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20 ECOLOGICAL RIGHTS FOUNDATION

21 UNITED STATES DISTRICT COURT
22 NORTHERN DISTRICT OF CALIFORNIA

23 ECOLOGICAL RIGHTS FOUNDATION, a
24 non-profit corporation,

25 Plaintiff,

26 v.

27 UNITED STATES ENVIRONMENTAL
28 PROTECTION AGENCY,

Defendant.

Civil Case No. 4:18-cv-00394-DMR

**AMENDED 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. EcoRights has submitted four FOIA
10 requests to EPA, submitted on February 1, 2017 (EPA-HQ-2017-003479) ("FOIA Request 1"), January
11 23, 2018 (EPA-HQ-2018-003680) ("FOIA Request 2"), March 21, 2018 (EPA-HQ-2018-005683)
12 ("FOIA Request 3"), and April 10, 2018 (EPA-HQ-2018-006474) ("FOIA Request 4"). At issue in this
13 case are EPA's responses to these requests, and EPA's pattern and practice of failing to abide by FOIA's
14 mandatory deadlines and unlawful withholding of documents.

15 2. EcoRights amends its Complaint (Dkt. 1) to: 1) revise the First Claim for Relief to request
16 declaratory judgment that EPA violated FOIA in issuing its determination over a year after the statutory
17 deadline in response to FOIA Request 1; 2) add a Second Claim for relief alleging that EPA has
18 conducted an inadequate search and is illegally withholding documents responsive to FOIA Request 1;
19 3) add a Third Claim for Relief alleging that EPA has violated FOIA's deadlines and failed to promptly
20 produce documents in response to FOIA Request 2, or in the alternative, that EPA issued an arbitrary
21 and capricious determination with respect to FOIA Request 2; 4) add a Fourth Claim for Relief alleging
22 that EPA violated FOIA's deadlines and failed to promptly produce documents in response to FOIA
23 Request 3; 5) add a Fifth Claim for Relief alleging that EPA has violated FOIA's deadlines and failed to
24 promptly produce documents in response to FOIA Request 4; 6) add a Sixth Claim for Relief alleging
25 that EPA is engaged in a pattern and practice of violating FOIA's deadlines and unlawfully withholding
26 documents; 7) add a Seventh Claim for Relief alleging that EPA has failed to comply with the FOIA
27 Improvement Act of 2016 in its response to EcoRights' FOIA Requests 1 and 2.

1 3. EcoRights' FOIA Request 1 seeks documents addressing directives or requests issued since the
2 inauguration of President Trump by any Trump administration official to employees of the EPA
3 instructing them to not speak publicly about work at EPA, and concerning whether scientific data must
4 undergo review by a political appointee prior to publication by EPA. FOIA Request 2 seeks documents
5 related to EPA's efforts to investigate employees for expressing political views different than that of the
6 Trump Administration, including EPA's contracts and communications with outside entities to
7 effectuate this purpose. FOIA Request 3 seeks documents related to EPA's use of drug testing to
8 intimidate employees, and documents related to EPA's hiring freeze, reductions in staffing, and plans to
9 curtail environmental programs to accommodate the decrease in staff. FOIA Request 4 seeks documents
10 related to Administrator Pruitt's use of a condo connected with an industry lobbyist and communications
11 with that lobbyist, as well as documents reflecting the Administrator's role in hiring, demoting, and
12 securing pay raises for certain employees within the agency, the Administrator's use of public funds for
13 first class airfare and security measures, and documents related to the Administrator's travel
14 expenditures.

15 4. The records sought by EcoRights are crucial to inform the public how the Trump
16 administration is instructing EPA employees to fulfill or neglect statutory obligations in administering
17 and enforcing federal environmental laws; to evaluate the extent to which EPA employees are being
18 instructed to operate in secrecy, and therefore promote public oversight and accountability for EPA
19 actions; to evaluate the impacts of funding cuts on programs that implement the nation's environmental
20 laws; to determine the degree to which EPA employees are censored by Trump administration officials;
21 to evaluate EPA's capacity to fulfill its obligations under federal environmental laws; and to reveal the
22 impact of partisan politics on the agency's priorities, operations, and implementation, all of which have
23 consequences for imperiled wildlife, catastrophic climate change, and public health in communities
24 across the country.

25 5. EcoRights has intended to use the information requested to educate the public about any steps
26 taken by the Trump administration to counter the efforts of EPA employees to administer and enforce
27 federal environmental laws and to communicate inner-agency policy changes with the public. Without

1 this information, EcoRights cannot successfully serve as an effective public interest watchdog ensuring
2 that EPA is lawfully fulfilling its statutory duties.

3 6. For EcoRights' FOIA Requests 1, 2, 3, and 4, EPA has failed to produce all responsive
4 documents or respond with a final determination within the statutory timeframe, in violation of 5 U.S.C.
5 section 552(a). EPA's inadequate response to EcoRights' FOIA requests at issue in this case is part of a
6 continuing pattern and practice of violating FOIA which has thwarted EcoRights' efforts to timely
7 receive current information in EPA's possession and has hampered EcoRights' efforts to serve as an
8 effective public interest watchdog over EPA's activities under the Trump Administration, and reflects a
9 broader pattern of EPA's FOIA violations with respect to the public at large that are systematically
10 blocking timely public access to documents that are relevant to revealing the agency's activities. Finally,
11 EcoRights alleges that EPA's practice of responding to FOIA requests runs afoul of the FOIA
12 Improvement Act of 2016.

13 **JURISDICTION**

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

18 8. This Court has personal jurisdiction over EPA and its officials because EPA is an agency of
19 the federal government operating within the United States.

20 **VENUE**

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

24 **INTRADISTRICT ASSIGNMENT**

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

THE PARTIES

1
2
3 11. EcoRights is a non-profit, public benefit corporation, organized under the laws of the State of
4 California, devoted to furthering the rights of all people to a clean, healthful, and biologically diverse
5 environment. To further its environmental advocacy goals, EcoRights actively seeks federal and state
6 agency implementation of state and federal environmental laws and, as necessary, directly initiates
7 enforcement actions on behalf of itself and its members.

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

STATUTORY AND REGULATORY BACKGROUND

10
11 13. FOIA requires that an agency disclose documents to any person except where the document
12 falls under a specifically enumerated exemption. 5 U.S.C. § 552. The courts have emphasized the
13 narrow scope of these exemptions and "the strong policy of the FOIA that the public is entitled to know
14 what its government is doing and why." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868
15 (D.C. Cir. 1980).

