

Attorneys General of California, Illinois, Iowa, Maine, Maryland, New York, Rhode Island, Vermont, Washington, the Commonwealth of Massachusetts, and the District of Columbia, the Corporation Counsel of the City of Chicago, and the California Air Resources Board

November 19, 2018

Via Certified Mail and Regulations.gov

Acting Administrator Wheeler
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Request for Publication of 40 C.F.R. Part 60, Subpart OOOOa Compliance Reports and for Extension of Comment Period on EPA's Proposed Rule "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration," Docket ID No. EPA-HQ-OAR-2017-0483

Dear Acting Administrator Wheeler:

The Attorneys General of California, Illinois, Iowa, Maine, Maryland, New York, Rhode Island, Vermont, Washington, the Commonwealth of Massachusetts, and the District of Columbia, the Corporation Counsel of the City of Chicago, and the California Air Resources Board ("the States") respectfully request that the Environmental Protection Agency ("EPA") make public all compliance data submitted to EPA pursuant to the new source performance standards ("NSPS") for the oil and natural gas sector at 40 Code of Federal Regulations part 60, subpart OOOOa ("2016 NSPS"), including all second annual compliance reports that were due by October 31, 2018. Further, we request that EPA make public any summation, study, or other analysis of this compliance data (collectively "analysis") that EPA has conducted or that EPA has in its possession. This information is crucial to the States' ability to meaningfully comment on EPA's proposed reconsideration amendments to the 2016 NSPS. Therefore, we are also requesting that EPA extend the deadline for public comments on the proposed rule, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration" (the "NSPS Reconsideration Proposal" or "Proposal"),¹ until sixty days after such compliance data and analysis are made available to allow adequate time for review and comment.

Under the Clean Air Act, a regulatory proposal must include a "statement of basis and purpose," including a summary of "the factual data on which the proposed rule is based" and "the methodology used in obtaining the data and in analyzing the data." 42 U.S.C. § 7607(d)(3). EPA must also make available for public comment in the docket for the proposed rule "[a]ll data, information, and documents . . . on which the proposed rule relies." *Id.* "In order to allow for useful criticism, it is especially important for the agency to identify and make available technical

¹ 83 Fed. Reg. 52,056 (Oct. 15, 2018).

studies and data that it has employed in reaching the decisions to propose particular rules.” *Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 530-531 (D.C. Cir. 1982). Courts have found that EPA’s failure to make data relating to the basis for its Clean Air Act regulations publicly available made “meaningful comment on the merits of EPA’s assertions impossible” and constituted reversible error. *Kennecott Corp. v. EPA*, 684 F.2d 1007 (D.C. Cir. 1982); *see also Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 392-95 (D.C. Cir. 1973) (“It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, (in) critical degree, is known only to the agency.”) Moreover, the compliance reports collect “emission data” within the meaning of section 114 of the Clean Air Act, and so EPA is required by the statute to make this information public.

The 2016 NSPS has been in effect for over two years, requiring owners and operators to conduct leak detection and repair surveys and to submit various compliance reports to EPA.² In November 2017, the States submitted a request to EPA under the Freedom of Information Act (“FOIA”), U.S.C. § 552, seeking all records related to the 2016 NSPS, including, but not limited to, all compliance reports. EPA has released some reports to the States pursuant to that FOIA request, but has indicated it is withholding numerous documents from public disclosure due to their supposed inclusion of proprietary business information.³ A limited number of reports submitted via EPA’s Compliance and Emissions Data Reporting Interface are also available through EPA’s public WebFIRE database, but EPA has not yet made available all of the compliance reports that have been submitted to date, despite its clear obligation under the Clean Air Act to do so.

Although the publicly available compliance reports represent a small fraction of the wells subject to the 2016 NSPS reporting standards, an initial analysis of the reports demonstrates that they offer key data that is directly relevant to the NSPS Reconsideration Proposal. The compliance reports include data on the number of components found leaking at each well site during an inspection, the types of components found most frequently with leaks, the time expended by a surveyor to conduct an inspection, and the percentage of leaking components repaired. This data is needed to evaluate the success of the 2016 NSPS at reducing emissions at a semiannual monitoring frequency and to evaluate the success of the 30-day leak repair period currently found in the 2016 NSPS. The data also provide vital insight into compliance costs associated with the 2016 NSPS and whether EPA overestimated costs to operators in the 2016 NSPS and the current NSPS Reconsideration Proposal.

The reports submitted to EPA under the 2016 NSPS contain detailed compliance information from each affected source,⁴ all of which was in EPA’s possession at the time it issued the NSPS Reconsideration Proposal. In order to conduct a reasoned analysis of the NSPS Reconsideration Proposal and whether reconsideration amendments of the 2016 NSPS are even

² 81 Fed. Reg. 35,824 (June 3, 2016).

³ *See* Letter from Martha Segall, Acting Director, Monitoring, Assistance and Media Programs Division, Office of Compliance, EPA, to Daniel Lucas, Deputy Attorney General, California Office of the Attorney General (Sept. 26, 2018), attached hereto.

