October 31, 2018

National FOIA Officer
U.S. EPA
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Email:

Regional FOIA Officer
U.S. EPA, Region 9
75 Hawthorne Street (OPA-2)3
San Francisco, CA 94105
Email: r9foia@epa.gov

Re: Freedom of Information Act (FOIA) Request

Dear FOIA Officers:

This is a Freedom of Information Act ("FOIA") request for information on the current Total Maximum Daily Load ("TMDL") study for Queen Creek located in eastern Arizona. This TMDL study is being undertaken by the Arizona Department of Environmental Quality ("ADEQ") as required by the Clean Water Act.

Last year in October 2017, ADEQ released a draft TMDL for public comment. Public comments were collected, and the comment period closed in December 2017. Per an update email sent out from ADEQ on September 27, 2018, the TMDL has not currently been approved. Instead, ADEQ stated that this project has been suspended to address technical issues.

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, we are respectfully requesting the following:

- Any and all copies of the TMDL study for Queen Creek (draft or final) that EPA has received from or sent to ADEQ from October 2017 to present); and

- Any and all "materials" (as defined below) in EPA's possession, custody or control related to the above described TMDL study for Queen Creek that have been (a) received by EPA, its employees or consultants from ADEQ or Resolution Copper Mining, their affiliates, or any consultant, testing laboratory or outside party; and/or (b) prepared, produced, or collected by EPA, its consultants or employees from October 2017 to present regarding ADEQ's TMDL study for Queen Creek.

Any and all "communications and documents" includes but is not limited to, documents on paper, digital, and any other format including emails, letters, memoranda, notes, recordings, maps, graphics, charts, meeting agendas, meeting records, and internal and external review documents of any type.

We ask that you please make these records available to us in an electronic format. Should the EPA elect to withhold or redact any of the documents relating to the above request, please note that FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that we be provided with all non-exempt portions that are reasonably segregable. We further request that you describe the deleted material in detail (including date, author, recipient, and parties copied), and specify the statutory basis for the denial under FOIA as well as your reasons for believing the alleged statutory justification applies in this instance.

Request for Fee Waiver

This request is not being made for commercial purposes. Further, we are asking for a fee waiver for this request. Under FOIA, a party is entitled to a fee waiver when "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 [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552a)(4)(A)(iii).

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *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). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005). The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as the Conservation Groups access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and *non-profit public interest groups*." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). 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).

Thus, the EPA must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns "the operations or activities of the Federal government," (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities, (3) whether the disclosure "will

contribute to public understanding" of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. 43 C.F.R. § 2.48(a)(1)-(4).

(1) The subject matter of this request concerns the operations and activities of the government (ADEQ and the EPA) related to listing the waters of Queen Creek as impaired, and the preparation of a TMDL which would be submitted to the EPA for approval. This FOIA would provide crucial insight into government activities relating to the Queen Creek TMDL. It is clear that federal agency management of public waters is a specific and identifiable activity of the government, in this case the EPA. *Judicial Watch,* 326 F.3d at 1313 ("[R]easonable specificity is all that FOIA requires with regard to this factor") (internal quotations omitted). The AZMRC meets this factor.

(2) Disclosure is likely to contribute to an understanding of government operations or activities. Disclosure of the requested records will allow AZMRC to convey to the public information about the Queen Creek TMDL project in a manner that will meaningfully enhance the public's understanding of this topic. Thus, he requested records are meaningfully informative and would certainly contribute to an increased understanding of EPA's operations or activities.

(3) Disclosure of the requested records will contribute to a reasonably broad audience of interested persons' understanding of the Queen Creek TMDL project and its relation to the EPA's mission to "protect human health and the environment." The public does not currently have an ability to easily evaluate the requested records and they are not currently in the public domain on EPA or ADEQ's website. Since ADEQ has still not responded to the public comments submitted on the TMDL and the project is now under indefinite suspension Accordingly, these records would contribute to the understanding of this process by a broad audience of interested persons including but not limited to the commenting parties. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying "public" to require a sufficient "breadth of benefit" beyond the requester's own interests); *Cmty. Legal Servs. v. Dep't of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's "work by its nature is unlikely to reach a very general audience," "there is a segment of the public that is interested in its work").

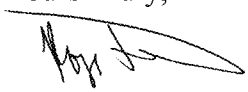
See Cmty. Legal Servs. v. HUD, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "clarify important facts" about agency policy, "the CLS request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[FOIA] legislative

history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations… ." Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of the Queen Creek TMDL project. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about federal management of public waters. In this connection, it is immaterial whether any portion of this request may currently be in the public domain because this request covers considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

(4) Disclosure is likely to contribute significantly to public understanding of government operations or activities. Disclosure of the requested records will significantly enhance the public's understanding of the government activities pertaining to the Queen Creek TMDL project as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, this factor is met as well.

I look forward to receiving your response to this request within 20 working days, as required by the statute. If you have any questions about this request, you may contact me at PO Box 43565, Tucson, AZ 85733. Thank you for your assistance in this matter.

Yours Truly,



Roger Featherstone
Director, Arizona Mining Reform Coalition
PO Box 43565
Tucson, AZ 85733