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

20 15. On June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016. The
21 Act made significant amendments to FOIA, effective as of enactment on June 30, 2016. 5 U.S.C. § 522,
22 § 6; Department of Justice Office of Information Policy Summary of the FOIA Improvement Act of
23 2016, available at <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016> ("OIP FOIA
24 2016 Summary"). The amendments include changes to the standard by which EPA must evaluate
25 withholdings. The FOIA Improvement Act of 2016 dictates that agencies shall withhold information
26 only if disclosure would harm an interest protected by an exemption – what is referred to as the
27 "foreseeable harm standard." 5 U.S.C. § 552(a)(8)(A)(i); OIP FOIA 2016 Summary.

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

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

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

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

23 20. An agency's process for dealing with FOIA requests constitutes "withholding" if its net effect
24 is to significantly impair the requester's ability to obtain the records or significantly increase the amount
25 of time he or she must wait to obtain them. *McGehee, III v. Central Intelligence Agency*, 697 F.2d 1095,
26 1110 (D.C. Cir. 1983), *vacated in part on other grounds*, 711 F.2d 1076 (1983).

FACTUAL BACKGROUND**EcoRights' FOIA Requests****EcoRights' February 2017 FOIA Request 1**

21. In January 2017 following the inauguration of President Trump, several national news outlets reported that the Trump Administration had instructed federal agencies to limit external communications with the media and the public, and reported that a memo had been issued to EPA employees with specific instructions restricting external communications, including a temporary ban on speaking with reporters, social media activity, speaking engagements, and a freeze on contract applications and grant awards. *See, e.g.*, Andrew Restuccia, Alex Guillen, and Nancy Cook, *Information lockdown hits Trump's federal agencies*, Politico (Jan. 24, 2017) <https://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122>; Michael Biesecker, *Trump admin orders EPA contract freeze and media blackout*, Associated Press (Jan. 25, 2017), <https://www.apnews.com/5ada25fc57b44a0989e681d6dc2a3daf>; Kate Sheppard, *EPA Freezes Grants, Tells Employees Not to Talk About It, Sources Say*, Huffington Post (Jan. 23, 2017, updated Jan. 25, 2017), https://www.huffingtonpost.com/entry/environmental-protection-grants-staff_us_5886825be4b0e3a7356b575f. The media also reported that the EPA was mandating that any studies or data from EPA scientists, and existing scientific data on the agency's website, be reviewed by political appointees before they can be released to the public, according to statements made by EPA's communications director, Doug Ericksen, who was quoted as saying, "We're taking a look at everything on a case-by-case basis, including the web page and whether climate stuff will be taken down." *See, e.g.*, Michael Biesecker, *EPA science under scrutiny by Trump political staff*, Associated Press (Jan. 26, 2017), <https://www.apnews.com/c1423276fb574b07953651a68a082db9>; The Guardian, *Trump administration: EPA studies, data must undergo political review before release* (Jan. 25, 2017), <https://www.theguardian.com/environment/2017/jan/25/donald-trump-epa-gag-order-political-review>.

22. EcoRights sent EPA FOIA Request 1 on February 1, 2017 (EPA-HQ-2017-003479) seeking documents addressing directives or requests issued since the inauguration of President Trump by any Trump administration official to employees of the EPA instructing them to not speak publicly about

1 work at EPA, including but not limited to instructions to not speak with media, and to not publish upon
2 social media ("Gag Order Directive(s)"); and documents concerning any directives or requests issued
3 since the inauguration of President Trump by any Trump administration official to EPA employees
4 concerning whether EPA information, reports, studies, and/or data must undergo review by a political
5 appointee prior to publication by EPA outside the agency ("Political Review Order").

6 23. The FOIA deadline for EPA's final response to EcoRights' FOIA Request 1 (sent on February
7 1, 2017) was March 2, 2017. EPA did not meet this deadline as it did not provide a final determination
8 on FOIA Request 1 until April 24, 2018, over one year after the mandatory FOIA deadline. EPA made
9 one interim release of documents responsive to the request on February 20, 2018, and made what EPA
10 styled as a final release on April 24, 2018. At that point, EPA had released 24 pages of documents in
11 response to EcoRights' FOIA Request 1. On July 26, 2018, EPA sent EcoRights the Fourth Declaration
12 of Elizabeth White which attached 22 additional pages of documents responsive to EcoRights' FOIA
13 Request 1.

14 24. The documents that EPA has released in response to FOIA Request 1 reference the pause on
15 external communications following the inauguration, confirming that limitations were indeed put in
16 place at EPA. However, EPA has not produced documents or memos that communicate to agency staff
17 or appointees that such a pause should or will be put in place, nor has EPA produced any documents
18 instructing staff on the scope of the new limitations, its length, or other details. In addition, EPA has not
19 produced any documents related to steps planned or taken by EPA in relation to the case-by-case
20 political review of scientific information that the communications director publicly stated that EPA was
21 conducting. On information and belief, EPA possesses additional documents responsive to EcoRights'
22 FOIA Request 1 that EPA has not provided to EcoRights, and EPA has not provided any explanation for
23 this withholding.

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

25 25. The first communication from EPA in response to EcoRights' February 1, 2017 Request was a
26 phone call dated March 11, 2017, a week past the FOIA statutory twenty working day response deadline
27

1 on March 2, 2017. Participants on the call included Becky Dolph, Director of FOIA Expert Assistance
2 Team Office at EPA and Christopher Sproul, counsel for EcoRights.

3 26. During this phone call, Ms. Dolph requested that EcoRights revise its FOIA Request to narrow
4 the language of the Request, and suggested narrowing language and custodians. EcoRights understood
5 her primary concern with the request as drafted was that it was broad and burdensome whereas a
6 narrower request would suffice for providing EcoRights the documents it was truly interested in.

7 27. EcoRights only agreed to the narrowing of the FOIA request because of Ms. Dolph's
8 representations that the custodians she identified would have the documents that EcoRights indicated it
9 wanted: the documents sufficient to explain whether EPA had in fact issued the Gag Order and Political
10 Review Order and what these Orders entailed (including any further directions on how to implement
11 these Orders).

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

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

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

20 ***August 8, 2017 EPA Letter***

21 31. EPA did not send any other communications to EcoRights concerning the February 1, 2017
22 FOIA Request until five months later in a letter dated August 8, 2017. In this letter, EPA indicated that
23 documents responsive to EcoRights' FOIA Request had been uploaded to the FOIAonline system. The
24 letter further instructed that EcoRights would soon receive an email with a direct link to the documents.
25 The letter also indicated that the Office of Public Affairs was still continuing to review potentially
26 responsive documents, thus indicating that a final determination had not been reached.
27

1 32. EcoRights never received the link to documents related to the request, as was referenced in the
2 August 8, 2017 letter.

