

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

WATERKEEPER ALLIANCE, INC.,)	
SIERRA CLUB, CLEAN WATER)	
ACTION, and ENVIRONMENTAL)	
INTEGRITY PROJECT,)	
)	
Plaintiffs,)	
)	Case No. 17-cv-7400
v.)	
)	
U.S. ENVIRONMENTAL PROTECTION)	COMPLAINT FOR DECLARATORY
AGENCY,)	AND INJUNCTIVE RELIEF
)	
Defendant.)	
)	
)	
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)	
)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs Waterkeeper Alliance, Inc., Sierra Club, Clean Water Action, and Environmental Integrity Project (collectively, “Plaintiffs”) assert violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, by Defendant United States Environmental Protection Agency (“EPA”) for improperly withholding requested agency records since the November 2016 presidential election concerning the Agency’s rule updating wastewater treatment standards for power plants (the “Effluent Limitation Guidelines rule” or “ELG rule”).

2. Coal-fired power plants are by far the largest discharger of toxic pollution in the United States, dumping billions of pounds of arsenic, selenium, mercury, and other dangerous pollutants into rivers, streams, and lakes across the United States every year. However, prior to

publishing the ELG rule in November 2015, EPA had not revised power plant wastewater treatment standards since 1982.

3. The 2015 ELG rule would require power plants to eliminate the vast majority of this pollution using affordable, state-of-the-art wastewater treatment technology, resulting in thousands of river miles that are safer to swim and fish in, and hundreds of cleaner water bodies that are vital drinking water sources. The effective date of the rule was January 4, 2016, but for the new, more stringent wastewater treatment standards, the rule required compliance “as soon as possible” on or after November 1, 2018, and “no later than” December 31, 2023.

4. In the past six months, however, EPA under the new Administration has undertaken a series of actions to postpone the rule’s future compliance deadlines and begin a new rulemaking to reconsider the two most significant of the new standards for coal combustion wastewater. The new EPA Administration has made these deregulatory moves at the utility industry’s request, and particularly in response to an administrative petition for reconsideration of the rule that was filed by an industry trade association, the Utility Water Act Group (“UWAG”), on March 24, 2017.

5. On April 3, 2017, Plaintiffs submitted their FOIA request, seeking records since the November 2016 presidential election concerning both EPA’s internal review of the ELG rule and communications with outside entities about the rule either before or after UWAG petitioned EPA for reconsideration.

6. Since the FOIA request was submitted, EPA has only provided one document to Plaintiffs in response to the request. EPA has acknowledged that it has numerous other agency records in its possession that are responsive to the request. However, EPA staff have informed Plaintiffs that EPA will not release additional records to Plaintiffs until the Agency completes a

“senior management review” of whether to release the records. EPA has been unable to provide Plaintiffs with any date certain by which this “senior management review” will be completed and EPA will comply with its obligations under FOIA.

7. EPA has failed to provide Plaintiffs with a complete and lawful response to, or determination of, their FOIA request within the timeframe required by FOIA.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

9. Venue is proper in this district because plaintiff Waterkeeper Alliance, Inc. resides and has its principal place of business in this judicial district. 5 U.S.C. § 552(a)(4)(B).

PARTIES

10. Plaintiff Waterkeeper Alliance, Inc. (“WKA”) is a nonpartisan, nonprofit organization headquartered in New York, New York uniting more than 300 Waterkeeper Organizations and Affiliates around the world and focusing citizen advocacy on issues that affect our waterways and water quality. Within the United States, WKA works with over 170 Waterkeeper Member Organizations and Affiliates to create and preserve drinkable, fishable, swimmable, and clean waterways. Communities nationwide look to WKA for critical information concerning, among other things, sources of pollution in their local waterways.

11. WKA has a proven ability to disseminate information quickly and effectively through various communication channels including publications, public interest litigation, educational programs, media initiatives, and its website. WKA’s website www.waterkeeper.org is updated regularly and draws thousands of visits per month. WKA also publishes *Waterkeeper Magazine*, a magazine on water-related environmental and public health subjects of current

interest, which has an annual circulation of 130,000. *Currents* is WKA's electronic newsletter on water-related issues that is distributed by email to approximately 24,000 subscribers monthly and made available to the general public online. WKA also issues press releases and participates in press conferences and interviews with reporters.

