IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, CENTER FOR BIOLOGICAL DIVERSITY, ENVIRONMENTAL INTEGRITY PROJECT, ECOLOGICAL RIGHTS FOUNDATION and OUR CHILDREN'S EARTH FOUNDATION Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Defendant.	)	Case Nos. 19-cv-2181-KBJ, 19-cv-2198-KBJ, and 19-cv-3270-KBJ (Consolidated Cases)

MEMORANDUM IN SUPPORT OF PLAINTIFFS ECOLOGICAL RIGHTS FOUNDATION AND OUR CHILDREN'S EARTH FOUNDATION'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND PARTIAL OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Congress enacted the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). Recent history at the Environmental Protection Agency ("EPA") has underscored the importance of this Congressional goal. Documents obtained by nongovernmental organizations and press outlets through FOIA have exposed ethically questionable conduct by EPA, including by former EPA Administrator Scott Pruitt, and these scandals have led to investigations by EPA's Inspector General, extensive news coverage, and ultimately to former Administrator Pruitt's resignation.[1] Instead of changing its behavior, EPA has reacted to these scandals by attempting to curtail the public's use of FOIA. A recent example of EPA's attempts to avoid public scrutiny came on June 26, 2019 when EPA promulgated its new, illegal FOIA regulations ("2019 Regulations"), which will further impede the public's ability to secure timely and complete productions of records under FOIA. *See* 84 Fed. Reg. 30,028 (June 26, 2019).

The 2019 Regulations violate the law in numerous ways. Perhaps the most troubling provision in the 2019 Regulations is EPA's attempt to vest the EPA Administrator with authority to make initial FOIA determinations that are not subject to appeal. This removes responsibility for initial FOIA determinations from presumably objective EPA FOIA career staff and allows the Administrator sole purview to decide what is produced, eliminating the check on political influence over FOIA determinations

[1] For some examples of these news stories see Christopher Sproul's declaration and the attachments thereto in another lawsuit challenging EPA's failure to lawfully process several FOIA requests. *Ecological Rights Foundation v. EPA*, 4:18-cv-00394-DMR (N.D. Cal.), Dkt. 26-2 ¶¶ 5-9, 13-15, 20-21 (filed May 9, 2018).

that Congress intended and an important appeal right. This change is contrary to the FOIA and EPA's prior policy. The 2019 Regulations also purport to authorize EPA to withhold non-responsive portions of responsive records, but this is without basis in FOIA and is squarely in violation of binding case law from the U.S. Court of Appeals for the D.C. Circuit. Additionally, EPA centralized FOIA processing at its Headquarters, which will cause further delays and political interference with FOIA requests. The 2019 Regulations represent an abuse of power that EPA compounded when it failed to engage in notice and comment rulemaking. By issuing the 2019 Regulations in a direct to final rule, EPA shut the public out and adopted the 2019 Regulations by fiat. This is not what Congress intended under either the Administrative Procedure Act ("APA") or FOIA.

Ecological Rights Foundation and Our Children's Earth Foundation (collectively "EcoRights") urge the Court to deny EPA's Motion to Dismiss ("MTD"), grant EcoRights' Cross-Motion for Partial Summary Judgment, and quickly vacate EPA's illegal 2019 Regulations. EcoRights has numerous FOIA requests currently before EPA and more that it is imminently planning to submit, all of which will be processed under the 2019 Regulations. In addition, EPA's many recent controversial and illegal actions have increased public interest in the Agencies' actions. Prompt resolution of this lawsuit is necessary to protect EcoRights', and the public, interests.

FACTUAL BACKGROUND

EPA's 2019 Regulations.

On April 12, 2000, EPA provided in the Federal Register notice and an opportunity for the public to comment on its FOIA regulations, promulgating final regulations on November 5, 2002 ("2002 Regulations"). 65 Fed. Reg. 65,073; 67 Fed.

Reg. 67,303. However, when EPA promulgated its new FOIA regulations on June 26, 2019, it did so via a direct to final rule without the benefit of public input. 84 Fed. Reg. 30,028. EPA claims that it was able to avoid public notice and comment rulemaking requirements based on the APA's "procedural" and "good cause" exceptions. *Id.* at 30,029. EPA has refused to reconsider this point despite significant congressional and public opposition. Declaration of Annie Beaman ("Beaman Decl."), Dkt. 11-2 Ex. 5 at 2.

The 2019 Regulations significantly change how EPA accepts and processes FOIA requests. First, EPA centralized certain FOIA submission and processing activities at EPA Headquarters in Washington, D.C., removing the option to submit FOIA requests directly to EPA regional offices. 84 Fed. Reg. at 30,030, 30,031, 30,032-33. Second, EPA purported to provide the Administrator of EPA with authority to make initial FOIA determinations that are not subject to FOIA's appeal requirements. *Id.* at 30,035. Third, the 2019 Regulations say EPA is allowed to redact non-responsive portions of admittedly responsive records, not based on a FOIA exemption, but instead solely on a determination that those portions are not "responsive." *Id.* at 30,033. Fourth, the 2019 Regulations change regulatory language related to EPA aggregation of requests, 84 Fed. Reg. at 30,037; the fees EPA charges for processing requests, *id.* at 30,029, 30,030-31, 30,033, 30,035-38; expedited processing of requests, *id.* at 30,033, 30,034; and multi-track processing, whereby EPA categorizes and processes requests by perceived complexity, *id.* at 30,034. One example of these changes is that, EPA reduced its incentive to timely respond to FOIA requests by promulgating regulations allowing it to pursue fees even where it violates FOIA's determination deadline, *id.* at 30,036.

EPA's general failure to comply with FOIA.

As EPA data demonstrates, EPA regularly fails to meet the statutory 20-day FOIA determination deadline. For example, dozens of EPA FOIA requests have been pending over 4 years, with the oldest submitted August 12, 2011 (3,143 days ago). Declaration of Edward Scher ("Scher Decl."), Dkt. 11-1 ¶ 7. EPA's 2018 annual FOIA report lists 2,761 requests pending beyond the statutory deadline. *Id.* Ex. 1 at 15. This is over double the 1,284 backlogged requests at the end of 2016. *Id.* Ex. 2 at 16. The vast majority of these overdue requests (2,360 of 2,761) are at EPA Headquarters, not the regional offices. *Id.* Ex. 1 at 15. 76 of the 97 "simple" requests at EPA pending for over 401 days and 166 of the 193 "complex" requests at EPA pending over 401 days are at Headquarters. *Id.* at 9. EPA Headquarters' FOIA responses are far slower than the regional offices. *Id.* at 9, 15.

Upon inauguration, the Trump Administration quickly instituted a federal hiring freeze. Beaman Decl. Ex. 1 at 1. The Administration subsequently mostly lifted this freeze, but has kept the freeze in place for EPA. *Id.* Ex. 2 at 1-2. During his campaign and since, President Trump has indicated that he wants to abolish EPA, or "leave a little bit" of it left. *See* https://www.theguardian.com/us-news/2017/feb/02/donald-trump-plans-to-abolish-environmental-protection-agency. As one example of this plan in action, Administrator Wheeler submitted a budget request for 2020 that would be more than a 31% reduction as compared to EPA's 2019 budget. *Compare* Beaman Decl. Ex 3 at 1 ($6.068 billion proposed in 2020) *with* Beaman Decl. Ex. 4 at 2 ($8.849 billion enacted in 2019). These self-created staffing shortfalls have exacerbated EPA's FOIA violations.

In addition to these more passive impediments to FOIA compliance, EPA has also actively obstructed FOIA. For example, EPA instituted a "first in, first out" policy,

refusing to release any Trump Administration records until all Obama Administration records are released. Scher Decl. Ex. 4 at 1. EPA also instituted a new process requiring senior political appointees to review FOIA responses before they are released, a so-called "awareness review." *Id.* The House Committee on Oversight and Reform sent a letter to EPA stating EPA "is now responding more slowly, withholding more information, and rejecting more requests, according to EPA's own data and independent sources. Combined with [EPA's] refusal to produce documents requested by Congress, [EPA's] actions in delaying records under FOIA raise concerns about a fundamental lack of transparency at EPA." *Id.* A more recent letter to Administrator Wheeler from the House Committee on Oversight and Reform indicates these problems are continuing and that even Congress is unable to get EPA to produce records on time. *Id.* Ex. 5.

