

Exhibit A



EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

April 3, 2017

VIA ELECTRONIC SUBMISSION

National Freedom of Information Officer
U.S. Environmental Protection Agency
<https://www.foiaonline.regulations.gov>

**RE: Freedom of Information Act Request Regarding Effluent Limitation
Guidelines for the Steam Electric Power Generating Point Source Category**

Dear National FOI Officer:

This is a request for information on behalf of Earthjustice, Waterkeeper Alliance, Inc., Environmental Integrity Project, Sierra Club, and Clean Water Action (collectively, "Public Interest Groups") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Environmental Protection Agency's ("EPA") FOIA regulations, 40 C.F.R. § 2.107.

The Public Interest Groups also request a fee waiver for this request under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107.

I. Records Requested

The Public Interest Groups request all records created, stored, or received since November 8, 2016 concerning the "Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category" rule (the "Steam Electric ELGs rule") that was signed by the Administrator on September 30, 2015 and published in the Federal Register on November 3, 2015.

This request includes, but is not limited to, the following categories of records:

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 team¹ 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,² 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.

For purposes of this request, the term "records" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. As used herein, "and" and "or" shall be construed either conjunctively or disjunctively as required by the context to bring within the scope of these requests any information which might be deemed outside their scope by any other construction.

Further, for purposes of this request, the term "records" includes any personal email messages, telephone voice mails or text messages, and internet "chat" or social media messages, to the full extent that any such messages fall within the definition of "agency records" subject to FOIA, 5 U.S.C. § 552.

We remind you that FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i), and that that response must "at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions[, if any, you] will claim with respect to any withheld documents." *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose this information as it becomes available to you without waiting until all of the communications and records have been assembled for the time period requested. The Public Interest Groups request electronic copies of the records whenever possible.

¹ The "presidential transition team" may include, but is not limited to, the following individuals: Myron Ebell, Charles Munoz, David Schnare, George Sugiyama, David Kreutzer, Doug Ericksen, Holly Greaves, Justin Schwab, Patrick Davis, and Don Benton.

² The "beachhead team" may include, but is not limited to, the following individuals: Myron Ebell, Charles Munoz, David Schnare, George Sugiyama, David Kreutzer, Doug Ericksen, Holly Greaves, Justin Schwab, Patrick Davis, and Don Benton.

II. Claims of Exemption from Disclosure

If EPA regards any documents as exempt from required disclosure under the Freedom of Information Act, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency's justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

III. Fee Waiver

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107, the Public Interest Groups request that EPA waive all fees associated with responding to this request because the groups seek this information in the public interest and will not benefit commercially from this request. If EPA does not waive the fees entirely, the Public Interest Groups request that it reduce them to the extent possible.

FOIA provides that fees shall be reduced "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."³ EPA's FOIA regulations contain an identical requirement.⁴ The U.S. Department of Justice (DOJ) has identified six factors to assess whether a requester is entitled to a waiver of fees under FOIA, and the D.C. Circuit and other Courts of Appeals reference and apply these factors.⁵ These factors are:

- A. 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.'
- (1) **The subject of the request:** Whether the subject of the requested records concerns 'the operations or activities of the government';
 - (2) **The informative value of the information to be disclosed:** Whether the disclosure is 'likely to contribute' to an understanding of government operations or activities;

³ 5 U.S.C. § 552(a)(4)(A)(iii).

⁴ 40 C.F.R. § 2.107.

⁵ See, e.g., Stephen J. Markman, U.S. Dep't of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), available at http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm; *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that "for a request to be in the 'public interest,' four criteria must be satisfied," and citing agency's multi-factor fee waiver regulation).

- (3) **The contribution to an understanding of the subject by the general public likely to result from disclosure:** Whether disclosure of the requested information will contribute to ‘public understanding’; and
 - (4) **The significance of the contribution to public understanding:** Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.
- B. Disclosure of the Information ‘is Not Primarily in the Commercial Interest of the Requester.’
- (1) **The existence and magnitude of a commercial interest:** Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
 - (2) **The primary interest in disclosure:** Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’⁶

The Public Interest Groups’ request complies with each of the factors agencies weigh in a fee waiver determination, as demonstrated below. If this information is not sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

A. Public Interest Factor

The disclosure of this information is in the “public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”⁷ The Public Interest Groups’ request complies with each of the criteria DOJ has identified for the public interest factor.

i. The request concerns the operations or activities of the government.

The Public Interest Groups seek information related to EPA’s communications and other records concerning the Steam Electric ELGs rule since the November 2016 presidential election. Since EPA is an arm of the federal government, such EPA records plainly concern “operations or activities of the government.”⁸

⁶ Markman, *supra* note 5.