3 33. EPA has published a record of EcoRights' February 1, 2017 FOIA Request, including a pdf
4 document containing EcoRights' FOIA Request and Fee Waiver Request, on the FOIA Online website.
5 *See* FOIA Online, Request Details, Tracking No. EPA-HQ-2017-
6 003479, <https://www.foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA->
7 [HQ-2017-003479&type=request](https://www.foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA-HQ-2017-003479&type=request). The entry estimates a completion date of July 25, 2017, over four and
8 a half months past the twenty working day deadline of March 2, 2017. EPA did not send a response to
9 EcoRights by this estimated completion date. As of the date of drafting of this complaint, the status of
10 the request is currently listed as "Processing," the final disposition is listed as "Undetermined."

11 ***EPA's February 2018 Interim Release***

12 34. EPA sent EcoRights an interim release in response to EcoRights' FOIA Request 1 on
13 February 20, 2018. EPA's interim release consists of seven pages of documents.

14 35. Email messages included in EPA's interim release confirm that restrictions were indeed
15 put in place at EPA to pause communications with the media following the inauguration of the Trump
16 Administration. For instance, an email message from the EPA Acting Administrator to EPA employees
17 sent on January 27, 2017 summarizing major decisions taken by the agency during the transition states
18 that the agency had put in place "a pause on external communications and engagements." However,
19 EPA did not produce documents or memos that communicate to agency staff or appointees that such a
20 pause should or will be put in place, nor did EPA produced any documents instructing staff on the scope
21 of the new limitations, its length, or other details. In addition, EPA did not produce any documents
22 related to the case-by-case political review of scientific information that the communications director
23 publicly stated that EPA was conducting.

24 36. Email messages included in EPA's interim release reference other documents that appear to be
25 responsive to EcoRights' FOIA Request 1, yet were not produced to EcoRights. For example, an email
26 from Nancy Grantham to Catherine McCabe and Doug Ericksen sent on January 24, 2017 identifies a
27

1 memo “sent by the comms person in oarm” as the memo being discussed in a news article published in
2 Politico titled “EPA memo calls for communications lockdown.”
3 Some of the email messages included in EPA’s interim release do not contain the full email chain, which
4 FOIA requires EPA to produce to EcoRights (as FOIA does not allow agencies to redact any portion of a
5 document without claiming a valid FOIA exemption. The full e-mail chain, including both the text of the
6 e-mail and any attachments to the e-mail message text constitutes a single electronic file, hence a single
7 document. If any portion of that electronic file contains responsive material, the entire electronic file
8 must be produced unredacted). For example, an email sent from Julia Valentine to Nancy Grantham on
9 January 24, 2017 appears in its subject line to be a forwarded message containing an article, but the
10 forwarded message and article are not included in the documents produced to EcoRights.

11 ***EPA April 2018 Final Determination and Final Release***

12 37. EPA sent its final determination and final release of documents in response to EcoRights’
13 FOIA Request 1 on April 24, 2018 via email from Ann Marie Reding to EcoRights’ counsel.
14 The response included a letter from Matthew C. Marks to EcoRights’ counsel stating that EPA was
15 providing a “final production of records responsive to your request, which includes a full release of 17
16 pages of emails and associated attachments.”

17 38. EPA’s final determination did not notify EcoRights of its right to seek assistance from the
18 FOIA Public Liaison of the agency as mandated by the FOIA Improvement Act of 2016. 5 U.S.C.
19 § 552(a)(6)(A)(i)(II).

20 39. Email messages included in EPA’s final release confirm that restrictions were indeed
21 put in place at EPA to pause communications with the media following the inauguration of the Trump
22 Administration. For instance, a document titled “Suggested Talking Points for All Hands
23 Meetings/Employee Discussions” dated January 30, 2017 has a subsection titled “Pause on external
24 communications” with bullet point talking points, including a direction that “[i]f you have questions
25 about information to share publicly, including reports and new web content, or external meetings or
26 events, please raise them to your regional Public Affairs Director or Headquarters Communications
27 Director.” However, EPA did not produce documents or memos that communicate to agency staff or

1 appointees that such a pause should or will be put in place, nor did EPA produce any documents
2 instructing staff on the scope of the new limitations, its length, or other details. In addition, EPA did not
3 produce any documents related to the case-by-case political review of scientific information that the
4 communications director publicly stated that EPA was conducting, except for an email chain dated
5 January 25, 2017 forwarding on an NPR article about the political review order.

6 ***May 16, 2018 Document Production***

7 40. On May 16, 2018, EPA produced an additional document responsive to FOIA Request 1 in its
8 summary judgment briefing. This document is an email message sent by Joanne Amorosi,
9 Communications Director, to directors in the Office of Administration and Resources Management
10 memorializing that all Communications Directors were briefed with restrictions to be placed on
11 employees' ability to engage with press and the public, and that these restrictions would continue until
12 further information is received from the Administration's Beach Team.

13 41. In its summary judgment briefing, EPA claimed that this document is not responsive to FOIA
14 Request 1 because neither Joanne Amorosi, the Communications Director, nor the other EPA employees
15 who are directors in the Office of Administration and Resources Management, are the custodians
16 identified in the request as clarified during a March 11, 2017 phone call.

17 42. Only after EPA produced the document referred to in the paragraphs above did it come to
18 EcoRights' attention that EPA's suggested clarifications to EcoRights' February 1, 2017 FOIA request
19 narrowed the scope of responsive documents so as to exclude pertinent documents of interest to
20 EcoRights.

21 43. In response, EcoRights submitted a letter to EPA on May 21, 2018 stating that this email
22 represents the most relevant document responsive to FOIA Request 1 that has been produced thus far.
23 EcoRights further wrote that it only agreed to narrowing FOIA Request 1 during the March 11, 2017 call
24 because of EPA's representations that the custodians identified would have the documents that
25 EcoRights indicated it wanted: the documents sufficient to explain whether EPA had in fact issued the
26 Gag Order and Political Review Order and what these Orders entailed (including any further directions
27 on how to implement these Orders), but that it has now become clear that EPA's suggested clarifications

1 to FOIA Request 1 narrowed the scope of responsive documents so as to exclude pertinent custodians
2 and documents of interest to EcoRights. EcoRights thus requested that EPA deem any narrowing of
3 EcoRights' original FOIA Request 1 to be withdrawn and the original request reinstated in full, or to
4 treat the correspondence as a new FOIA request for the documents itemized in FOIA Request 1.