Lawsuits challenging EPA's ongoing failures to comply with FOIA.

Ecological Rights Foundation and Our Children's Earth Foundation (collectively "EcoRights") have a long history of submitting FOIA requests to EPA. This includes numerous FOIA requests that Ecological Rights Foundation submitted over the last few years requesting records related to various scandals and attempts at limiting transparency at EPA. When EPA failed to comply with FOIA's statutory requirements with regard to these requests, Ecological Rights Foundation was forced to file suit. *See* Complaint ¶¶ 42-46 (citing *Ecological Rights Found. v. EPA*, 4:18-cv-394 (N.D. Cal; *Ecological Rights Found. v. EPA*, 1:19-cv-980 (D.D.C). As of the filing of this Motion, EPA has not made legally compliant final determinations on any of the FOIA requests at issue in these lawsuits. Additionally, Ecological Rights Foundation's lawsuits are two of at least 64

lawsuits pending as of September 15, 2019 with at least one cause of action claiming EPA failed to comply with FOIA's deadlines. *See* Dkt. 34 at 6-7 n.4 (collecting cases).

LEGAL BACKGROUND

Judicial substantive review of EPA's rulemaking is governed by APA section 706, which mandates "[t]he reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Judicial review of the procedures EPA used during rulemaking is also governed by APA section 706, requiring that "[t]he reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be … without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

A motion for summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[A] party may file a motion for summary judgment at any time until 30 days after the close of all discovery." Fed. R. Civ. P. 56(b). In APA cases, a party may move for summary judgment prior to the agency designating an administrative record where, as here, the disputed issues are pure questions of law and can be resolved based on judicially-noticeable documents cited by both parties. *See State v. BLM*, 277 F. Supp. 3d 1106, 1116 (N.D. Cal. 2017); *see also Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 266 (D.C. Cir. 2001) (administrative record is not necessary to evaluate claims challenging facial validity of agency rule). That EPA has moved to dismiss four claims on the merits under Rule 12(b)(6), and thus effectively moved for summary judgment on those claims, further supports the timeliness of this Motion. *See Marshall*

Cty. Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993). EcoRights has not moved for judgment as a matter of law on Claim 1from its Complaint because it is awaiting the administrative record to sufficiently address the merits of that claim. *See Farrell v. Tillerson*, 315 F. Supp. 3d 47, 69 (D.D.C. 2018).

ARGUMENT

I. EcoRights has standing for all of its claims in this lawsuit.

To establish standing, a plaintiff need only show that they (1) have suffered or are imminently threatened with a concrete and particularized injury in fact, (2) that the injury is fairly traceable to the challenged action of the defendant, and (3) that the injury is likely to be redressed by a favorable judicial decision. *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014). Where a procedural injury is at issue, such as the failure to follow notice and comment rulemaking procedures, the plaintiff must show the agency action threatens a concrete interest that is not merely common to all members of the public. *Id.* Where plaintiff satisfies this threshold burden, "the normal standards for immediacy and redressability are relaxed." *Id* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). After all, "[i]f a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter." *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002). "For purposes of the standing inquiry," the Court must "assume [EcoRights] would succeed on the merits of [its] claim[s]." *Barker v. Conroy*, 921 F.3d 1118, 1124 (D.C. Cir. 2019). EcoRights has standing based both on its procedural and other injuries.

Here, EcoRights' declarations establish its standing. As these declarations indicate, EcoRights has long submitted FOIA requests to EPA and has concrete plans to continue doing so. Scher Decl. ¶¶ 5-6, 12; Beaman Decl. ¶¶ 5-6; *see also* MTD at 23 (noting that EcoRights are "active FOIA requesters"). EcoRights uses the information it gains through these requests to ensure that EPA is functioning properly and is properly implementing the environmental laws it administers. Scher Decl. ¶¶ 5-6, 13-17, 21, 29; Beaman Decl. ¶¶ 5-7, 11, 13, 15. The records that EcoRights obtains through FOIA are essential to carrying out EcoRights' environmental protection mission, and EPA's obstruction of FOIA thus interferes with EcoRights' ability to serve as an effective EPA watchdog. Scher Decl. ¶¶ 5-6, 13-17, 21, 29; Beaman Decl. ¶¶ 5-7, 11, 13, 15. Courts have repeatedly held that frequent FOIA requesters have a cognizable Article III interest in an agency's FOIA rules and policies where they have pending FOIA requests likely to implicate the challenged policy, and intend to submit similar requests in the future. *See Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 262 (D.D.C. 2012) ("[W]here a FOIA requester challenges an alleged ongoing policy or practice and can demonstrate that it has pending claims that are likely to implicate that policy or practice, future injury is satisfied."); *accord Muckrock, LLC v. CIA*, 300 F. Supp. 3d 108, 134 (D.D.C. 2018); *Gatore v. DHS*, 327 F. Supp. 3d 76, 90-94 (D.D.C. 2018); *Khine v. DHS*, 334 F. Supp. 3d 324, 332 (D.D.C. 2018); *CREW v. Cheney*, 593 F. Supp. 2d 194, 227 (D.D.C. 2009); *CREW v. EOP*, 587 F. Supp. 2d 48, 60-61 (D.D.C. 2008).

EcoRights has been harmed by EPA's repeated failures to timely, and completely, comply with FOIA, which EcoRights reasonably believes will be exacerbated by the 2019 Regulations. Scher Decl. ¶¶ 6, 11, 18-19, 21, 23-29; Beaman Decl. ¶¶ 11, 13, 15.

EcoRights has in the past, and is currently, litigating with EPA based on its failures to comply with FOIA. Scher Decl. ¶ 19; Beaman Decl. ¶ 11; *see also* Dkt. 34 at 6-7 n.4 (listing many additional FOIA deadline lawsuits against EPA). Because EcoRights will continue to submit FOIA requests to EPA that could be considered "politically charged," it reasonably anticipates that its requests will be subjected to political interference, both in terms of content and timing of release. Scher Decl. ¶¶ 5-6, 9, 11-17, 21, 24, 26; Beaman Decl. ¶¶ 7, 15. This interference with EcoRights' FOIA requests is particularly likely when the Administrator, someone with personal, reputational, and political interest in the records, makes the determinations. Scher Decl. ¶¶ 11, 24; Beamna Decl. ¶ 14. Furthermore, EcoRights is reasonably concerned that EPA will improperly determine that information in records EcoRights has requested is "non-responsive," improperly depriving EcoRights of this potentially useful information or at the very least delaying its production. Scher Decl. ¶ 28; Beaman Decl. ¶¶ 14-15. EPA's policy of centralizing certain FOIA processing activities at its Headquarters will deprive EcoRights of the connections it has made with regional staff over many years, which EcoRights reasonably believes have oftentimes proven to be better, more timely FOIA resources than Headquarters staff. Scher Decl. ¶¶ 7, 24, 26. This will also route all requests through the office with the highest density of political appointees, increasing opportunity for political interference with EcoRights' FOIA requests. Scher Decl. ¶ 26; Beaman Decl. ¶ 10.

Finally, EPA's decision to forego notice and comment rulemaking harms EcoRights because it prevents EcoRights from expressing its opinions and advocating for changes to the Regulations before EPA finalized them. Scher Decl. ¶¶ 22-29; Beaman Decl. ¶¶ 14-15. The APA's notice and comment procedures are designed to protect

against uninformed and unrepresentative agency decisionmaking. *See, e.g., Batterton v. Marshall*, 648 F.2d 694, 703-04 (D.C. Cir. 1980). Because the changes in the 2019 Regulations injure EcoRights in the ways discussed above, and others, this failure to provide a notice and comment opportunity caused EcoRights several informational and other injuries. These various harms suffice as the requisite injury in fact for standing purposes.

EcoRights also easily satisfies the causation and redressability prongs of standing, both under the relaxed procedural standards and otherwise. Interference with EcoRights' ability to effectively use FOIA and harm from EPA's failure to provide EcoRights with a statutorily required comment opportunity, relate to EcoRights' procedural notice and comment right that could have protected its concrete interests. *See, e.g., Veneman*, 289 F.3d at 95; *W. Watersheds Proj. v. Grimm*, 921 F.3d 1141, 1147 (9th Cir. 2019); *see also generally* Scher Decl.; Beaman Decl. Indeed, had EPA provided the required notice and comment opportunity, it may have changed its regulations based on EcoRights' input and promulgated regulations that are less likely to result in political interference, delays, improper withholding of documents requested by EcoRights, and other injuries. *See also generally* Scher Decl.; Beaman Decl. These injuries are thus caused and/or exacerbated by the 2019 Regulations and would be redressed if the Court vacated those Regulations.

