Vanholt, Richard

From: LindaE Green [Green.LindaE@epamail.epa.gov] on behalf of FOIA HQ [FOIA_HQ@epa.gov]
Sent: Friday, July 26, 2013 12:06 PM
To: Vanholt, Richard; GROUP R3FOIA
Subject: Fw: FOIA Request – Certain Fetzer, Rupert, DiDonato e-communications (Region 3, faxed directly to R3)
Attachments: ATI_ELC_EPA_Fetzer_Rupert_DiDonato_FOIA_I.pdf

This request appears to be for action in EPA Region 3. However, if you learn that EPA HQ needs to take action on this, please send it to the FOIA Group Box (FOIA_HQ@epa.gov)
with Special Instructions. Thank you.

------ Forwarded by LindaE Green/DC/USEPA/US on 07/26/2013 12:04 PM ------

From: Chris Horner <chornerlaw@aol.com>
To: FOIA HQ@EPA
Date: 07/25/2013 04:28 PM
Subject: FOIA Request – Certain Fetzer, Rupert, DiDonato e-communications (Region 3, faxed directly to R3)

To EPA's FOIA Office (this covers employees working in Region 3, and so is being faxed there, and we copy EPA's HQ FOIA Office to create that record, although this request is to the Region 3 office),

Please find the request for certain above-described EPA records attached in PDF format.

We draw EPA's attention particularly to the recent DC Circuit holding in *CREW v. FEC*, 711 F.3d 180, and most critically its discussion at 186 (D.C. Cir. 2013), also discussed in the attached.

This request is separate and distinct from any other request and we expect it to be handled as such.

If you have any questions, please do not hesitate to contact me.

Chris Horner
202.262.4458 M

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The information contained in this message may be privileged. This transmission is therefore intended by the sender to be confidential and intended only for the proper recipient. If you are not the intended recipient distribution of this message is prohibited.*(See attached file: ATI_ELC_EPA_Fetzer_Rupert_DiDonato_FOIA_I.pdf)*

The Free Market
Environmental Law Clinic

REQUEST UNDER THE FREEDOM OF INFORMATION ACT

July 25, 2013

Regional Freedom of Information Officer
U.S. EPA, Region 3
1650 Arch Street (3PA00)
Philadelphia, PA 19103

BY ELECTRONIC MAIL: hq.foia@epa.gov
BY FAX (215) 814-5102[1]

RE: FOIA Request – Certain Fetzer, Rupert, DiDonato e-communications

EPA Region 3 Freedom of Information Officer,

On behalf of the American Tradition Institute (ATI), and the Free Market Environmental Law Clinic (ELC) as a separate, co-requester and also ATI counsel, please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. Both entities are non-profit public policy and/or legal institutes organized under section 501(c)3 of the tax code and with research, legal, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

[1] We choose to not file this via FOIAOnline because, as we have noted to FOIAOnline tech support and in recent requests to no useful effect, of that system's deficiencies with certain web browsers impeding requester's ability to attach additional discussion and limiting discussion of, *e.g.*, fee waiver, to two thousand characters per field.

Please provide us, within twenty working days,[2] copies of all **emails, text messages, or instant messages** sent **to or from** (including also as cc: or bcc:) any EPA-assigned email, text and/or IM account(s) of a) **Richard Fetzer**, the On-Scene Coordinator (OSC) who led EPA's Dimock, PA, response; b) **Richard Rupert**, the geologist/OSC involved in managing the sample collection; and/or c) **Ann DiDonato**, EPA Region 3 OSC, **which communications include,** in the subject or body, "White House," the acronym "WH" (or "wh"), and/or "HQ" (or "hq").[3]

Responsive records will be dated over the seven-month period from December 1, 2011 through June 30, 2012, inclusive.

Background to the Request Illustrating Public Interest, Governmental Operations/Activities

As described in more detail herein, these records will cite, discuss or otherwise relate to political involvement in EPA reversing its campaign against hydraulic fracturing, and its attendant claims of substantial public health threats, co-incident with a national political election campaign. The request, background for which we provide here and elsewhere below, is grounded in verbal and visual information provided to us by two career EPA sources and indicating high-level political interest and involvement in this reversal. Our inquiry and related use of such records will relate to the meaning of such arbitrariness for this and related regulatory decisions. For example, a politically driven reversal is subject to reversal yet again when political conditions or needs change; this is highly disruptive to local communities and, particularly in the instant matter, the

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[2] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at page 27, *infra*.