12. Sierra Club was founded in 1892 and is the nation's oldest grassroots environmental organization. Sierra Club's national headquarters is located in Oakland, California. Sierra Club is a nonprofit, membership organization incorporated in California with more than 840,000 members in all 50 states and the District of Columbia. Sierra Club's purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

13. Sierra Club's Beyond Coal campaign is a major effort to replace dirty coal with clean energy by mobilizing grassroots activists in local communities to advocate for the retirement of old and outdated coal plants and to prevent new coal plants from being built. As part of its campaign, Sierra Club has prioritized its efforts to ensure that coal-fired power plants comply with the Clean Water Act and other environmental laws, and has an active communications, organizing, and litigation campaign to further these efforts.

14. The Beyond Coal campaign participates in dozens of agency and judicial proceedings concerning coal-fired power plants every year, has a large communications budget, and communicates weekly with tens of thousands of citizens. Campaign experts and attorneys use available information to develop reports, media materials, and litigation briefs that further educate the public and decision-makers. Through that campaign, Sierra Club has built an extensive national network of public organizations and individuals interested in these issues, and

it communicates with them regularly. Sierra Club also disseminates information through its website, www.sierraclub.org.

15. Clean Water Action (“CWA”) is a nonpartisan, nonprofit organization incorporated under the laws of the District of Columbia, and has more than 800,000 members nationwide. CWA’s mission includes the prevention of pollution in the nation’s waters, protection of natural resources, and creation of environmentally-safe jobs and businesses. CWA has continuously worked to strengthen and preserve key drinking water protections and protect small streams and wetlands. With over one million members, volunteers, and seasoned professional staff, CWA has led hundreds of successful campaigns in dozens of states around the country.

16. CWA disseminates information on its website, www.cleanwateraction.org, by blogging and publishing monthly newsletters, reports, and scorecards on both state and national issues. CWA is therefore capable of making the information from this request available to at least one million people around the country, as well as to relevant members of Congress and other elected officials.

17. Environmental Integrity Project (“EIP”) is a nonpartisan, nonprofit organization founded in 2002 by former EPA enforcement attorneys to advocate for more effective enforcement of environmental laws. EIP’s three objectives are: to provide objective analysis of how the failure to enforce or implement environmental laws increases pollution and affects the public’s health; to hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and to help local communities in key states obtain the protection of environmental laws.

18. EIP advocates for laws to protect public health and the environment from air and water pollution from coal-fired power plants and other large sources of pollution. As part of its efforts to ensure effective enforcement of environmental laws, EIP participates in federal and state rulemakings related to water pollution from the utility industry and brings lawsuits to enforce the Clean Water Act on behalf of community and environmental groups that are harmed by coal-fired power plant pollution. In addition, EIP uses public data obtained through FOIA requests to develop reports, media materials, and litigation briefs that educate the public and decision-makers, and achieve its objectives. EIP also disseminates information through its website, www.environmentalintegrity.org.

19. Plaintiffs routinely use FOIA to obtain information from federal agencies, which Plaintiffs' legal and scientific experts analyze in order to inform their members and the public about public health and environmental issues, such as the impacts of water pollution from coal-fired power plants and other large sources of pollution, as well as the governmental decisions (and influences on those decisions) that affect the amount of pollution that power plants and other large sources of water pollution discharge into our rivers, lakes, and streams. Plaintiffs regularly convey important information to their members and the public through publications and press releases, as well as by publicly releasing information and documents obtained through FOIA requests.

20. Plaintiffs bring this action on their own behalf and on behalf of their members. Plaintiffs and their members have been and continue to be injured by Defendant's failure to provide requested records within the timeframe mandated by FOIA. The requested relief will redress these injuries.

21. Defendant EPA is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1), and has possession or control of the records Plaintiffs seek in this action.

LEGAL BACKGROUND

22. Enacted in 1966, the Freedom of Information Act was designed to “encourage public disclosure of information” in order to “ensure an informed citizenry.” *Am. Civil Liberties Union v. Dep’t of Def.*, 543 F.3d 59, 66 (2d Cir. 2008) (citations omitted). To this end, FOIA requires agencies of the federal government to release, upon request, information to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C. § 552(a)(3)(A). These exemptions are narrowly construed, and the agency bears the burden of establishing the applicability of each exemption as to each record for which it is claimed. *See Milner v. Dep’t of Navy*, 562 U.S. 562, 565 (2011).

23. Upon receiving a FOIA request, an agency has twenty working days to respond by determining whether responsive documents exist and whether the agency will release them. 5 U.S.C. § 552(a)(6)(A); 40 C.F.R. § 2.104(a). An agency may delay an initial determination by ten working days only if the agency can demonstrate that it faces “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B); 40 C.F.R. § 2.104(d). FOIA further requires agencies to make records themselves “promptly available” to requesting parties. 5 U.S.C. § 552(a)(3)(A).