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000) (citation omitted). As

discussed above, and further below, EcoRights' members would have standing to sue in their own right. The interests at stake are germane to EcoRights' organizational purposes and neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit. *See, e.g.,* Scher Decl. ¶¶ 4-6; Beaman Decl. ¶¶ 4-7. As a result, EcoRights also satisfies the requirements for organizational standing. Though notably EPA does not challenge EcoRights' standing for any claims on these grounds.

II. The Court should withhold ruling on EcoRights' challenge to EPA's decision to centralize FOIA processing at its Headquarters.

EPA's decision to centralize its FOIA processing activities at its Washington, D.C. Headquarters is unreasonable, arbitrary, and capricious in light of its overwhelming failure to timely process FOIA requests and the fact that this centralization effort will inevitably slow that process down further. *See, e.g., Landmark Legal Found. v. EPA*, 82 F. Supp. 3d 211, 227 (D.D.C. 2015) ("Despite prior admonitions from this Court and others … EPA continues to demonstrate a lack of respect for the FOIA process."); Dkt. 34 at 6-7 n.4 (collecting cases). FOIA is crystal clear: within 20 working days of the date that an agency receives a FOIA request, the agency must provide the requester with a determination on their request, including notification that the determination is appelable to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i). EPA must then promptly produce all requested records that are not exempt from disclosure under FOIA's nine statutory exemptions. 5 U.S.C. § 552(a)(3)(A). However, the available data shows that EPA regularly fails to meet FOIA's deadlines and that centralizing FOIA processing at EPA Headquarters will lead to further delay. In fact, EPA's staff has spoken out against the changes in the 2019 Regulations. EPA's staff strongly prefers improving centralization of FOIA processes *within regions themselves* (42%) over attempting to centralize FOIA

processing at EPA Headquarters (23%). *See* Scher Decl. Ex. 6 at ES-4. It is EPA staff's position that EPA lacks the resources or staff necessary to support any successful centralization effort. *Id.* at ES-5. In addition to delay, this centralization will also increase political interference.

Extraordinarily, EPA has repeatedly argued that the merits of this claim cannot be determined absent an administrative record and then immediately argues the merits of this claim. EPA cannot have it both ways. EPA's decision is not based on reasoned decisionmaking and is hallmark arbitrary and capricious activity. EcoRights reasonably believes that the administrative record will prove this point and properly alleges a claim for relief here and in its Complaint. As a result, the court should deny EPA's motion to dismiss for failure to state a claim and allow the issue to be resolved on summary judgment after development of the record, which EPA has repeatedly contended is the proper route to resolution. Quite simply, EcoRights has adequately alleged that this centralization decision violates the law and awaits the preparation of the administrative record to provide the proof to obtain judgment as a matter of law in its favor on this issue.

A. EcoRights has standing to bring this claim.

EPA's decision to centralize FOIA processing injures EcoRights because it will cause additional delay in resolving EcoRights' FOIA requests and will facilitate political interference. *See Mendoza*, 754 F.3d at 1010. EPA's flawed arguments alleging that the 2019 Regulations do not imminently injure EcoRights must fail.

FOIA "is plainly written so as to disfavor any effort by agency officials to shirk their responsibilities to respond promptly and fully to requests for records." *McGehee*, 697 F.2d at 1101 n.18 (citation omitted). Congress has shown "an increasing concern

over the timeliness of disclosure, recognizing that delay in complying with FOIA requests may be tantamount to denial." *Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004) (citations omitted). An agencies' implementation of FOIA is improper where it impairs a requester's ability to obtain timely and complete releases of agency records. *See McGehee*, 697 F.2d at 1100-01, 1110 (agencies' processes for resolving FOIA requests must be reasonable and system adopted for processing documents "constitutes 'withholding' of those documents if its net effect is significantly to impair the requester's ability to obtain the records or significantly to increase the amount of time he must wait to obtain them."); *Payne,* 837 F.2d at 494 (unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent [such] abuses."); *Or. Natural Desert Ass'n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (failure to make timely determination is an "improper withholding"); *Gilmore v. Dep't of Justice*, 33 F. Supp. 2d 1184, 1187-88 (N.D. Cal. 1998) (same). The reasonableness of an agency's procedures for addressing FOIA requests must be judged based on how the procedures comport with the agency's delays in processing requests, if any. *McGehee*, 697 F.2d at 1104.

As discussed above, at the end of 2018, EPA had 2,761 overdue FOIA requests pending. Scher Decl. Ex. 1 at 15. This is more than twice as many overdue requests as two years before, indicating an escalating problem. Scher Decl. Ex. 2 at 16. Nearly all of EPA's overdue requests (2,360 of 2,761) are at EPA Headquarters, not the regional offices. Scher Decl. Ex. 1 at 15. This, along with the fact that EPA Headquarters is the site of nearly all of the most egregious FOIA deadline violations (those pending over 401 days), indicates that EPA Headquarters is by far the slowest EPA office in terms of

responding to FOIA requests. Scher Decl. Ex. 1 at 9 (76 of 97 "simple" requests and 166 of 193 "complex" requests pending over 401 days are at Headquarters). These delays are bound to grow as the Trump Administration continues to shrink the EPA. *See* Beaman Decl. Ex. 1 at 1 (discussing hiring freeze); Beaman Decl. Ex. 2 at 1-2 (continuing hiring freeze at EPA despite lifting elsewhere); Beaman Decl. Ex 3 at 1 (EPA proposing drastically reduced 2020 EPA budget as compared to 2019). However, even before the Trump Administration took office, it was clear that EPA staff did not agree that EPA should centralize FOIA processing at Headquarters, citing a lack of resources necessary to do so. Scher Decl. Ex. 6 at ES-4-5. These delays have resulted in a multiplicity of lawsuits using valuable individual, non-governmental organization, and court resources. *See, e.g.,* Dkt. 34 at 6-7 n.4 (collecting cases). However, despite these pervasive failures to follow the law, EPA inexplicably claims that increasing the FOIA workload at Headquarters will not increase delay.

First, EPA argues that EcoRights misunderstands the 2019 Regulations and that EPA Headquarters will not be the site of "processing" FOIA requests, but will only be the site of "intake." MTD at 9-10. However, this semantic difference is irrelevant to EcoRights' claim that EPA Headquarters, the site of massive delay even before increasing its workload, will now be carrying out further FOIA work. EPA cannot reasonably dispute this fact. EPA's chosen name for this work is irrelevant.

Second, EPA claims that the 2019 Regulations are intended to increase efficiency, but this is only spin if not paired with facts that make this likely to actually happen. MTD at 9. In support of its proposition, EPA points to just two pieces of information: that the National FOIA Office ("NFO") hired five new staff members and that "the NFO planned

for and undertook a number of efforts to improve EPA's implementation of the FOIA, including planning for implementation of centralized intake." MTD at 10 (citing Declaration of Timothy Epp ¶¶ 4, 5). As to the new staff, the Epp Declaration says only that the five new staffers will "perform, among other things, FOIA request intake-related work." Epp Decl. ¶ 5. However, that these new people will spend an undefined amount of their time on intake is no consolation when EPA Headquarters is abjectly failing to comply with FOIA and has been for a very long time. This minor staffing increase in the face of a large increase in work proves nothing. Additionally, the vague statements about NFO's efforts to prepare for centralization certainly are not sufficient to show the serious changes that would need to occur for EPA to even meaningfully address its prior workload, much less this new influx of work. *Id.* ¶ 4. That this increase in workload will exacerbate EPA's tardiness despite its paltry preparation measures is not a "speculative chain of possibilities," it is a virtual certainty. *See* MTD at 10 (citation omitted).