5 ***May 29, 2018 Re-submitted FOIA Request 1***

6 44. EcoRights received a communication from EPA on May 29, 2018 acknowledging receipt of
7 the re-submitted FOIA Request 1. EPA assigned the request tracking number EPA-HQ-2018-008089.

8 45. The 20-working day statutory deadline for EPA to respond to issue a final determination for
9 this request was June 26, 2018.

10 46. As of the date of this amended complaint, EcoRights has not received a final determination or
11 any additional communications from EPA regarding this re-submitted request.

12 ***July 26, 2018 Elizabeth White Declaration***

13 47. Pursuant to the Court's Amended Minute Order on June 14, 2018 (Dkt. 33) ordering EPA to
14 provide EcoRights with an updated declaration by Elizabeth White regarding EPA's search for
15 documents responsive to FOIA Request 1, EPA sent EcoRights the Fourth Declaration of Elizabeth
16 White dated July 26, 2018.

17 48. The Fourth White Declaration includes 22 additional pages of responsive documents that had
18 not previously been produced to EcoRights. EPA represented that it found these additional responses as
19 the result of an additional centralized search of Nancy Grantham's email messages.

20 49. The Fourth White Declaration does not describe who searched Ms. Grantham's emails, which
21 search terms were used, who reviewed potentially responsive records, or how those people were
22 instructed to conduct the review.

23 50. The Fourth White Declaration also lacks detail with respect to Nancy Grantham's manual
24 search of her email conducted in the summer of 2017. The Declaration does not describe what
25 instructions were provided to Ms. Grantham to conduct this search.

1 51. The White Declaration reveals that EPA did not include Joanne Amorosi as a custodian of
2 documents potentially responsive to FOIA 1 in its searches for responsive documents, despite the fact
3 that her memo sparked the media attention around the Gag Order.

4 52. The White Declaration acknowledges that one of the custodians that it named in the
5 clarification the parties agreed to regarding the scope of FOIA 1, "Senior Press Advisor for Public
6 Affairs," is not a position within the agency. When EcoRights agreed to clarifying its request, it was
7 under the impression that EPA was simply limiting the custodians to the highest ranking officials
8 involved in the Gag Order and Political Review Order, and was not in the position to know who those
9 officials were, or whether the titles EPA suggested were accurate. According to the Fourth White
10 Declaration, EPA staff had initially thought that this position referred to then Acting Director of the
11 Office of Media Relations Julia Valentine, but recently realized it probably referred to then Senior
12 Advisor for Crisis Communications Nancy Grantham (though the Fourth White Declaration provides no
13 explanation as to whose understanding within EPA the White Declaration was referring to in this
14 respect). Because the most relevant memo produced was written by EPA Communications Director
15 Joanne Amorosi, EPA should have instructed its staff to include Ms. Amorosi as a custodian of
16 potentially responsive documents in addition to Nancy Grantham, and is the EPA official most
17 appropriately deemed to be the equivalent of the nonexistent "Senior Press Advisor for Public Affairs."
18 EPA should further have expressly requested Ms. Amorosi to search her computer and paper files for
19 responsive documents.

20 53. The White Declaration reveals that EPA did not include Douglas Ericksen as a custodian of
21 documents potentially responsive to FOIA 1 in its searches for responsive documents.

22 54. The White Declaration acknowledges that Douglas Ericksen was a member of the Trump
23 Administration Beachhead Team. As such, some of his communications would have been covered by
24 EcoRights' FOIA Request 1, even as narrowed by the parties' agreed upon clarification. Responsive
25 documents produced by EPA have named Douglas Ericksen as someone involved in and who has
26 knowledge of the subject matter of EcoRights' request. As such, EPA should have instructed its staff to
27

1 include Douglas Erickson as a custodian of potentially responsive documents and should have requested
2 Mr. Ericksen to search his computer and paper files for responsive documents.

3 55. Paragraph 5 of the Fourth White Declaration indicates that on March 19, 2018, unidentified
4 staff within EPA submitted a centralized search request for Outlook e-mail to EPA's eDiscovery
5 Division within the Office of Environmental Information. This centralized search produced 16,124
6 potentially responsive documents. The Fourth White Declaration indicates that EPA staff reviewed these
7 16,124 potentially responsive documents and culled them down to 17 pages of actually responsive
8 documents. However, the Fourth White Declaration fails to explain 1) who the EPA staff were who
9 conducted the original centralized search, 2), who the EPA staff were who reviewed the 16,124
10 potentially responsive documents to cull them down to 17 pages of actually responsive documents, 3)
11 what instructions were provided to these latter staff who did the culling, and 4) how these staff decided
12 what was and what was not a responsive document.

13 **EcoRights' January 2018 FOIA Request 2**

14 56. In December 2017, several media outlets reported that EPA was engaged in efforts to
15 investigate its own employees for holding political views different than the Trump Administration and
16 Administrator Pruitt, including through contracts and communications with Definers Corp., America
17 Rising, and affiliated employees, such as Allan Blutstein. *See* Eric Lipton & Lisa Friedman, E.P.A.
18 Contractor Has Spent Past Year Scouring the Agency for Anti-Trump Officials, N.Y. Times (Dec. 15,
19 2017), <https://www.nytimes.com/2017/12/15/us/politics/epa-scott-pruitt-foia.html>; Eric Lipton & Lisa
20 Friedman, E.P.A. Employees Spoke Out. Then Came Scrutiny of Their Email , N.Y. Times (Dec. 17,
21 2017), <https://www.nytimes.com/2017/12/17/us/politics/epa-pruitt-media-monitoring.html>; Rebecca
22 Leber, Andy Kroll & Russ Choma, The EPA Hired a Major Republican Firm to Track Press Activity,
23 Mother Jones (Dec. 15, 2017), <https://www.motherjones.com/politics/2017/12/the-epa-hired-a-major-republican-opposition-research-firm-to-track-press-activity/>.

