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August 13, 2013

FREEDOM OF INFORMATION ACT REQUEST

By Certified Mail

Regional Freedom of Information Officer
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
FAX (303) 312-6859

Re: Freedom of Information Act Request regarding inspection of oil and gas industry storage tanks and facilities using infrafed technology.

Dear Freedom of Information Act Officers:

Pursuant to the Freedom of Information Act (FOIA) of 1966, 5 U.S.C. § 552, and 40 C.F.R. Part 2, Earthjustice requests copies of all inspection records, video or other recorded images and documentation dated, generated or submitted to the EPA from January 1, 2011 to the present, relating to inspections using infrared technology, such as infrared cameras, or forward looking infrared cameras, of any equipment, facilities or operations used by the oil and gas exploration and production industry in the state of Colorado.

We request that EPA identify and produce all responsive records from any EPA offices where such records may be found.

We request that responsive records be released as soon as they are available. To the extent that some subset of the requested records is readily available, we would be happy to receive them while EPA searches for other records. Please note that if it is more convenient for the agency, we would be happy to accept electronic copies of the requested records (on a CD, for example).

We also note that federal courts have held that any record exchanged between a federal government agency and another party cannot be withheld under Exemption 5 of the FOIA. See 5 U.S.C. § 552(b)(5) (2009); see also Mead Data Cent., Inc. v. Dep't of the Air Force, 556 F.2d 242, 253 (D.C. Cir. 1977); Senate of Puerto Rico v. Dep't of Justice, 823 F.2d 574, 587 (D.C. Cir. 1987); Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 1 (2001) (Exemption 5 applies to "inter-agency or intra-agency" communication). Further, any comments from or to other agencies on the environmental impact of any activities may not be withheld as interagency documents. See 40 C.F.R. § 1506.6(f) (2009).

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This request is made by Earthjustice: a non-profit environmental law firm that advocates for the public interest before the courts and governmental bodies.

Release of the records described in this request will primarily benefit the public and substantially contribute to public understanding of the air pollution policies of the EPA, the Colorado Department of Public Health and Environment ("CDPHE"), and the Colorado Air Quality Control Commission, specifically as they relate to the oil and gas industry, and the impacts of increasing oil and gas development in our state. Earthjustice will make the information obtained from this request available to the public and other groups concerned with protecting air quality in Colorado and surrounding states. Earthjustice will also make available to the media newsworthy summaries of the requested documents, as well as newsworthy documents themselves.

Release of the information will also empower members of Earthjustice, its clients, and members of the public, to engage in public advocacy efforts to protect air quality in Colorado. Earthjustice is a not-for-profit corporation and does not seek these documents for commercial use.

Accordingly, we request that you grant a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A) and 40 C.F.R. § 2.107. We fully expect that such a waiver will be granted, as it has been in the past. However, if a waiver is not granted, please inform the undersigned of the cost of disclosing the above-described records if such fees exceed $15.00.

Additional Information Concerning Fee Waiver: Legal Background.

In 1974, Congress amended the judicial review section for fee waivers under FOIA, replacing the "arbitrary and capricious" threshold of review, by which courts are required to grant deference to agencies, with the more rigorous *de novo* review standard. See 5 U.S.C. § 552(a)(4)(A)(vii) (when review is limited to the administrative record before the agency at the time of the decision). The reason for this change is that Congress was concerned that agencies were using search and copying costs to prevent critical monitoring of their activities:

> Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information....

132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy).

FOIA's amended fee waiver provision was intended specifically to facilitate access to agency records by citizen "watchdog" organizations, which utilize FOIA to monitor and mount challenges to governmental activities. See Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 88-89 (D.C. Cir. 1986). Fee waivers are essential to such groups, which

> [R]ely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions . . . .
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> . . . . . [The fee waiver] provision was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests," in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups.

Id. at 93-94 (quoting Ettlinger v. FBI, 596 F. Supp. 867, 872 (D. Mass. 1984)) (emphasis added). Thus, one of the main goals of FOIA is to promote the active oversight roles of watchdog public interest groups, organizations that actively challenge agency actions and policies.

Public-interest fee waivers are to be "liberally construed in favor of waivers for noncommercial requesters." McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sen. Leahy)). "'[T]he presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public." Ettlinger, 596 F. Supp. at 873 (quoting legislative history). An agency may not refuse a fee waiver when "there is nothing in the agency's refusal of a fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefiting the general public." Id. at 874 (quoting Fitzgibbon v. CIA, Civ. No. 76-700 (D.D.C. Jan. 10, 1977)). "Once the FOIA requester has made a sufficiently strong showing of meeting the public interest test of the statute, the burden, as in any FOIA proceeding, is on the agency to justify the denial of a requested fee waiver." Id. (citing 5 U.S.C. § 552(a)(4)(B)).