⁴ *See, e.g.*, 81 Fed. Reg. at 35,846.

warranted, EPA must consider and provide to the public all relevant data regarding the 2016 NSPS. This data contains information critical to assessing the feasibility and cost-effectiveness of the 2016 NSPS and any purported need to relax the standards. Indeed, it would be arbitrary and capricious for EPA not to take this compliance data into account before issuing the NSPS Reconsideration Proposal, and a failure to make this information fully available for public comment renders it impossible for interested parties to provide meaningful comments. *See Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1981) (“An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”)

For these reasons, we respectfully request that EPA make public in the docket all compliance reports submitted to the agency pursuant to 40 C.F.R. Part 60, Subpart OOOOa, including reports due by October 31, 2018, along with any analysis of compliance data undertaken by EPA. We also request that EPA extend the comment period until sixty days after these reports have been made public, to allow for meaningful analysis and comment on the NSPS Reconsideration Proposal. An extension of the comment period is warranted given EPA’s failure to provide the data and analysis underlying the NSPS Reconsideration Proposal, thereby depriving the public and our States of the ability to effectively comment. Our request is also consistent with important principles of public participation and cooperative federalism emphasized by EPA, as “EPA must provide for the fullest possible public participation in [its] decision making” and must “take affirmative steps to seek out the views of those who will be affected by the decisions, including ... the governments of states, cities and towns.”⁵

⁵ See Message from Andrew Wheeler, Acting Administrator, EPA, to EPA Employees (Aug. 2018), available at <https://www.epa.gov/sites/production/files/2018-08/documents/wheeler-messageontransparency-august022018.pdf>.

If we can provide additional information that would be helpful in considering this request, or if you wish to discuss this request with us, please contact the California Attorney General's Office.

Sincerely,

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General
DAVID A. ZONANA
Supervising Deputy Attorney General
CATHERINE WIEMAN
Deputy Attorney General

/s/ Kavita P. Lesser
KAVITA P. LESSER
Deputy Attorney General
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013
Tel: (213) 269-6605
Email: Kavita.Lesser@doj.ca.gov

FOR THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General

/s/ Jason James
JASON JAMES
Assistant Attorney General
69 W. Washington Street, 18th Floor
Chicago, IL 60602
(312) 814-0660
Email: jjames@atg.state.il.us

FOR THE STATE OF IOWA

THOMAS J. MILLER
Attorney General

/s/ Jacob Larson
JACOB LARSON
Assistant Attorney General
Office of Iowa Attorney General
Hoover State Office Building
1305 E. Walnut Street, 2nd Floor
Des Moines, Iowa 50319
Tel: (515) 281-5341
Email: jacob.larson@ag.iowa.gov

FOR THE STATE OF MAINE

JANET T. MILLS
Attorney General

/s/ Gerald D. Reid
GERALD D. REID
Assistant Attorney General
Chief, Natural Resources Division
6 State House Station
Augusta, Maine 04333
Tel: (207) 626-8800
Email: jerry.reid@maine.gov

Acting Administrator Wheeler
November 19, 2018
Page 5

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General

/s/ Joshua M. Segal
JOSHUA M. SEGAL
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
200 SAINT PAUL PLACE
BALTIMORE, MD 21202
TEL: (410) 576-6446
EMAIL: jsegal@oag.state.md.us

FOR THE STATE OF RHODE ISLAND

PETER F. KILMARTIN
Attorney General

/s/ Gregory S. Schultz
GREGORY S. SCHULTZ
Special Assistant Attorney General
Rhode Island Department of the Attorney
General
150 South Main Street
Providence, Rhode Island 02903
Tel: (401) 274-4400
Email: gschultz@riag.ri.gov

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

/s/ Katharine G. Shirey
KATHARINE G. SHIREY
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, Washington 98504
Tel: (360) 586-6769
Email: kays1@atg.wa.gov

FOR THE STATE OF NEW YORK

/s/ Michael J. Myers
MICHAEL J. MYERS
Senior Counsel
MORGAN A. COSTELLO
Chief, Affirmative Litigation
Environmental Protection Bureau
New York State Attorney General
The Capitol
Albany, NY 12224
Tel: (518) 776-2382
Email: michael.myers@ag.ny.gov

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General

/s/ Nicholas F. Persampieri
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
Tel: (802) 828-3186

FOR THE COMMONWEALTH OF
MASSACHUSETTS

MAURA HEALEY
Attorney General

/s/ Melissa Hoffer
MELISSA HOFFER
Chief, Energy and Environment Bureau
TURNER SMITH
Assistant Attorney General
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

Acting Administrator Wheeler
November 19, 2018
Page 6

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General

/s/ Brian Caldwell

BRIAN CALDWELL
Assistant Attorney General
Office of the Attorney General

441 Fourth Street, N.W. Suite 600-S
Washington, D.C. 20001
Tel: (202) 727-6211
Email: brian.caldwell@dc.gov

FOR THE CITY OF CHICAGO

EDWARD N. SISSEL
Corporation Counsel
Benna Ruth Solomon
Deputy Corporation Counsel