24
25 57. On January 23, 2018, EcoRights submitted FOIA Request 2 requesting documents related to
26 EPA's efforts to investigate employees that are engaged in political expressions that are critical of the
27 Trump Administration, including documents related to a contract awarded and then rescinded to

1 Definers Corporation in December 2017 and documents related to EPA’s communications with
2 employees of Definers Corp. and affiliated organizations such as America Rising (EPA-HQ-2018-
3 003680). EPA sent a letter to EcoRights on February 13, 2018 informing EcoRights that EPA would
4 release unidentified “contract-related documents” by February 28, 2018, but that EPA was denying the
5 rest of the request. EcoRights appealed this decision by letter on March 5, 2018 (EPA-HQ-2018-
6 005140). EPA made its decision on the appeal by letter dated April 19, 2018. EPA’s decision affirmed
7 the agency’s view that EcoRights’ request is overly broad in part, and remanded the request to the
8 agency to produce documents related to portions of the request that it deemed are not overly broad, but
9 did not specify which portions of the request would be responded to or the scope of documents that
10 would be produced or withheld in response to EcoRights’ request. EPA’s deadline to make a final
11 determination on FOIA Request 2 was February 22, 2018.

12 ***February 2018 Partial Denial***

13 58. The first communication from EPA in response to EcoRights' FOIA 2 Request was an
14 email from Kush Khatri, Government Information Specialist, Office of Acquisition Management, EPA
15 to EcoRights’ counsel dated February 13, 2018. This email informed EcoRights that its
16 FOIA request was “too broad and does not identify any specific documents such as purchase order
17 number.” The email further informed that the request was being forwarded to the EPA Office of
18 Acquisition Management and that some documents related to the contract file would be released to
19 EcoRights by February 28, 2018. EPA further informed that:

20 Regarding correspondence: You have to clarify that and file another FOIA request
21 specific to those documents properly identifying them. Most of the time internal
22 correspondence is treated as internal deliberations and is not released under
23 Exemption 5 of the FOIA.

24 59. EcoRights interpreted this email to be a final determination partially denying EcoRights’
25 request. EcoRights filed an appeal of this decision by letter dated March 5, 2018, arguing that EPA: 1,
26 improperly issued a partial rejection of EcoRights’ request for documents, 2, made an inadequate search
27 for documents, 3, has improperly withheld documents without adequate justification that the documents
are exempt under FOIA, and 4, has failed to promptly produce documents.

EPA's April 2018 Decision on Appeal

1
2 60. EPA made its decision on EcoRights' appeal of EPA's February 13, 2018 determination on
3 FOIA 2 by letter from Kevin Miller to EcoRights' counsel dated April 19, 2018. EPA's letter asserts that
4 part of EcoRights' request is not reasonably described but that the agency did not provide an opportunity
5 to discuss and modify the request, and remands the entire request to the "applicable program" within
6 EPA for further processing. EPA's letter on appeal asserts that it constitutes a "final determination" on
7 the matter.

8 61. EPA's letter on appeal did not notify EcoRights of its right to seek assistance from the FOIA
9 Public Liaison of the agency as mandated by the FOIA Improvement Act of 2016. 5 U.S.C.
10 § 552(a)(6)(A)(i)(II).

11 62. Kristina Sandfoss, EPA, sent an email message to EcoRights' counsel on April 29, 2018 stating
12 that OAM is processing "contract records responsive to Item 1(a)" of FOIA Request 2, and requesting
13 clarification with respect to the rest of the requested documents.

14 63. EcoRights sent a letter in response to EPA's letter on appeal and related e-mail message
15 from Kristina Sandfoss on April 30, 2018, arguing that EPA's letter on appeal and related e-mail
16 message: 1, do not provide a clear decision as to which portions of EcoRights' request are reasonably
17 described; 2, do not identify the scope of documents that will be produced or withheld, and therefore
18 does not constitute a final determination within the meaning of FOIA; 3, the statutory deadline to
19 produce documents with respect to the portion of EcoRights' Request 2 that is reasonably described has
20 come and gone; 4, EPA's decision that portions of EcoRights' request are unclear or too broad is
21 arbitrary and capricious; and 5, EPA failed to conduct a reasonable search for responsive documents.

May 10, 2018 Interim Release

22
23 64. EPA provided two interim releases of documents that are partially responsive to FOIA Request
24 2 section 1(a) on May 10, 2018. EPA's releases consist of some of the contract related documents to
25 EcoRights in response to FOIA Request 2 paragraph 1(a), but EPA has not released all of the documents
26 requested under this paragraph.
27

1 65. EPA has not made clear which portions of FOIA Request 2 EPA is planning to respond to and
2 which portions EPA has deemed do not reasonably describe the documents sought.

3 **EcoRights' March 2018 FOIA Request 3**

4 66. On March 21, 2018, EcoRights submitted FOIA Request 3 requesting documents related to
5 EPA's use of drug testing to intimidate employees, and documents related to EPA's hiring freeze,
6 reductions in staffing, and plans to curtail environmental programs to accommodate the decrease in staff
7 (EPA-HQ-2018-005683). The FOIA deadline for EPA's final response to EcoRights' March 21, 2018
8 request was April 18, 2018. As of the date of this filing, EcoRights has not received any documents
9 responsive to the request.

10 67. The FOIA deadline for EPA to provide a final determination on FOIA Request 3 lapsed on
11 April 18, 2018.

12 68. EPA sent a letter to EcoRights on May 15, 2018, three weeks after the 20 working day
13 statutory deadline, alleging that EcoRights' request is "very broad and general" and that "EPA will need
14 you to clarify your request."

15 69. EcoRights responded to EPA by email on May 16, 2018 expressing disagreement with EPA's
16 determination that the request is too broad or that it requires narrowing. EcoRights sent EPA a follow-up
17 email on May 24, 2018 to reiterate its willingness to work with the Agency to answer the request, but
18 with judicial supervision given EPA's poor history in working both promptly and in good faith to
19 provide EcoRights with responsive documents.

20 ***EPA's June 12, 2018 Final Determination and Appeal***

21 70. EPA issued a final determination denying EcoRights' request on June 12, 2018 via a letter
22 from Janice Jablonski. The letter alleged that EPA could not respond to the Request because EcoRights'
23 Request was "not reasonably described." The letter did not indicate why EPA determined that the
24 Request was "not reasonably described."

25 71. EcoRights filed an administrative appeal of EPA's final determination on June 18, 2018.

26 72. EPA has not responded to EcoRights' administrative appeal of its final determination denying
27 FOIA Request 3. EPA's statutory deadline to respond was twenty working days from receipt of the

1 appeal, i.e., by July 19, 2018. 5 U.S.C. § 552(a)(6)(A)(ii). Accordingly, EPA's response to EcoRights'
2 administrative appeal is now overdue.

