Green, LindaE

From: Zak J Ritchie <zak.j.ritchie@wvago.gov>
Sent: Tuesday, October 06, 2015 2:29 PM
To: FOIA HQ
Subject: New FOIA Request
Attachments: 2015-10-06 Letter to EPA-FOIA (M0107323xCECC6)-c1.pdf

To Whom It May Concern:

Attached is a FOIA request from the State of West Virginia, et al. We have also sent this document by certified mail. Please let me know if you have any questions.

Sincerely,
J. Zak Ritchie
Assistant Attorney General
State of West Virginia

State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

October 6, 2015

Via Certified Mail & Email

The Honorable Gina McCarthy
National Freedom of Information Office
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
hq.foia@epa.gov

Re: Freedom of Information Act Request From The States Of West Virginia, Arizona, Arkansas, Colorado, Florida, Georgia, Louisiana, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Wisconsin, and the Commonwealth of Kentucky, Concerning EPA's Communications with the Office of the Federal Register Regarding the Publication of the Clean Power Plan, EPA-HQ-OAR-2013-0602.

Dear Administrator McCarthy:

This letter is a request under the Freedom of Information Act, 5 U.S.C. § 552(a) *et seq.* (the "Act"), for information concerning communications relating to the publication of the so-called Clean Power Plan ("Rule") in the Federal Register. *See* Dkt. No. EPA-HQ-OAR-2013-0602.[1] The EPA Administrator signed the Rule as final on August 3, 2015, but it has not yet been published in the Federal Register. As a result, the States are now experiencing significant and irreparable harms attempting to comply with the Rule, because the Rule imposes specific dates certain deadlines for the submission of State Plans by the States—September 6, 2016, and

[1] The final Rule may be found at http://www2.epa.gov/sites/production/files/2015-08/documents /cpp-final-rule.pdf.

September 6, 2018. These compliance deadlines have been set by EPA irrespective of the date of publication. Since a Petition For Review challenging the final rule cannot occur until publication, States must wait until publication finally occurs before seeking judicial review.

EPA has provided inconsistent explanations—at best—regarding its role in the publication of the Rule in the Federal Register and the long delay between finalization and publication. EPA's General Counsel wrote in a letter to States in early August that EPA "is moving expeditiously to have the final rule published in the Federal Register,"[2] but on the previous day, the same General Counsel told the States on a conference call that EPA has *no control* over the Federal Register process. A few weeks later—in response to an order by the United States Court of Appeals for the D.C. Circuit—EPA was forced to admit that the Rule will likely not be published until *late October*. And again, EPA claimed to have no control over the long delay in the publication process. Despite signing the Rule as final on August 3, EPA had not even submitted the Rule to the Office of Federal Register ("OFR") to begin the publication process *until September 4*. At a minimum, EPA is responsible for the initial month-long delay before submission to OFR. This request is intended to help the public understand why one of most touted—and widely criticized—rules in this Nation's history is being subject to such unexplained delays that harm the States and undermine the availability of judicial review.[3]

The Request

Accordingly, we request that you provide a copy of any documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2014, to the date of this letter, between any persons associated with the Office of the Federal Register regarding the Clean Power Plan and any EPA employees. We also request that you provide a copy of any documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2014, of any communications between or among EPA employees that discuss the timing of Federal Register publication. We explicitly limit our request to documents relating to the publication process of the Clean Power Plan in the Federal Register.

This request reasonably describes the documents we are seeking, and would permit EPA officials to identify and locate those documents. Under FOIA, agencies like EPA are required to make "promptly available" records that are "reasonably describe[d]" in a request. 5 U.S.C.

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[2] This letter may be found here: http://www.ago.wv.gov/publicresources/epa/Documents/EPA%27s%20response%20to%20stay%20request%20%28M0101015xCECC6%29.pdf.

[3] Moreover, one news article has suggested that publication of this Rule may be connected to the date of the UN Climate Change Conference to be held in Paris in December. InsideEPA, *EPA Said To Target Early August for ESPS Release* (July 13, 2015) ("[The Rule is] unlikely to appear in the Federal Register . . . until . . . climate talks in Paris in December.").

