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16 ECOLOGICAL RIGHTS FOUNDATION

17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA

19 ECOLOGICAL RIGHTS FOUNDATION, a
20 non-profit corporation,

21 Plaintiff,

22 v.

23 UNITED STATES ENVIRONMENTAL
24 PROTECTION AGENCY,

25 Defendant.

Civil Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1 Ecological Rights Foundation ("EcoRights") alleges as follows:

2 **INTRODUCTION**

3 1. EcoRights brings this action under the Freedom of Information Act ("FOIA"), which allows an
4 aggrieved party to seek relief when documents are unlawfully withheld, and authorizes a reviewing
5 court to enjoin the agency from withholding records and to order the production of any agency records
6 improperly withheld from the complainant. 5 U.S.C. § 552(a)(4)(B). EcoRights also brings this action
7 under the FOIA regulations that the United States Environmental Protection Agency ("EPA") has
8 adopted and which allow an aggrieved party to seek judicial relief. 40 C.F.R. § 2.104(a). EcoRights
9 seeks declaratory and injunctive relief for FOIA violations by EPA. At issue in this case is EcoRights'
10 FOIA request dated February 1, 2017 (EPA-HQ-2017-003479) seeking documents addressing directives
11 or requests issued since the inauguration of President Trump by any Trump administration official to
12 employees of the EPA instructing them to not speak publicly about work at EPA, including but not
13 limited to instructions to not speak with media, and to not publish upon social media ("Gag Order
14 Directive(s)"); and documents concerning any directives or requests issued since the inauguration of
15 President Trump by any Trump administration official to EPA employees concerning whether EPA
16 information, reports, studies, and/or data must undergo review by a political appointee prior to
17 publication by EPA outside the agency ("Political Review Order"). EcoRights alleges that EPA has
18 failed to produce any documents or respond with a final determination within the statutory timeframe, in
19 violation of 5 U.S.C. section 552(a).

20 **JURISDICTION**

21 2. This Court has subject matter jurisdiction under 5 U.S.C. section 552(a)(4)(B), which allows an
22 aggrieved party to seek relief when documents are unlawfully withheld, and authorizes a reviewing
23 court to enjoin the agency from withholding records and to order the production of any agency records
24 improperly withheld from the complainant.

25 3. This Court has personal jurisdiction over EPA and its officials because EPA is an agency of
26 the federal government operating within the United States.

VENUE

4. Venue in the United States District for the Northern District of California is proper under 5 U.S.C. section 552(a)(4)(B) because the complainant has its principal place of business in the Northern District of California.

INTRADISTRICT ASSIGNMENT

5. Intradistrict assignment of this matter to the San Francisco Division of the Court is appropriate pursuant to Civil Local Rule 3-2(d) because EcoRights' principal counsel resides in San Francisco County, and EcoRights' principal place of business is located in Garberville, California.

THE PARTIES

6. EcoRights is a non-profit, public benefit corporation, organized under the laws of the State of California, devoted to furthering the rights of all people to a clean, healthful, and biologically diverse environment. To further its environmental advocacy goals, EcoRights actively seeks federal and state agency implementation of state and federal environmental laws and, as necessary, directly initiates enforcement actions on behalf of itself and its members.

7. Defendant EPA is the agency of the United States Government responsible for administering and implementing the nation's environmental laws.

STATUTORY AND REGULATORY BACKGROUND

8. FOIA requires that an agency disclose documents to any person except where the document falls under a specifically enumerated exemption. 5 U.S.C. § 552. The courts have emphasized the narrow scope of these exemptions and "the strong policy of the FOIA that the public is entitled to know what its government is doing and why." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

9. When an agency decides to withhold records under a claim of exemption it must notify the person making such request of such determination and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i). Government agencies bear the burden of proof to show that any withheld documents are exempt from the duty to disclose. 5 U.S.C. § 522(a)(4)(B).

1 10. On June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016. The
2 Act made significant amendments to FOIA, effective as of enactment on June 30, 2016. 5 U.S.C. § 522,
3 § 6; Department of Justice Office of Information Policy Summary of the FOIA Improvement Act of
4 2016, available at <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016> (“OIP FOIA
5 2016 Summary”). The amendments include changes to the standard by which EPA must evaluate
6 withholdings. The FOIA Improvement Act of 2016 dictates that agencies shall withhold information
7 only if disclosure would harm an interest protected by an exemption – what is referred to as the
8 “foreseeable harm standard.” 5 U.S.C. § 552(a)(8)(A)(i); OIP FOIA 2016 Summary.

9 11. Furthermore, 5 U.S.C. section 552(a)(6)(A)(i) requires that the agency provide enough
10 information, presented with sufficient detail, clarity, and verification, so that the requester can fairly
11 determine what has not been produced and “the reasons therefore.”

