

Exhibit G



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

October 13, 2017

VIA E-MAIL

Larry F. Gottesman
National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667
hq.foia@epa.gov

Re: FREEDOM OF INFORMATION ACT APPEAL FOR FEE WAIVER DENIAL;
REQUEST NO. EPA-HQ-2017-010217

Dear Mr. Gottesman,

On behalf of Earthjustice, Waterkeeper Alliance, Inc., Environmental Integrity Project, Sierra Club, and Clean Water Action (collectively, “Public Interest Groups”), I write to appeal the United States Environmental Protection Agency’s (“EPA’s”) denial of a fee waiver on the above-captioned request for documents under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”) and EPA’s FOIA Regulations, 40 C.F.R. § 2.107.

I. Background

On August 4, 2017, the Public Interest Groups filed the above-captioned FOIA request with EPA, seeking all records since April 25, 2017 created, stored, or received by EPA, or reflecting communications with other agencies or outside entities concerning EPA reconsideration, and postponement of compliance deadlines, of the “Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category” rule (the “Steam Electric ELGs rule”). *See* Appendix A. The letter contained a fee waiver request that explained why the Public Interest Groups are entitled to a waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). *Id.* at 3-8.

By letter dated September 15, 2017, EPA denied the Public Interest Groups’ fee waiver request. Appendix B. The purported reason for the denial was that the Public Interest Groups “failed to demonstrate that the release of the information requested significantly increases the public understanding of government operations or activities.” *Id.* The September 15 letter did not provide any additional explanation for the denial.

This appeal is timely, having been made within 30 days of the Public Interest Groups' receipt of EPA's fee waiver denial.

II. Discussion

EPA's denial of the Public Interest Groups' fee waiver request is unlawful. Consistent with FOIA's requirement for a fee waiver, the disclosure requested here would be "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(1)(2)(ii). Courts have repeatedly held that "the public interest exception should be *viewed in an expansive manner.*" *Judicial Watch v. Dep't of Energy*, 310 F. Supp. 2d 271, 291 (D.D.C. 2004) (emphasis added); *see also Judicial Watch v. Rossotti*, 326 F. 3d 1309, 1315 (D.C. Cir. 2003) [hereinafter *Rossotti*]. Although EPA bases its denial of the fee waiver request on only one of the criteria in the Agency's FOIA regulations¹, as discussed in the initial request and below, the Public Interest Groups have met all of the fee waiver criteria.

A. The subject matter of the records, in the context of this request, specifically concerns identifiable operations or activities of government.

Public Interest Groups meet the first factor under EPA regulations because "the subject of the requested records concerns 'the operations or activities of the government.'" 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(1)(2)(i). The original letter requests information, as well as any communications with other agencies or outside entities, concerning EPA reconsideration, and postponement of compliance deadlines, of the Steam Electric ELGs rule. The operations or activities of the government at issue include: EPA collection of data concerning EPA reconsideration, and postponement of compliance deadlines, of the Steam Electric ELGs rule; and EPA communications with other agencies or outside entities concerning EPA reconsideration, and postponement of compliance deadlines, of the Steam Electric ELGs rule. Since EPA is an arm of the federal government, the subject of the request plainly concerns "the operations or activities of the government." *Id.*; *see also Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 107-08 (D.D.C. 2006) [hereinafter *CREW*]; *Judicial Watch v. Dep't of Transp.*, Civ. No. 02-566-SBC, 2005 WL 1606915, at *3-4 (D.D.C. July 7, 2005) [hereinafter *Judicial Watch*].

¹ Because the denial letter only listed a failure to demonstrate that the release of the information requested would "significantly [increase] the public understanding of government operations or activities" as grounds for denial, App. B, EPA has arguably conceded that requesters have met remaining criteria for a fee waiver. *See, e.g., Friends of the Coast Fork v. United States DOI*, 110 F.3d 53, 55 (9th Cir. 1997) ("On judicial review, we cannot consider new reasons offered by the agency not raised in the denial letter") (citations omitted); *see also* The United States Department of Justice Guide to the Freedom of Information Act, Fee Waivers at 119 (2009), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fee-waivers.pdf> ("To the extent that an agency in its fee waiver analysis does not consider a factor or factors addressed by the requester in its request, courts generally have construed that factor as not at issue and thus conceded.").