§ 552(a)(3)(A); *see also* 40 C.F.R. § 2.102(c). The "reasonably describes" standard "'makes explicit the liberal standard for identification that Congress intended.'" *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 274 (D.D.C. 2012) (quoting S. Rep. No. 93–854, at 10 (1974)). *See also Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) ("A request reasonably describes records if 'the agency is able to determine precisely what records are being requested.'" (quoting *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (D.C. Cir. 1982))). Our request satisfies this "liberal standard" because it includes specific information regarding the "date," "author[s]," "recipient[s]," and "subject matter" of the documents sought. *Id.*

The Fee Waiver

We also request that you waive any applicable fees. "FOIA's fee waiver provision states that documents requested from a government agency 'shall be furnished without any 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.'" *Perkins v. U.S. Dep't of Veterans Affairs*, 754 F. Supp. 2d 1, 5 (D.D.C. 2010) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)); *see also Cause of Action v. FTC*, No. 13-5335, -- F.3d --, --, 2015 WL 5009388, at *1 (D.C. Cir. Aug. 25, 2015). Where the requesters are public officials with no "commercial interest[s]," as here, a fee request must be given a liberal construction. *See Perkins*, 754 F. Supp. at 5; *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1282, 1284 (9th Cir. 1987) (the public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters"). The *only* question here is whether release of the information requested will 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).

The D.C. Circuit recently held that some of FTC's regulations interpreting the public interest waiver under FOIA improperly demanded more than the statutory text required. *Cause of Action*, 2015 WL 5009388, at *5 (the agency "pressed erroneous interpretations of FOIA contained in its own regulations"). Giving "no particular deference to [the agency's] interpretation of FOIA," the D.C Circuit explained that "the text of the public-interest waiver provision indicates that such a fee-waiver application must satisfy three criteria." *Id.* (quotations omitted). "Disclosure of the requested information must: (1) shed light on 'the operations or activities of the government'; (2) be 'likely to contribute significantly to public understanding' of those operations or activities; and (3) not be 'primarily in the commercial interest of the requester.'" *Id.* (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). As such, *Cause of Action* casts serious legal doubt on any EPA FOIA regulations governing the public interest waiver that demand more than the statutory text. Even so, this request easily satisfies the three statutory criteria set forth in *Cause of Action*, as well as EPA's FOIA regulations. *See generally* 40 C.F.R. § 2.107(l).

Criterion 1: The requested information—communications regarding the publication process of the Clean Power Plan in the Federal Register—sheds light on "the operations or activities of the government."

The first criterion is whether disclosure of the requested information "sheds light on 'the operations or activities of the government'"—here, the publication process of the Clean Power Plan. *Cause of Action*, 2015 WL 5009388, at *5 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). The subject of the requested records is the Clean Power Plan, a rule signed by the EPA Administrator as final on August 3, 2015, purportedly authorized by Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d). EPA's Rule imposes significant and costly obligations on States and fossil fuel-fired power plants across the Nation. And these substantial obligations will directly impact jobs and electricity rates. Because a Petition For Review challenging the final rule cannot be filed until publication, stakeholders seeking judicial review are necessarily interested in the Federal Register publication process for the Clean Power Plan. The requested communications will shed light on, among other things, how long the publication process may take, whether EPA in fact had any influence on the length of the pre-publication period, and whether EPA officials have accurately explained the agency's influence on the publication process to this point. Therefore, the process of publication of the Clean Power Plan in the Federal Register unmistakably "sheds light on the operations or activities of the government," *Cause of Action*, 2015 WL 5009388, at *5 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)), or, as EPA regulations require, "concern[s] identifiable operations or activities of the Federal government, with a connection that is direct and clear." 40 C.F.R. § 2.107(l)(2)(i).

Criterion 2: The information is "likely to contribute significantly to public understanding" of the publication process of the Clean Power Plan in the Federal Register.

The second criterion asks whether the disclosure is "'likely to contribute significantly to public understanding' of those operations or activities." *Cause of Action*, 2015 WL 5009388, at *5 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)); *accord* § 2.107(l)(2)(ii). The D.C. Circuit explained that whether the requested information is "'likely to contribute *significantly* to public understanding' may . . . require assessment along two dimensions: [1] the degree to which 'understanding' of government activities will be advanced by seeing the information; and [2] the extent of the 'public' that the information is likely to reach." *Cause of Action*, 2015 WL 5009388, at *6 (footnotes omitted) (emphasis in original). This assessment is plainly met here.

First, the disclosure of records sought in our request are "likely to contribute significantly" to an understanding of government operations or activities because these records will "advance[]" public understanding of how the publication process for the Clean Power Plan works and why it is taking so long. *Id.*; *accord* 40 C.F.R. § 2.107(l)(2)(iv). More specifically, the publication process directly affects—at a minimum—*when* members of the public can seek judicial review of the Rule. This is because the Clean Air Act permits the filing of a Petition For Review upon "promulgat[ion]" of a final rule, 42 U.S.C. §7607(b)(1), which means "publication

in the Federal Register," *Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090, 1093 (D.C. Cir. 1997). Thus even under EPA's FOIA regulations, the requested records will prove "meaningfully informative" about EPA's "operations or activities" because they will "increase[] [the] public understanding" regarding EPA's precise role in the publication of the Clean Power Plan in the Federal Register, and when the public may be able to bring a court challenge. 40 C.F.R. § 2.107(l)(2)(ii). These facts are particularly relevant here, because EPA's past assertions have painted an inconsistent picture regarding its influence over the publication process. The requested disclosures will undoubtedly advance public understanding of EPA's role in this controversial process.

