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Submitted via FOIAonline (https://www.foiaonline.gov)

RE: Freedom of Information Act Request and Fee Waiver Request

Dear FOIA Officer:

This request is made pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and 40 C.F.R. pt. 2, on behalf of Our Children's Earth Foundation ("OCE"). Consistent with its mission, OCE hereby requests copies of the following records,[1] from the Environmental Protection Agency ("EPA"). Note that these records are requested up to and including the date that EPA issues a determination for this request:

1. Information from EPA's State Planning Electronic Collaboration System ("SPeCS") system reflecting state implementation plan ("SIP") revisions that Nevada[2] has submitted to EPA pursuant to the Clean Air Act, but that are still awaiting EPA approval or disapproval, in whole or in part (including SPeCS review page IDs, statuses, state submittal dates, and any proposed or final actions for the SIPs);
2. Copies of all SIP revisions that Nevada has submitted to EPA but that are still awaiting EPA approval or disapproval;
3. Any EPA SIP revision approvals or disapprovals of portions of Nevada SIP revisions that were submitted together with SIP revisions that are still awaiting EPA approval or disapproval and the parts still awaiting approval or disapproval; and

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[1] This request defines "records" broadly to include all documents, books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics. "Documents," as used herein, refers to paper documents and/or electronically stored information, including writings, correspondence, emails, records of phone conversations, notes, meeting minutes, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations, stored in any medium.

[2] OCE is aware that Nevada Department of Environmental Protection submits some of the State of Nevada's SIPs and that at least Clark County and Washoe County submit others. Please construe any references to "Nevada" in this request to include Nevada Department of Environmental Protection, Clark County, Washoe County, and any other Nevada agency, county, or other subdivisions that has submitted SIPs covering all or any portion of the State of Nevada.

4. Any list or compilation of EPA's SIP backlog in Nevada and/or nationwide.

OCE requests all records dated before fulfillment of this FOIA request. Please tender responsive records in digital format whenever possible.

* * *

Please identify and inform us of all responsive or potentially responsive records within the 20 working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the basis of any claimed exemptions or privilege, including the specific responsive or potentially responsive records(s) to which such exemption or privilege may apply. *See Citizens for Responsibility and Ethics in Wash. v. Federal Election Comm'n*, 711 F.3d 180, 182-83 (D.C. Cir. 2013) (holding that the agency must identify the exemptions it will claim with respect to any withheld documents within the time frame prescribed by FOIA). The Supreme Court has stated that FOIA establishes a "strong presumption in favor of disclosure" of requested information, and that the burden is on the government to substantiate why information may not be released under FOIA's limited exemptions. *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). Congress affirmed these tenets of FOIA in legislation as recently as December 2007, stating that government remains accessible to the American people and "is always based not upon the 'need to know' but upon the fundamental 'right to know.'" Pub. L. No. 110-175, 121 Stat. 2524, 2525 (Dec. 31, 2007).

If your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979). A *Vaughn* index must (1) identify each document or portion of document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure of the document or portion of document would damage the interests protected by the claimed exemption. *See Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). "The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document," in order to provide "the requestor with a realistic opportunity to challenge the agency's decision." *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Such explanation will be helpful in deciding whether to appeal a decision to withhold documents and may help to avoid unnecessary litigation.

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. *See* 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Cent. v. U.S. Dep't of the Air Force*, 455 F.2d 242, 261 (D.C. Cir. 1977). Claims of non-segregability must be made with the same detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

FOIA requires federal agencies to make their records "promptly available" to any person who makes a proper request for them. 5 U.S.C. § 552(a)(3)(A) (as amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524).

Presumption of Openness and "Foreseeable Harm" Standard

On his first full day in office former President Barrack Obama demonstrated his commitment to the ideals of transparency and openness by issuing a Memorandum to the heads of all Executive Branch Departments and agencies by calling on them to "renew their commitment to the principles embodied in FOIA." *See* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the FOIA, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President directed all agencies to administer the FOIA with a clear presumption in favor of disclosure, to resolve doubts in favor of openness, and to not withhold information based on "speculative or abstract fears." *Id.* In addition, the President called on agencies to ensure that requests are responded to in "a spirit of cooperation," that disclosures are made timely, and that modern technology is used to make information available to the public even before a request is made. *Id.*

In accordance with the President's directives, on March 19, 2009, Attorney General Holder issued new FOIA guidelines, calling on all agencies to reaffirm the government's "commitment to accountability and transparency." Memorandum from Att'y Gen. Eric Holder for Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf. The Guidelines stress that the FOIA is to be administered with the presumption of openness called for by the President. *Id*. at p. 1.

