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VIA FOIA ONLINE: HTTPS://FOIAONLINE.GOV/FOIAONLINE/ACTION/PUBLIC/REQUEST

Regional Freedom of Information Officer
U.S. EPA, REGION 9
75 Hawthorne Street (OPA-2)
San Francisco, CA 94105

Re: Freedom of Information Act Request
Client-Matter No. 43983.00003

Dear Regional Freedom of Information Officer:

On behalf of the Southern California Alliance of Publicly Owned Treatment Works ("SCAP"), a non-profit trade association, we respectfully submit this request for information pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Although we previously sent a similar request in October of 2018, and after having received an estimated cost of the requested documents in the range of $80,000, we supplemented that initial request with a fee waiver request in December of 2018.

Without receiving a single document from our initial request, we were asked to submit a wholly new request to the United States Environmental Protection Agency ("USEPA"), which is supposed to adhere to a presumption of openness in responding to requests of information under FOIA.[1] As requested, SCAP submitted a wholly new request to USEPA, along with a fee waiver request, in February 2019. However, SCAP's request for a waiver or reduction in fees was completely denied and a new estimated cost of the requested documents was issued again, which was in the range of $80,000. SCAP's February 2019 FOIA Request was later withdrawn on March 14, 2019.

SCAP now submits this new FOIA Request and Request for Waiver or Reduction of Fees, which are both set forth in greater detail below. The presumption of openness follows an executive memorandum instructing all federal agencies to adopt a presumption of disclosure when administering requests under FOIA, which provides:

[1] U.S. ENVIRONMENTAL PROTECTION AGENCY, *Freedom of Information Act (FOIA)*, Learn about FOIA, https://www.epa.gov/foia/learn-about-foia (last visited February 7, 2019).

> All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA. (*See* Memorandum from President Obama to the Heads of Executive Departments and Agencies regarding Freedom of Information Act, January 21, 2009.)[2]

The United States Attorney General subsequently issued a memorandum to the Executive Departments and Agencies emphasizing that "an agency should not withhold information simply because it may do so legally" and that "whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure [and] be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information." (*See* Memorandum for Heads of Executive Departments and Agencies, March 19, 2009.)[3]

Information Requested

Please provide copies of all records in USEPA Region 9's possession or control that are responsive to the following categories of information requested:

1. Any e-mails and attachments to e-mails, between USEPA Region 9 offices in the State of California and the California State Water Resources Control Board ("SWRCB") regarding the State of California's use of the Test of Significant Toxicity ("TST") in the SWRCB's proposed Toxicity Provisions, dated June 8, 2015 and thereafter.

To alleviate any doubt, the requests set forth above seek responsive documents in either native format, or in PDF format that is preferably in searchable electronic format, either word or text-searchable.

Request for Waiver or Reduction of Fees

In addition, on behalf of SCAP, we respectfully request a waiver or reduction of fees for this FOIA request pursuant to 40 C.F.R. § 2.107(l). Should only some of the requested records satisfy the requirements for a fee waiver, we respectfully request that a waiver be granted for those records. *See* 40 C.F.R. § 2.107(l)(4). As explained in greater detail below, and pursuant to

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[2] This memorandum is directly available at https://obamawhitehouse.archives.gov/the-press-office/freedom-information-act (last visited February 7, 2019) and is also located on the United States Environmental Protection Agency's website under 'FOIA Memoranda' at https://www.epa.gov/foia/foia-resources (last visited February 7, 2019).

[3] This memorandum is directly available at https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf (last visited February 7, 2019) and is also located on the United States Environmental Protection Agency's website under 'General FOIA Guidance' at https://www.epa.gov/foia/foia-resources (last visited February 7, 2019).

40 C.F.R. § 2.107(l)(5), this FOIA request is in the public interest because the information is likely to contribute significantly to public understanding of the operations or activities of USEPA, especially in relation to USEPA's use and encouragement of the TST in the SWRCB's proposed Toxicity Provisions, dated June 8, 2015 and thereafter. Moreover, as outlined below, this request is not for a commercial purpose.