⁷ See 40 C.F.R. § 2.107(l)(1).

⁸ See 40 C.F.R. § 2.107(l)(2)(i).

ii. The disclosure is “likely to contribute” to an understanding of government operations and activities.

The records the Public Interest Groups have requested bear upon any internal review of the Steam Electric ELGs rule that EPA has undertaken since the November 2016 presidential election, as well as any communications that EPA has received concerning the rule from outside entities. On March 24, 2017, the Utility Water Act Group submitted a petition to EPA for reconsideration of the Steam Electric ELGs rule.⁹ However, it is not currently public knowledge as to whether EPA since the November 2016 presidential election has conducted any internal review or has received any communication from outside entities, such as industry groups or the White House, concerning the Steam Electric ELGs rule. Thus, disclosure is “likely to contribute” to public understanding of government operations and activities.¹⁰

iii. The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

This information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.¹¹ The general public is already following issues related to water pollution from coal-fired power plants, which has frequently been the focus of investigative reports by members of the media.¹² Thus, any review or reconsideration of the Steam Electric ELGs rule will receive close and critical scrutiny from members of the public and the news media.

The Public Interest Groups are particularly able to ensure that the information requested will be disseminated to the general public.

Earthjustice is a non-profit public interest law organization dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment.¹³ Earthjustice has made safeguarding the nation’s waters one of its top priorities. To this end, Earthjustice has brought numerous lawsuits to enforce the Clean Water Act in the public interest. In light of its substantial legal expertise, Earthjustice is well-prepared to analyze and evaluate the records we receive pursuant to this request and

⁹ See <https://www.regulations.gov/document?D=EPA-HQ-OW-2009-0819-6478>.

¹⁰ See 40 C.F.R. § 2.107(l)(2)(ii).

¹¹ See 40 C.F.R. § 2.107(l)(2)(iii).

¹² See, e.g., Heather Rogers, ProPublica, *Lobbyists Bidding to Block Government Regs Set Sights on Secretive White House Office*, July 31, 2014, available at <http://www.propublica.org/article/lobbyists-bidding-block-government-regs-sights-set-secretive-white-house>; Bill Chameides, Nat’l Geographic Energy Blog, *Coal Ash Ponds: How Power Companies Get a ‘Bypass’ on Regulations Against Pollution*, Mar. 24, 2014, available at <http://energyblog.nationalgeographic.com/2014/03/24/coal-ash-ponds-how-power-companies-get-a-bypass-on-regulations-against-pollution/>; Charles Duhigg, N.Y. Times, *Cleansing the Air at the Expense of Waterways*, Oct. 12, 2009, available at <http://www.nytimes.com/2009/10/13/us/13water.html>.

¹³ See <http://earthjustice.org/about>.

assess them in the context of the statutory mandates of the Clean Water Act. In addition, Earthjustice has the “ability and intention” to convey this information to the public.¹⁴ Earthjustice can publicize information received from this request in its monthly electronic newsletter, which serves approximately 223,000 subscribers, and it can utilize its online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request; typically, 15,000 to 20,000 individuals respond to such alerts. Earthjustice’s communications staff can disseminate newsworthy information obtained from this request to the media.

Waterkeeper Alliance (WKA) has 178 local affiliates throughout the United States. Communities nationwide look to Waterkeeper Alliance for critical information concerning, among other things, sources of pollution in their local waterways. 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. Waterkeeper Alliance’s website www.waterkeeper.org is updated regularly and draw thousands of visits per month. WKA also publishes WATERKEEPER, 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. WKA routinely uses FOIA to obtain information from federal agencies that WKA's legal and scientific experts analyze in order to inform the public about a variety of issues, including water pollution, drinking water safety, and energy policy. WKA has demonstrated its ability to analyze and distribute information to a broad audience of interested people.

The Environmental Integrity Project (EIP) is a non-profit, non-partisan public interest law organization that was founded to advocate for the effective enforcement of environmental laws that pertain to coal-fired power plants and other large sources of pollution. EIP’s three objectives are to: (1) provide objective analysis of how the failure to enforce or implement environmental laws increases pollution and affects the public's health; (2) hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and (3) help local communities in key states obtain the protection 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 plant pollution. In addition, EIP uses public data to develop reports, media materials, and litigation briefs that educate the public and decision-makers, and achieve its objectives. For example, EIP, in coordination with the other Public Interest Groups and other partners, has released several reports documenting

¹⁴ See, e.g., Markman, *supra* note 5.

water pollution from coal-fired power plants.¹⁵ Most recently, EIP released a detailed report on the power plant wastewater loads, the adequacy of monitoring requirements in existing permits, the prevalence of overdue permit renewals, and the extent to which existing power plant discharges could meet the Steam Electric ELG rule's new pollution limits.¹⁶ EIP's reports are published on its website.

