SUPER LAW GROUP, LLC

Feb. 16, 2018

National Freedom of Information Officer
U.S. Environmental Protection Agency 1200
Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667

BY FOIA ONLINE
BY EMAIL: hq.foia@epa.gov

RE: FOIA Request Regarding Communications Pertaining to Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water

Dear Freedom of Information Officer:

On February 14, 2018, EPA issued for publication in the Federal Register a Notice and Request for Comment on "whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation"("February 14 Notice"). *See* Attachment. Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), Waterkeeper Alliance, Inc., ("Waterkeeper") respectfully requests copies of the following records[1] in EPA's possession:

> Any and all records of communications subsequent to November 7, 2016, regarding whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be

[1] As used throughout this letter, the terms "record" and "records" shall mean all materials in whatever form (handwritten, typed, electronic, or otherwise produced, recorded, reproduced or stored) in EPA's possession, including, but not limited to, any correspondence, letters, minutes of meetings, memoranda, notes, e-mails, notices, electronic files, internet chat logs, tapes, photos, videos, text messages, telefaxes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Note that this request specifically seeks responsive records in or on the personal computers, cellphones, or other devices, or personal email accounts used by any federal employee or official if used for any government purpose. As used herein, "and" and "or" shall be construed either conjunctively or disjunctively as required by the context to bring within the scope of these requests any information which might be deemed outside their scope by any other construction.

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> subject to Clean Water Act regulation, including but not limited to records or communications related to the February 14 Notice attached, between (A) people and organizations outside EPA and (B) members of the transition, beachhead, and landing teams[2] in any EPA office, and EPA staff in any EPA office, including but not limited to the Office of the Administrator (Immediate Office), Office of Congressional and Intergovernmental Relations, Office of the Executive Secretariat, Office of Policy, Office of Public Affairs, Office of Water, and Office of General Counsel.

Relevant search terms include, but are not limited to, "hydrologic connection," "hydrological connection," "hydrologically connected," "discharge to groundwater," "groundwater discharge," all the foregoing phrases with the word "discharge" replaced by the term "discharges," with the word "groundwater" replaced by the term "ground water," and with the word "to" replaced by the term "into." These terms are offered to assist the production of requested documents and should not be construed to narrow the scope of the requested documents.

It may be possible for us to further limit this request if we have a better idea of the nature and scope of the records in your files. Please contact me to discuss this possibility. In addition, to the extent that records responsive to this request are available in a widely-used electronic format (e.g., pdf, Excel, Word, or WordPerfect files), we would prefer to receive them in that format, provided that the electronic versions are in comprehensible form.

Waterkeeper requests that responsive records be released as soon as they are available, on a rolling basis, but in no event later than 20 days, as required by law. To the extent that some subset of the requested records is readily available and can be provided immediately, please send it immediately while EPA searches for other records.

Waterkeeper also requests expedited treatment of this request because there is an urgency to inform the public about an actual or alleged Federal Government activity in light of EPA's intent to publish in the next copy of the Federal Register a call for public comment on whether EPA should clarify or revise its long-standing position on the hydrological connection issue. Once published in the Federal Register, the public will have 90 days to comment.

We remind you that FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i), and that that response must "at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions [,if any, you] will claim with respect to any withheld documents." *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

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[2] The membership of these teams may include, but is not limited to, the following individuals: Myron Ebell, Charles Munoz, David Schnare, George Sugiyama, David Kreutzer, Doug Ericksen, Holly Greaves, Justin Schwab, Patrick Davis, and Don Benton.

CLAIMS OF EXEMPTION FROM DISCLOSURE

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless, as such disclosure would serve the public interest of educating citizens and advancing the purposes of the Clean Water Act. Further, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency's justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

REQUEST FOR FEE WAIVER

Waterkeeper requests a waiver of all fees in connection with this FOIA request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l) because Waterkeeper seek this information in the public interest and will not benefit commercially from this request. If EPA does not waive the fees entirely, Waterkeeper requests that EPA reduce them to the extent possible.

Waterkeeper is prepared to pay fees, under protest, of not more than $250 to facilitate the immediate release of the requested records.

FOIA carries a presumption of disclosure and Congress designed FOIA's fee waiver provision to allow nonprofit public interest groups—such as Waterkeeper—to access government documents without the payment of fees.

Waterkepeer is a national, non-profit environmental organization with no commercial interest in obtaining the requested information. Instead, our organization intends to use the requested information to inform the public so that the public can meaningfully participate in protecting the nation's natural resources.

FOIA provides that fees shall be reduced "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."[3] EPA's FOIA regulations contain an identical requirement.[4] The U.S. Department of Justice (DOJ) has identified six factors to assess whether a requester is entitled to a waiver of fees under FOIA, and the D.C. Circuit and other Courts of Appeals reference and apply these factors.[5]

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[3] 5 U.S.C. § 552(a)(4)(A)(iii).
[4] 40 C.F.R. § 2.107.
[5] *See, e.g.*, Stephen J. Markman, U.S. Dep't of Justice, FOIA Update, Vol. VIII, No. 1, New Fee

These factors are:

A. 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.'

(1) The subject of the request: Whether the subject of the requested records concerns 'the operations or activities of the government';

(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;

(3) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to 'public understanding'; and

(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.