3 **EcoRights' April 2018 Request**

4 73. On April 10, 2018, EcoRights submitted FOIA Request 4 seeking documents
5 related to Administrator Pruitt's use of a condo connected with an industry lobbyist and communications
6 with that lobbyist, as well as documents reflecting the Administrator's role in hiring, demoting, and
7 securing pay raises for certain employees within the agency, the Administrator's use of public funds for
8 first class airfare and security measures, and documents related to the Administrator's travel
9 expenditures (EPA-HQ-2018-006474). The FOIA deadline for EPA's final response to EcoRights'
10 FOIA Request 4 was May 8, 2018.

11 74. EPA sent a letter to EcoRights on May 15, 2018, a week after the 20-working day statutory
12 deadline to issue a final determination, alleging that it would need at least an additional 180 days in
13 order to issue a response. EPA also indicated that it may potentially reach out for clarification with
14 respect to this request.

15 75. EPA sent an email to EcoRights on June 1, 2018, stating the following: "In fiscal year 2017,
16 the average processing time for complex FOIA requests processed by AO was 388 working days. Using
17 this number as instructive to estimate the time to process your request, the new estimated completion
18 date for this FOIA is October 4, 2019."

19 76. As of the date of this complaint, EcoRights has not received any final EPA determination or
20 documents from EPA responsive to the request.

21 **EPA's FOIA Backlog**

22 77. EPA's FOIA website, <https://www.epa.gov/foia>, contains data and reports documenting
23 EPA's pattern and practice of violating FOIA's deadlines with respect to the public at large. For
24 instance, EPA's FOIA Annual Report for fiscal year 2017 reports 1,891 backlogged requests, defined as
25 requests pending that are beyond the statutory time period for a response. Larry F. Gottesman, EPA
26 FOIA Annual Report for 10/01/2016 through 9/30/2017,
27 https://www.epa.gov/sites/production/files/2018-03/documents/2017_foia_annual_report.pdf. Similarly,

1 EPA's excel spreadsheet titled "All FOIA Requests Pending as of March 31, 2018" lists thousands of
 2 overdue FOIA requests. EPA, All FOIA Requests Pending as of March 31, 2018, *available at*
 3 <https://www.epa.gov/foia/all-foia-requests-pending-month>.

4 78. Since the inauguration of the Trump Administration, EPA has been under a hiring freeze
 5 and recent news reports have indicated that staffing is lower than it has ever been since the Reagan
 6 Administration was in office. Paul Bedard, *Success: EPA set to reduce staff 50% in Trump's first term*,
 7 Washington Examiner (Jan. 9, 2018), [https://www.washingtonexaminer.com/success-epa-set-to-reduce-](https://www.washingtonexaminer.com/success-epa-set-to-reduce-staff-50-in-trumps-first-term/article/2645362)
 8 [staff-50-in-trumps-first-term/article/2645362](https://www.washingtonexaminer.com/success-epa-set-to-reduce-staff-50-in-trumps-first-term/article/2645362). On information and belief, EPA has chosen to employ
 9 insufficient staffing to address the FOIA request backlog pending before the agency. Due to EPA's
 10 chosen insufficient staffing, the backlog of FOIA requests is likely to continue to grow rather than to
 11 diminish in the future and less EPA reverses course and assigns more staff to responding to FOIA
 12 requests.

FIRST CLAIM FOR RELIEF

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

Request for Declaratory Relief that EPA Has Failed to Comply with FOIA Deadlines

16 79. EcoRights reasserts and realleges all the preceding paragraphs above.

17 80. EPA has violated 5 U.S.C. §§ 552(a)(6)(A) and (B) by failing to provide a final
 18 determination concerning FOIA Request 1 within the statutory deadline. 5 U.S.C. § 552(a)(6)(A)(i) is
 19 plain: within 20 working days of the date that a FOIA request is received federal agencies must provide
 20 a determination that (1) informs the requester as to the disposition of its request, *i.e.*, whether documents
 21 will be provided or withheld and if the latter, why, and (2) that informs the requester of a right to appeal
 22 any decision not to provide requested documents. Federal agencies at most can extend this 20 working
 23 day deadline by an additional 10 working days by informing the requester in writing (1) that "unusual
 24 circumstances" necessitate such an extension and (2) when the agency will respond. 5 U.S.C. §
 25 552(a)(6)(B)(i). The statutory deadline for EPA's determination on EcoRights' FOIA Request 1 was
 26 March 2, 2017. (EPA could have extended this deadline until March 16, 2017 if EPA had asserted the
 27 10-day "unusual circumstances" extension, but EPA did not do so). EPA did not provide a final

1 determination on FOIA Request 1 until April 18, 2018, over a year past the statutory deadline. EPA has
2 thus violated FOIA's statutory deadlines for responding to the February 1, 2017 FOIA Request.
3 EcoRights constructively exhausted its administrative remedies given EPA's failure to provide a final
4 determination on FOIA Request 1 within FOIA's statutory time limits at the time that EcoRights filed
5 this suit. 5 U.S.C. § 552(a)(6)(C)(i). Additionally, EPA has violated FOIA by failing to issue its final
6 determination on the re-submitted FOIA Request 1 (revoking EPA's clarifying language) within FOIA's
7 statutory deadline.

8 81. EPA has violated FOIA by failing to "promptly" produce all documents responsive to
9 FOIA Request 1 not subject to a lawful FOIA exemption and illegally withholding documents that are
10 not exempt from disclosure. 5 U.S.C. § 552(a)(3)(A).

11 82. EcoRights has constructively exhausted its administrative remedies given EPA's failure to
12 provide a final determination for FOIA Request 1 within FOIA's statutory time limits at the time this
13 suit was filed. 5 U.S.C. § 552(a)(6)(C)(i).

14 **SECOND CLAIM FOR RELIEF**

15 **EPA Violation of** 16 **5 U.S.C. § 552(a)**

17 **Request for Declaratory Relief and Injunction to Compel EPA to Comply with FOIA** 18 **Requirement to Release Documents Unless a Valid Exemption Applies**

19 83. EcoRights reasserts and realleges all the preceding paragraphs above.

20 84. EPA has violated FOIA by failing to conduct a reasonable search and withholding documents
21 responsive to EcoRights' FOIA Request 1. On information and belief, there are documents responsive to
22 EcoRights' FOIA Request 1 that EPA did not produce, including documents that are explicitly
23 referenced or implied to exist by the emails EPA produced in its Interim and Final Releases, including
24 but not limited to additional memos, complete email chains, and documents constituting instructions to
25 political appointees or EPA staff regarding the scope and length of the pause on external
26 communications.