Third, EPA's claim that EcoRights is "specious and insincere" about its desire to submit requests to FOIA regional offices because it has submitted several requests via FOIAOnline is incorrect. The requests at issue were all related to records that would be held by EPA Headquarters. *See* Scher Decl. ¶¶ 13-17; Declaration of Joan G. Kaminer ("Kaminer Decl.") Ex. A. As a result, requesting those records from a regional office would make little sense. EcoRights has submitted requests to regional offices in the past and is harmed by its inability to do so now and in the future where the content of the FOIA request makes that appropriate. *See* Scher Decl. ¶ 26. That EcoRights is not submitting requests to regional offices now that EPA has clearly stated it will not process

those requests is irrelevant. EcoRights need not waste its time and resources in this way to have standing.

EPA also ignores that EPA Headquarters, in addition to being incredibly slow to issue FOIA determinations, is also the location of the majority of EPA's political appointees. As discussed below, FOIA determinations are supposed to be politically neutral, objective determinations. However, EPA has shown an intention to insert political interference into this process. *See* Sections III, VI.C, *infra*. Centralizing FOIA processing at EPA Headquarters increases the likelihood that FOIA determinations will be subject to improper political pressure, leaving indefensible decisions that will force additional litigation.

FOIA's "basic objective" is "the fuller and faster release of information." *Oglesby v. Dep't of Army*, 920 F.2d 57, 64 n.8 (D.C. Cir. 1990). EPA's centralization of FOIA processing interferes with EcoRights' right to promptly obtain responsive records from EPA under FOIA. *See* 5 U.S.C. § 552(a)(3)(A); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) ("future injury" satisfies Article III when plaintiff shows "a substantial risk that the harm will occur"). Indeed EPA's past poor performance increases the likelihood that this harm will come to fruition. *See DOC v. New York*, 139 S. Ct. at 2566 (considering "historical[]" experience in evaluating future injury). This harms EcoRights. *See Muckrock*, 300 F. Supp. 3d at 134-35 ("unreasonable delay" resulting from challenged FOIA policy qualifies as Article III injury); *EPIC v. DOJ*, 416 F. Supp. 2d 30, 40 (D.D.C. 2006) ("loss of . . . value" of timely obtaining records "constitutes a cognizable harm").

Finally, EPA claims that EcoRights cannot rely on *McGehee* to support standing for its pleading of this claim under FOIA because *McGehee* examined when referrals result in improper withholdings and because a request for records was one aspect of the case. MTD at 11-12. Notably, EPA does not explain why those differences matter, and they do not. FOIA's citizen suit provision allows a plaintiff to bring suit to enjoin agencies from improperly withholding agency records. 5 U.S.C. § 552(a)(4)(B). *McGehee* held that the legality of "*processing or* referral procedures that are likely to result *eventually*, but not immediately, in the release of documents" are "best determined on the basis of their consequences" and explained that such systems constitute a "withholding" of records if their "net effect is significantly to impair the requester's ability to obtain the records or significantly to increase the amount of time he must wait to obtain them." 697 F.2d 1095, 1110 (1983) (emphasis added). The same concerns are at issue here, a processing procedure, centralization, that will significantly impair EcoRights' ability to timely obtain complete productions of records. EPA's contrary arguments lack substance, and, regardless, the Court must assume EcoRights would succeed on the merits of this claim for standing purposes. *Barker*, 921 F.3d at 1124.[2]

III. EPA unlawfully purports to vest the Administrator with authority to make initial FOIA determinations that are not appealable.

The 2019 Regulations purport to provide the EPA Administrator with authority to issue FOIA determinations that are not subject to appeal. EPA cannot eliminate the public's appeal right and circumvent Congress' FOIA determination structure.

[2] This same reasoning rebuts EPA's arguments that EcoRights cannot bring a challenge to EPA's FOIA processing outside of the context of a specific FOIA request elsewhere in its Motion to Dismiss as well, and EcoRights incorporates this response rather than repeatedly re-stating it. *See* MTD at 16, 19-20, 22.

A. EPA cannot eliminate the right to appeal initial FOIA determinations.

EPA seeks to prohibit the public from filing appeals of FOIA determinations made by the Administrator, but all FOIA determinations are appealable *to the Administrator* as a matter of law. EPA seems to have been aware of the untenable nature of placing initial determination authority and appeal authority in the same individual. However, instead of abandoning this improper delegation of authority, EPA doubled down and purported to eliminate the public's right to an appeal when the Administrator makes a FOIA determination. *See* 40 C.F.R. § 2.104(j)(2). EPA lacks this authority.

One of the requirements for a valid FOIA determination is a notification of the right "to appeal [any adverse determination] *to the head of the agency*…" 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa) (emphasis added); *see also Judicial Watch*, 895 F.3d at 775 ("Upon a denial of a request, the requester may seek reconsideration by the head of the agency."). EPA is an agency as defined by FOIA, 5 U.S.C. § 552(f)(1), and the Administrator is the head of EPA. 5 U.S.C. APP. 1 REORG. PLAN 3 1970 § 1(b). As a result, EPA FOIA determinations are appealable to the Administrator by definition.

EPA's regulation states that "[a]n adverse determination by the Administrator on an initial request will serve as the final action of the Agency." 40 C.F.R. § 2.104(j)(2). What this means is that EPA will not provide an appeal procedure, or a notice that such a procedure exists, for FOIA determinations made by the Administrator. However, EPA lacks the authority to eliminate a right explicitly created by Congress. *See, e.g., Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984). Furthermore, EPA's implementation of this Regulation would prevent it from ever providing a legally compliant FOIA determination for Administrator determinations because a determination

that is not appealable cannot be a determination at all. *See, e.g., CREW v. Fed. Election Comm'n*, 711 F.3d 180, 186, 188 (D.C. Cir. 2013).

EPA's attempt to eliminate the appeal procedures for determinations made by the Administrator is also inconsistent with the well-settled appeal requirements that often bar plaintiffs from bringing lawsuits before they have exhausted their administrative remedies. *See, e.g., Oglesby*, 920 F.2d at 69-70. Allowing EPA to bypass this mandatory process would undermine the "administrative scheme" and the "purposes of exhaustion." *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 98–100 (D.D.C. 2013) (quoting *Hidalgo v. FBI*, 344 F.3d 1256, 1258–59 (D.C. Cir. 2003)). For example, EPA's elimination of appeals is contrary to the three primary purposes of exhaustion. *See, e.g., Sapp v. Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010). First, this prevents requesters from convincing EPA to "correct its own mistakes" and produce wrongfully withheld records. *See id.* Second, this will require requesters to go directly to court and to forego the more efficient, quicker, and more economical remedy of an appeal. *See id.* Third, this will prevent further development the record on appeal, thus hampering judicial review in cases where litigation is necessary. *See id.* The 2019 Regulations therefore violate the letter and spirit of FOIA, will reduce transparency, and will waste judicial resources.

EPA claims that none of this matters so long as the Administrator makes a determination at some point, be it an initial determination or an appeal, but it provides no statutory language in support of this conclusory, circular argument. *See* MTD at 18-19. That is because no such support exists, and EPA's position is wholly without basis in the law.

B. The Administrator may only decide appeals, not initial determinations.

Congress' decision to task the Administrator with deciding FOIA appeals is clear indication that it did not intend to vest the Administrator with initial determination authority. 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa). However, EPA's regulation purports to provide the Administrator with authority to issue initial FOIA determinations. *See* 40 C.F.R. § 2.102(b); 84 Fed. Reg. at 30,031.

In addition to its clear language, the structure and policy of FOIA also support that Congress intended to avoid the type of politicization of FOIA that EPA's grant of authority to the Administrator, a political appointee, creates. First, FOIA cases are nearly always resolved on summary judgment and appeals are decided *de novo*. *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 989-90 (9th Cir. 2016) (citations omitted); *see also Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011) (citation omitted). In other words, the court owes no deference to agency FOIA determinations. *See, e.g., Fed. Labor Relations Auth. v. United States Dep't of Treasury*, 884 F.2d 1446, 1451 (D.C. Cir. 1989). These exemption determinations are objective questions of law, not the type of discretionary, political decisions reserved for a political appointee.

There is no defensible reason for the Administrator, who lacks any expertise in resolving FOIA requests, to make FOIA determinations. To hold otherwise would contravene FOIA's policy to "permit access to official information long shielded unnecessarily from public view" and "to secure such information from possibly unwilling official hands." *Mink*, 410 U.S. at 80; *see also Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172‑73 (2004) (FOIA is "a means for citizens to know what their Government is up to.' This phrase should not be dismissed as a convenient formalism. It

defines a structural necessity in a real democracy.") (internal citation omitted). EPA's attempt to politicize FOIA determinations by purporting to allow the Administrator to make FOIA initial determinations is a clear threat to these goals.