[3] By this we do not mean words using those letters, but any use of the letters, which are customary political shorthand for "White House" and of course "headquarters",[3] used in stand-alone fashion (for purposes of illustrating the use of these acronyms, only, *e.g.*, "WH doesn't want this", "HQ said stand down").

national economy. Similarly, we are curious about how this informs other EPA priorities that on their face also have a large political component.

After undersigned counsel Horner revealed the "Richard Windsor" false-identity created for former EPA Administrator Lisa Jackson, more sources providing information came forth. As already noted, among them are two EPA career employees who have separately offered information that suggests politics and the White House were behind EPA reversing its erstwhile campaign against hydraulic fracturing.

We note the administration's embrace of the boom in "fracked" natural gas represents abandonment of the *pre-boom* declaration we "overproduc[e]"[4] gas, and vow to curtail domestic production. This indication that EPA's regulatory priorities are driven by arbitrary political needs leaves all energy sources and related decisions subject to equally arbitrary reversal as politics dictate. This concern is relevant to the instant request and our request for fee waiver.

As institutions dedicated in great part in recent months to transparency, this claim is of significant interest to us and, it is fairly obvious, to the general public given the national public, political and media attention given to "transparency".

That is also to note that to the extent the sudden easing of the campaign against gas is politically driven it is also temporary, *e.g.*, until after the 2014 elections *a la* the Keystone XL pipeline decision and enforcement of the Affordable Care Act's employer mandate.

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[4] *See, e.g.*, http://www.treasury.gov/press-center/press-releases/Pages/tg284.aspx.

One Agency source who has come to us with information and a request that we help make certain information public alleges[5], with some specifics, political "micro-managing", "political management" of field work and priorities, and "for political reasons" to the point of engaging in the most serious of ethical breaches."

One statement in this source's communications to us is that "Richard Windsor[6]...is only the tip of the iceberg. The micromanaging from the Administrator's [sic], that went on inside EPA during the Dimock response was unlike anything in EPA's history. I am interested in putting daylight on this whole corrupt mess."

Finally, as one of our two Agency sources on this matter informs us, and we have confirmed via https://foiaonline.regulations.gov/, EPA's Dimock/fracking decisionmaking is the subject of multiple FOIA requests by media, pressure groups, researchers which remain languishing despite more than a year passing and in some cases eighteen months. Our request, being targeted, is unlikely to carry similar burdens while also being of equal if not greater public interest, due to its very specificity.