27 85. Furthermore, 5 U.S.C. section 552(a)(6)(A)(i) "requires that the agency provide enough

1 information, presented with sufficient detail, clarity, and verification, so that the requester can fairly
2 determine what has not been produced and why, and the court can decide whether the exemptions
3 claimed justify the nondisclosure.” When an agency invokes any of the FOIA exemptions, the agency
4 must also explain its reasons for withholding documents. EPA has not complied with these
5 requirements.

6 86. EPA improperly narrowed the scope of documents responsive to FOIA Request 1 during the
7 March 11, 2017 clarification phone call. EPA is improperly withholding documents that are responsive
8 to EcoRights’ Request, as further clarified by EcoRights letter to EPA on May 21, 2018.

9 **THIRD CLAIM FOR RELIEF**

10 **EPA Violation of**
11 **5 U.S.C. § 552(a)**

12 **Request for Declaratory Relief and Injunction to Compel EPA to Comply with FOIA**
13 **Requirement to Release Documents Unless a Valid Exemption Applies**

14 87. EcoRights reasserts and realleges all the preceding paragraphs above.

15 88. EPA has violated 5 U.S.C. §§ 552(a)(6)(A) and (B) by failing to provide a decision that
16 constitutes a final determination within the meaning of FOIA concerning FOIA Request 2 within the
17 statutory deadline. To issue a final determination on a FOIA request, an agency must at least: 1, gather
18 and review the documents; 2, determine and communicate the scope of documents it intends to release
19 and withhold, including articulating reasons for any withholdings; and 3, inform the requester that any
20 adverse determination can be appealed. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d
21 180, 188 (2013). EPA’s decision on appeal fails to identify which portions of EcoRights’ request will be
22 responded to, and fails to identify the scope of documents that will be produced or withheld. 5 U.S.C.
23 § 552(a)(6)(A)(i) is plain: within 20 working days of the date that a FOIA request is received, federal
24 agencies must provide a determination that (1) informs the requester as to the disposition of its request,
25 *i.e.*, whether documents will be provided or withheld and if the latter, why, and (2) that informs the
26 requester of a right to appeal any decision not to provide requested documents. Federal agencies at most
27 can extend this 20 working day deadline by an additional 10 working days by informing the requester in
writing (1) that "unusual circumstances" necessitate such an extension and (2) when the agency will

1 respond. 5 U.S.C. § 552(a)(6)(B)(i). The statutory deadline for EPA's determination on EcoRights' FOIA
2 Request 2 was February 22, 2018. EPA has not provided a final determination within the meaning of
3 FOIA, and has thus violated FOIA's statutory deadlines for responding to FOIA Request 2.

4 89. In the alternative, if EPA's decision on appeal is found to be a final determination on the
5 matter, it is an arbitrary and capricious decision because EcoRights' request was reasonably described.
6 As such, EPA's decision to partially deny EcoRights' request runs afoul of FOIA's requirements to
7 search for and provide documents to which EcoRights is entitled.

8 90. In the alternative, if EPA's decision that portions of EcoRights' request were unreasonably
9 described is found to be reasonable, EPA has still violated FOIA's deadlines by not promptly producing
10 documents to EcoRights requested by portions of FOIA Request 2 that EPA found to have reasonably
11 described the requested documents. EPA's failure to promptly produce documents constitutes an illegal
12 withholding of documents without a valid exemption in violation of FOIA.

13 91. EcoRights has constructively exhausted its administrative remedies by filing and receiving a
14 ruling on its administrative appeal to EPA of the EPA's initial partial denial of EcoRights' FOIA
15 Request 2.

16 **FOURTH CLAIM FOR RELIEF**

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

19 **Request for Declaratory Relief and Injunction to Compel EPA to Comply with FOIA** 20 **Requirement to Release Documents Unless a Valid Exemption Applies**

21 92. EcoRights reasserts and realleges all the preceding paragraphs above.

22 93. EPA has violated 5 U.S.C. §§ 552(a)(6)(A) and (B) by failing to provide a final
23 determination concerning FOIA Request 3 within the statutory deadline. 5 U.S.C. § 552(a)(6)(A)(i) is
24 plain: within 20 working days of the date that a FOIA request is received federal agencies must provide
25 a determination that (1) informs the requester as to the disposition of its request, *i.e.*, whether documents
26 will be provided or withheld and if the latter, why, and (2) that informs the requester of a right to appeal
27 any decision not to provide requested documents. Federal agencies at most can extend this 20 working
day deadline by an additional 10 working days by informing the requester in writing (1) that "unusual

1 circumstances" necessitate such an extension and (2) when the agency will respond. 5 U.S.C. §
 2 552(a)(6)(B)(i). The statutory deadline for EPA's determination on EcoRights' March 21, 2018 FOIA
 3 request was April 18, 2018. EPA did not provide a final determination until June 12, 2018 and has thus
 4 violated FOIA's statutory deadlines for responding to FOIA Request 3. In addition, EPA has violated the
 5 statutory deadline for responding to EcoRights' appeal of its final determination on FOIA Request 3.
 6 EcoRights submitted its appeal on June 18, 2018. EPA was required to respond to the appeal within 20
 7 working days of its receipt, as required by 5 U.S.C. § 552(a)(6)(A)(ii). As of the date of this complaint,
 8 EPA has violated FOIA's statutory deadline by failing to issue its decision on EcoRights' appeal.

9 94. EPA has violated FOIA by failing to "promptly" produce all documents responsive to
 10 FOIA Request 3 not subject to a lawful FOIA exemption and illegally withholding documents that are
 11 not exempt from disclosure. 5 U.S.C. § 552(a)(3)(A).

12 95. EcoRights has constructively exhausted its administrative remedies given EPA's failure to
 13 provide a final determination for the FOIA Request 3 within FOIA's statutory time limits. 5 U.S.C. §
 14 552(a)(6)(C)(i).

FIFTH CLAIM FOR RELIEF

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

Request for Declaratory Relief that EPA Has Failed to Comply with FOIA Deadlines

18 96. EcoRights reasserts and realleges all the preceding paragraphs above.