The Attorney General "strongly encourage[d] agencies to make discretionary disclosures of information." *Id*. He specifically directed agencies not to withhold information simply because they may do so legally and to consider making partial disclosures when full disclosures are not possible. *Id*. He also comprehensively addressed the need for each agency to establish effective systems for improving transparency. *Id*. at p. 2. In doing so he emphasized that "[e]ach agency must be fully accountable for its administration of the FOIA." *Id*.

In issuing these new guidelines, Attorney General Holder established a new "foreseeable Harm" standard for defending agency decisions to withhold information. Under this new standard, the U.S. Department of Justice will defend an agency's denial of a FOIA request "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law." *Id*. As a result, "agencies must now include the 'foreseeable harm' standard as part of the FOIA analysis at the initial request stage and the administrative appeal stage." Department of Justice Guide to the FOIA (2009), p. 25, available at http://www.justice.gov/oip/foia_guide09.htm.

This presumption of openness was enshrined in law when Congress passed, and President Obama signed, the FOIA Improvement Act of 2016, Pub. L. No. 114-185, which added a new section to FOIA that states:

(8)(A) An agency shall –

(i) withhold information under this section only if –

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

5 U.S.C. § 552(a)(8).

Request for Fee Waiver

FOIA was designed to grant a broad right of access to government information, with a focus on the public's "right to be informed about what their government is up to," thereby "open[ing] agency action to the light of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). A key component of providing public access to those records is FOIA's fee waiver provision, 5 U.S.C. § 552(a)(4)(A)(iii), which provides that "[d]ocuments shall be furnished without any charge or at a [reduced] charge . . . 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."

FOIA's fee waiver requirement is to be "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver amendments of 1986 were designed specifically to provide organizations such as OCE access to government documents without the payment of fees. As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . ." 132 Cong. Rec. S. 14298 (statement of Senator Leahy). Indeed, FOIA's waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests, in clear reference to requests from journalists, scholars, and . . . non-profit public interest groups." *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984)).

OCE, a non-commercial requester, hereby requests a waiver of all fees associated with this request because disclosure "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); 40 C.F.R § 2.107(l)(1). This request satisfies both statutory and regulatory requirements for granting a fee waiver, including fees for search, review, and duplication.[3] Below, stated first in bold, are the criteria EPA considers under its new

[3] Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iv), no fee may be charged for the first two hours of search time or for the first one hundred pages of duplication.

regulations in assessing requests for fee waivers, followed by an explanation of OCE's satisfaction of those requirements. *See* 40 C.F.R § 2.107(l).[4] Fee waiver requests must be evaluated based on the face of the request. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice,* 602 F. Supp. 2d 121, 125 (D.D.C. 2009).

(1) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.

The requested records concern EPA's implementation of the Clean Air Act, processing of SIPs, and cooperation with states, as required by the Clean Air Act. The subject matter of the requested records directly and specifically concerns identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote.

The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government. *See* Department of Justice Guide to the FOIA (2009), p. 25. This requirement is clearly met in this case.

(2) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.

The requested records are meaningfully informative about government operations or activities and are "likely to contribute" to an increased public understanding of those operations or activities. The records requested will provide us with the ability to communicate to the public about EPA's implementation of the Clean Air Act in Nevada. The actions and assessments of the EPA regarding this issue are of concern to the public. Disclosure of the requested records will enhance the public's knowledge of these issues and support public oversight of federal agency operations. These records will also illuminate in a clear and direct way, the operations and activities of the EPA to fulfill important Congressional mandates under environmental laws. There is a logical connection between the content of the records we have requested and the Government's operations and activities related to protection of human health and the environment.

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[4] *See also Department of Justice Fee Waiver Guidance to Agency Heads From Stephan Markman, Assistant Att'y Gen.* (Apr. 2, 1987) (advising agencies of factors to consider when construing fee waivers), *available at* http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm.

Furthermore, the information being requested is new. Although the full contents of the information requested are currently unknown to us, OCE does not request any documents previously provided to us by the Government. The information OCE is requesting is not, to our knowledge, publicly available. The Government may refrain from sending us requested records that are available in publicly accessible forums such as on the internet or in published materials that are routinely available at public or university libraries so long as the Government provides us with adequate references and/or website links so that we may obtain these materials on our own. However, the requested materials will otherwise not be available unless we receive them from the Government in response to this FOIA request.