EPA argues that the Administrator has some sort of inherent authority to make FOIA determinations as the head of the Agency. MTD at 17-19. However, Congress conferred only appeal authority to the Administrator, and this additional authority should not be read in where contrary intention is clear, and indeed explicitly stated. *U.S. Telecomms. Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) ("The Executive Branch does not possess a general, free-standing authority to issue binding legal rules. The Executive may issue rules only pursuant to and consistent with a grant of authority from Congress…") (citation omitted). EPA's recitation of general "head of agency" authority case law from other courts actually supports EcoRights' position because it stands for the black letter rule that the executive branch agencies derive their authority from acts of Congress and do not have it inherently. *See* MTD at 17 (citing *In re Alappat*, 33 F.3d 1526, 1579 (Fed. Cir. 1994) (Plager, J. concurring); *Pyne v. Comm'r ex rel. United States*, 1999U.S. Dist. LEXIS 1059, at *5-6 (D. Haw. Jan. 6, 1999)). In fact, the very next sentence following EPA's quotation of *Alappat* says "agency heads typically are given … adjudicative authority -- the power to decide, as an administrative matter, the application of the agency's rules to individual cases." 33 F.3d at 1579. In other words, though agency heads typically have that authority, it is not automatic and must be conferred by Congress. Similarly, EPA's citation to legislative history provides no support for its position. EPA italicizes the words "by an agency subordinate" in the quote "[i]f a request for information is denied by an agency subordinate the person making the

request is entitled to prompt review by the head of the agency." MTD at 19 (quoting H.R. Rep. No. 1497, at 9 (1966)). However, this has no force because an appeal would not be necessary unless there was an initial negative determination by a subordinate. This language read in context in fact supports EcoRights in that it makes clear that the intended process is a timely determination by a subordinate employee, an appeal of negative determinations to the Administrator, and then a lawsuit if the appeal fails to resolve remaining disagreement. This is Congress' carefully laid out structure that EPA's 2019 Regulations seek to evade. EPA's contrary arguments have no basis in the language or purpose of FOIA. Congress understood the risk of providing FOIA initial determination authority to heads of agencies and protected requesters from this threat.

C. EPA fails both to explain its decision to authorize the Administrator to make FOIA determinations and to acknowledge this is a change in policy.

EPA repeatedly insists that it is only clarifying the list of employees it has always allowed to make FOIA determinations. *See, e.g.,* 84 Fed. Reg. at 30,029, 30,031; MTD at 15-17. However, this is demonstrably false. As discussed above, this authority is absent from FOIA, and EPA's 2002 Regulations did not purport to give the Administrator that authority. EPA's failure to adequately explain, or even acknowledge, its change in policy renders the 2019 Regulations illegal on its own.

To be sure, agencies are allowed to change their policies, even if those policies are longstanding. However, when an agency changes a policy, it must provide a reasoned explanation for why it is doing so and must show an awareness that it is changing that policy. *See, e.g., Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 927-28 (D.C. Cir. 2017) (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). EPA has not done so here.

Here EPA claims that the new list of individuals that it purports to authorize to make FOIA determinations does not expand the previously existing list but merely clarifies it. MTD at 15-17. However, the 2002 Regulations only provided initial determination authority to the "head of an office" or their designee. 40 C.F.R. § 2.103(b) (2002); 67 Fed. Reg. at 67,308. The Administrator is not the head of an office, they are the head of the entire Agency. 5 U.S.C. APP. 1 REORG. PLAN 3 1970 § 1(b). The 2002 Regulations also explicitly provide that the "Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices" are the individuals with authority to issue initial determinations. 40 C.F.R. § 2.104(h) (2002). The Administrator is conspicuously absent from this list, where EPA must have considered giving the Administrator this authority and declined to do so. *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168-69 (2003) (citations omitted). After all, this list includes three positions with the word "administrator" in their title. It is not plausible that EPA merely forgot to consider the Administrator, and the only reasonable inference to be drawn from his exclusion from this list is that EPA decided to follow the law with its 2002 Regulations and did not purport to provide the Administrator with authority to make initial FOIA determinations at that time. *See id.*; 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa). In fact, as recently as Ryan Jackson's aforementioned November 16, 2018 awareness review memo, EPA explained that, "[c]onsistent with [EPA's] FOIA policy and procedures, FOIA staff, program staff, and program managers will continue to determine whether information should be released or withheld under FOIA's exemptions." *See* Scher Decl. Ex. 8 at 1. The 2019 Regulations upend this policy.

EPA argues that this initial determination authority was included, not in the section discussed above, entitled "[i]nitial denials of requests," *i.e.* what is at issue in this claim, but in another section entitled "[a]ppeals of adverse determinations." MTD at 15 (citing 40 C.F.R. § 2.104(j)(3) (2002)); *see also* 40 C.F.R. § 2.104(h) (2002). But the titles of these sections alone show this obviously lacks any credibility. Furthermore, the section that EPA quotes merely says that "[a]n adverse determination by the Administrator on an initial request will serve as the final action of the Agency." 40 C.F.R. § 2.104(j)(3) (2002). In other words, an appeal decision by the Administrator is the final EPA agency action, requiring no further administrative exhaustion before it can be the basis for a lawsuit. *See, e.g., Hall & Assocs. v. EPA*, 77 F. Supp. 3d 40, 45 (D.D.C. 2014). These regulations merely reflect the FOIA determination structure as discussed above. This also refutes EPA's arguments relating to alleged statute of limitations problems and citations to authority addressing causation and redressability because the 2019 Regulations clearly represent a substantive change in the status quo, causing harm that would be redressed if the Regulations were vacated. *See* MTD 15-17.

The 2019 Regulations are an expansion of authority for the Administrator. EPA does not provide a reasoned basis for this change or, indeed, even an awareness that it is changing its policy. In fact, EPA denies that it has made any changes at all. As a result, EPA has crossed over from the "tolerably terse to the intolerably mute," and the 2019 Regulations should be vacated on this ground as well. *Perdue,* 873 F.3d at 928.

D. EcoRights has standing to bring this claim.

EPA alleges that its illegal grant of authority to the Administrator to make unappealable initial FOIA determinations does not harm EcoRights, but this in incorrect

as it removed an important appeal right and places determination authority in an individual that is motivated to delay production and withhold records for political, personal, and other reasons. This is more than sufficient to show injury.

As discussed above, Congress provided EcoRights, and all FOIA requesters, with the right to appeal initial FOIA determinations to the head of the agency, without exception. EPA's 2019 Regulations eliminate that right for a category of requests. As a frequent FOIA requester that often uses its appeal rights to press for production of additional records and removal of redactions, elimination of this right harms EcoRights. *See* Scher Decl. ¶¶ 5-6, 11, 24; Beaman Decl. ¶¶ 5-7, 11, 14; MTD at 23.

Additionally, many of EcoRights' FOIA requests are "politically charged." *See* Scher Decl. ¶¶ 11-19, 24, Ex. 7 at 1 (awareness review memo admitting targeting "politically charged" requests); Beaman Decl. 6-7. Indeed, in recent years EcoRights has submitted several FOIA requests for records directly related to Administrator wrongdoing and other scandals at EPA. Scher Decl. ¶¶ 11-19; Kaminer Decl. Ex. A. The Administrator's incentives for interfering with these requests for personal, reputational, and political reasons are clear. Importantly, as discussed above, this is all against the backdrop of unprecedented interference with FOIA at EPA, an agency that already was abjectly failing to comply with the law before. This regulation is thus designed to and in fact will result in harm to EcoRights and other requesters attempting to serve as watchdogs over EPA. Why else attempt to provide this authority to the politically appointed Administrator now with all of their other "many responsibilities?" MTD at 15 n.2. Therefore, Administrator determinations pose a substantial risk of harm to EcoRights sufficient to confer standing. *See DOC v. New York*, 139 S. Ct. at 2565.