B. The records to be disclosed are “likely to contribute” to an understanding of specific government operations or activities.

As explained in the initial FOIA request, disclosure of the requested records is “likely to contribute to an understanding” of government activities. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(2)(ii). The Public Interest Groups are only requesting records that are not already publicly available. This disclosure will shed light on EPA’s internal review process concerning reconsideration of the Steam Electric ELGs rule and postponement of its compliance deadlines, as well as any communications between EPA and outside entities about those matters. It is not currently public knowledge as to the scope, timing, or substance of EPA’s reconsideration process, nor has EPA made public any communications with UWAG or SBA (and/or other outside entities) other than an April letter informing them that it would grant the petitions for reconsideration and an August letter stating that it intended to move forward with a rulemaking. Thus, the public release of any non-public government records will likely contribute to an understanding of the government activities and operations involved.

Importantly, a “fee waiver request should be evaluated based on the fact of the request and the reasons given by the requestor in support of the waiver, not on the possibility that the records may ultimately be determined to be exempt from disclosure.” *Judicial Watch*, 2005 WL 1606915, at *4 (internal citations omitted). Any EPA predictions about which records will ultimately be released are therefore irrelevant.

C. The disclosure will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons.

For this requirement, the courts consider “the requestor’s ability and intent to effectively convey the information to the public.” *Judicial Watch*, 2005 WL 1606915, at *5; *see also* *CREW*, 481 F. Supp. 2d at 113-16. As documented in their original request, Public Interest Groups have shown that disclosure of the requested records will likely contribute to public understanding. They have demonstrated that disclosure will “contribute to the understanding of a reasonably broad audience of persons” and that they have the “ability and intention” to disseminate the disclosed records. 40 C.F.R. § 2.107 (l)(2)(iii); *see also* *Judicial Watch v. DOJ*, 365 F.3d 1108, 1126 (D.C. Cir. 2004). They have amply explained why they are requesting disclosure, what they will use the disclosed information for, why they are particularly well situated to disseminate information, and how they will disseminate information for use by the general public and their members.

In light of its substantial legal expertise, Earthjustice is well-equipped and prepared to analyze and evaluate the records it receives pursuant to FOIA requests and assess them in the context of the mandates of applicable statutes. Earthjustice has extensive outreach tools to publicize information received from FOIA requests, including its monthly electronic newsletter, which serves approximately 223,000 subscribers, and an active e-mail list of approximately 2 million people. Additionally, Earthjustice prints *Earthjustice Quarterly Magazine*, which includes feature-length articles on environmental issues and is mailed to over 100,000 supporters. Online, Earthjustice receives about 31,000 page views each month. Furthermore, over 1.2 million people

have signed up for Earthjustice e-mail action alerts. Action alerts highlight environmental issues and provide opportunity for public participation, and typically, 15,000 to 20,000 individuals respond to such alerts.

Waterkeeper Alliance, Inc. (“WKA”) publishes *Waterkeeper Magazine*, a magazine on water-related environmental and public health subjects of current interest, which has an annual circulation of 130,000.² *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 sends weekly updates to over 330 local Waterkeeper Organizations and Affiliates, 176 of which are located within the United States, and these updates often include information on federal legislative and regulatory developments that might impact their work and be of interest to their members. WKA also issues press releases and participates in press conferences and interviews with reporters.

Environmental Integrity Project (“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. For example, EIP, in coordination with the other Public Interest Groups and other partners, has released several reports documenting water pollution from coal-fired power plants.³ 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.⁴

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.⁵ Sierra Club’s Beyond Coal Campaign participates in dozens of regulatory proceedings each year, and communicates weekly with tens of thousands of citizens through reports, press releases, coalition meetings, and Sierra Club’s broader membership.⁶

With over one million members, volunteers, and seasoned professional staff, Clean Water Action (“CWA”) has led hundreds of successful campaigns to strengthen and preserve key drinking water protections and protect small streams and wetlands in dozens of states around the country.

² See <http://waterkeeper.org/magazines/>.

³ 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; Earthjustice et al., *EPA’s Blind Spot: Hexavalent Chromium in Coal Ash* (Feb. 1, 2011), *available at* <http://earthjustice.org/sites/default/files/CoalAshChromeReport.pdf>.

⁴ 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>.

