulations at 40 C.F.R. § 2.100, *et seq*. Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of climate change, fossil fuel energy and clean energy, as well as the organization's long-standing interest in government accountability and transparency. **Please note that EPA may receive multiple FOIA requests from Sierra Club on the topic of EPA's Temporary Enforcement Policy during the coronavirus crisis. These requests are not duplicative but are tailored to seek documents particular to a specific Regional Office, or from Headquarters.**

## REQUESTED RECORDS[1]

Sierra Club requests the following records in the possession, custody, or control of the EPA concerning the development and implementation of the (1) Missouri Department of Natural Resources statement captioned "Requests for Regulatory Relief Due to COVID-19 Impacts" dated

[1] "Records" means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, emails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of EPA, National Headquarters and all of its Offices, Regions and other subdivisions.

March 24, 2020[2] ("Missouri Statement"), and (2) EPA Temporary Enforcement Policy, which is described in the March 26, 2020 Memorandum by Susan Parker Bodine captioned "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program" ("EPA Temporary Enforcement Policy").[3] **The timeframe for this request is February 1, 2020 through the date of your search for documents**. Sierra Club requests:

1. All records of communications between EPA Region 7 staff and Missouri regarding expected or possible noncompliance, specific requests for regulatory or enforcement flexibility, or no action assurances, at the facilities listed below. This includes, but is not limited to, requests stemming from the Missouri Statement or EPA Temporary Enforcement Policy.

| Name | Operator | Location | EPA Site ID # |
|---|---|---|---|
| Bissell Point Wastewater Treatment Plant & Incinerator | Metropolitan St. Louis Sewer District | St. Louis, MO | MOR000005934 |
| Brushy Creek Mine/Mill | Doe Run Company | Boss, MO | MOT300010691 |
| Fletcher Mine/Mill | Doe Run Company | Centerville. MO | MOD086785391 |
| Hawthorn Generating Station | Evergy, Inc. | Kansas City, MO | MOD000766949 |
| Iatan Generating Station | Evergy, Inc. | Weston, MO | MOD000766915 |
| John Twitty Energy Center | City Utilities of Springfield | Springfield, MO | MOD985772144 |
| Labadie Energy Center | Ameren Missouri | Labadie, MO | MOD079933198 |
| Meramec Energy Center | Ameren Missouri | St. Louis, MO | MOD086817897 |
| New Madrid Power Plant | Associated Electric Cooperative, Inc. | Marston, MO | MOD053964862 |
| Rush Island Energy Center | Ameren Missouri | Festus, MO | MOD079888871 |
| Sikeston Power Plant | Sikeston Board of Municipal Utilities | Sikeston, MO | MOD980742407 |
| Sioux Energy Center | Ameren Missouri | West Alton, MO | MOD086817954 |
| Thomas Hill Energy Center | Associated Electric Cooperative, Inc. | Clifton Hill, MO | MOD053979316 |

2. All records of communications between EPA Region 7 staff and Missouri regarding the need for statewide, regional, or national regulatory or enforcement flexibility or cessation policies.

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[2] https://dnr.mo.gov/docs/2020-03-24-requests-for-regulatory-relief-due-to-covid-19-impacts.pdf.

[3] *See* https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf

3. All records of communications between EPA Region 7 staff and the owners, operators, or representatives of any of the above facilities regarding expected or possible noncompliance, specific requests for regulatory or enforcement flexibility, or no action assurances at the aforementioned facilities. This includes, but is not limited to, requests stemming from the Missouri Statement, the EPA Temporary Enforcement Policy, or their implementation.

4. All calendar entries of EPA Region 7 staff for meetings, phone calls, or videoconferences, about the Missouri Statement or EPA Temporary Enforcement Policy, the policies underlying those documents, or their implementation.

Should EPA employ a keyword search to respond to this request, the following are suggested keywords searches for identifying responsive documents. (An asterix (*) indicates that the search term should be for the beginning of the word, rather than the whole word.) However, if Region 7 employees have records that are responsive to the above three requests but do not contain these precise keywords, those records still fall within the scope of this request.

"enforcement discretion"
"routine" within three words of "monitoring" or "reporting"
"COVID* memo*"
"coronavirus memo*"
"COVID* guidance"
"coronavirus guidance"
"COVID*" within three words of "polic*"
"coronavirus" within three words of "polic*"
"temporary" within three words of "polic*" (to capture "policy" or "policies")
"temporary" within three words of "guidance"
"enforcement" within three words of "polic*"
"enforcement guidance"
"enforcement polic*"
"force majeure" and "pandemic" or "coronavirus" or "covid" or "crisis"
"act of God" and "pandemic" or "coronavirus" or "covid" or "crisis"
"affirmative defense" and "pandemic" or "coronavirus" or "covid" or "crisis"
"no action assurance"

If these search terms reveal an unexpectedly large volume of documents, I would welcome the opportunity to discuss them further with you.