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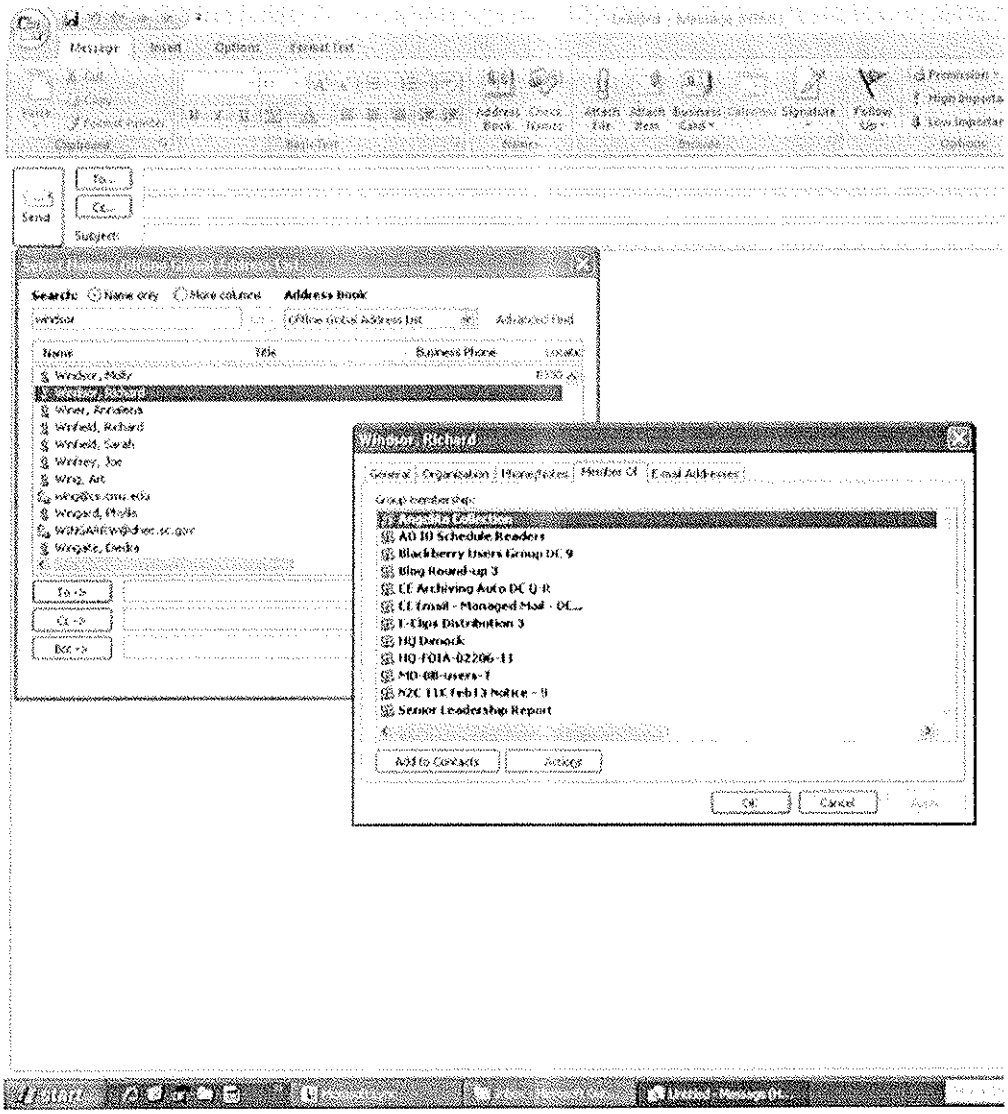
[5] We take the individual seriously, from someone who apparently is an EPA employee and who did not approach us directly, but came to us thorough a well-known and -regarded academic scientist. The person suggests that the Dimock response team was encouraged by the White House to put an end, at least for the time being, to the then-ongoing response. This person also writes, in pertinent part, "I have for over a year now worked within the system to try and make right the injustice and apparent unethical acts I witnessed. (I have not been alone in this effort.) I took an oath when I became a federal employee that I assume very solemnly. Additionally there is a Code of Conduct that was once displayed for all to see, that I also believe and ascribe to. So as a matter of conscience, I now believe it is my responsibly to make public what I believe are patently unethical and possibility illegal acts conducted by EPA management that manifestly depart from ethics, standards and laws under which EPA operates."

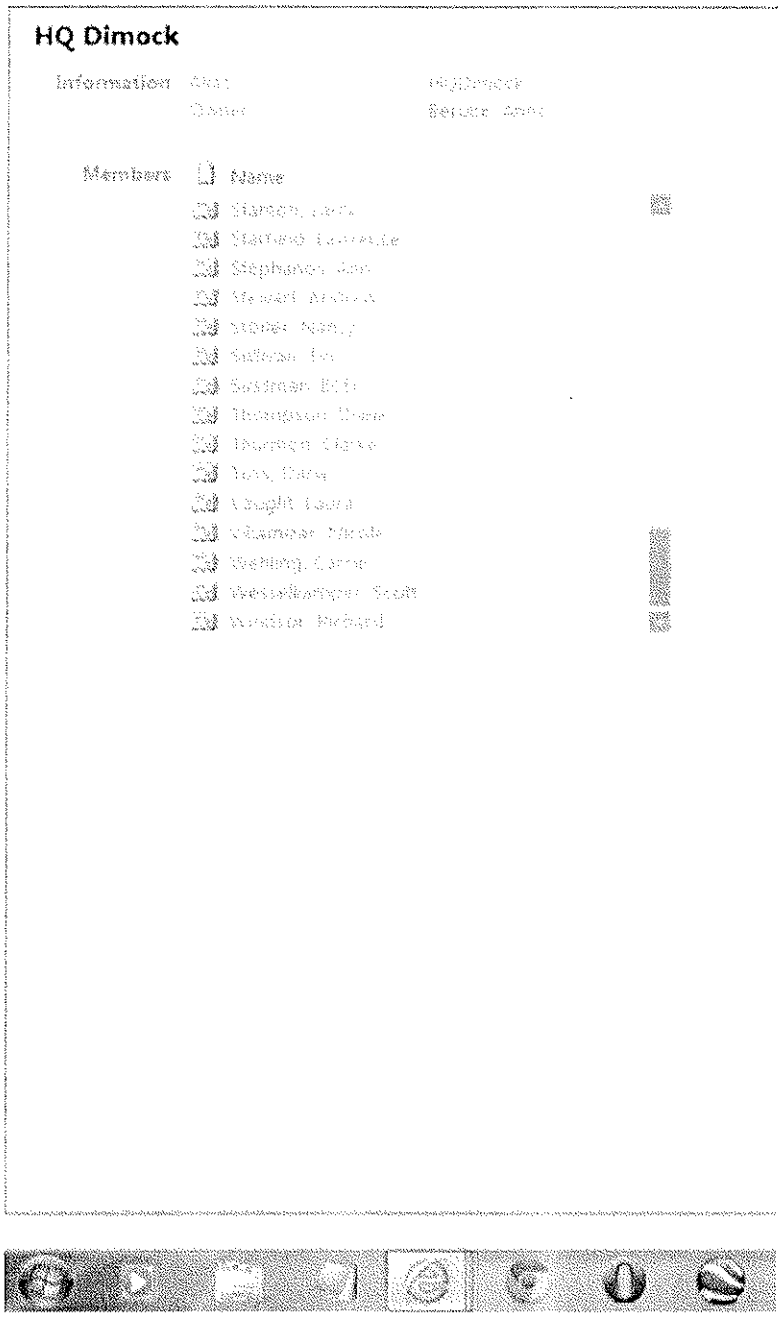
[6] "Richard Windsor" was the false identity created for former administrator Lisa Jackson for the purpose of certain correspondence, an email account which is relevant to this request.