⁵ See <http://www.sierraclub.org/press-releases>; <http://www.sierraclub.org/sierra/green-life>; <http://www.sierraclub.org/blogs>.

⁶ See <http://content.sierraclub.org/coal/>

CWA disseminates information on its website by blogging and publishing monthly newsletters, reports, and scorecards on both state level and national issues.⁷ CWA is 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 size of the Public Interest Groups' members, subscribers, and audiences, as well as their intention to share information through the above-mentioned means, demonstrates that disclosure would reach a reasonably broad public audience and that the Public Interest Groups are entitled to a fee waiver. *Rossotti*, 326 F.3d at 1314; *cf. Carney v. United States Dep't of Justice*, 19 F.3d 807, 814 (2d Cir. 1994) (finding that a scholar seeking information for a dissertation with no guarantee of publishing still met the third criteria for public interest fee waiver).

To satisfy this requirement, the Public Interest Groups need not "outline a specific plan in addition to describing its methods of publication." *Judicial Watch*, 2005 WL 1606915, at *5. To do so would amount to "pointless specificity." *Id.* (internal quotation omitted). Courts have granted fee waivers for requesters with far less robust distribution capabilities than the Public Interest Groups in this case. *See, e.g., Center for Food Safety v. U.S. Dep't of Agriculture*, Civ. No. 04-1324 (RMU) (D.D.C. Feb. 7, 2005) (Memorandum Opinion overturning USDA's denial of fee waiver).

Since EPA first announced its reconsideration of the Steam Electric ELGs rule and postponement of its compliance deadlines, it has received significant critical scrutiny from members of the public and news media.⁸ Thus, the non-public records concerning this topic that the Public Interest Groups are requesting will attract interest from a broad audience of Americans.

D. The disclosure will contribute "significantly" to public understanding of government operations or activities, as compared to the level of understanding prior to the disclosure.

The Public Interest Groups' request seeks non-publicly available information that will enhance and contribute significantly to public understanding of the government operations and activities at issue. Disclosure of records concerning EPA reconsideration, and postponement of compliance deadlines of the Steam Electric ELGs rule will contribute significantly to public understanding of the scope, timing, and substance of EPA's reconsideration process. Additionally, disclosure of records reflecting EPA's communications with UWAG or SBA

⁷ See <https://www.cleanwateraction.org/news-updates>; <https://www.cleanwateraction.org/blog>.

⁸ *See, e.g.,* Brady Dennis, Washington Post, *Trump administration halts Obama-era rule aimed at curbing toxic wastewater from coal plants*, Apr. 13, 2017, available at https://www.washingtonpost.com/news/energy-environment/wp/2017/04/13/trump-administration-halts-obama-era-rule-aimed-at-curbing-toxic-wastewater-from-coal-plants/?utm_term=.b6c11be54f03; Michael Biesecker, Detroit News, *EPA to undo tougher pollution limits on coal plants*, Apr. 14, 2017, available at <http://www.detroitnews.com/story/news/nation/2017/04/14/epa-undo-tougher-pollution-limits-coalplants/100482394/>; Ian Johnston, The Independent, *Donald Trump's plan to allow coal plants to poison rivers faces legal challenge*, May 4, 2017, available at <http://www.independent.co.uk/news/world/americas/uspolitics/donald-trump-coal-power-plants-river-water-pollution-toxic-waste-us-environmental-protection-agency-a7717386.html>.

(and/or other outside entities) since informing them it would grant the petitions for reconsideration would contribute significantly to public understanding of the influence of outside entities on EPA's reconsideration process. Without EPA disclosure of such records, the public has no understanding of their nature, extent, and content.

When the FOIA request was first submitted, EPA had just proposed a rule to postpone the Steam Electric ELG 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 basis for EPA's proposed postponement and reconsideration, and the extent to which EPA has been influenced in its decision by communications with or lobbying by the utility industry, are matters of clear public interest. The Public Interest Groups seek documents, currently shielded from public review, that relate to EPA's communications with the industry and other third parties about the Steam Electric ELGs rule and its proposed postponement and reconsideration. These documents would contribute "significantly" to the public's understanding of an important environmental matter of national relevance, and the basis for EPA's decision to postpone and reconsider compliance deadlines of a rule that would result 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 Public Interest Groups have previously used the release of FOIA documents to contribute "significantly" to public understanding of government operations and activities. Over the past several years, Earthjustice and its partners have published many reports and analysis documenting the growing public health threat from coal ash, the hazardous waste that remains after coal is burned.⁹ A significant amount of the data analyzed and information relied on in these coal ash reports and publications were obtained through FOIA requests. Furthermore, several of the reports were a collaboration with the other Public Interest Groups.¹⁰