24. If an agency withholds responsive records, in whole or in part, the burden is on the agency to prove that an exemption applies and that it outweighs FOIA’s policy of disclosure. *See, e.g.*, 5 U.S.C. § 552(a)(4)(B); *Halpern v. F.B.I.*, 181 F.3d 279, 287 (2d Cir. 1999).

25. With respect to the one document that EPA has produced to Plaintiffs in response to their request at issue in this case, EPA has invoked Exemption 5, which applies to “inter-agency or intra-agency memorandums or letters that would not be available by law to a party

other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Courts employ a two-part test to examine an agency’s withholding of deliberative information under Exemption 5: (1) the document must be either inter-agency or intra-agency, and (2) the document must be both predecisional and part of the agency’s deliberative or decisionmaking process. *See, e.g., Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001). “Purely factual” material cannot be withheld under Exemption 5. *Grand Cent. P’ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999).

26. Whenever an agency determines that a portion of a record should be withheld under one of FOIA’s exemptions, the agency must still release to the public any portions of that record that contain “reasonably segregable” non-exempt information. 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”).

27. If an agency makes an initial determination that it will deny a FOIA request in whole or in part, the requester is entitled to administratively appeal the determination. 5 U.S.C. § 552(a)(6)(A)(ii). EPA regulations require administrative appeals to be filed within thirty calendar days. 40 C.F.R. § 2.104(j). FOIA requires the agency to make a determination with respect to an administrative appeal of a denial of a request within twenty working days. 5 U.S.C. § 552(a)(6)(A)(ii).

28. FOIA provides that the District Court shall have jurisdiction “to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

29. FOIA and Defendant’s regulations state that a requester is entitled to a waiver of fees associated with responding to a FOIA request when the information sought “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); 40 C.F.R. § 2.107(l)(1). Further, an agency cannot assess fees against a requester if it does not respond to the request within the time established by FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(viii).

30. FOIA permits the Court to “assess . . . reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E).

FACTUAL BACKGROUND

31. On April 3, 2017, Plaintiffs submitted a FOIA request to EPA seeking all records created, stored, or received since November 8, 2016 concerning the ELG rule. Plaintiffs’ request is attached as Exhibit A. Specifically, Plaintiffs asked that EPA release “(1) All records reflecting communications between EPA (or the Department of Justice) and the Utility Water Act Group, the law firm Hunton & Williams LLP, and/or any other entity or individual representing an electric generating utility or the utility industry, concerning the Steam Electric ELGs rule; (2) All records reflecting communications between EPA (or the Department of Justice) and the White House concerning the Steam Electric ELGs rule; (3) All records reflecting communications between EPA (or the Department of Justice) and the presidential transition team concerning the Steam Electric ELGs rule; (4) All records created, stored, or received by the EPA Administrator, or any of the Administrator’s staff, concerning the Steam Electric ELGs rule; (5) All records created, stored, or received by the EPA ‘beachhead’ team, or any staff supporting the ‘beachhead’ team, concerning the Steam Electric ELGs rule; and (6) All records created, stored, or received by the EPA Office of Water concerning the Steam Electric ELGs rule.” Exhibit A at 1-2 (citations omitted). Plaintiffs also requested a public interest fee waiver. *Id.* at 1, 3-8.

32. EPA received Plaintiff's FOIA Request on April 3, 2017. In a letter to Plaintiffs dated April 12, 2017 (attached as Exhibit B), EPA stated that they reviewed Plaintiffs' submission and granted a fee waiver.

33. EPA initially responded to the request in an undated letter that Plaintiffs' counsel received on April 17, 2017, attached as Exhibit C. In that letter, EPA requested the opportunity to discuss and modify the FOIA request because it believed that the request did not reasonably describe the records that Plaintiffs were seeking. Exhibit C at Section I. EPA also granted itself a 10 working-day extension of time to respond to the FOIA request, pursuant to 5 U.S.C. § 552(a)(6)(B) and 40 C.F.R. § 2.104(d), based on a finding of "unusual circumstances." Exhibit C at Section II.

34. Plaintiffs' counsel responded to EPA's undated letter on April 17, 2017, in an email (attached as Exhibit D) that objected to EPA's characterization of Plaintiffs' FOIA request as not reasonably describing the records sought, but offered to discuss the scope of the request further.

35. Plaintiffs' counsel spoke with EPA staff on April 24, 2017, April 28, 2017, and May 4, 2017 to address questions and clarify the FOIA request. A letter from EPA documenting these conversations is attached as Exhibit E. Over the course of these conversations, Plaintiffs and EPA agreed on a list of records custodians whose records would be searched for responsive records, as well as a list of search terms. Exhibit E at Section I.