As such, the political involvement in this reversal is of critical public importance and is a basis for our request. Combined with claims by the career scientist we cite, *infra*, and screen shots we possess from "Richard Windsor's" email account, provided to us by another employee, we see at minimum that this policy issue drew unique attention of the EPA administrator.

Specifically, and as EPA can readily affirm, amid email discussion groups addressing day-to-day issues such as "Blackberry Users Group DC 9", "A0 I0 Schedule Readers", and "Blog Roundup", is "HQ Dimock".



The visible participants are heavy on lawyers. Also included are EPA's Deputy Administrator, Jackson's Chief of Staff, and others in Lisa Jackson's inner circle. As such, this is further evidence supporting a reasonable conclusion that whatever led to the reversal, which was centered on the Dimock response, prompted attention at the highest political levels.



EPA Owes ATI and ELC a Reasonable, Non-Conflicted Search

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.*

A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure").

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty "to ensure that abuse and conflicts of interest do not occur."

Cuban v. S.E.C., 744 F.Supp.2d 60, 72 (D.D.C. 2010). See also *Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it "was aware that employee had withheld records as 'personal' but did not require that 'he submit those records for review' by the Department.)).

For these reasons ATI and ELC expect this search be conducted free from conflict of interest, *including* in its choice of who conducts the search and initial review.

Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies.

By the nature of records that would be responsive to this request are far more likely, to involve Agency and/or other executive branch political appointees expressing or discussing a political instruction on a topic of great public and political interest than any possible actual deliberative process as implicated in, *e.g.*, *Jordan v. DoJ*, 591 F.2d 753, 774 (D.C. Cir. 1978).

Pursuant to high-profile and repeated promises and instructions from the president and attorney general (see, *infra*) we request EPA err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes to deliberate which withholdings they may be able to justify. This is particularly true for any information that EPA seeks to claim as reflecting (the oft-abused, per even Attorney General Holder) "deliberative process", in the absence of any actual formal EPA deliberation being

underway truly antecedent to the adoption of an Agency policy on the relevant matters. It is also true for correspondence which may be embarrassing for the activism or close personal relationships with, *e.g.*, environmental activists, it reveals but which embarrassment -- as precedent makes abundantly clear -- does not qualify a record as "personal".

Therefore, if EPA claims any records or portions thereof are exempt under *any* of FOIA's discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that "**The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today" (President Barack Obama**, January 21, 2009), and "**Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged**. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government'").

Nonetheless, if your office takes the position that any portion of the requested records is exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. *See* 5 U.S.C. §552(b).

We remind EPA it cannot withhold entire documents rather than producing their "factual content" and redacting the confidential advice and opinions. As the D.C. Court of Appeals noted, the agency must "describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents." *King v. Department of Justice*, 830 F.2d 210, at 254 n.28 (D.C. Cir. 1987). As an example of how entire records should not be withheld when there is reasonably segregable information, we note that basic identifying information (who, what, when) is not "deliberative". As the courts have emphasized, "the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process." *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261. Further, we request that you provide us with an index of those documents as required under V*aughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA" pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and "describ[ing] each document or portion thereof withheld, and for each

withholding it must discuss the consequences of supplying the sought-after information." *King v. Department of Justice*, 830 F.2d at 223-24.

Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.

Please provide responsive documents in complete form, without any deletions or other edits and with any appendices or attachments and related email, text or Instant message threads as the case may be.

Request for Fee Waiver

This discussion is lengthy solely due to our experience, and that of others[7] with agencies, including EPA, improperly using denial of fee waivers to impose delay and require further expenditure of assets, representing an economic barrier to access and an improper means

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[7] *See* February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at http://images.politico.com/global/2012/03/aclueffffeewvrfoialtr.pdf; *see also National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); *see also* "Groups Protest CIA's Covert Attack on Public Access," OpentheGovernment.org, February 23, 2012, http://www.openthegovernment.org/node/3372.

of delaying or otherwise denying access to public records, despite our plainly qualifying for fee waiver.[8]

1) Requesters have no commercial interest, disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest

Requesters Have No Commercial Interest

As such and for the following reasons ATI and ELC request waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents 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 government and is not primarily in the commercial interest of the requester"); see also 40 C.F.R. §2.107(l), and (c).

The information sought in this request is not sought for a commercial purpose. Requesters are organized and recognized by the Internal Revenue Service as 501(c)3 educational organizations (not a "Religious...Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals Organization[]"). Neither group charges for copies of its reports. Information provided to ATI and ELC cannot result in any form of commercial gain to ATI or ELC. With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public's interest.

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[8] We also have been credibly informed by Agency staff of similar bias, re: HQ-FOI-0152-12 and HQ-FOI-0158-12, filed as *American Tradition Institute v. EPA*, CV: 13-112 U.S. District Court for the District of Columbia. This filing also led to unfavorable press coverage (*see, e.g.*, "Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests", *Washington Examiner*, January 28, 2013, http://washingtonexaminer.com/public-interest-group-sues-epa-for-foia-delays-claims-agency-ordered-officials-to-ignore-requests/article/2519881), and was followed by a series of facially improper fee waiver denials to undersigned.

As non-commercial requesters, ATI and ELC are entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010). Specifically, the public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. "The legislative history of the fee waiver provision reveals that it was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,' in particular those from journalists, scholars and nonprofit public interest groups." *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[9]

Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at

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[9] This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that "rely 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." *Better Gov't v. State*. They therefore, like Requester, "routinely make FOIA requests that potentially would not be made absent a fee waiver provision", requiring the court to consider the"Congressional determination that such constraints should not impede the access to information for appellants such as these." *Id.*

8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI.*

Given this, "insofar as ...[agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better Gov't v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that "'chill' the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage." *Id.* As such, agency implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for requester.

"This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requester's ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers. This 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. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as '"toll gates" on the public access road to information.'" *Better Gov't Ass'n v. Department of State.*

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "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." That is true in the instant matter as well.

Indeed, recent EPA assertions to the undersigned in relation to various recent FOIA requests, both directly and through counsel reflecting its pique over the robustness of said FOIAing efforts (and subsequent, toned-down restatements of this acknowledgement), prove too much in the context of EPA now serially denying fee waiver requests from groups deemed as unfriendly, conservative, libertarian or otherwise not among the roster of those with which EPA is working closely to craft a shared regulatory agenda,[10] given that it reaffirms that the groups undersigned represents on FOIA matters are precisely the sort of group the courts have identified in establishing this precedent.

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[10] See the matters underlying the extant EPA Inspector General Investigation into EPA's disparate application of FOIA fee waivers on initial determination. *See also, e.g.*, Geman, Ben, "EPA to review claims of bias against conservatives amid fight over IRS", *The Hill*, May 16, 2013, http://thehill.com/blogs/e2-wire/e2-wire/300167-epas-internal-watchdog-to-probe-bias-claims-amid-gop-comparisons-to-tax-scandal; see also http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.Blogs&ContentRecord_id=c27df7a8-05c9-6f77-6358-176a2c04e854.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified. The information sought by ATI and ELC in this FOIA request will be used to better the public's understanding of political involvement in EPA's fracking reversal as described, above. Particularly, responsive records should directly or indirectly reflect discussions about this topic by Agency staff with senior political officials, as well possibly as other parties both inside and outside government about this topic,, including pressure groups, particular industry participants, campaign contributors or investors.