WKA culminated its years-long effort to hold Kentucky coal mining companies accountable for falsifying thousands of water pollution reports. Using data obtained through FOIA and state public records requests, WKA identified a pattern of false reporting and exposed the issues to the public.¹¹

EIP routinely collects data through FOIA requests in order to analyze the data and make the information accessible to the general public through data-oriented reporting. For example, EIP recently made use of data obtained through FOIA requests to analyze the causes of, and potential solutions to, agricultural pollution issues.¹² One of EIP's primary focus areas is coal ash, and

⁹ See <https://earthjustice.org/features/campaigns/coal-ash-reports-and-publications>.

¹⁰ Earthjustice et al., *State of Failure: How States Fail to Protect Our Health and Drinking Water from Toxic Coal Ash* (Aug. 2011), available at http://earthjustice.org/sites/default/files/StateofFailure_2013-04-05.pdf; Earthjustice et al., *Coming Clean: What the EPA Knows About the Dangers of Coal Ash* (May 2009), available at <https://earthjustice.org/sites/default/files/library/reports/final-coming-clean-ejeip-report-20090507.pdf>.

¹¹ Waterkeeper Alliance, *Citizen Groups File Legal Action Against Frasure Creek Mining For Falsifying Pollution Reports*, Nov. 17, 2014, available at <http://waterkeeper.org/citizen-groups-file-legal-action-frasure-creek-mining-falsifying-pollution-reports/>; Michael Wines, *New York Times*, *Clean Mining a Deception in Kentucky, Groups Say*, Nov. 17, 2014, available at <https://www.nytimes.com/2014/11/18/us/clean-mining-a-deception-in-kentucky-groups-say.html>.

¹² EIP, *Water Pollution from Livestock in the Shenandoah Valley: Virginia's System of Manure Management Fails to Protect Waterways and Needs to be Strengthened* (Apr. 26, 2017), available at <http://www.environmentalintegrity.org/wp-content/uploads/2017/02/Shenandoah-Report.pdf>.

EIP has produced many reports on this topic using data from state and federal agencies. Prior to the promulgation of EPA’s solid waste rule for coal ash (“CCR rule”), EIP prepared several “damage reports” documenting harm from unsafe coal ash disposal practices.¹³ Nearly all of the data analyzed in these reports was obtained through FOIA requests, and the damage reports became part of the EPA rulemaking record and provided important support for the CCR rule. Furthermore, EIP maintains an “Ashtracker” website that provides the public with access to detailed information about groundwater contamination near areas used to dispose of coal ash.¹⁴ The website uses a map-based interface to display monitoring wells and provide a visual analysis of groundwater quality data, and allows users to download the underlying data. The majority of the data on Ashtracker is obtained through FOIA requests.

Sierra Club has a strong record of contributing information acquired through FOIA requests to national news outlets, garnering extensive news coverage and public interest, as well as to its own press releases, contributing significantly to the public’s understanding of government operations and activities.¹⁵ Most recently, Sierra Club obtained information through a FOIA request that revealed that, ahead of what would turn out to be a potentially record-breaking hurricane season, the National Weather Service had 216 vacant positions it could not fill due to a government wide hiring freeze imposed by the Trump administration.¹⁶

Last year, a CWA FOIA request revealed that the Texas Railroad Commission has let the petroleum industry inject oil and gas waste into groundwater for decades without the required federal approval.¹⁷ In addition to its own FOIA requests, CWA has used information obtained

¹³ EIP et al., *Out of Control: Mounting Damages from Coal Ash Waste Sites* (Feb. 24, 2010), *available at* http://www.environmentalintegrity.org/wp-content/uploads/2016/11/2010-02_Out_of_Control.pdf; 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/wp-content/uploads/2016/11/2010-08_In_Harms_Way.pdf; EIP, *Toxic Waters Run Deep: Coal Ash Open Dumps Still Open for Business?* (June 23, 2011), *available at* http://www.environmentalintegrity.org/wp-content/uploads/2016/11/2011-06_Toxic_Waters_Run_Deep.pdf; EIP, *Risky Business: Coal Ash Threatens America’s Groundwater Resources at 19 More Sites* (Dec. 12, 2011), *available at* http://www.environmentalintegrity.org/wp-content/uploads/2016/11/2011-12_Risky_Business.pdf; EIP, *TVA’s Toxic Legacy: Groundwater Contaminated by Tennessee Valley Authority Coal Ash* (Nov. 2013), *available at* http://www.environmentalintegrity.org/wp-content/uploads/2016/11/2013-11_TVAs_Toxic_Legacy.pdf.

