

EPA FOIA Responses

Executive Summary

On January 23, 2015, the State of West Virginia, along with Kansas, Kentucky, Louisiana, Nebraska, Oklahoma, South Carolina, and Wyoming, filed a formal request under the federal Freedom of Information Act asking EPA to release copies of records regarding EPA's 2011 settlement agreement with several environmental groups. The settlement agreement committed EPA to regulating carbon dioxide emissions under Section 111 of the Clean Air Act and was the subject of the legal challenge, *State of West Virginia, et al. v. EPA*, No. 14-1146 (D.C. Cir. 2014). The multistate request letter and EPA's responsive documents may be found on the official website for the Office of the Attorney General of West Virginia (OAG), *see* <http://www.ago.wv.gov/publicresources/epa/Pages/EPA-FOIA-Request.aspx>.

The OAG letter made the following specific request under the federal Freedom of Information Act:

a copy of any documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2010, to the date of this letter between any persons representing one or more party to the 2011 Settlement Agreement—the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York, and Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund—and any of the following employees or former employees of EPA: Lisa Jackson, Gina McCarthy, Janet McCabe, Joseph Goffman, Elliott Zenick, Patricia Embrey, Scott Jordan, Avi Garbow, Lorie Schmidt, Howard Hoffman. We explicitly limit our request to documents relating to the 2011 Settlement Agreement, the Section 111(b) rulemaking(s), and the Section 111(d) rulemaking.

The responsive documents sent to the OAG demonstrate that EPA maintained a close relationship with several leading environmental groups during the time period in which the agency was developing its regulatory objectives targeting fossil fuel-fired power plants. The responsive documents were delivered electronically to the OAG on a rolling basis, beginning in March 13, 2015 and

ending on June 9, 2015. In total, EPA transmitted 3,899 *pages* of documents responsive to the request submitted by OAG.

In general, many of the responsive documents were emails from the environmental groups like the Environmental Defense Fund and the Natural Resources Defense Council (“NRDC”), sent to high ranking EPA officials involved in the development of air pollution rules for fossil fuel-fired power plants. These emails often contained analysis, commentaries, and reports from the environmental organizations relating to the regulation of power plants under the Clean Air Act. Sometimes these emails contained criticisms of efforts by Congress that would have limited EPA’s authority to regulate such plants.

In other cases, the emails demonstrated that top EPA officials responsible for regulating power plants kept regular contact with the leaders of environmental groups, suggesting these individuals maintained close personal relationships. For example, EPA’s Acting Assistant Administrator for the Air and Radiation Office, Janet McCabe—arguably the agency’s top power plant regulator under the Administrator—sent an email to the “Clean Air Director” for NRDC, John Walke, on December 6, 2013, in which McCabe simply wrote:

Hi John—it’s been a while since we talked, and I hope you’ve been doing ok. I was wondering whether you’d have a few minutes for a phone call, either later today, or Monday, or even over the weekend if convenient.

*Thanks,
Janet*

Other emails illustrate that the close relationships between EPA officials and leaders of environmental groups extended to specific litigation and settlement efforts regarding the regulation of power plants under the Clean Air Act. For example, in another email—and related to the States’ litigation in case No. 14-1146 (D.C. Cir. 2014)—the director and senior attorney at NRDC wrote an email to EPA, responding to a comment by EPA, which had apparently implied that EPA had “no plans” for regulating existing sources under Section 111(d). Doniger expressed concerned that the comment is “[b]eing taken as a repudiation of the settlement.” Accordingly, Doniger asked: “Can you please clarify that you are not walking away from the settlement?” This email refuted several arguments that EPA had made in the litigation in case number 14-1146.