Additionally, and given the longstanding, outstanding FOIA requests on related topics, these records, if produced, will shed light on the Agency's compliance with its obligations to maintain such records of involvement in EPA-related discussions, using EPA assets/resources, as required by federal record-keeping and disclosure laws.

These records are "agency records" under federal record-keeping and disclosure law, represent senior Agency officials' communications.

The Requested Records are of Significant Public Interest

The records are of significant public interest for reasons including the importance of energy policy decisions on major domestic industries and the larger economy, with direct impacts on our sources of electricity employment of many thousands both directly and indirectly. It relates as

well to policies that the president has acknowledged would lead to "bankrupt[ing]" the coal industry's customers if they sought to expand use of certain the industry's product for electricity generation, and which similarly could cause great impact for those who have now followed the administration's lead and fuel-switched to gas.

"Fracking" is behind an American production boom in oil and gas on private lands. It is one of its very few economic bright spots. The fracking boom led to a collapse in the price of gas (from $10 per million Btu to about $2, now around $4), which in turn provided cover for the administration's "war on coal",[11] allowing and even encouraging utilities to fuel-switch (some recent examples chronicled at, *e.g.*, http://hotair.com/archives/2013/07/14/imaginary-war-on-coal-claims-more-non-imaginary-victims/) without immediately raising rates as would have been the case, but-for fracking. Again, for now.

It is a reasonable surmise that those economics factored in the never explained reversal of EPA's anti-fracking campaign premised on thunderous claims of a public health threat, from which claims the Agency each time retreated. As Dan Kish of the Institute for Energy Research wrote, EPA "rushed to claim that natural gas production is associated with groundwater contamination. In all three cases, the agency has had to recant and conduct further analysis because of repeated breaches of standard scientific protocols." It was the last case, Dimock,

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[11] In addition to stating an intention to use policy to reverse what it called the U.S.'s supposed "overproduction" of oil and gas, the current administration has targeted the coal industry for decline, our nation's largest source of electricity production and an industry employing many thousands and supporting hundreds of communities, in a fashion widely described as its "war on coal". That campaign extends to the point of promoting policies that the president has acknowledged would lead to "bankrupt[ing]" the industry's customers if they sought to expand use of certain the industry's product for electricity generation.

where the reversal came on the administration's own initiative and, we are informed, with a direction from "HQ" to field staff.

Relevant to this, the information we cite to in this request comes from EPA sources and centers on the town that became Ground Zero in the war over fracking, Dimock, Pennsylvania. This small town served as a backdrop for the advocacy-documentary "Gasland", celebrated despite obvious stagecraft coupled with deceptive claims that, *e.g.*, Dimock's drinking water was suddenly now flammable after local fracking activity (a claim, and a film, scorched by a counter-documentary, "FrackNation"). It became the focus of a well-organized campaign by major green groups and crusading entertainers hoping to turn Dimock into the next Love Canal. EPA officials even helped with the film "Gasland" (see, *e.g.*, http://thehill.com/blogs/congress-blog/energy-a-environment/293141-if-confirmed-mccarthy-should-avoid-pitfalls-of-past-at-epa).

Then, in late 2011 and in early 2012, EPA reversed itself in Dimock, manifesting a larger reversal, of its campaign comparable to the administration's campaign against other hydrocarbon energy (coal and offshore oil drilling).

Further, the above-cited career EPA professional claims to undersigned counsel that the order for the Dimock research team to stop looking for problems in nearby groundwater came from "HQ" and the "White House". This person writes, among other thoughts on administration machinations including supposedly unprecedented interference from "HQ management":

> When this administration got started with this fracking investigation I think Jackson was in the lead. As the elections neared...the administration decided that gas was indeed good news for the economy and the administration was desperate for good economic news. Hence the withdrawal of the TX order and the curtailing of the WY report and the current ongoing national study on fracking. Now comes Dimock 2011. Things got a way [sic] from the EPA leadership and they had to pull it back in. The sensitivity to fracking issues started in R3 mid 2011. There was a response in early-summer that got killed and there were rumors from the

> response team that the leader had received an email from a White House staffer pushing for an end to the response...

We recognize that this is not evidence of problems with fracking, but of political interference in to the reversal on fracking; meaning that reversal, itself, is subject to arbitrary revisiting.

As also revealed in other emails obtained by congressional investigators, the rest of which we expect should come out eventually, a debate about this very issue raged within the administration and without, involving EPA officials and green pressure groups, as well as certain very political industry leaders (some who had previously helped underwrite public affairs activities in pursuit of their shared policy agenda).

