



Ten Strategies to Use When eNGOs FOIA EPA to Prepare for Citizen Suits

"...[W]e file Freedom of Information Act requests with government agencies, comb through industry reports, crunch numbers, and interview and photograph people out in the field. . ." Environmental Integrity Project [Center for Investigations](#).

Environmental non-governmental organizations (eNGOs) looking to develop citizen suits typically first mine publicly available compliance information companies must submit to state and federal environmental agencies. eNGOs have legal rights under multiple federal environmental statutes to serve as private attorneys general in lieu of a government that is allegedly failing to enforce the law or take non-discretionary actions. As we have reported, eNGOs boast increasingly sophisticated teams of attorneys adept at working with technical experts to analyze data and bring citizen suits against industry.

We expect [citizen suits to rise significantly under the second Trump administration](#). There are critical ways to prepare for these cases, including understanding the mechanics of federal Freedom of Information Act (FOIA) requests made to the U.S. Environmental Protection Agency (EPA).¹

1. Know your publicly available data and ensure its accuracy.

EPA maintains several databases of data submitted by companies. One key database is EPA's [Enforcement and Compliance History Online \(ECHO\)](#). This searchable platform is an easy starting point for eNGOs to gain a sense of a company's compliance profile. Companies

should be aware of what ECHO contains and consider developing a profile of that data to better understand how eNGOs might utilize the information as part of a lawsuit. Importantly, ECHO may house erroneous data and information. Identify those errors and request they be corrected. The ECHO system contains a portal for reporting such errors, and EPA



indicates it will make corrections where warranted.

2. Regularly monitor for FOIAs of company information—FOIA the FOIAs.

- An early sign that your company could be a target of eNGOs and/or the plaintiffs' bar is the FOIA process. There are various mechanisms to detect when eNGOs and other third parties are seeking your data:
 - Routinely check EPA's [Released Records page](#), which compiles released records and tracks relevant administrative opinions and FOIA logs, among other useful information
 - Take advantage of pre-disclosure review opportunities (EPA provides notice in some instances)
 - Consider filing your own FOIA to obtain third-party FOIA requests regarding your company—i.e., FOIA the FOIA—and what information may already have been released

3. Identify, organize, and protect confidential business information (CBI).

FOIA Exemption 4 protects certain categories of information from public disclosure, including "trade secrets and commercial or financial information." 5 U.S.C. 552(b)(4). Most companies have well-developed policies for marking information CBI upon submission to EPA. Consider amending those policies to require that plant sites maintain an evergreen log of CBI submitted to EPA, when it was submitted, in what context (e.g., permit application, enforcement defense, reporting requirement), and the general basis of confidentiality. Such a log could help place the company in a strong position to substantiate its CBI claim if necessary.

To that end, the CBI substantiation process can be highly detailed, and the deadlines for responding to a request for substantiation are typically very short. To reduce that burden,

consider limiting CBI submissions only to information in critical need of protection. Consider also creating public versions of documents that contain CBI but are not CBI in their entirety. Narrow claims of CBI will be less burdensome to defend, buttress the necessity of a company's claims of CBI, facilitate EPA's review (avoiding a review of volumes of information that is clearly not CBI), and could deflect a FOIA in the first instance where it is clear that substantial information is in the public domain.

On principle, most eNGOs believe that too much information is kept from the public domain for being "purportedly" confidential. The Biden administration often aligned with eNGOs even for information that industry has long viewed as confidential. The Trump administration may recognize industry rights to proprietary and safety information more broadly. As a consequence, eNGO challenges to EPA CBI determinations are likely to increase.

4. Know the legal reasons EPA will make to determine CBI.

If CBI information falls within the scope of a FOIA request, the company will be notified and provided an opportunity to substantiate the claim with the following information:

- The portions of the information which are alleged to be entitled to confidential treatment;
- The period of time for which confidential treatment is desired by the business (e.g., until a certain date, until the occurrence of a specified event, or permanently);
- The purpose for which the information was furnished to EPA and the approximate date of submission, if known;
- Whether a business confidentiality claim accompanied the information when it was received by EPA;

- Measures taken by the business to guard against undesired disclosure of the information to others;
- The extent to which the information has been disclosed to others, and the precautions taken in connection therewith;
- Pertinent confidentiality determinations, if any, by EPA or other Federal agencies, and a copy of any such determination, or reference to it, if available;
- Whether the business asserts that disclosure of the information would be likely to result in substantial harmful effects on the business's competitive position, and if so, what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects²; and
- Whether the business asserts that the information is voluntarily submitted information as defined in § 2.201(i), and if so, whether and why disclosure of the information would tend to lessen the availability to EPA of similar information in the future.

40 C.F.R. § 2.204(e)(4). Where EPA has requested certain information, the submittal of which could be considered voluntary (i.e., beyond EPA's regulatory or contractual authority to request), companies can request advanced determinations of confidentiality. *Id.* § 2.206.

5. Factor in tight timelines for responding to CBI defense information.

The FOIA process unfolds on a tight statutory timeline, which makes proactive preparation even more important. Barring agreement, EPA must respond to FOIA requests within 20 working days. 40 C.F.R. § 2.104(a)(1). Once EPA makes its preliminary confidentiality determination and provides notice to the

affected business, the company (i.e., CBI claimant) has *15 working days* to submit substantiation, absent extension. 40 C.F.R. § 2.204(e)(2).