EPA seeks to overcome this showing by saying EcoRights does not allege that the Administrator has ever made a FOIA determination on an EcoRights request. MTD at 14-15. However, this misstates the standard and is irrelevant. First, EcoRights must only show, as it has above, that there is a substantial risk that the Administrator will use the authority EPA purports to grant. *See DOC v. New York*, 139 S. Ct. at 2565. EcoRights has met this burden here, especially given the sensitive nature of the records it often seeks. *See id* at 2566; Scher Decl. ¶¶ 11-19, 24, Ex. 7 at 1 (awareness review memo admitting targeting "politically charged" requests); Beaman Decl. 6-7; Kaminer Decl. Ex. A. Second, as discussed in Section III.B, *supra*, the Administrator has no authority to make initial determinations, and EPA accepted this up until it promulgated the 2019 Regulations. As a result, it is unlikely the Administrator made determinations on anyone's requests before that time. That this is a new grant of authority from the 2019 Regulations is also sufficient to dispose of EPA's argument that this claim fails on causation and redressability grounds. MTD 15-16; Section II.C, *supra*. The 2019 Regulations created this grant of authority for the first time and vacatur would redress the injury caused by that action. *See Mendoza*, 754 F.3d at 1010. Even if EPA disputes this, the Court must assume EcoRights would succeed on the merits of this claim for standing purposes. *Barker*, 921 F.3d at 1124.

IV. EcoRights is not pursuing its challenge to EPA's search cut-off date.

EcoRights does not oppose dismissal of its third claim for relief. MTD at 19-20.

V. EPA's purported authorization to withhold portions of records on responsiveness grounds is unlawful and is ripe for review.

A. EPA's purported authorization to redact information from records based on responsiveness violates binding D.C. Circuit precedent.

It is undisputed that binding D.C. Circuit precedent prohibits EPA from withholding non-responsive information from a responsive record without a FOIA exemption on point. *See, e.g.,* MTD at 20; *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016). However, EPA's 2019 Regulations purport to allow EPA to "issue final determinations whether to release or withhold a record *or a portion of a record* on the basis of responsiveness…" *See* 40 C.F.R. § 2.103(b). Now, instead of withdrawing the illegal 2019 Regulations, EPA instead pursues a line of argument to save the Regulations that lacks legal or factual basis.

In *AILA*, the Court unequivocally held that FOIA "does not provide … for redacting nonexempt information within responsive records." 830 F.3d at 677. When an agency identifies a responsive record, FOIA "compels disclosure of the responsive record—*i.e*., as a unit—except insofar as the agency may redact information falling within a statutory exemption." *Id.* A contrary interpretation, such as provided in the 2019 Regulations, "cannot be squared with the statutory scheme." *Id.* at 670.

The disputed language in the 2019 Regulations states that certain EPA employees:

> are authorized to make determinations required by 5 U.S.C. 552(a)(6)(A), including to issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA, and to issue "no records" responses.

40 C.F.R. § 2.103(b). EPA argues, "[t]he only sensible way to read the regulation is that the various reasons stated for making a determination are not all necessarily

applicable to each type of determination identified in the regulation." MTD 27-28 (citation omitted). "[B]ut that is not what the regulation says. And it seems clear that that is not what the regulation means." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 160 (2012); *see also Mortg. Bankers Ass'n*, 135 S. Ct. at 1222 ("The proper question faced by courts in interpreting a regulation is not what the best policy choice might be, but what the regulation means."); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (court must give effect to plain meaning).

A plain language reading of the 2019 Regulations shows that they purport to allow withholding a portion of a record based on responsiveness. The listed bases for EPA's action (responsiveness or under FOIA exemptions) can only apply to withholding a record or a portion of a record and not the release of records because EPA is only required to provide a basis for withholding records; EPA can release records for any reason or no reason. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (FOIA "places the burden on the agency to justify the withholding of any requested documents," or "the redaction of … information in a particular document."). EPA concedes this as to exemptions and disagrees as to responsiveness, but this position lacks internal coherence. MTD at 27 ("Of course, records are withheld, not released, under FOIA exemptions."). EPA's position is ultimately the bald contention that the various clauses only apply where it says they apply, but the only reasoned reading is that the Regulation authorizes EPA to (1) "release … a record," and (2) "withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA."

EcoRights' reading is also supported by several canons of construction. First, the "nearest reasonable referent canon" and the "rule of the last antecedent" both provide that

"within reason, modifiers and qualifying phrases attach to the terms that are nearest." *Grecian Magnesite Mining & Shipping Co. v. IRS*, 926 F.3d 819, 824 (D.C. Cir. 2019). Here, the phrase "withhold a record or a portion of a record" immediately precedes the "on the basis of" qualifying phrase, and thus is the "nearest referent" to which that qualifier could attach. It is also a "reasonable" referent because, as noted, FOIA mandates that agencies provide a "basis" for all withholdings, but not for the release of records. Second, the "distributive canon," recognizes that sometimes "'[w]here a sentence contains several antecedents and several consequents,' courts should 'read them distributively and apply the words to the subjects which, by context, they seem most properly to relate.'" *Encino Motorcars*, 136 S. Ct. at 1141. Here, a purely disjunctive reading, as discussed above, does not make sense because it would apply the verb "release" to the phrase "a record on the basis of responsiveness or under one or more exemptions under the FOIA." The only logical reading would thus be to apply the verb withhold to "a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA." *See id.*

EPA also incorrectly claims that its reading of the 2019 Regulations is correct because the 2019 Regulations do not explicitly discuss that they purport to allow actions that are contrary to D.C. Circuit precedent. MTD at 28. However, this argument does not support EPA for at least three reasons. First, it is axiomatic that EPA cannot promulgate illegal regulations merely by failing to discuss their illegality. Second, even if this were relevant, EPA provides no evidence that it was even aware of *AILA*, much less that it had considered the case as related to its 2019 Regulations. Third, EPA has a history of redacting allegedly non-responsive portions of responsive records. *See Pub. Empls. for*

Envtl. Responsibility v. EPA, 288 F. Supp. 3d 15, 25 n.4 (D.D.C. 2017); *Se. Legal Found., Inc. v. EPA*, 181 F. Supp. 3d 1063, 1068 (N.D. Ga. 2016); *Shurtleff v. EPA*, 2012 U.S. Dist. LEXIS 157027, at **16-18 (D.D.C. Sept. 25, 2012). Therefore, EPA's argument on this point fails.

In a last ditch effort to save the 2019 Regulations, EPA relies on the largely defunct *Auer* deference. MTD 28-29. However, the recent Supreme Court decision in *Kisor*, which sharply curtails *Auer* deference, provides further support for declining to extend *Auer* deference to EPA here. *Kisor*, 139 S. Ct. at 2415-18. In fact, the limitations cabining *Auer* deference in *Kisor* are so severe that Justice Gorsuch aptly stated that *Auer* has been "maimed and enfeebled—in truth, zombified." 139 S. Ct. at 2425 (J. Gorsuch concurring). *Kisor* brings consistency to the case law indicating that a regulation means what it says and prevents agencies from calling for deference to interpretations of regulations that the regulatory language will not bear. Here, the language of the 2019 Regulations is not "genuinely ambiguous," EPA's interpretation of that language is not "reasonable," EPA's support is limited to post-hoc rationales, EPA's interpretation does not implicate EPA's "substantive expertise," *and* EPA's interpretation does not reflect EPA's "fair and considered judgment," and *Auer* deference is thus inapplicable. *See, e.g., Kisor*, 139 S. Ct. at 2415-18 (requiring all factors be met for *Auer* deference to apply). In fact, EPA's interpretation is contrary to its longstanding practice of redacting allegedly non-responsive portions of responsive records. *See PEER v. EPA*, 288 F. Supp. 3d at 25 n.4; *Se. Legal Found.*, 181 F. Supp. 3d at 1068; *Shurtleff*, 2012 U.S. Dist. LEXIS 157027, at **16-18. As a result, EPA's post-hoc litigation position deserves no deference. *See, e.g., Kisor*, 139 S. Ct. at 2416.

