

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA )  
*ex rel.* SCOTT PRUITT, )  
in his official capacity as Attorney General )  
of Oklahoma; )

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by and through LUTHER STRANGE, )  
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Case No.

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	)
Plaintiffs,	)
v.	)
	)
UNITED STATES ENVIRONMENTAL	)
PROTECTION AGENCY,	)
	)
Defendant.	)

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

Plaintiffs, the States of Oklahoma, Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming, <sup>1</sup> bring this action against Defendant the United States Environmental Protection Agency (“EPA”) to compel compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* As set forth below, under FOIA, the States sought records from EPA concerning the agency’s implementation of a specific federal Clean Air Act (“CAA”) program, 42 USC § 7401 *et seq.* In violation of FOIA, EPA has denied the States’ request. As grounds therefore, Plaintiffs allege as follows:

**JURISDICTION AND VENUE**

1. The Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. §

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<sup>1</sup> At this time only the Attorney General of Oklahoma is admitted to practice before this Court. On behalf of the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming, the Attorney General of Oklahoma, pursuant to LCvR83.3(c), will be filing with the Court a Motion for Relief from LCvR83.2. Because the Attorney General of Oklahoma is the lead Plaintiff and will be filing all pleadings in this matter, the other State Attorneys General respectfully seek relief from the requirement that they each be required to be admitted pro hac vice.

552(a)(4)(A)(vii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

2. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

### **PARTIES**

3. Plaintiffs are the State of Oklahoma with an address of 313 NE 21st Street, Oklahoma City, Oklahoma 73105; and the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming. Bill Schuette, Attorney General of Michigan, is bringing this action on behalf of the People of Michigan under Mich. Comp. Law § 14.28, which provides that the Michigan Attorney General may "appear for the people of [Michigan] in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of [Michigan] may be a party or interested." Under Michigan's constitution, the people are sovereign. Mich. Const. art. I, § 1 ("All political power is inherent in the people. Government is instituted for their equal benefit, security, and protection.").

4. Defendant is an agency of the United States Government and is headquartered in the Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington D.C. 20460. Defendant has possession, custody and control of records to which Plaintiffs seek access.

## BACKGROUND

### **I. FOIA AND FEE WAIVER REQUESTS**

5. FOIA requires agencies of the federal government to release requested records to the public unless one or more statutory exemptions apply. *See* 5 U.S.C. § 552(b).6.

6. When making a FOIA request, the requesting party must “reasonably describe such records” requested. 5 U.S.C. § 552(a)(3). EPA’s FOIA regulations state that requesting parties:

should reasonably describe the records [they] are seeking in a way that will permit EPA employees to identify and locate them. Whenever possible, [the requestor] should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, [the requestor] should include any file designations or descriptions for the records [requested]. The more specific [the requestor is] about the records or type of records [requested], the more likely EPA will be able to identify and locate records responsive to [the] request.

40 C.F.R. § 2.102

7. FOIA also mandates fee waiver or reduction when “disclosure of the [requested] 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 U.S.C. § 552(a)(4)(A)(iii).

8. Congress intended that the assessment of fees not be a bar to private individuals or public interest groups seeking access to government records. Both FOIA and the legislative history of the relevant FOIA provision call for a liberal interpretation of the fee waiver standard. “Documents shall be furnished without any charge or at a charge

reduced below the fees established . . . 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.” 5 U.S.C. § 552(a)(4)(A)(iii). (“A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.” 132 Cong. Rec. H9464 (Reps. English and Kindness)).