This request incudes communication related to EPA that is or was on any system or device, computer, phone, smartphone, tablet, email account, cloud, server or other communication system either **personal or business**.

This request applies to all email accounts, whether on an official EPA email address or server or not, that relate to official business of EPA. This request applies to so-called "alias" email accounts that may or may not include the names of the EPA personnel in the email address.

## Duty to Preserve Records

EPA must preserve all the records requested herein while this FOIA is pending or under appeal. 40 C.F.R. § 2.106 ("[r]ecords shall not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA"); *see Chambers v. U.S. Dep't of Interior,* 568 F.3d 998, 1004 (D.C. Cir. 2009) ("an agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act"). Accordingly, please immediately advise custodians of potentially responsive records that the above records have been requested under FOIA and therefore may not be destroyed.

If any of the requested records are destroyed, the agency and responsible officials are subject to attorney fee awards and sanctions, including fines and disciplinary action. A court held EPA in contempt for "contumacious conduct" and ordered the agency to pay plaintiff's costs and fees for destroying "potentially responsive material contained on hard drives and email backup tapes." *Landmark Legal Found. v. EPA*, 272 F.Supp.2d 59, 62 (D.D.C. 2003); *see also Judicial Watch, Inc. v. Dep't of Commerce*, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (awarding attorneys' fees and costs because, among other factors, agency's "initial search was unlawful and egregiously mishandled and ...likely responsive documents were destroyed and removed"), *aff'd in relevant part*, 470 F.3d 363, 375 (D.C. Cir. 2006) (remanding in part to recalculate attorney fees assessed). In another case, in addition to imposing a $10,000 fine and awarding attorneys' fees and costs, the court found that an Assistant United States Attorney prematurely "destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending" and referred him to the Department of Justice's Office of Professional Responsibility. *Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).

## EXEMPT RECORDS

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the following information must be included:

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

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

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and deliver the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

## FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in the format requested if the record is readily reproducible by the agency in that format. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B). We request that you provide electronic documents individually, and not as batched files. Specifically, for any



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document stored as Electronically Stored Information ("ESI"), we request that the document be produced in the native file type. This includes e-mail (whether sent, received or drafted), word-processing files, tables, charts, graphs and database files, electronic calendars, proprietary software files, and spreadsheets. ESI can also be provided in the form of a load file that includes a common file type (TIFF, HTML, PDF) while maintaining access to the native file and its source data, including the ability to keyword search documents.

## RECORD DELIVERY

We appreciate a prompt determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i) ; 40 C.F.R. § 2.104. Please email copies of the requested records to the e-mail address below. If the records are not available electronically, please contact me for a physical address. Failure to comply within the statutory timeframe may result in Sierra Club filing an action before the relevant U.S. District Court to ensure timely receipt of the requested materials.

*Deliver electronic documents to:*

Sunil Bector
sunil.bector@sierraclub.org

Please send documents 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).

## FEE WAIVER REQUEST

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l).[4]

Sierra Club is the nation's oldest grassroots non-profit organization with more than 3.5 million members and supporters nationwide. Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of environmental protection including climate change, fossil fuel energy, clean energy and clean water. Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment,

[4] With the award-winning Sierra magazine and its extensive use of blogs to communicate with the public, Sierra Club would also be eligible for a fee waiver as a media requestor. 5 U.S.C. § 552(a)(4)(A)(ii); 40 C.F.R. § 2.107(c)(1)(iii); *see also* 40 C.F.R. § 2.107(b)(6) (defining "[r]epresentative of the news media"). A representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public).

and has routinely received fee waivers under FOIA.[5]

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as Sierra Club access to government records without the payment of fees. *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (fee waiver provision intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and non-profit public interest groups.").

As explained below, this FOIA request satisfies the factors listed in EPA's governing regulations for waiver or reduction of fees, as well as the requirements for a fee waiver under the FOIA statute – that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l).

**1. The subject matter of the requested records specifically concerns identifiable "operations and activities of the government."**

The requested records relate to the communications, schedules, and meetings of EPA personnel, which reflect the activities and work of these personnel on behalf of the agency. As such, the documents concern "identifiable operations or activities of the government."

**2. The disclosure of the requested documents would be meaningfully informative and "likely to contribute to an understanding of Federal government operations or activities."**

Disclosure of the requested records will allow Sierra Club to convey information to the public about the communications and meetings of EPA personnel, and in particular, the agency's development and implementation of the March 26, 2020 Memorandum, which reflects the agency's environmental enforcement policy during the COVID-19 pandemic. Disclosure of the requested records will also allow Sierra Club to inform its members, supporters, and the public of EPA's

[5] For recent examples, *see* FOIA Request Reference No. DOI-HQ-2017-2172 (fee letter waiver received Jan. 9, 2017); FOIA Request Reference No. DOI-HQ-2017-008402 (fee letter waiver received June 26, 2007); FOIA Request Reference No. DOI-HQ-2017-008571 & DOI-HQ-2017-008581 (fee letter waiver received June 27, 2017); FOIA Request Reference No. DOI-HQ-2017-008568 (fee letter waiver received June 28, 2017).