12 12. Additionally, FOIA requires an agency to consider partial disclosure whenever the agency
13 determines that full disclosure of a requested record is not possible and to take reasonable steps
14 necessary to segregate and release nonexempt information. 5 U.S.C. § 552(a)(8)(A).

15 13. FOIA requires that an agency, upon any request for records, shall make the records available
16 promptly. 5 U.S.C. § 552(a)(3)(A). An agency shall make a determination whether to comply with a
17 request within twenty (20) business days after the receipt of the request and shall immediately notify the
18 party making the request of such determination, the reasons for the determination, and the party's right
19 to appeal. 5 U.S.C. § 552(a)(6)(A)(i). In unusual circumstances, the agency may extend the time for the
20 determination, for no more than ten (10) days, by written notice to the party, specifying the reasons for
21 the extension and the date on which the determination is expected to be sent. 5 U.S.C. § 552(a)(6)(B)(i).
22 "Unusual circumstances" means (1) the need to search for and collect requested records from field
23 facilities or other establishments separate from the office processing the request; (2) the need to search
24 for, collect, and appropriately examine a voluminous amount of separate and distinct records; or (3) the
25 need for consultation with another agency or agency component having a substantial interest in the
26 determination of the request. *Id.* Consultation with another agency shall be conducted with all
27 practicable speed. 5 U.S.C. § 552(a)(6)(B)(iii)(III).

1 14. Federal agencies are under a duty to conduct a reasonable search for records responsive to a
2 party's request using methods that can be reasonably expected to produce the information requested to
3 the extent they exist. 5 U.S.C. § 522(a)(3)(C).

4 15. An agency's process for dealing with FOIA requests constitutes "withholding" if its net effect
5 is to significantly impair the requester's ability to obtain the records or significantly increase the amount
6 of time he or she must wait to obtain them. *McGehee, III v. Central Intelligence Agency*, 697 F.2d 1095,
7 1110 (D.C. Cir. 1983), *vacated in part on other grounds*, 711 F.2d 1076 (1983).

8 FACTUAL BACKGROUND

9 **EcoRights' FOIA Request**

10 16. EcoRights sent EPA a FOIA request for documents on February 1, 2017 (EPA-HQ-2017-
11 003479) seeking documents addressing directives or requests issued since the inauguration of President
12 Trump by any Trump administration official to employees of the EPA instructing them to not speak
13 publicly about work at EPA, including but not limited to instructions to not speak with media, and to not
14 publish upon social media ("Gag Order Directive(s)"); and documents concerning any directives or
15 requests issued since the inauguration of President Trump by any Trump administration official to EPA
16 employees concerning whether EPA information, reports, studies, and/or data must undergo review by a
17 political appointee prior to publication by EPA outside the agency ("Political Review Order"). EPA has
18 failed to issue a final determination concerning EcoRights' February 1, 2017 request within the deadlines
19 mandated by FOIA or to produce any documents responsive to this request.

20 17. The records sought by EcoRights are crucial to inform the public how the Trump
21 administration is instructing EPA employees to fulfill or neglect statutory obligations in administering
22 and enforcing federal environmental laws; to evaluate the extent to which EPA employees are being
23 instructed to operate in secrecy, and therefore promote public oversight and accountability for EPA
24 actions; to evaluate the impacts of funding cuts on programs that implement the nation's environmental
25 laws; to determine the degree to which EPA employees are censored by Trump administration officials;
26 fulfilling its obligations under federal environmental laws; and to reveal the impact of partisan politics
27

1 on the agency's priorities, operations, and implementation, all of which have consequences for imperiled
2 wildlife, catastrophic climate change, and public health in communities across the country.

3 18. EcoRights has intended to use the information requested to educate the public about any steps
4 taken by the Trump administration to counter the efforts of EPA employees to administer and enforce
5 federal environmental laws and to communicate inner-agency policy changes with the public. Without
6 this information, EcoRights cannot successfully serve as an effective public interest watchdog ensuring
7 that EPA is lawfully fulfilling its statutory duties.

8 ***March 11, 2017 EPA Communications and Revised FOIA Request***

9 19. The first communication from EPA in response to EcoRights' February 1, 2017 Request was a
10 phone call dated March 11, 2017, a week past the FOIA statutory twenty working day response deadline
11 on March 2, 2017. Participants on the call included Becky Dolph, Director of FOIA Expert Assistance
12 Team Office at EPA and Christopher Sproul, counsel for EcoRights. During this call, EcoRights agreed
13 to revise its FOIA Request at the request of EPA.