Second, the disclosures requested here will undoubtedly contribute to a "public understanding of a reasonably broad audience of persons interested in the subject," because all documents received pursuant to our request will be disseminated to the public through various, specific ways uniquely available to the West Virginia Attorney General. *Cause of Action*, 2015 WL 5009388, at *6; *accord* 40 C.F.R. § 2.107(l)(2)(iii). Even so, this element "does *not* require that a requester be able to reach a 'wide audience.'" *Cause of Action*, 2015 WL 5009388, at *6 (emphasis added). Moreover, the requester need *not* "identify several methods of disseminating the information it seeks." *Id.* (quotations omitted). Rather, as noted, "the relevant inquiry is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Id.* (quotations and ellipsis omitted); *accord Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003).

As the chief legal officer of the State of West Virginia and independent constitutional officer who is directly elected by the People, the West Virginia Attorney General has the ability and intention to convey the requested information to a reasonably broad audience of persons interested in the subject. *Cause of Action*, 2015 WL 5009388, at *6; 40 C.F.R. § 2.107(l)(2)(iii). *See* W. Va. Const. art. VII, § 1. Specifically, the Attorney General will make all documents disclosed by EPA available to the general public, both in hard copy form at the main office of the Attorney General of West Virginia, and on the West Virginia Attorney General's website, free of charge.[4] The Attorney General will also review the documents, describe them in an executive summary that highlights the most significant of the documents, and post that summary on the Attorney General's website. Depending on the content of the documents, the Attorney General may also publicize the disclosures through press releases to the entire media spectrum, media interviews with both newspaper and local television stations, and personal "town hall"-style discussions held throughout the State. In addition, again, depending upon the content of the documents, the Attorney General may share the disclosed information with the Governor and the elected leaders of the state legislature for further dissemination through the public's elected

[4] *See generally* http://www.ago.wv.gov/publicresources/epa/Pages/default.aspx.

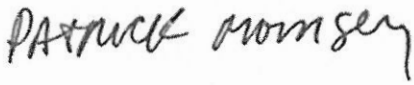
representatives. These specific and identifiable means by which the Attorney General will publicize the disclosures are far more than "FOIA requires." *Rossotti*, 326 F.3d at 1314.[5]

* * *

In light of the importance of this inquiry to the public, we respectfully request that you disclose all responsive documents as soon as possible, but no later than 20 business days from receipt of this letter, as required under the Act. Should you assert that any of the material is exempt from disclosure, please redact the allegedly exempt sections and provide the remaining material. In each instance, please describe the redacted material in detail and specify the statutory bases for refusing to disclose the material. We reserve the right to appeal the withholding or deletion of any information. Because multiple parties are listed as co-requestors, Patrick Morrisey, the Attorney General of the State of West Virginia, confirms that he is the authorized representative for communications regarding this FOIA request. Should you have further questions, please contact Assistant Attorney General Zak Ritchie, Office of the Attorney General of the State of West Virginia, who may be reached at 304-558-2021 or jzr@wvago.gov.

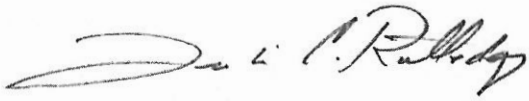
Thank you in advance for your prompt cooperation in this important matter.

Sincerely,



Patrick Morrisey
West Virginia Attorney General

Mark Brnovich
Arizona Attorney General



Leslie Rutledge
Arkansas Attorney General

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[5] The third criterion—that the "[d]isclosure of the requested information . . . not be 'primarily in the commercial interest of the requester'"—is easily met here. *Cause of Action*, 2015 WL 5009388, at *5 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). In no way do the disclosures requested in this case "further[] the commercial, trade or profit interests of the [State of West Virginia]." *Id.* at *8 n.8 (quotations omitted).

Cynthia H. Coffman
Colorado Attorney General

Pam Bondi
Florida Attorney General

Sam Olens
Georgia Attorney General

Jack Conway
Kentucky Attorney General

James D. "Buddy" Caldwell
Louisiana Attorney General

Douglas J. Peterson
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Alan Wilson
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