The Sierra Club is the nation's oldest and largest grassroots environmental organization, with more than 2.7 million members and supporters, including online activists and newsletter subscribers. Its website is highly trafficked and Sierra Club media and communications reach hundreds of thousands of people through an extensive digital communications network and online information system, print magazine, radio show, web videos, and news reports.

Clean Water Action is a non-profit, non-partisan public interest organization. One of the nation's largest grassroots environmental organizations, it was founded to protect the environment, health, economic well-being, and community quality of life by promoting safe water and preventing health threatening pollution. Clean Water Action has continuously worked to strengthen and preserve key drinking water protections and protect small streams and wetlands. With over one million members, Clean Water Action has led hundreds of successful campaigns in dozens of states around the country. Clean Water Action disseminates information on its website by blogging, publishing monthly newsletters, reports, and scorecards on both state level and national issues. The organization 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.

The Public Interest Groups have the ability to digest and quickly disseminate information gleaned from FOIA requests to the general public. The Public Interest Groups will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public comments and further action regarding these proposed permit renewals. Thus, the Public Interest Groups are uniquely well positioned to analyze and publicize the requested information.

¹⁵ EIP et al., *Selling Our Health Down the River: Why EPA Needs to Finalize the Strongest Rule to Stop Water Pollution from Power Plants* (June 17, 2015), *available at* http://earthjustice.org/sites/default/files/files/Selling%20Our%20Health%20Down%20The%20River_0.pdf; EIP et al., *Closing the Floodgates: How the Coal Industry is Poisoning Our Water and How We Can Stop It* (July 23, 2013), *available at* http://www.environmentalintegrity.org/news_reports/07_23_2013.php; EIP et al., *In Harm's Way: Lack of Federal Coal Ash Regulations Endangers Americans and their Environment* (Aug. 26, 2010), *available at* http://www.environmentalintegrity.org/news_reports/08_26_10.php; Earthjustice et al., *EPA's Blind Spot: Hexavalent Chromium in Coal Ash* (Feb. 1, 2011), *available at* <http://www.environmentalintegrity.org/documents/CoalAshChromeReportFINAL.pdf>.

¹⁶ EIP, *Toxic Wastewater from Coal Plants* (Aug. 11, 2016), *available at* <http://www.environmentalintegrity.org/wp-content/uploads/2016/11/Toxic-Wastewater-from-Coal-Plants-2016.08.11-1-1.pdf>.

iv. The information will contribute “significantly” to public understanding of government operations or activities.

The information the Public Interest Groups seek will contribute “significantly” to the ongoing public conversation about pollution from coal-fired power plants.¹⁷ None of the materials the groups have requested are now widely known (if they have been made public at all), yet they are essential to the public’s understanding of any EPA internal review of the Steam Electric ELGs rule or any communications with outside entities concerning reconsideration of the rule. As noted above, on March 24, 2017, the Utility Water Act Group submitted a petition to EPA for reconsideration of the Steam Electric ELGs rule.¹⁸ However, the extent to which EPA engaged in internal review or communications with outside entities either before the UWAG petition was submitted, or since, is not currently public information. As discussed above, the Public Interest Groups will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public advocacy, including in any future public proceedings concerning the Steam Electric ELGs rule. Releasing this information will, thus, significantly enhance public understanding of any EPA activities since the November 2016 presidential election concerning the Steam Electric ELGs rule.

B. Commercial Interest Factor

Public Interest Groups are non-profit organizations with no commercial, trade, or profit interests in the requested information. Public Interest Groups seek to use this information solely to inform the public and to support advocacy efforts around protecting human health and the environment through effective CCR standards and regulations. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

For all of the foregoing reasons, a fee waiver is warranted here under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107. If EPA does not believe that the above information is sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

Thank you for your assistance processing this request. Please contact me at the email or telephone number below if you have any questions or concerns about this request for information.

Sincerely,



Thomas Cmar
Earthjustice

¹⁷ See 40 C.F.R. § 2.107(l)(2)(iv).

¹⁸ See <https://www.regulations.gov/document?D=EPA-HQ-OW-2009-0819-6478>.

(312) 257-9338
tcmar@earthjustice.org

Submitted on behalf of:

Waterkeeper Alliance, Inc.
Environmental Integrity Project
Sierra Club
Clean Water Action