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environmental and public health objectives and priorities during the pandemic, and whether polluting facilities are seeking exemptions from environmental compliance pursuant to the policy.

Once the requested documents are made available, Sierra Club will analyze them and present its findings to its members and online activists and the general public in a manner that will meaningfully enhance the public's understanding of how these EPA personnel have been acting and operating. The documents requested will thus be "meaningfully informative" and "likely to contribute" to an understanding of EPA's environmental enforcement during the COVID-19 pandemic.

The requested records are not otherwise in the public domain and are not accessible other than through a FOIA request. Thus, the requested documents provide information that is not already in the public domain and are accordingly likely to meaningfully contribute to public understanding of governmental operations and priorities. Given the possibility that the pandemic "may affect the ability of an operation to meet enforceable limitations on air emissions and water discharges, requirements for the management of hazardous waste, or requirements to ensure and provide safe drinking water,"[6] and EPA's policy allowing regulators to exercise discretion in delaying enforcement activities, the requested records are of significant public concern.

3. **The disclosure would contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons.**

Sierra Club has longstanding experience and expertise in the subject area of the FOIA requests, including issues related to government accountability and transparency, and the activities that properly fall within the mission of the EPA.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, such as: analysis and distribution to the media, distribution through publication and mailing, posting on its website, emailing and list serve distribution to our members across the U.S., and via public meetings and events. Every year the Sierra Club website receives 26,298,200 unique visits and over 30 million page views; on average, the site gets 72,049 visits per day. Sierra Magazine is a bi-monthly magazine with a printed circulation of approximately 650,000 copies. Sierra Club Insider, an electronic newsletter, is sent to nearly 3.5 million people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies.[7]

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[6] Memorandum from Susan Parker Bodine to All Governmental and Private Sector Partners, COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program at 2, March 26, 2020.

[7] For example, Sierra Club publicized results of its FOIA requests regarding outside influence on foreign travel at the EPA, a story that was covered by the New York Times. Lisa Friedman, Eric Lipton and Kenneth P. Vogel , *Ex-Lobbyist for Foreign Governments Helped Plan Pruitt Trip to Australia*, The New York Times, https://www.nytimes.com/2018/05/02/climate/epa-pruitt-australia-travel.html. Sierra Club also publicized the results of its FOIA requests regarding agency job freezes,

Sierra Club intends to share the information received from this FOIA request with the general public, our impacted members across the country, the media and our allies who share a common interest in the operations of the EPA, and ensuring that federal air, water, and other environmental and public health safeguards are implemented and enforced.

Sierra Club unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the "public-at-large."

**4. The disclosure would contribute "significantly" to public understanding of government operations or activities.**

As discussed in section (2) above, the records requested will significantly contribute to the public understanding of governmental operations and activities. Disclosure of EPA's development and implementation of its environmental enforcement policy during the COVID-19 pandemic, as well as communications regarding the enforcement policy, will significantly enhance the public's understanding of whether EPA is advancing its stated mission to protect public health and the environment, or whether EPA is abdicating its responsibilities or advancing the agenda of polluters.

**5. The requester has no commercial interest that would be furthered by the requested disclosure.[8]**

Sierra Club has no commercial interest in the requested records. Nor does it have any intention to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. Sierra Club is a nonprofit, tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club's mission to inform the public on matters of vital importance to the environment and public health.

Sierra Club respectfully requests that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A) because the public will be the primary beneficiary of this requested information. In the event that your agency denies a fee waiver, please send a written explanation for the denial. Please do not incur expenses beyond $250 without first contacting our office for explicit authorization.

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a story that was covered by the Washington Post. Alexander Rony, *Trump Admin Policy Leaves 700 CDC Jobs Vacant*, The Planet, http://www.sierraclub.org/planet/2017/05/trump-admin-policies-leave-700-cdc-jobs-vacant; Lena H. Sun, *Nearly 700 vacancies at CDC because of Trump administration's hiring freeze*, The Washington Post, https://www.washingtonpost.com/news/to-your-health/wp/2017/05/19/nearly-700-vacancies-at-cdc-because-of-trump-administration-hiring-freeze/?utm_term=.6c2e70d8581e.

[8] Because Sierra Club has no commercial interest, the Club also satisfies the final factor for a fee waiver, which compares the magnitude of an identified commercial interest to the public interest in disclosure.

Thank you for your cooperation. **If you find that this request is unclear in any way please do not hesitate to call me at (415) 977-5759 or e-mail me at sunil.bector@sierraclub.org**.

Sincerely,

/s/ Sunil Bector
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