¹⁴ See <https://ashtracker.org/>.

¹⁵ Rene Marsh and Gregory Wallace, CNN, *More than 350 jobs at EPA unfilled during Trump hiring freeze*, April 13, 2017, *available at* <http://www.cnn.com/2017/04/13/politics/epa-hiring-freeze/index.html>; Lena H. Sun, The Washington Post, *Nearly 700 vacancies at CDC because of Trump administration’s hiring freeze*, May 19, 2017, *available at* https://www.washingtonpost.com/news/to-your-health/wp/2017/05/19/nearly-700-vacancies-at-cdc-because-of-trump-administration-hiring-freeze/?utm_term=.258ec9537f78; Sierra Club, *Sierra Club Challenges Dirty and Dangerous Fossil Fuel Exports in Oregon*, *available at* <http://content.sierraclub.org/environmentallaw/lawsuit/2013/sierra-club-challenges-dirty-and-dangerous-fossil-fuel-exports-oregon>; Alexander Rony, Sierra Club, *Trump Admin Policies Leave 700 CDC Jobs Vacant*, May 19, 2017, *available at* <http://www.sierraclub.org/planet/2017/05/trump-admin-policies-leave-700-cdc-jobs-vacant>.

¹⁶ Dino Grandoni, The Washington Post, *The Energy 202: Trump’s hiring freeze shrank National Weather Service staff before hurricanes hit*, Sept. 27, 2017, *available at* https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2017/09/27/the-energy-202-trump-s-hiring-freeze-shrank-national-weather-service-staff-before-hurricanes-hit/59cabf8330fb0468cea81c01/?utm_term=.226f3b2a73ea.

¹⁷ Jeff Mosier, Dallas News, *Texas failed to get federal approval to inject oil and gas drilling waste into groundwater*, Aug. 26, 2016, *available at* <https://www.dallasnews.com/news/environment/2016/08/26/texas-failed-get-federal-approval-inject-oil-gas-drilling-waste-groundwater>; Jim Malewitz, Texas Tribune, *Texas Promised to*

through FOIA requests submitted by other organizations to publish reports¹⁸ and factsheets¹⁹ and submit legal petitions to EPA.²⁰ CWA also worked with Marketplace on a story, that relied in part on information obtained through FOIA requests submitted by other organizations, about EPA's study on the impacts of fracking on drinking water.²¹

Finally, several of the Public Interest Groups along with other partners published a report based in part on information obtained through FOIA requests regarding the 2015 Steam Electric ELGs rule.²² These previous efforts of the Public Interest Groups effectively displays how the Public Interest Groups have taken action to make sure that information obtained through FOIA disclosures contributed significantly to public understanding of government operations or activities.

E. The Public Interest Groups have absolutely no commercial interest in disclosure of the information.

As explained in our original request, the Public Interest Groups do not seek the requested records for any commercial use. *See* 40 C.F.R. § 2.107(b)(1) (definition of “commercial use request”). The Public Interest Groups do not have any commercial interest that would be furthered by the requested disclosure. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). As non-profit, public interest environmental and public health organizations, the Public Interest Groups do not have any commercial, trade, or profit interest. *See* 40 C.F.R. § 2.107(l)(3)(i). “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F. 3d at 1312 (internal citation omitted). The Public Interest Groups’ interest in obtaining the requested materials is to serve the public interest by disclosing non-public information about EPA reconsideration, and postponement of compliance deadlines of the Steam Electric ELGs rule and EPA’s communications with third parties regarding the postponement and reconsideration process. Release of the requested records will serve to inform

Track Oilfield Waste in Aquifers. It Didn't., Aug. 24, 2016, available at <https://www.texastribune.org/2016/08/24/texas-promised-34-years-ago-track-oilfield-waste-a/>; Clean Water Action, Texas Aquifer Exemptions: Ignoring Federal Law to Fast Track Oil & Gas Drilling (August 2016), available at <http://www.cleanwateraction.org/sites/default/files/docs/publications/Texas%20Aquifer%20Exemptions%20-%20Clean%20Water%20Action%20August%202016.pdf>.