19 97. EPA has violated 5 U.S.C. §§ 552(a)(6)(A) and (B) by failing to provide a final
 20 determination concerning FOIA Request 4 within the statutory deadline. 5 U.S.C. § 552(a)(6)(A)(i) is
 21 plain: within 20 working days of the date that a FOIA request is received federal agencies must provide
 22 a determination that (1) informs the requester as to the disposition of its request, *i.e.*, whether documents
 23 will be provided or withheld and if the latter, why, and (2) that informs the requester of a right to appeal
 24 any decision not to provide requested documents. Federal agencies at most can extend this 20 working
 25 day deadline by an additional 10 working days by informing the requester in writing (1) that "unusual
 26 circumstances" necessitate such an extension and (2) when the agency will respond. 5 U.S.C. §
 27 552(a)(6)(B)(i). The statutory deadline for EPA's determination on EcoRights' FOIA Request 4 was May

1 8, 2018, or May 22, 2018 assuming EPA asserted the 10-day "unusual circumstances" extension. EPA
2 has not provided a final determination on FOIA Request 4, and has indicated that it will not provide its
3 final determination until October 4, 2019, nearly a year and a half past the statutory deadline. EPA has
4 thus violated FOIA's statutory deadlines for responding to FOIA Request 4. EcoRights constructively
5 exhausted its administrative remedies given EPA's failure to provide a final determination on FOIA
6 Request 4 within FOIA's statutory time limits at the time that EcoRights. 5 U.S.C. § 552(a)(6)(C)(i).

7 98. EPA has violated FOIA by failing to "promptly" produce all documents responsive to
8 FOIA Request 4 not subject to a lawful FOIA exemption and illegally withholding documents that are
9 not exempt from disclosure. 5 U.S.C. § 552(a)(3)(A).

10 99. EcoRights has constructively exhausted its administrative remedies given EPA's failure to
11 provide a final determination for FOIA Request 4 within FOIA's statutory time limits. 5 U.S.C. 5 U.S.C.
12 § 552(a)(6)(C)(i).

13 **SIXTH CLAIM FOR RELIEF**

14 **EPA Violation of**
15 **5 U.S.C. § 552**

16 **Request for Declaratory Relief and Injunction to Compel EPA to Cease Its Patterns and Practices
17 that Violate FOIA**

18 100. EcoRights reasserts and realleges all the preceding paragraphs above.

19 101. EPA has violated and is in ongoing violation of 5 U.S.C. § 552 by continuing a pattern
20 and practice of illegally delaying final determinations for EcoRights' FOIA requests; continuing a
21 pattern and practice of failing to promptly disclose responsive documents; continuing a pattern and
22 practice of failing to conduct a reasonable search for documents; and continuing a pattern and practice of
23 illegally withholding documents that are responsive to EcoRights' FOIA requests that are not exempt
24 from disclosure.

25 102. EPA's pattern and practice of responding to EcoRights' FOIA requests necessarily causes
26 many types of relevant documents to be released only after considerable delay and in some cases
27 completely precludes EcoRights from obtaining documents and the information they contain when the
information is still relevant.

1 103. EPA's pattern and practice of responding to EcoRights' FOIA requests makes it likely that
2 EPA will not meet the FOIA deadline to provide a final determination on EcoRights' currently pending
3 and future FOIA requests, will not promptly produce documents, and will not conduct a complete search
4 for documents responsive to EcoRights' requests.

5 104. Furthermore, EPA's reports and data published on its FOIA webpage demonstrate that
6 EPA has violated and is in ongoing violation of 5 U.S.C. § 552 by continuing a pattern and practice of
7 illegally delaying final determinations on FOIA requests submitted by the public at large.

8 **SEVENTH CLAIM FOR RELIEF**

9 **EPA Violation of**
10 **5 U.S.C. § 552**

11 **Request for Declaratory Relief and Injunction to Compel EPA to Comply with FOIA**
12 **Improvement Act of 2016**

13 105. EcoRights reasserts and realleges all the preceding paragraphs above.

14 106. EPA has violated 5 U.S.C. § 552(a)(6)(A)(i)(II) as amended by the FOIA
15 Improvement Act of 2016 by failing to notify EcoRights in its final determinations on FOIA Requests 1
16 and 2 of its right to seek assistance from the FOIA Public Liaison of the agency.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, EcoRights seeks the following relief:

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

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

25 c. A declaratory judgment pursuant to 5 U.S.C. § 552 that EPA violated FOIA by failing to
26 conduct a reasonable search, produce documents, or provide a final determination on EcoRights' FOIA
27 Request 2 in accordance with FOIA's statutory deadlines, or, in the alternative, a determination under 5
U.S.C. § 552(a)(4)(B) that EPA's decision on appeal was an arbitrary and capricious final determination

1 because EcoRights' request was reasonably described, or, in the alternative, a determination that EPA
2 violated FOIA by failing to promptly produce documents responsive to the portions of EcoRights'
3 request that were reasonably described;

4 d. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) ordering EPA to immediately provide its
5 determination for EcoRights' FOIA Request 2 and produce all documents in its possession responsive to
6 said request that are not exempt from disclosure;

7 e. A declaratory judgment pursuant to 5 U.S.C. § 552 that EPA violated FOIA by failing to
8 produce documents or provide a final determination for EcoRights' FOIA Request 3 in accordance with
9 FOIA's statutory deadlines, and that EPA violated FOIA by failing to respond to EcoRights' appeal of
10 its final determination on FOIA Request 3 within the statutory deadline;

11 f. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) ordering EPA to
12 produce all documents in its possession responsive to FOIA Request 3 that are not exempt from
13 disclosure;

14 g. A declaratory judgment pursuant to 5 U.S.C. § 552 that EPA violated FOIA by failing to
15 conduct a reasonable search, produce documents, or provide a final determination for EcoRights' FOIA
16 Request 4 in accordance with FOIA's statutory deadlines;

17 h. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) ordering EPA to immediately provide its
18 determination for EcoRights' FOIA Request 4 within FOIA's deadline and promptly produce all
19 documents in its possession responsive to said request that are not exempt from disclosure;

20 i. A declaratory judgment pursuant to 5 U.S.C. § 552 that EPA has a pattern and practice of
21 violating FOIA's deadlines, failing to promptly produce documents, and therefore unlawfully
22 withholding pertinent information from EcoRights and the public at large;

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

24 k. Declaratory judgment that EPA has violated 5 U.S.C. § 552(a)(6)(A)(i)(II) as amended by the
25 FOIA Improvement Act of 2016 by failing to notify EcoRights in its final determinations on FOIA
26 Requests 1 and 2 of its right to seek assistance from the FOIA Public Liaison of the agency; and

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

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Dated: August 3, 2018

Respectfully submitted,

By: /s/ Christopher Sproul
Christopher Sproul
Counsel for Ecological Rights Foundation