Granting deference to EPA's unreasonable post-hoc construction of the 2019 Regulations here "would 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'" *Id.* at 2415 (citation omitted). Additionally, even if EPA intended its regulation to match its litigation position now, which it did not, "[i]t is well settled that regulations cannot be construed to mean what an agency intended but did not adequately express." *Donovan v. A.A. Beiro Constr. Co.*, 746 F.2d 894, 905 (D.C. Cir. 1984); *TSG Inc. v. EPA*, 538 F.3d 264, 271 (3d Cir. 2008) ("The EPA's interpretation and application of [its regulation] must be based on the plain language of that regulation, not what it might have intended.") (citations omitted); *Beazer E., Inc. v. EPA*, 963 F.2d 603, 607 (3d Cir. 1992) (holding "we are not at liberty to allow the agency to imply language that does not exist in the regulation.") (citation omitted). Contrary to EPA's claims, the Court need only interpret the 2019 Regulations and need not presume agency bad faith. *See* MTD at 21. EPA cannot avoid vacatur by saying it will not apply the 2019 Regulations as written. *See* MTD at 20-29.

B. EcoRights has standing to bring this claim.

EPA seeks to hold EcoRights to a higher standard than required by the law when it argues that EcoRights lacks standing to assert its claim because it has not alleged that EPA must or will withhold responsive portions of records from EcoRights under the Regulations. EcoRights need only show a substantial risk of harm. *See DOC v. New York*, 139 S. Ct. at 2565. This substantial risk is clear, especially given that withholding allegedly nonresponsive portions of responsive records has been EPA's longstanding practice. *See* Section V.A., *supra* (citing *PEER v. EPA*, 288 F. Supp. 3d at 25 n.4; *Se. Legal Found.*, 181 F. Supp. 3d at 1068; *Shurtleff*, 2012 U.S. Dist. LEXIS 157027, at

**16-18); *DOC v. New York*, 139 S. Ct. at 2566. EPA cannot defeat standing merely by saying that it will not take actions that are purportedly allowed by the plain language of its regulations and which it has a history of taking. *See* Section V.A, *supra*. On these facts, EcoRights adequately alleges an "informational injury" whereby "a denial of access to information" qualifies as an "'injury in fact' … where a statute (on the claimants' reading) requires that the information 'be publicly disclosed' and there 'is no reason to doubt their claim that the information would help them.'" *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-41 (D.C. Cir. 2016). Because the 2019 Regulations violate FOIA's disclosure requirements, they cause EcoRights to suffer an informational injury.

EPA also relies on a letter from Administrator Wheeler to support its standing argument, but this is merely a post-hoc attempt to prop up the 2019 Regulations that were illegal when passed and remain so. *See* Kaminer Decl. Ex. C (letter from Administrator Wheeler dated October 22, 2019, nearly four months after publication of the 2019 Regulations). Additionally, the FOIA manual that EPA cites does not say that nonresponsive portions of responsive records must be produced. Kaminer Decl. Ex. B. At best this manual is ambiguous on this point. *See id.* at 10 (section entitled "Determine Which Records (or Portions) May Be Released" says "After thorough review, the Action Office will prepare to release *responsive*, non-exempt records or *portions of records*.") (emphasis added). However, even if it were clear, this guidance could not overcome the plain language of the 2019 Regulations or EPA's past practices. *See* Section V.A, *supra.*

C. This claims is ripe and EcoRights has no adequate alternative remedy.

EPA incorrectly claims that, even if the Court follows the clear language of the 2019 Regulations and finds that they do purport to allow EPA to withhold portions of

records based on responsiveness, that a challenge to the Regulations is not ripe. MTD 22-25. EPA's flawed position is that EcoRights has "an adequate alternative remedy" because it can wait for EPA to withhold records based on responsiveness, find out that EPA did so, and then challenge that individual determination in court. MTD at 25-26.

In the D.C. Circuit, when determining whether an issue is ripe for judicial review, the Court considers (1) the fitness of the issues for judicial review and (2) the hardship to the parties of withholding court consideration. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1281 (D.C. Cir. 2005). When considering the fitness prong, the D.C. Circuit has "often observed that a purely legal claim in the context of a facial challenge, such as [EcoRights' claims challenging the 2019 Regulations], is 'presumptively reviewable.'" *Id.*

EPA attempts to avoid this outcome by saying it will not apply the 2019 Regulations. *See* Sections V.A, V.B, *supra*. However, this argument is foreclosed by case law. The D.C. Circuit has held that "a purely legal challenge to final agency action is not unfit for review merely because the application of the disputed rule remains within the agency's discretion." *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 854 (D.C. Cir. 2006) (citing *Nat'l Ass'n of Home Builders*, 417 F.3d at 1282). Because the issue here is whether the 2019 Regulations, on their face, violate FOIA, no factual development is necessary. *Nat'l Ass'n of Home Builders*, 417 F.3d at 1282

Once the Court has determined that an issue is fit for review, the hardship inquiry is largely irrelevant. *See Cohen v. United States*, 650 F.3d 717, 735 (D.C. Cir. 2011) (*en banc*); *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 493 (D.C. Cir. 1988). Given that this issue is fit for review, the court need not consider hardship. However, even if the

court did consider hardship, EPA's ripeness argument still must fail. EPA claims that having to litigate this issue will cause it hardship. MTD at 24-25. However, there is little if anything left for EPA to do given that it has already expended legal resources to stake out its position in court. This, and EPA's other hypothetical concerns, are insufficient for it to avoid review of the 2019 Regulations.

As whether EcoRights has an adequate alternative remedy, EPA's position is that EcoRights could challenge an EPA partial withholding in court under FOIA. MTD at 22-26. However, the D.C. Circuit case law makes clear that Congress did not intend filing lawsuits to be the mechanism for prompt FOIA productions of records. *Judicial Watch, Inc. v. DHS*, 895 F.3d 770, 780 (D.C. Cir. 2018). Having to file a lawsuit to challenge an improper withholding instead of having that basis for withholding thrown out will inherently create delay. *See id.* ("[f]iling a lawsuit hardly ensures 'prompt[] availab[ility]'" of records as required by FOIA, "not to mention the chilling effect that litigation costs can have on members of the public much less the burden imposed on the courts"). Courts have noted that delay under FOIA is tantamount to denial. S*ee Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004); *see also McGehee v. CIA*, 697 F.2d 1095, 1101 n.18 (D.C. Cir.), *vacated in part on other grounds*, 711 F.2d 1076 (1983). EPA's proposal that EcoRights resolve these violations individually while letting this illegal policy stay in place is certainly not an adequate remedy. EPA should not be able to avoid review of the legality of these regulations, particularly with no real countervailing interest. As a result, the Court should not delay striking down EPA's facially illegal 2019 Regulations.

VI. EPA unlawfully failed to provide notice and comment opportunity before publishing the final 2019 Regulations.

The Court should vacate the 2019 Regulations because EPA failed to comply with both APA and FOIA notice and comment rulemaking requirements when it promulgated the 2019 Regulations. *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012).

A. FOIA itself requires notice and comment for the 2019 Regulations.

When EPA promulgated the 2019 Regulations, it exclusively relied on two APA exceptions to notice and comment rulemaking and entirely failed to consider that these exceptions could not apply here because of FOIA's own notice and comment requirements. EPA's failure here is twofold, first EPA "entirely failed to consider an important aspect of the problem," *see, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm,*, 463 U.S. 29, 43 (1983), and second, EPA's decision was without observance of procedure required by law, *see, e.g., Iowa League of Cities v. EPA*, 711 F.3d 844, 874-75 (8th Cir. 2013). The Court should thus vacate the 2019 Regulations. *Mack Truck*, 682 F.3d at 95.

The APA generally requires that agencies engage in "notice and comment" rulemaking when proposing a new regulation. 5 U.S.C. § 553(b), (c). This is necessary for "public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies," to enable the agency to educate itself "before establishing rules and procedures which have a substantial impact on those who are regulated," and "to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *See Batterton*, 648 F.2d at 703-04; *Intl Union, UMW v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (citation omitted). The APA provides that, "*[e]xcept when notice or hearing is required by statute*," these notice and comment requirements do not apply

to "rules of agency … procedure…" (the so-called procedural exception) or "when the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" (the so-called good cause exception). 5 U.S.C. § 553(b)(3) (emphasis added). Therefore, the procedural and good cause exceptions cannot apply where notice and comment rulemaking is required by another statute. *Id.* That EPA may consider these notice and comment requirements inconvenient is irrelevant, for "when a statute commands an agency without qualification to carry out a particular program in a particular way, the agency's duty is clear; if it believes the statute untoward in some respect, then it should take its concerns to Congress, for in the meantime it must obey the statute as written." *Friends of Blackwater v. Salazar*, 691 F.3d 428, 447 (D.C. Cir. 2012) (citations and internal punctuation omitted).