¹⁸ Clean Water Action, Aquifer Exemptions: A first-ever look at the regulatory program that writes off drinking water resources for oil, gas and uranium profits (January 2015), available at <http://www.cleanwateraction.org/sites/default/files/docs/publications/Aquifer%20Exemptions%20-%20Clean%20Water%20report%201.6.15.pdf>.

¹⁹ Clean Water Action, Aquifer Exemptions: Prioritizing Fossil Fuel Production Over Drinking Water, available at <http://www.cleanwateraction.org/files/docs/publications/Aquifer%20Exemptions%20Fact%20Sheet%20-%20Clean%20Water%20Action%20Clean%20Water%20Fund.pdf>.

²⁰ *See* <http://www.cleanwateraction.org/files/SDWA%20Aquifer%20Exemption%20Petition%20-%20NRDC%20et%20al%20-%202016.pdf>.

²¹ Scott Tong and Tom Scheck, Marketplace, *EPA's late changes to fracking study downplay risk of drinking water pollution*, Nov. 30, 2016, available at <https://www.marketplace.org/2016/11/29/world/epa-s-late-changes-fracking-study-portray-lower-pollution-risk>; Scott Tong and Tom Scheck, Marketplace, *EPA reverses course, highlights fracking contamination of drinking water*, Dec. 13, 2016, available at <https://www.marketplace.org/2016/12/13/sustainability/epa-reverses-stance-fracking-drinking-water>.

²² 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://earthjustice.org/sites/default/files/ClosingTheFloodgates-Final.pdf>.

the public about this topic of interest to many, and will not advance any commercial, trade, or profit interests of the Public Interest Groups in any way.

III. Conclusion

For the reasons discussed above, the Public Interest Groups ask that EPA immediately grant a fee waiver for all records requested.

Sincerely,



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Submitted on behalf of:

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

Appendix A



August 4, 2017

VIA ELECTRONIC SUBMISSION

National Freedom of Information Officer
U.S. Environmental Protection Agency
<https://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 April 25, 2017 concerning EPA reconsideration, and postponement of compliance deadlines, of 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 created, stored, or received by the EPA Administrator, any of the Administrator's staff, or the EPA Office of Water concerning reconsideration of the Steam Electric ELGs rule or postponement of its compliance deadlines;
2. 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, including reconsideration of the rule or postponement of its compliance deadlines; and

3. All records reflecting communications between EPA (or the Department of Justice) and the White House, the U.S. Small Business Administration, the Tennessee Valley Authority, or any other federal agency concerning the Steam Electric ELGs rule, including reconsideration of the rule or postponement of its compliance deadlines.

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.

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.

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.”¹ EPA’s FOIA regulations contain an identical requirement.² 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.³ 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) **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.

¹ 5 U.S.C. § 552(a)(4)(A)(iii).

² 40 C.F.R. § 2.107.

³ 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).

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.’⁴

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.”⁵ 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 reconsideration and postponement of compliance deadlines of the Steam Electric ELGs rule. Since EPA is an arm of the federal government, such EPA records plainly concern “operations or activities of the government.”⁶

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 EPA’s pending internal review process concerning reconsideration of the Steam Electric ELGs rule and postponement of its compliance deadlines, as well as any communications between EPA and outside entities about those matters. On March 24, 2017, the Utility Water Act Group (“UWAG”) submitted a petition to EPA for reconsideration of the Steam Electric ELGs rule.⁷ The U.S. Small Business

⁴ Markman, *supra* note 3.

⁵ See 40 C.F.R. § 2.107(l)(1).

⁶ See *id.* § 2.107(l)(2)(i).

⁷ See <https://www.regulations.gov/document?D=EPA-HQ-OW-2009-0819-6478>.