B. Disclosure of the Information 'is Not Primarily in the Commercial Interest of the Requester.'

(1) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(2) The primary interest in disclosure: Whether the magnitude of the 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.'[6]

Waterkeeper's request complies with each of the factors, as demonstrated below. If this information is not sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

Waiver Policy Guidance at 3-10 (1987), *available at* http://www.justice.gov/oip/foia_updates/Vol_VIII_1/ viii1page2.htm; *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that "for a request to be in the 'public interest,' four criteria must be satisfied," and citing agency's multi-factor fee waiver regulation).

[6] Markman, *supra* note 5.

A. Public Interest Factor

The disclosure of this information is in the "public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."[7] Waterkeeper's request complies with each of the criteria DOJ has identified for the public interest factor.

1. The request concerns the operations or activities of the government.

Waterkeeper seeks information related to EPA's communications and other records concerning the February 14 Notice and its subject matter – an important issue pertaining to EPA's administration of the Clean Water Act. Since EPA is an arm of the federal government, such EPA records plainly concern "operations or activities of the government."[8]

2. The disclosure is "likely to contribute" to an understanding of government operations and activities.

The records Waterkeeper has requested are "likely to contribute" to an understanding of government operations and activities, as the records pertain to EPA's February 14 Notice, its efforts related to that notice, and the subject matter of that notice, since the November 2016 presidential election, as well as any related communications EPA has received from outside entities that may have affected EPA's decision to seek comment on an important question related to the scope of the Clean Water Act. The public does not currently have knowledge as to whether EPA, since the November 2016 presidential election, has conducted any internal review or has received any communication from outside entities, such as industry groups or the White House, concerning these issues. Thus, disclosure is "likely to contribute" to public understanding of government operations and activities.[9]

3. The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

This information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.[10] The general public is already following issues related to water pollution that results when point source discharges of pollutants reach surface water through hydrologically connected groundwater or subsurface flows, thus any information made public will receive close and critical scrutiny from members of the public, scientists, and the news media.

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[7] *See* 40 C.F.R. § 2.107(l)(1).
[8] *See* 40 C.F.R. § 2.107(l)(2)(i).
[9] *See* 40 C.F.R. § 2.107(l)(2)(ii).
[10] *See* 40 C.F.R. § 2.107(l)(2)(iii).

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Indeed, the subject matter of the February 14 Notice is relevant in a number of different environmental contexts, including pollution discharged from massive unlined coal ash lagoons at power plants adjacent to surface water bodes, Concentrated Animal Feeding Operation, and the injection of sewage into underground wells as a disposal method.

Waterkeeper, through its expertise and experience, is particularly able to ensure that the information requested will be disseminated to the general public, and convey to the general public how it might bear on a numerous water quality issues. Waterkeeper has 178 local affiliates throughout the United States. Communities nationwide look to Waterkeeper for critical information concerning, among other things, sources of pollution in their local waterways. Waterkeeper has a proven ability to disseminate information quickly and effectively through various communication channels including publications, public interest litigation, educational programs, media initiatives, and its website. Waterkeeper's website www.waterkeeper.org is updated regularly and draw thousands of visits per month. Waterkeeper also publishes WATERKEEPER, a magazine on water-related environmental and public health subjects of current interest, which has an annual circulation of 130,000. Currents is Waterkeeper's electronic newsletter on water-related issues that is distributed by email to approximately 24,000 subscribers monthly and made available to the general public online. Waterkeeper also issues press releases and participates in press conferences and interviews with reporters. Waterkeeper routinely uses FOIA to obtain information from federal agencies that Waterkeeper's legal and scientific experts analyze in order to inform the public about a variety of issues, including water pollution, drinking water safety, and energy policy. Waterkeeper has demonstrated its ability to analyze and distribute information to a broad audience of interested people. Thus, Waterkeeper is uniquely well positioned to analyze and publicize the requested information.

4. The information will contribute "significantly" to public understanding of government operations or activities.

The information Waterkeeper seeks will contribute "significantly" to the ongoing public conversation about the administration of the Clean Water Act in the context of pollution that reaches surface water through groundwater, a topic that is important in numerous environmental settings,[11] The vast majority of materials Waterkeeper has requested are not publicly available, yet they are essential to the public's understanding of any EPA review related to the February 14 Notice, and its subject matter. The request seeks information that is not publicly available about, among other things, who is seeking to influence EPA's regulatory actions, the extent of those efforts, and the effectiveness of their attempts to do so, and Waterkeeper has a track record of disseminating information regarding issues, policies, and laws relating to the environment and public health. Releasing this information will, thus, significantly enhance public understanding of any EPA activities since the November 2016 presidential election concerning the February 14 Notice, and its subject matter.

[11] *See* 40 C.F.R. § 2.107(l)(2)(iii).

B. Commercial Interest Factor

Waterkeeper is a non-profit organizations with no commercial, trade, or profit interests in the requested information. Waterkeeper seeks to use this information solely to inform the public and to support advocacy efforts around protecting human health and the environment. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

For all of the foregoing reasons, a fee waiver is warranted here under 5 U.S.C. § 552(a)(4)(A)(iii)and 40 C.F.R. § 2.107. If EPA does not believe that the above information is sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

CONCLUSION

If possible, please post the records to FOIA Online, email the requested records to me at the address below, or inform me and I will provide access to a shared file system for uploading. Alternatively, please mail the records to me on electronic storage media if possible, or on paper if not, to the office address listed below.

Please send records on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

If you find that this request is unclear in any way, or that the number of records responsive to this request is relatively large or difficult to copy, please do not hesitate to call me at (212) 242-2355. You can also reach me by email at: edan@superlawgroup.com.

Thank you for your assistance.

Respectfully submitted,

s/Edan Rotenberg
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LLC, on behalf of
Waterkeeper
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