14 20. The agreed-upon revisions are recorded in a March 11, 2017 email from Becky Dolph to
15 Christopher Sproul. These revisions include clarifying the language of the February 1, 2017 FOIA
16 Request.

17 21. The March 11, 2017 email from EPA states that: "In our conversation we were able to clarify
18 your request so that we are now able to proceed with processing."

19 22. Despite EcoRights' efforts to work collaboratively with EPA and revise its FOIA Request, EPA
20 did not make a final determination nor did EPA provide any documents responsive to EcoRights' FOIA
21 Request following this phone call.

22 ***August 8, 2017 EPA Letter***

23 23. EPA did not send any other communications to EcoRights concerning the February 1, 2017
24 FOIA Request until five months later in a letter dated August 8, 2017. In this letter, EPA indicated that
25 documents responsive to EcoRights' FOIA Request had been uploaded to the FOIAonline system. The
26 letter further instructed that EcoRights would soon receive an email with a direct link to the documents.
27

1 The letter also indicated that the Office of Public Affairs was still continuing to review potentially
2 responsive documents, thus indicating that a final determination had not been reached.

3 24. EcoRights never received a link to any documents related to the request, as was referenced in
4 the August 8, 2017 letter.

5 25. EPA has published a record of EcoRights' February 1, 2017 FOIA Request, including a pdf
6 document containing EcoRights' FOIA Request and Fee Waiver Request, on the FOIA Online website.
7 *See* FOIA Online, Request Details, Tracking No. EPA-HQ-2017-003479,
8 <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28113d03a>. The
9 entry estimates a completion date of July 25, 2017, over four and a half months past the twenty working
10 day deadline of March 2, 2017. EPA did not send a response to EcoRights by this estimated completion
11 date. As of the filing of this complaint, the status of the request is currently listed as "Processing," the
12 final disposition is listed as "Undetermined," and the site states that "No records have been released."

13 26. No documents responsive to the request were ever uploaded to FOIAonline.

14 27. EcoRights has not received any documents in response to its February 1, 2017 FOIA request or
15 its March 11, 2017 revised request.

16
17 **FIRST CLAIM FOR RELIEF**

18 **EPA Violation of**
19 **5 U.S.C. § 552(a)**

20 **Request for Declaratory Relief and Injunction to Compel EPA**
21 **To Comply with FOIA Deadlines and Produce Illegally Withheld Records**

22 28. EcoRights reasserts and realleges all the preceding paragraphs above.

23 29. EPA has violated 5 U.S.C. §§ 552(a)(6)(A) and (B) by failing to provide final
24 determinations concerning the February 1, 2017 FOIA request within the statutory deadline. 5 U.S.C.
25 § 552(a)(6)(A)(i) is plain: within 20 working days of the date that a FOIA request is received federal
26 agencies must provide a determination that (1) informs the requester as to the disposition of its request,
27 *i.e.*, whether documents will be provided or withheld and if the latter, why, and (2) that informs the
requester of a right to appeal any decision not to provide requested documents. Federal agencies at most

1 can extend this 20 working day deadline by an additional 10 working days by informing the requester in
2 writing (1) that "unusual circumstances" necessitate such an extension and (2) when the agency will
3 respond. 5 U.S.C. § 552(a)(6)(B)(i). The statutory deadline for EPA's determination on EcoRights'
4 February 1, 2017 FOIA request was March 2, 2017, or March 16, 2017 if EPA had asserted the 10-day
5 "unusual circumstances" extension (which EPA did not). EPA has not provided either a partial or full
6 release of responsive records and in fact has not released any documents related to the request, nor has
7 EPA provided a final determination or asserted an exemption to FOIA's requirements. EPA has thus
8 violated FOIA's statutory deadlines for responding to the February 1, 2017 FOIA Request. EcoRights
9 has constructively exhausted its administrative remedies given EPA's failure to provide a final
10 determination for the February 1, 2017 FOIA Request within FOIA's statutory time limits. 5 U.S.C.
11 § 552(a)(6)(C)(i).

12 30. EPA has violated FOIA by failing to "promptly" produce all documents responsive to the
13 February 1, 2017 FOIA Request not subject to a lawful FOIA exemption, as the final determinations are
14 overdue. 5 U.S.C. § 552(a)(3)(A).

15 31. EcoRights has constructively exhausted its administrative remedies given EPA's failure to
16 provide a final determination for the February 1, 2017 Request within FOIA's statutory time limits. 5
17 U.S.C. § 552(a)(6)(C)(i).