Administration (“SBA”) submitted a second petition for reconsideration on April 5, 2017.⁸ On April 12, 2017, EPA informed UWAG and SBA that it would reconsider the rule and take action to postpone the rule’s compliance deadlines under the Administrative Procedure Act, 5 U.S.C. § 705 (“APA”).⁹ EPA subsequently published the APA action in the Federal Register, 82 Fed. Reg. 19,005 (Apr. 25, 2017), and later also published a proposed rule to postpone the compliance deadlines, on which it accepted public comment, 82 Fed. Reg. 26,017 (June 6, 2017).

However, it is not currently public knowledge as to the scope, timing, or substance of EPA’s reconsideration process, nor has EPA made public any communications with UWAG or SBA (and/or other outside entities) since informing them it would grant the petitions for reconsideration. 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 Since EPA first announced its reconsideration of the Steam Electric ELGs rule and postponement of its compliance deadlines, it has received significant critical scrutiny from members of the public and news media.¹³ Thus, the non-public

⁸ <https://www.regulations.gov/document?D=EPA-HQ-OW-2009-0819-6481>.

⁹ <https://www.regulations.gov/document?D=EPA-HQ-OW-2009-0819-6482>.

¹⁰ See 40 C.F.R. § 2.107(l)(2)(ii).

¹¹ See *id.* § 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, e.g., Brady Dennis, Washington Post, *Trump administration halts Obama-era rule aimed at curbing toxic wastewater from coal plants*, Apr. 13, 2017, available at https://www.washingtonpost.com/news/energy-environment/wp/2017/04/13/trump-administration-halts-obama-era-rule-aimed-at-curbing-toxic-wastewater-from-coal-plants/?utm_term=.b6c11be54f03; Michael Biesecker, Detroit News, *EPA to undo tougher pollution limits on coal plants*, Apr. 14, 2017, available at <http://www.detroitnews.com/story/news/nation/2017/04/14/epa-undo-tougher-pollution-limits-coal-plants/100482394/>; Ian Johnston, The Independent, *Donald Trump’s plan to allow coal plants to poison rivers faces legal challenge*, May 4, 2017, available at <http://www.independent.co.uk/news/world/americas/us-politics/donald-trump-coal-power-plants-river-water-pollution-toxic-waste-us-environmental-protection-agency-a7717386.html>.

records concerning this topic that the Public Interest Groups are requesting will attract interest from a broad audience of Americans.

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.¹⁴ 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 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.¹⁵ 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 draws 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

¹⁴ See <http://earthjustice.org/about>.

¹⁵ See, e.g., Markman, *supra* note 3.

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 water pollution from coal-fired power plants.¹⁶ 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.¹⁷ 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

¹⁶ 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>.

¹⁷ 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>.

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.

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.¹⁸ 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 EPA’s reconsideration of the Steam Electric ELGs rule or postponement of its compliance deadlines, or any communications with outside entities concerning those issues. The extent to which EPA is actively reconsidering portions of the rule, and/or communicating with outside entities about them, 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 concerning reconsideration of the Steam Electric ELGs rule or postponement of its compliance deadlines.

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 Effluent Limitations Guidelines and standards. 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.

¹⁸ See 40 C.F.R. § 2.107(l)(2)(iv).

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
(312) 257-9338
tcmr@earthjustice.org

Submitted on behalf of:

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

Appendix B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENVIRONMENTAL INFORMATION

SEP 15 2017

Mr. Thomas Cmar
Earthjustice
1101 Lake Street, Suite 405B
Oak Park, IL 60301

RE: Request Number EPA-HQ-2017-010217

Dear Mr. Cmar:

This is in response to your fee waiver request in connection with the above referenced Freedom of Information Act request.

We have reviewed your submission and based on the information provided, we are denying your request for a fee waiver. You have failed to demonstrate that the release of the information requested significantly increases the public understanding of government operations or activities. As a result of you failing to meet the above criteria, accordingly, there is no need to address the remaining prongs of the fee waiver criteria. The Office of Water (OW) will be responding to your information requests. You have been placed in the "other" fee category and will be charged for the costs of search time and duplication excluding the first two hours of search time and the first 100 pages of duplication. If the estimated costs exceed \$25.00, OW will contact you regarding the cost of processing your requests and seek an assurance of payment. They will be unable to process your requests until they receive your assurance of payment.

You may appeal this denial for a fee waiver by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals *received* after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope,

if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry F. Gottesman". The signature is stylized and written over the word "Sincerely,".

Larry F. Gottesman
National FOIA Officer