First, this FOIA request concerns the operations and activities of USEPA because USEPA has utilized and promoted the use of the TST with the SWRCB in National Pollutant Discharge Elimination System ("NPDES") permits, including paying for the economic analysis used by the SWRCB to support its most recent draft Toxicity Provisions. Undoubtedly, USEPA's actions in relation to the TST are specific, identifiable and direct activities, and responsive documents to this FOIA request would contribute significantly to the public understanding of USEPA's operations and activities on this subject.

Second, publicly available information regarding USEPA's operations and activities in relation to the TST are extremely limited. Moreover, USEPA's use and promotion of the TST impacts a broad audience—essentially any entity that seeks, or already has an NPDES permit, that regulates acute and chronic toxicity. Thus, disclosure of responsive documents would be meaningfully informative and likely to contribute to an increased public understanding of USEPA's operations and activities in relation to the TST.

Third, and tied to the above, any such disclosure of responsive documents would contribute to the public understanding of USEPA's operations and practices in relation to the TST. USEPA, as well as the SWRCB, regulate numerous entities through the NPDES permit program, and such disclosure of information regarding the TST will surely inform that broad audience about USEPA's operations and activities on the subject.

Finally, there is no doubt that the disclosure of responsive documents would significantly enhance the public's understanding about USEPA's operations and activities in relation to the TST. Again, publicly available information from USEPA on the TST is extremely limited. Furthermore, both SCAP and Downey Brand LLP ("Downey Brand") routinely provide educational or non-commercial scientific information, as well as news media e-alerts to members of the public that subscribe to or are members of SCAP or Downey Brand's mailing lists on a variety of environmental issues. For example, SCAP routinely provides its members with toxicity updates, and Downey Brand recently provided an e-alert to its public subscribers regarding the SWRCB's proposed Toxicity Provisions, the very underlying subject of this FOIA request.[4] Thus, producing documents that are responsive to all of the categories of documents set forth in this FOIA request will contribute significantly to the public's understanding of the TST.

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[4] *See* Downey Brand LLP, *State Water Resources Control Board Issues Draft Toxicity Policy – What You Need to Know*, Nov. 21, 2018, available at: https://www.downeybrand.com/Resources/Legal-Alerts/154705/State-Water-Resources-Control-Board-Issues-Draft-Toxicity-Policy-What-You-Need-to-Know.

Conclusion

As required by the Act, please provide a response within twenty (20) days from the receipt of this letter, stating your determination regarding this request. *See* 5 U.S.C. § 552(a)(6)(A); 40 C.F.R. § 2.104(a). Moreover, as stated above, USEPA may produce responsive documents to this FOIA request on a rolling basis.

Should you decide any of the requested material is exempt from disclosure under the Act, please describe in detail the material withheld and specify the legal basis and authority for withholding the requested material. Such description should include, but need not be limited to: the type of record and number of pages; the full name and title of the author of the record; the date of the record; the full name and title of the addressee of the record; the full name and title of all persons to whom the record was circulated; the title, "re" line, and headings from within the record, unless doing so would reveal properly exempted material; a detailed description of the entire content of the record; the custodian of the record at the time of this request; and the number of the record category to which the record responds. *See* 5 U.S.C. § 552(b); *Coastal Corp. v. Department of Energy*, 496 F. Supp. 57, 60-64 (D. Del. 1980); *ACLU Foundation v. Department of Justice*, 833 F. Supp. 399, 402-405 (S.D.N.Y. 1993).

Please also provide us with all non-exempt portions of all responsive records that are reasonably segregable from the withheld material, identifying the length and location of the withheld portion on the non-withheld portion of the record. 5 U.S.C. § 552(b).

If the cost of duplication of the responsive documents exceeds $250, please contact me regarding the cost as we may prefer to review the responsive documents and, after review, bring in a copy service or pay the cost of duplication for only those documents we select. *See* 5 U.S.C. § 552 (a)(4)(A)(v).

Please contact me by phone at (916) 520-5376 or by email at mthorme@downeybrand.com, if you have any questions regarding this request, or would like to discuss how we might assist in your response to this request. We would be happy to work with you to obtain this information in an expedited manner through clarifications of any issues pertaining to these requests. Thank you for your prompt attention to this matter.

Very truly yours,

DOWNEY BRAND LLP

Melissa A. Thorme

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