/s/ Jared Policicchio

Jared Policicchio
Supervising Assistant Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, IL 60602
(312) 744-7764

FOR THE CALIFORNIA AIR
RESOURCES BOARD

/s/ Richard W. Corey

Richard W. Corey
Executive Officer
Jessica Gordon
Senior Attorney
California Air Resources Board
1001 I St., Floor 23
Sacramento, California 95822
Tel: (916) 324-4581
Email: jessica.gordon@arb.ca.gov

ENCL



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

SEP 26 2018

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Daniel M. Lucas, Esq.
Deputy Attorney General
California Department of Justice, Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013

RE: Freedom of Information Act Request EPA-HQ-2018-001886, Final Response

Dear Mr. Lucas:

This letter concerns your above referenced Freedom of Information Act (FOIA) request, submitted to the Environmental Protection Agency (EPA or Agency) on November 21, 2017. The three-part request sought (1) reports submitted to EPA pursuant to 40 C.F.R. Part 60 Subpart OOOOa (OOOOa) reporting requirements, (2) copies of correspondence between EPA and external parties containing reference to OOOOa and a series of terms, and (3) copies of internal correspondence containing reference to OOOOa and a series of terms. On December 8, 2017, you agreed to limit the scope of parts 2 and 3 to correspondence to or from the Office of Enforcement and Compliance Assurance, the Office of the Administrator, or the Office of Air and Radiation, and you clarified the timeframe for the request as August 2, 2016 to November 21, 2017.

Fees and Interim Productions

On November 29, 2017, the EPA granted your request for a fee waiver. There are no fees associated with this request. The EPA uploaded interim productions of records into FOIAonline on December 21, 2017; March 5, 2018; March 9, 2018; March 15, 2018; April 10, 2018; May 4, 2018; June 26, 2018; and July 11, 2018. Today, EPA is making a final production of records and closing your request. As described below, some records are withheld in full or in part. Your request is therefore partially granted and partially denied.

Today's Production

Today's production includes records responsive to parts 2 and 3 of your request. There is a total of 27,024 pages. They are compiled in 5 PDFs titled "September Prod pt. [1-5]." You can access them at the link below:

- <https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA-HQ-2018-001886&type=request>

FOIA Exemptions

In response to part 1 of your request, EPA produced 5,747 pages and 32 excel spreadsheets with some redactions. EPA initially withheld approximately 164 records in full from the response to part 1 under Exemption 4 of the FOIA as the submitter of the records claimed the records as Proprietary Business Information (PBI). The Agency is undergoing a separate PBI determination in accordance with 40 C.F.R. § 2.204 and § 2.205 to assess whether the information claimed as PBI is properly withheld under Exemption 4. Once the assessment is completed the Office of General Counsel (OGC) will issue a final determination with respect to these records. The tracking number for the PBI case is EPA-2018-009101, and the point of contact for PBI issues is Joan Kaminer, Attorney-Adviser, OGC, who can be reached at 202-564-0334 or kaminer.joan@epa.gov.

In the responses to parts 2 and 3 of your request, EPA produced 1,208 records with some redactions. EPA withheld 929 records in full from the responses to parts 2 and 3.

Where information was redacted, the basis for the withholding is printed above the withheld material. The attached index contains a description of the fully withheld records. Information was redacted and records were withheld in full pursuant to FOIA exemptions 4, 5, 6, and 9. Exemption 4 of the FOIA protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. 5 U.S.C. § 552(b)(4). Exemption 5 of the FOIA exempts from disclosure information that would not be available to another party in litigation. § 552(b)(5). This includes information subject to the deliberative process privilege (internal, pre-decisional, and deliberative information which would harm Agency decision making if released), attorney-client privilege (confidential communications between an attorney and client concerning legal advice), and attorney work product privilege (documents prepared by or at the direction of an attorney in anticipation of litigation). Exemption 6 of the FOIA protects personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. § 552(b)(6). Exemption 9 of the FOIA exempts from disclosure geological and geophysical information and data, including maps, concerning wells. § 552(b)(9).

Appeal Information

This letter concludes our response to your request. As noted above, OGC will review the information initially withheld under Exemption 4 and issue a final PBI determination. Therefore, you do not need to appeal the withholding of information under Exemption 4. Once OGC issues a final determination, EPA will notify you whether the information qualifies for confidential treatment or may be released.

To the extent you would like to appeal any other issue, including any non-Exemption 4 withholdings, you may appeal this response by email at hq.foia@epa.gov, or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460 or through FOIAonline if you are an account holder. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Avenue, N.W., Room 5315, Washington, DC 20460. 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 p.m. 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.

If you have any questions concerning this response, please contact Peter Bermes of the Office of General Counsel at (312) 886-6631 or bermes.peter@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Martha Segall". The signature is fluid and cursive, with the first name "Martha" written in a larger, more prominent script than the last name "Segall".

Martha Segall
Acting Director
Monitoring, Assistance, and Media Programs Division
Office of Compliance