Despite that the same green pressure group allies being *in favor of natural gas before they were against it,* it was soon apparent that this "fracking" (oil and gas) boom was also the single greatest factor keeping the U.S. economy from stagnating as badly as those European economies the president used to praise as his models. This, and that fracking also provided welcome cover for the war on coal was apparent in the 2013 State of the Union speech, in which the president praised the gas boom EPA had fought tooth-and-nail, until suddenly it didn't, and even claimed "my administration will keep cutting red tape and speeding up new oil and gas permits". However, reminiscent of the president boasting of increased domestic oil production -- thanks to a boom on private lands, while the administration fought it on land under its control after having also vowed to reduce our domestic oil production -- available evidence raises questions about whether this rhetoric has a regulatory shelf life beyond its use for proclaiming and seemingly taking credit for some economic good news.

It is our position that the public deserve to review public records possibly shedding light on what if any political influence was exerted in this reversal on a key element of its campaign

against abundant energy sources, in part but by no means exclusively as this signals the prospect for a similarly arbitrary renewal of the campaign against fracking, with all of the economic upheaval and larger uncertainty this creates.

We emphasize that **a requester need not demonstrate that the records would contain any particular evidence, such as of misconduct.** Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir. 2003).

The subject matter of the requested records specifically concerns identifiable operations or activities of the government. The requested correspondence, pertaining to an issue of key policy and economic importance and also possible to political involvement in a reversal on one of the most economically significant developments in the U.S. in years, would contribute significantly to public understanding of the operations or activities of the government about which information there is no other information in the public domain.

As such, release of these records also directly relates to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration, ever". This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (see, *e.g.*, an internet search of "study Obama transparency").

Particularly after undersigned counsel's recent discoveries using FOIA, related publicizing of certain EPA record-management and electronic communication practices and

related other efforts to disseminate the information, the public, media and congressional oversight bodies are very interested in how widespread are the violations of this pledge of unprecedented transparency and, particularly, in the issue central to the present request.

This request, when satisfied, will further inform this ongoing public discussion.

Further, ATI and ELC have conducted several studies on the operation of government, particularly EPA and its agenda against politically deselected (and government's intervention in favor of politically selected) energy sources. On its face, therefore, information shedding light on this relationship satisfies FOIA's test.

For the aforementioned reasons, potentially responsive records unquestionably reflect "identifiable operations or activities of the government" with a connection that is direct and clear, not remote.

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request. The requested records have an informative value and are "likely to contribute to an understanding of Federal government operations or activities" just as did *ATI v. EPA*, cited above: this issue is of significant public interest for reasons described, *supra*, and as affirmed by any internet search for news and opinion coverage of "fracking". This is not subject to reasonable dispute, for the same reasons.

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain.** There is no reasonable claim to deny that, to the extent the requested information is available to any parties, this is information held only by EPA's correspondents. We also repeat that Dimock-related information is the subject of numerous unsatisfied requests under the Freedom of Information Act.

It is clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. Precisely as with the records being produced by EPA in *ATI v. EPA*, and indeed in conjunction with the efforts to present information for public scrutiny ATI and ELC intend to present these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein. ATI and ELC counsel have spent a great portion of their respective energies over the past two-plus years promoting the public interest advocating sensible policies to protect human health and the environment, including through obtaining information from EPA, routinely receiving fee waivers under FOIA (until recently, but even then on appeal) for its ability to disseminate public information. These FOI or open-records efforts have also obtained substantial media coverage, including in local, state, national and international English-language outlets.

Further, as demonstrated herein and in the above litany of exemplars of newsworthy FOIA activity, requester and particularly undersigned counsel have an established practice of utilizing FOIA to educate the public, lawmakers and news media about the government's operations and, in particular, have brought to light important information about policies grounded in energy and environmental policy, like EPA's.[12]

Requesters also intend to disseminate the information gathered by this request via media appearances (the undersigned counsel Horner appears regularly, to discuss his work, on national television and national and local radio shows, and weekly on the radio shows "Garrison" on WIBC Indianapolis and the nationally syndicated "Battle Line with Alan Nathan").