Companies should train internally to elevate notice of a FOIA determination to its Legal Department, seek an extension if necessary, and prepare a detailed and specific response.³ In this environment, be ready to litigate. Even if the company receives a favorable ruling, the ruling can be administratively appealed, 40 C.F.R. § 2.108, and subsequently litigated.

6. Check for environmental statute-specific FOIA provisions.

FOIA regulations contain special rules for certain statutes. EPA regulations include provisions that apply specifically to the Clean Air Act (CAA), Clean Water Act, Safe Drinking Water Act, Solid Waste Disposal Act, among others. 40 C.F.R. §§ 2.301-305. Be familiar with these specific regulatory provisions and how to defend their scope. For example, "emissions data," i.e., data that are necessary to determine air emissions from a source under the CAA are presumptively public information. 40 C.F.R. § 2.301(a)(2)(i)(A)-(C). eNGOs may claim that a broad range of information falls within the scope of "emissions data"—including confidential calculation methodologies. Yet, several federal courts of law have recognized that "'emissions data' should be defined narrowly to focus on information obtained from a source of emissions and that a strict interpretation of the 'necessary to determine' requirement is warranted in order to ensure that the exception does not swallow the rule." *Graff v. Haverhill N. Coke Co.*, No. 1:09-CV-670, 2014 WL 360013, at *12 (S.D. Ohio Feb. 3, 2014) (internal citations omitted).

7. If eNGOs are evaluating your data, consider retaining an expert, under the attorney-client privilege, to do the same.



If an eNGO is examining your company's data, consider retaining an expert to evaluate that information. The expert can conduct a privileged analysis and prepare defenses to a possible Notice of Intent (NOI) to sue, the first step in a citizen suit. If the expert identifies vulnerabilities, consider proactive steps to correct issues and put the company on stronger footing if litigation does ensue. Think through how an organization may depict your data publicly. For example, some eNGOs have used [public data to create searchable maps](#) purporting to show toxicity levels of certain contaminants by region. Companies should consider creating their own depictions of data to correct often incendiary tools made available by eNGOs.

8. Develop a FOIA response protocol now and train!

Developing an internal protocol to institutionalize a proactive approach to FOIA will likely save your company significant time and money in the long run. The protocol should include convening company stakeholders who understand key issues and can implement these strategies. Checklists can include the following types of steps to counter the advantages eNGOs are seeking through accessing public data:

- Compile and assess public data
- FOIA the FOIA at routine intervals
- Track CBI, with substantiation concepts in place
- Assign someone to track CBI substantiation notice and timelines
- Compile applicable FOIA provisions for statutes that apply to your operations
- Check with your trade association for early warnings and industry-wide defenses
- Conduct expert analysis of the data that third parties are analyzing

Regular training on CBI is critical—both in terms of submitting claimed CBI to EPA in the first instance and on how to respond to the FOIA substantiation opportunity.

9. Know your state FOIA laws.

In addition to EPA, state environmental protection agencies will also house substantial information—perhaps even more than federal agencies. Most state laws are based on FOIA but will be implemented through separate state rules, sometimes even agency-specific rules. And in some cases, what state law might protect, federal law may not, and vice versa. The differences in exemptions can be critical. The Reporters Committee for Freedom of the Press publishes an excellent resource that surveys state FOIA laws, which can be found [here](#).

10. Think through litigation defense strategies as soon as you become aware of a FOIA request.

Assume that the FOIA is the precursor to an NOI and that the NOI will be based on information provided in response to the FOIA, and begin preparing your defense strategy now. In the citizen suit context, company information essentially becomes the allegations themselves. For example, companies must regularly submit certified reports—often times for years of data covering multiple pollutants—that disclose noncompliance. An NOI can simply point to those reports as the basis for thousands of allegations. Consider preparing a strategy for defending a possible NOI, including determining whether the violations are continuing and, if so, the projected dates for corrections and whether there has been federal or state enforcement, among other possible defenses. Determine whether there has been some level of federal or state prosecution of the violations that would satisfy a diligent prosecution defense. The time to respond to an NOI is 60 days under most federal statutes—eNGOs know this and will allege thousands of



violations as part of their NOI in efforts to ensure their prospects for standing and thwart a company and agency's ability to timely

respond and avoid suit. Know in advance what violations eNGOs will likely allege so that any NOI response time can be used most effectively.

Beveridge & Diamond focuses on environmental and natural resource law as applied to business strategy, regulatory compliance, transactions and project development, litigation, and dispute resolution. We help clients around the world resolve environmental and sustainability issues relating to facilities, products, and operations.

¹ This tip sheet focuses on FOIAs to EPA, but it is important to keep in mind that other federal agencies are subject to FOIA. Each agency has its own set of regulations governing the FOIA process. Many of the concepts covered in this piece apply generally to all agencies receiving a FOIA.

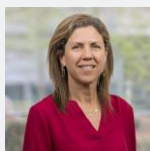
² Substantiating companies are no longer required to provide this information, and it is unclear whether EPA will consider this factor. See *Food Marketing Institute v. Argus Leader Media*, 588 U.S. 427 (2019).

³ Note, extensions to state public records request substantiation may not be granted as liberally. Historically, EPA has been willing to

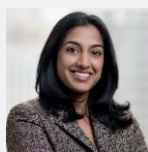
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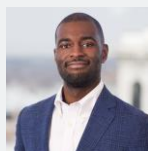
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