In light of these principles, based on this FOIA request, it is clear that Earthjustice, a non-profit group interested in the impacts of air pollution generated by the oil and gas industry, and regulations designed to govern the oil and gas industry, is entitled to a fee waiver for the documents requested. The factors identified in the regulations concerning fee waivers are addressed more specifically below.

"Whether disclosure of the requested information is likely to contribute to an understanding of specific government operations or activities."

As an initial matter, "courts have consistently overturned agency denials of fee waivers when requestors have made a legitimate, objectively supportable showing of using the requested information for scholarly research into political and historical events." Ettlinger, 596 F. Supp. at 875; see also Weisberg v. Dep't of Justice, 705 F.2d 1344, 1360 (D.C. Cir. 1983).

The informative value of the documents requested is high. This FOIA will better inform Earthjustice, its clients, the public, local elected and administrative officials, and legislators about decisions that are likely to have significant impacts on the air quality of Colorado, and allow members of these organizations to act as informed participants of the public input process.

"Whether disclosure of the requested information will contribute to an understanding of the subject by the general public."

Federal courts have held that public interest groups satisfy this requirement where requestors show the "ability to understand and disseminate the information." Judicial Watch, Inc. v. Dep't of Justice (Judicial Watch I), 122 F. Supp. 2d 5, 10 (D.D.C. 2000). In addition, a description of past successful methods of informing the public combined with a "firm intent to disseminate" the information has been held to meet this test. Judicial Watch, Inc. v. Dep't of Justice (Judicial Watch II), 185 F. Supp. 2d 54, 59-60 (D.D.C. 2002) (quoting Judicial Watch I, 122 F Supp. 2d at 13).

Earthjustice meets this test. First, the information will enable Earthjustice to provide information to the public at large about the impacts of oil and gas development. Earthjustice has expertise in communicating with the public and the media on those issues in Colorado. Earthjustice has professional staff and volunteers recognized as experts on the policy and politics of energy development and air quality to which this request relates.

Second, Earthjustice intends to publish summaries of the information sought here to the media as well as make available the information itself.

"*Whether the disclosure is likely to contribute 'significantly' to public understanding of government operations or activities.*"

The legislative history of FOIA makes clear that the 'significance' test is met where, as here, the information requested will support "public oversight of agency operations":

> A requester is likely to contribute significantly to the 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); see also McClellan Ecological Seepage Situation, 835 F.2d at 1284-86.

The requested records will support public oversight by allowing the public to better understand the potential of EPA, CDPHE, and Colorado Air Quality Control Commission regulatory decisions that will impact air quality. Those actions are expected to be the subject of public debate. That debate will be better informed by the release of these records, which are at least in part new and have never been divulged or presented to the public. Earthjustice therefore meets this standard.

In addition, EPA cannot deny a fee waiver on the basis that any of the requested information is reasonably available to Earthjustice through means other than this FOIA request. See Project on Military Procurement v. Dep't of Navy, 710 F. Supp. 362, 365-66 (D.D.C. 1989) (rejecting Navy's argument that overlapping information may be found in other Navy documents which other members of the public have; "the substantive contents of even a single document may substantially enrich the public domain and justify a fee waiver").

We also note that Congress amended FOIA with the Openness Promotes Effectiveness in Our National (OPEN) Government Act of 2007, 110 Pub. L. No. 175, 121 Stat. 2524 (to be codified at 5 U.S.C. § 552). In the Congressional findings to the OPEN Government Act, Congress found that "the American people firmly believe that our system of government must itself be governed by a presumption of openness." 110 Pub. L. No. 175 § 2(2). In addition, Congress found that "disclosure, not secrecy, is the dominant objective of [FOIA]." Id. § 2(4) (quoting Dep't of Air Force v. Rose, 425 U.S. 352 (1976)). Thus, under FOIA, there is a "strong presumption in favor of disclosure." Id. § 2(3) (quoting Dep't of State v. Ray, 502 U.S. 164 (1991)).

Thank you for your prompt attention to this request. I look forward to your response as soon as possible, but in no event any later than 20 days, as required by law. If you have any questions in this matter, please contact me at 303-623-9466.

Sincerely,

Michael S. Freeman

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