18 **PRAYER FOR RELIEF**

19 WHEREFORE, EcoRights seeks the following relief:

20 a. A declaratory judgment pursuant to 5 U.S.C. § 552 that EPA violated FOIA by failing to
21 produce documents or provide a final determination for EcoRights' February 1, 2017 Request in
22 accordance with FOIA's statutory deadlines;

23 b. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) ordering EPA to immediately provide its
24 determination for EcoRights' February 1, 2017 FOIA request and produce all documents in its
25 possession responsive to said request that are not exempt from disclosure;

26 c. An award of attorneys fees and costs to EcoRights pursuant to 5 U.S.C. § 552(a)(4)(E); and

27 d. Such other and further relief as this Court deems just and proper.

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Dated: January 18, 2018

Respectfully submitted,

By: Christopher a. sproul
Christopher Sproul
Counsel for Ecological Rights Foundation

JS-CAND 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Ecological Rights Foundation

(b) County of Residence of First Listed Plaintiff Humboldt
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
(1) Environmental Advocates, 5135 Anza Street, San Francisco, CA 94121,
(415) 533-3376, Christopher Sproul (2) Law Offices of Fredric Evenson, 109
Quarry Lane, Santa Cruz, CA 95060, (831) 454-8216, Fredric Evenson

DEFENDANTS

United States Environmental Protection Agency

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF	PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4 <input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5 <input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
110 Insurance	PERSONAL INJURY 310 Airplane 315 Airplane Product Liability	625 Drug Related Seizure of Property 21 USC § 881 690 Other	422 Appeal 28 USC § 158 423 Withdrawal 28 USC § 157	375 False Claims Act 376 Qui Tam (31 USC § 3729(a))
120 Marine	320 Assault, Libel & Slander 330 Federal Employers' Liability 340 Marine 345 Marine Product Liability 350 Motor Vehicle 355 Motor Vehicle Product Liability 360 Other Personal Injury 362 Personal Injury -Medical Malpractice	367 Health Care/Pharmaceutical Personal Injury Product Liability 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY 370 Other Fraud 371 Truth in Lending 380 Other Personal Property Damage 385 Property Damage Product Liability	LABOR 710 Fair Labor Standards Act 720 Labor/Management Relations 740 Railway Labor Act 751 Family and Medical Leave Act 790 Other Labor Litigation 791 Employee Retirement Income Security Act	400 State Reapportionment 410 Antitrust 430 Banks and Banking 450 Commerce 460 Deportation 470 Racketeer Influenced & Corrupt Organizations 480 Consumer Credit 490 Cable/Sat TV 850 Securities/Commodities/Exchange 890 Other Statutory Actions 891 Agricultural Acts 893 Environmental Matters 895 Freedom of Information Act 896 Arbitration 899 Administrative Procedure Act/Review or Appeal of Agency Decision 950 Constitutionality of State Statutes
130 Miller Act	CIVIL RIGHTS 440 Other Civil Rights 441 Voting 442 Employment 443 Housing/Accommodations 445 Amer. w/Disabilities-Employment 446 Amer. w/Disabilities-Other 448 Education	PRISONER PETITIONS HABEAS CORPUS 463 Alien Detainee 510 Motions to Vacate Sentence 530 General 535 Death Penalty OTHER 540 Mandamus & Other 550 Civil Rights 555 Prison Condition 560 Civil Detainee-Conditions of Confinement	PROPERTY RIGHTS 820 Copyrights 830 Patent 835 Patent-Abbreviated New Drug Application 840 Trademark SOCIAL SECURITY 861 HIA (1395ff) 862 Black Lung (923) 863 DIWC/DIWW (405(g)) 864 SSID Title XVI 865 RSI (405(g)) FEDERAL TAX SUITS 870 Taxes (U.S. Plaintiff or Defendant) 871 IRS-Third Party 26 USC § 7609	
140 Negotiable Instrument				
150 Recovery of Overpayment Of Veteran's Benefits				
151 Medicare Act				
152 Recovery of Defaulted Student Loans (Excludes Veterans)				
153 Recovery of Overpayment of Veteran's Benefits				
160 Stockholders' Suits				
190 Other Contract				
195 Contract Product Liability				
196 Franchise				
REAL PROPERTY				
210 Land Condemnation				
220 Foreclosure				
230 Rent Lease & Ejectment				
240 Torts to Land				
245 Tort Product Liability				
290 All Other Real Property				

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation-Transfer
- 8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

5 U.S.C. 552(a), et seq.

Brief description of cause:

Suit to compel response to FOIA request.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. **DEMAND \$**

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE

DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only)

SAN FRANCISCO/OAKLAND

SAN JOSE

EUREKA-MCKINLEYVILLE

DATE 01/18/2018

SIGNATURE OF ATTORNEY OF RECORD

Christopher Sproul