9. FOIA’s fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005).

10. A recent study found that EPA disproportionately denies fee waiver requests from noncommercial requesters who seek records so as to understand whether EPA is faithfully complying with applicable law. According to the Competitive Enterprise Institute’s (“CEI”) study, 92 percent of the time EPA grants fee waiver requests from noncommercial requesters who are supportive of EPA’s policies and agendas, but denies a majority of fee waiver requests from noncommercial requesters who are critical of EPA. *See EPA Gives Info For Free to Big Green Groups 92% of Time; Denies 93% of Fee Waiver Requests from Biggest Conservative Critic*, Competitive Enterprise Institute, May 14, 2013, <http://cei.org/news-releases/epa-gives-info-free-big-green-groups-92-time-denies-93-fee-waiver-requests-biggest-con>.

## II. THE CLEAN AIR ACT

11. The CAA establishes “a comprehensive national program that makes the States and the Federal Government partners in the struggle against air pollution.” *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). At the same time, the CAA recognizes that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3); *see also id.* § 7407(a) (“Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . .”). Under the CAA, one way that the control of air pollution is achieved is through the States implementation of national ambient air quality standards (“NAAQS”) (CAA §110). The CAA directs EPA’s Administrator to promulgate NAAQS and provides for the adoption of State Implementation Plans (“SIPs”) to achieve and maintain those standards. The “primary” NAAQS prescribe maximum acceptable concentrations of various pollutants in the ambient air, which, “allowing an adequate margin of safety, are requisite to protect the public health.” CAA § 109(b)(1). The statute provides that the primary NAAQS for each targeted pollutant be based on “air quality criteria” that “accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health...which may be expected from the presence of such pollutant in the ambient air, in varying quantities.” CAA § 108(a)(2).

12. EPA must review each NAAQS at least every five years. CAA § 109(d)(1). In conducting each such review, EPA must conduct notice-and-comment rulemaking

pursuant to CAA § 307(d). CAA § 307(d)(1)(A). The adoption of a new or revised NAAQS triggers a standard implementation process in which “[e]ach State shall have the primary responsibility for assuring air quality” within its boundaries “by submitting an implementation plan for such State which will specify the manner in which national primary . . . ambient air quality standards will be achieved and maintained . . . .” CAA § 107(a).

13. In contrast to the NAAQS, the CAA’s Visibility Protection Program is a non-health based program built around the goal, set forth in Section 169A(a)(1) of the CAA, of the “prevent[ing] of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas, which impairment results from manmade air pollution.” Recognizing that visibility impairment does not rise to the same level of public policy concern as dangers to public health, Congress made the visibility improvement goal discretionary. Thus, under Section 169A(f), for purposes of the citizens suit provision of the statute, the national visibility goal “shall not be considered to be a ‘non-discretionary duty’ of the Administrator.”

14. In furtherance of the Section 169A visibility goal, the Visibility Protection Program directs States to develop Regional Haze SIPs to ensure “reasonable progress” is made toward the visibility goal, including satisfying certain requirements for identifying best available retrofit technology (“BART”). *See* 42 U.S.C. § 7491-7492. In 1999, EPA promulgated Regional Haze Rules that require all States to revise their federal CAA SIPs to address visibility in nearby national parks and wilderness areas known as Class I areas.

These rules were the subject of several federal court challenges. *See American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), *Center for Energy and Economic Development v. EPA*, 398 F.3d 653 (D.C. Cir. 2005), and *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333, 1338 (D.C. Cir. 2006). In *American Corn Growers* the D.C. Circuit made clear that States have great discretion in setting reasonable progress goals and determining BART. The CAA's "provisions give [] the States broad authority over BART determinations." *American Corn Growers*, 291 F.3d 19.

15. Specifically, Section 169A of the CAA provides that the States shall have the dominant role in making a BART determination, with EPA having only a more limited role. Second, because visibility improvement is an aesthetic goal, the CAA does not make improving visibility conditions in Class I areas paramount above all other competing considerations. Instead, the States are given broad discretion to weigh public interest factors in determining (a) how much progress towards improving visibility they deem to be reasonable and (b) whether particular BART controls, or any BART controls at all, should be imposed on a particular source, based on a balancing of the cost of controls and the visibility improvement benefits that such controls will produce. EPA may not second-guess those State judgments so long as the States' determinations are consistent with Section 169A of the CAA and are reasonable and rationally supported by the State's administrative record reflecting the data and analysis used to come to those determinations.