(3) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered.

Disclosure of the records will promote the understanding of the general public in a significant way because OCE will analyze the information and make its conclusions known to our members, other environmental groups nationwide, and the public at large via press releases, newsletters, and by posting our analyses of the information on one or more internet web sites or citizen group email broadcast "systems," such as the Clean Water Action Network. There has been significant environmental group and media focus on EPA's implementation of the Clean Air Act in Nevada, where clean air problems have existed for decades. The documents requested are expected to shed light on these issues. Because OCE has the intention to analyze these records and disseminate the contents to its membership and the public at large, this requirement is easily met.

These activities publicizing and distributing information received through FOIA requests demonstrate OCE's intention to disseminate the information to the public with the goal of disclosing material that will inform, or has the potential to inform, the public. *See also Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) (finding an online newsletter and maintenance of a website sufficient to show how the requester will disseminate information); *Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203-04 (D.D.C. 2009) (finding public interest organization's "website [and] newsletter . . . are an adequate means of disseminating information," and noting the organization's "stature as [an] advocacy group . . . len[t] credence" to its dissemination argument). OCE will use the information obtained through this FOIA request in the methods described herein, therefore it will contribute to "public understanding."

(4) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing

prior to the disclosure, must be enhanced by the disclosure to a significant extent. FOI Offices will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

Disclosure of the requested information will significantly contribute to public understanding of government operations. Specifically, the information will demonstrate the extent that EPA has effectively implemented the Clean Air Act in Nevada, including the extent to which it has cooperated with the State to timely approve SIPs that are necessary to meet clean air benchmarks. Because the public does not currently have the information necessary to assess these issues, this criterion is met.

Threats to our environment such as water and air pollution adversely affect millions of people throughout the United States, and adequate, efficient implementation and enforcement of environmental laws is critical for the public health of millions. OCE has a demonstrated ability to disseminate the beneficial and problematic features of government activities to a wider public audience, by litigation as well as the other means. Factors indicating an ability to disseminate information to the public include publication on an organization website and the ability to obtain media coverage. *Judicial Watch v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003).

OCE's analyses will be disseminated via press releases as well as posted on OCE's web site (http://www.ocefoundation.org) and likely the web sites of other environmental groups. OCE has a proven track record of obtaining press coverage of the environmental issues it publicizes. Generally, OCE obtains press coverage in the local and national media, including newspapers and radio stories.

(5) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.

OCE is a community-based educational nonprofit corporation committed to advocating on behalf of children, who are most vulnerable to pollution, to enable them to breathe clean air and use clean water. Incorporated in 1998, OCE has been doing this work for over 20 years. To further OCE's environmental advocacy goals, OCE actively seeks federal and state agency implementation of state and federal air and water quality laws, and as necessary, directly initiates enforcement actions on behalf of itself and its members. Accordingly, OCE has no commercial interest in the information requested. OCE seeks the information solely to determine the extent of EPA's compliance with the Clean Air Act's mandates. This information will therefore aid in OCE's efforts to protect the environment.

OCE has no financial interest in the information sought or any enforcement actions that may result. OCE's goal in urging enforcement of environmental laws is not private financial gain, but rather vindication of the larger public interest in ensuring that the EPA is operating in such a way that it can achieve compliance with environmental laws designed to protect our environment, wildlife, health, and natural resources.

(6) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

OCE has no commercial interest in the requested information, as discussed above. Accordingly, the identified public interest in the disclosure of the requested information discussed above necessarily outweighs any commercial interest in this request. For the above reasons, OCE respectfully requests a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107 for all copying costs, mailing costs, and other costs related to locating and tendering the documents.

In the event that EPA denies OCE a fee waiver, please send a written explanation for the denial along with a cost estimate. Please contact us for authorization before incurring any costs in excess of $25.

I look forward to your determination on this FOIA request within twenty days, as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and 40 C.F.R. § 2.104. The twenty-day statutory deadline is also applicable to OCE's fee waiver request. *See*, *e.g.*, *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (finding where an agency "fails to answer the [fee waiver] request within twenty days," judicial review is appropriate).

Please direct all correspondence and responsive records to:

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Thank you for your attention to this request. If you have any questions about the requested documents or the requested fee waiver, please do not hesitate to contact me at the phone or email below.

Sincerely,
/s/ Stuart Wilcox
Stuart Wilcox
Counsel for OCE