More importantly, with foundational, institutional interests in and reputations for playing leading roles in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies, the undersigned requesters unquestionably have the

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[12] In addition to the coverage of ATI's and undersigned counsel's recent FOIA suit against EPA after learning of an order to perform no work on two requests also involving EPA relationships with key pressure groups, this involves EPA (*see, e.g.,* http://washingtonexaminer.com/epa-refuses-to-talk-about-think-tank-suit-demanding-docs-on-officials-using-secret-emails/article/2509608#.UH7MRo50Ha4, referencing revelations in a memo obtained under FOIA; *Horner et al. (CEI) v. EPA* (CV-00-535 D.D.C., settled 2004)), *see also* see also requests by the undersigned on behalf of a similarly situated party, the Competitive Enterprise Institute (CEI) requests of the Departments of Treasury (*see, e.g.*, http://www.cbsnews.com/8301-504383_162-5314040-504383.html, http://www.cbsnews.com/8301-504383_162-5322108-504383.html) and Energy (see, e.g., http://www.foxnews.com/scitech/2011/12/16/complicit-in-climategate-doe-under-fire/, http://news.investors.com/ibd-editorials/031210-527214-the-big-wind-power-cover-up.htm?p=2), NOAA (*see, e.g.*, http://wattsupwiththat.com/2012/10/04/the-secret-ipcc-stocker-wg1-memo-found/, http://wattsupwiththat.com/2012/08/21/noaa-releases-tranche-of-foia-documents-2-years-later/), and NASA (*see, e.g.*, http://legaltimes.typepad.com/blt/2010/11/global-warming-foia-suit-against-nasa-heats-up-again.html, which FOIA request and suit produced thousands of pages of emails reflecting agency resources used to run a third-party activist website, and revealing its data management practices; *see also* http://wattsupwiththat.com/2012/10/04/the-cyber-bonfire-of-gisss-vanities/), among numerous others discussion of most of which is available online.

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

The disclosure will contribute "significantly" to public understanding of government operations or activities. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is "likely to contribute" to an understanding of specific government operations or activities.*

As previously explained, the public has no source of information on EPA officials' correspondence with senior political officials about the remarkable reversal in the campaign against fracking, made only more remarkable by the information brought to us by two career EPA employees. The ATI-ELC inquiry and any related study will provide on this unstudied area of government operations. Because there is no such analysis currently existent, any increase in public understanding of this issue is a significant contribution to this highly visible and politically important issue as regards the operation and function of government.

Because ATI and ELC have no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

As such, the requesters have stated "with reasonable specificity that its request pertains to operations of the government," and "the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

2) **Alternately, ATI and ELC qualify as media organizations for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as ATI and ELC are non-commercial requesters, and are entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event EPA deviates from prior practice on similar requests and refuses to waive our fees under the "significant public interest" test, which we will then appeal while requesting EPA proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...") and 40 C.F.R. §2.107(d)(1) ("No search or review fees will be charged for requests by educational institutions...or representatives of the news media."); see also 2.107(b)(6).

However, we note that as documents are requested and likely are by their very nature available electronically, there should be no copying costs.

Requesters repeat by reference the discussion as to their publishing practices, reach and intentions to broadly disseminate, all in fulfillment of ATI and ELC's mission, from pages 22-24, *supra*.

As already discussed with extensive supporting precedent, government information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with Agency activities in this controversial area or, as the Supreme Court once noted, what their government is up to.

For these reasons, requesters qualify as "representatives of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the pubic. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format; as such, there are no duplication costs other than the cost of a compact disc(s).

CONCLUSION

We expect the agency to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face

of doubt, openness prevails. The government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears").

We expect this all aspects of this request be processed free from conflict of interest.

We request the agency provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). EPA must at least to inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires EPA to immediately notify ATI and ELC with a particularized and substantive determination, and of its determination and its reasoning, as well as ATI and ELC's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013). See also; *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request records be produced on a rolling basis, as they become available, preferably electronically,[13] but *as necessary* in hard copy to my attention at the address below. We inform

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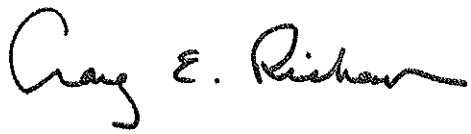
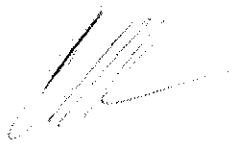
[13] For any mailing that EPA finds necessary, we request you use 1489 Kinross Lane, Keswick, Virginia, 22947 Attn. Chris Horner.

EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, e.g., *CREW v. FEC*.

If you have any questions please do not hesitate to contact undersigned counsel.

Respectfully submitted,





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