16. In addition to making and submitting BART determinations to EPA, CAA § 169A(b)(2), requires EPA to issue regulations requiring States containing Class I areas, or States whose emissions may reasonably be anticipated to cause or contribute to visibility impairment in a Class I area, to submit SIPs containing “such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting” the national visibility goal. The amount of progress that is “reasonable” is not defined according to objective criteria, but instead involves a discretionary balancing by the State of public interest factors, specifically “the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements.” CAA § 169A(g)(1).

17. Notably, CAA Section 169A is clear that it is the States, not EPA, that make both the reasonable progress and BART determination decisions. Section 169A(b)(2)(A) specifically provides that both the reasonable progress and the BART determinations are “determined by the State.” Section 169A(g)(2) similarly provides that “in determining [BART], the State” shall weigh the BART factors.

### **III. STATEMENT OF FACTS**

18. On February 6, 2013, the States of Oklahoma, Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming submitted a FOIA request to EPA for records concerning EPA’s negotiations with certain

non-governmental organizations that have led to binding consent decrees that dictate when and how EPA must proceed concerning various States' Regional Haze SIPs. *See* Exhibit 1. The States' FOIA request explained that EPA's practice of settling litigation via consent decrees with certain non-governmental organizations is of great concern because such decrees then define EPA's regulatory approach to State Regional Haze SIPs without the States involvement, yet the States must bear the consequences of EPA's process and implement these regulatory changes. The States expressed concern that EPA's actions were not consistent with the cooperative federalism structure of the CAA or the Regional Haze program.

19. The February 6, 2013 FOIA request was submitted after EPA denied the States' previous FOIA request for records concerning EPA's practice of entering into consent decrees with non-governmental organizations in cases concerning the implementation of several environmental programs, not just the Regional Haze program. EPA denied the States' previous FOIA request asserting that the request was overbroad and that there was no demonstration that the records would be disseminated to the general public. At the time EPA denied the States' previous FOIA request, EPA advised Oklahoma Deputy Solicitor General Eubanks in a telephone conversation that the States should resubmit FOIA requests for records concerning individual environmental programs and specific cases and that EPA would review those requests.

20. The States' FOIA request makes clear the type, scope and location of the records sought from EPA. Specifically, the States' FOIA request asks for any and all documents sent and/or received by specific EPA offices, including the office of the Administrator, that discuss or in any way relates to:

- (a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy, concerning:
  - i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the CAA, 42 U.S.C. § 7604(a)(2);
  - ii. the course of action to take with respect to any Regional Haze SIP required to be submitted to the EPA pursuant to CAA § 169A for any State;
  - iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP.

"Interested Organizations" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club

- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates

*See* Exhibit 1 at 1-3.

21. Clearly set forth in the States' FOIA request was a fee waiver request based on the fact that the States' request is in the public interest and therefore EPA must waive any applicable fees associated with fully responding to the request. *See* 40 C.F.R. § 2.107(l). The States' FOIA request clearly sets forth that the requested documents will be made available to the public at the University, Federal Depository and State Library systems located in each of the requesting States. *See* Exhibit 1 at 5. Additionally, the States will analyze the data presented in the requested records and will produce a report as part of their ongoing review of EPA's operations. *See id.* The report will be disseminated to others in the States as well as disseminated to the media and Congress as a component of the States' active involvement in "State efforts addressing environmental issues." *See id.* The States' FOIA request averred that none of the requested documents or the resulting report will be used for commercial use or gain. *See id.*

22. By letter dated February 22, 2013, EPA denied the States' fee waiver request, claiming that the States had "not expressed a specific intent to disseminate the information to the general public." *See* Exhibit 2 at 1.