36. Plaintiffs' counsel spoke further with EPA staff on May 31, 2017, June 30, 2017, and July 7, 2017 to receive updates concerning EPA's progress in collecting and reviewing records responsive to the FOIA request. During the July 7, 2017 phone call, EPA staff informed Plaintiffs' counsel that EPA had identified at least three briefing papers in hard copy that could

be provided to Plaintiffs in redacted form within two weeks, and that EPA had identified over 6,000 electronic records that were potentially responsive to Plaintiffs' FOIA request that they had begun reviewing. EPA staff also informed Plaintiffs' counsel on July 7, 2017 that they believed that EPA would begin producing electronic records responsive to Plaintiffs' FOIA request by the end of August.

37. In a follow-up email on July 21, 2017, attached as Exhibit F, EPA staff informed Plaintiffs' counsel that "[w]e have several hard copy records in final review that we anticipate releasing to you shortly," including "a small release early next week and another release the first week of August." Exhibit F. In that email, EPA staff further indicated that EPA was "experiencing some issues with [its] document processing and review tools at the moment" but was continuing to review electronic records responsive to Plaintiffs' FOIA request. *Id.*

38. EPA staff spoke again with Plaintiffs' counsel on July 28, 2017 to provide another update on EPA's progress in responding to Plaintiffs' FOIA request. During that conversation, EPA staff informed Plaintiffs' counsel that they were seeking approval within EPA to release hard copy records to Plaintiffs in redacted form. EPA staff further represented to Plaintiffs' counsel that it was "probably still true" that EPA would begin producing electronic records to Plaintiffs by the end of August.

39. On August 4, 2017, EPA provided to Plaintiffs an "Interim 1" release of only 1 document totaling 2 pages from EPA's hard copy records that it had gathered in response to Plaintiffs' FOIA request, attached as Exhibit G. Portions of this document were partially withheld under FOIA Exemption 5, 5 U.S.C. § 552(b)(5), as inter- or intra-agency records subject to the deliberative process privilege. Exhibit G ¶ 2

40. On August 22, 2017, EPA staff spoke with Plaintiffs' counsel and asserted that the remaining hard copy records that EPA had gathered in response to Plaintiffs' FOIA request had been "cleared" for release and that Plaintiffs would receive them within a week.

41. On August 24, 2017, EPA staff spoke with Plaintiffs' counsel and stated that EPA would no longer be producing the hard copy records that week. According to EPA staff, the hard copy records were undergoing a review by senior management at EPA to evaluate whether to release them to Plaintiffs. EPA staff were unable to provide any information concerning when this senior management review would be completed and EPA would make a final decision as to release of the hard copy records.

42. EPA staff spoke with Plaintiffs' counsel again on September 20, 2017. During that conversation, EPA staff repeated that EPA's "senior management review" of the hard copy records that had been gathered in response to Plaintiffs' FOIA request was still ongoing, and that EPA was still unable to provide Plaintiffs with a date by which that review would be completed. EPA staff further notified Plaintiffs' counsel that EPA's initial review of electronic documents in response to Plaintiffs' FOIA request had been completed, but was similarly unable to provide a date by which any of those records would be released to Plaintiffs.

CLAIM FOR RELIEF

43. Plaintiffs re-allege and incorporate the allegations of all preceding paragraphs of this Complaint as if fully set forth herein.

44. By improperly withholding records responsive to Plaintiffs' April 3, 2017 FOIA request, EPA has violated FOIA's mandate to release agency records to the public. *See* 5 U.S.C. § 552(a)(3)(A) & (a)(6).

45. Defendant EPA has wrongfully withheld the requested records from Plaintiffs.

46. Plaintiffs have exhausted the applicable administrative remedies.
47. Plaintiffs are entitled to obtain the requested records immediately at no cost.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request that this Court enter a judgment:

(1) declaring that Defendant EPA has violated FOIA by failing to provide all records responsive to Plaintiffs' FOIA request;

(2) ordering that Defendant EPA make all requested records available to Plaintiffs promptly and at no cost to Plaintiffs;

(3) retaining jurisdiction over this case to rule on any assertions by EPA that any responsive records, in whole or in part, are exempt from disclosure;

(4) awarding Plaintiffs' litigation costs and reasonable attorneys' fees in this action;
and

(5) ordering such other relief as the Court may deem just and proper.

DATED: September 28, 2017

Respectfully Submitted,

/s/ Thomas J. Cmar

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