23. On March 15, 2013 the States timely filed their appeal of EPA's denial of the States' fee waiver request. *See* Exhibit 3.

24. By email dated May 2, 2013, EPA stated that it required “a brief extension of time” until May 15, 2013 to complete its review and respond to Oklahoma’s March 15 appeal. *See* Exhibit 4. On May 15, 2013, EPA sent the office of the Attorney General of Oklahoma an email informing Oklahoma that EPA required yet another extension of time until May 31, 2013 to complete its review and issue a determination of whether Oklahoma’s fee waiver request should be granted. *See* Exhibit 5.

25. By letter dated May 31, 2013, EPA denied the States’ FOIA request. *See* Exhibit 6. In its denial letter, EPA claims that the States’ FOIA request “fails to adequately describe the records sought,” and therefore the request was denied. Exhibit 6 at 1. EPA’s denial of the States’ FOIA request is consistent with their apparent protocol to avoid compliance with FOIA by telling requestors that their FOIA request is overbroad. In a recent email exchange disclosed by EPA as a result of a FOIA request, an EPA official advises a Region 6 EPA employee that “standard [EPA] protocol” is to tell all “requestor[s] that they need to narrow their [FOIA] request because it is overbroad.” *See* Exhibit 7 at 6.

26. Further, because EPA denied the States’ FOIA request, EPA refused to act on Oklahoma’s appeal of EPA’s denial of the States’ FOIA fee waiver request asserting that the appeal was moot. *See* Exhibit 6 at 3.

27. The EPA’s May 31, 2013 denial letter constitutes the agency’s final determination. *See* Exhibit 6 at 6. Plaintiff has therefore exhausted all administrative

remedies with EPA and now files this action for judicial review of EPA's determinations, which is proper pursuant to 5 U.S.C. 552(a)(4)(B).

## **PLAINTIFFS' CLAIMS FOR RELIEF**

### **COUNT ONE (Failure to Produce Records)**

28. Plaintiff States re-allege and incorporate by reference all preceding paragraphs.

29. Defendant is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.

30. Plaintiff States properly asked for specific records within the custody and control of EPA. The States' FOIA request was not overbroad. The States' FOIA request stated with specificity the type of records sought in such a way that would "permit EPA employees to identify and locate" the requested records. U.S.C. § 552(a)(3), 40 C.F.R. § 2.102.

31. EPA violated FOIA's mandate to release agency records to the public by failing to release the records as the States specifically requested. U.S.C. §§ 552(a)(3)(A), 552(a)(3)(B).

### **COUNT TWO (Improper Denial of Fee Waiver Request)**

32. Plaintiff States re-allege and incorporate by reference all preceding paragraphs.

33. Plaintiff States have demonstrated they are entitled to a waiver of fees associated with processing their FOIA request because the information sought in the FOIA

request is in the public interest, will significantly contribute to the public's understanding of the operations and activities of EPA and will not be used to further any commercial interest. 5 U.S.C. § 552(a)(4)(A)(iii), 40 C.F.R. § 2.107(l).

34. EPA violated FOIA and its own regulations when it failed to grant the States' fee waiver request. U.S.C. § 552(a)(4)(A)(ii)-(iii), 40 C.F.R. § 2.107(1)(2) and (3).

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff States respectfully requests that this Court:

1. Order Defendant to immediately process the States' FOIA request;
2. Order Defendant to conduct a thorough search for all responsive records;
3. Order Defendant to promptly disclose the requested records in their entirety and make copies available to the Plaintiff States;
4. Enjoin Defendant from charging the Plaintiff States fees for the processing of their requests;
5. Award Plaintiff States their costs and reasonable attorneys' fees incurred in this action under U.S.C. § 552(a)(4)(E); and
6. Grant such other relief as the Court may deem just and proper.

Date: July 16, 2013.

Respectfully submitted,

s/ E. Scott Pruitt

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