FOIA explicitly provides that agencies may only promulgate regulations on certain topics through notice and comment rulemaking. *See* 5 U.S.C. § 552(a)(6)(B)(iv) (aggregation regulations); 5 U.S.C. § 552(a)(4)(A)(i) (schedule of fees); 5 U.S.C. § 552(a)(6)(E)(i) (expedited processing); 5 U.S.C. § 552(a)(6)(D)(i) (multitrack processing); *see also, e.g., Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 n.1 (9th Cir. 2005) (noting that FOIA fee schedule regulations must be promulgated by notice and comment rulemaking); *ACLU of N. Cal. v. Dep't of Justice*, 880 F.3d 473, 480 n.4 (9th Cir. 2018) (noting that FOIA expedited processing regulations must be promulgated by notice and comment rulemaking); Declaration of Stuart Wilcox ("Wilcox Decl."), Dkt. 29-1, Ex. 1 (law review article citing FOIA fee schedule regulations provision as example of place where government has notice and comment duty

prescribed by statute); Wilcox Decl., Ex. 2 (law review article citing notice and comment requirement for FOIA expedited processing regulations). Therefore, when promulgating regulations that address aggregation of certain requests, the schedule of fees applicable to the processing of requests, expedited processing of requests, and multitrack processing, notice and comment rulemaking "is required by statute." *See* 5 U.S.C. § 553(b)(3).

EPA's reliance on the APA notice and comment exceptions to avoid providing for public notice and comment on the 2019 regulations (*see* 84 Fed. Reg. at 30,029) is erroneous because FOIA expressly precludes their application in this case. *See, e.g., Louis v. Dep't of Labor*, 419 F.3d 970, 976-77 (9th Cir. 2005) (invalidating rule because Privacy Act, 5 U.S.C. § 552a(k)(2), "by its text requires that a rule be promulgated" by notice and comment rulemaking and agency did not comply); *EPIC v. USFS*, 432 F.3d at 947 n.1; *ACLU v. DOJ*, 880 F.3d at 480 n.4. EPA's 2019 Regulations make changes addressing aggregation of certain FOIA requests, the schedule of fees applicable to the processing of requests, expedited processing of requests for records, and multitrack processing. *See* 40 C.F.R. §§ 2.107, 2.102(c), 2.104(f), 2.104(c). FOIA requires that regulations affecting these categories of action only be adopted following notice and comment rulemaking regardless of whether an exception to the APA notice and comment requirements might otherwise apply.

In *Hajro v. U.S. Citizenship & Immigration Servs.*, 832 F. Supp. 2d 1095 (N.D. Cal. 2011), *rev'd in part, vacated in part on other grounds,* 807 F.3d 1054 (9th Cir. 2015), the plaintiff sought to invalidate a rule addressing multitrack processing (one of the notice-and-comment-required provisions of FOIA) because the agency had failed to engage in notice and comment rulemaking. *Id.* at 1117. The agency claimed that the rule

in question was exempt from these requirements under the procedural exception. *Id.* However, the Court correctly pointed out that exceptions to notice and comment do not apply where that procedure is required by statute and that "FOIA's provision for institution of multitrack processing by agencies requires such notice." *Id.* at 1118. The Court explained that this requirement is "unambiguous" and that the agency's failure violated the requirements of both the APA and FOIA. As in *Hajro*, the procedural and good cause exceptions could not exempt EPA from engaging in notice and comment rulemaking for the 2019 Regulations because "notice … is required by statute." *See* 5 U.S.C. § 553(b)(3); *see also Hajro*, 832 F. Supp. 2d at 1117-19. However, contrary to this unambiguous statutory requirement, EPA never even considered if the language of FOIA required it to engage in notice and comment rulemaking.

EPA claims that these FOIA notice and comment provisions only apply to promulgation of the initial regulation (MTD at 37-39), but this cannot be squared with the statutory language, which contains no such exception. To the contrary, by creating an absolute requirement to follow notice and comment when promulgating regulations on these topics, Congress identified these topics as *per se* of significant public interest. In addition, EPA provides no basis for its artificial constraint on the term "promulgate" and, indeed, none exists. In fact, EPA has referred to its action as promulgating regulations multiple times throughout the litigation of this case. *See* Dkt. 22 at 6; Dkt. 31 at 1; *see also CREW v. EPA*, 19-cv-2181, Dkt. 12 at 14. EPA's recent attempt at reinterpretation of its action to avoid this claim is baseless and must fail.

EPA's failure to involve the public prevented it from having the benefit of input on these FOIA notice and comment required provisions that could have made its

regulations better and increased transparency. For example, EcoRights would have requested that EPA provide additional categories of requests that would qualify for expedited processing. *See* 5 U.S.C. § 552(a)(6)(E)(i) (providing for expedited processing in cases where there is a compelling need (defined in the statute) *and* "in other cases determined by the agency."); Scher Decl. ¶¶ 22, 27; Beaman Decl. ¶ 14. Plaintiffs would also have provided comments encouraging EPA to curtail instances where EPA will attempt to recover fees even where it fails to comply with FOIA's statutory determination deadline. *See* 40 C.F.R. § 2.107(c)(6) (EPA added discretionary language to regulations creating times where it will attempt to collect fees even though it has failed to meet deadlines); Scher Decl. ¶¶ 22-23; Beaman Decl. ¶ 14. Regardless, there is no exception to notice and comment rulemaking applicable to regulations addressing these topics. As a result, even if EPA believes the procedural and good cause exceptions might have otherwise applied, FOIA itself requires notice and comment rulemaking here and forecloses this possibility.

B. EPA was required to promulgate the 2019 Regulations via notice and comment because that is how EPA promulgated its 2002 Regulations.

In addition to the explicit notice and comment requirements in FOIA, EPA was also required to engage in notice and comment rulemaking when promulgating the 2019 Regulations because it promulgated the 2002 Regulations through notice and comment. It is well settled that, where regulations are promulgated pursuant to notice and comment rulemaking, amendments to those regulations must also be by notice and comment rulemaking. *See, e.g., Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) (citation omitted); *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (citation omitted). It is beyond dispute that EPA promulgated the 2002 Regulations after notice

and comment. *See* 65 Fed. Reg. 65,073; 67 Fed. Reg. 67,303. As a result, EPA could only amend the 2002 Regulations, via the 2019 Regulations, through notice and comment.

C. The procedural exception cannot apply because the 2019 Regulations affect private rights and interests and encode substantive value judgments.

Even if the Court reaches EPA's invocation of the procedural exception, it cannot apply here. The APA provides that notice and comment rulemaking is generally not required for "rules of agency … procedure …" 5 U.S.C. § 553(b)(3)(A). However, exceptions to notice and comment rulemaking are narrow, and the Court determines the adequacy of the agency's notice and comment procedure *de novo*, without deferring to the agency's opinion because the "agency has no interpretive authority over the APA…" *See, e.g., Lake Carriers' Ass'n v. EPA,* 652 F.3d 1, 6 (D.C. Cir. 2011) (citation omitted); *Sorenson Communs. Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (citation omitted).

EPA claims that the procedural exception applies to certain portions of the 2019 Regulations because EPA claims the changes only update rules to reflect EPA's structure and implement statutorily directed changes. 84 Fed. Reg. at 30,029. As a result, EPA claims the Regulations will not affect EcoRights' substantive rights or interests. MTD at 33-36. However, the procedural exception must be construed narrowly, and the 2019 Regulations are not procedural because they are intended to, and will, alter private rights and interests. *See, e.g., Mendoza*, 754 F.3d at 1023 (citations omitted); *Batterton*, 648 F.2d at 707 (procedural rules do not alter private rights and interests). EPA additionally claims that the procedural exception applies because the 2019 Regulations do not encode a substantive value judgment. MTD 33-36. However, this is also incorrect because the 2019 Regulations both seek to politicize what should be a politically neutral, objective

FOIA determination process and to further delay processing of FOIA requests in favor of shielding EPA from disclosure of its activities. As a result, the procedural exception does not excuse EPA's failure to promulgate the 2019 Regulations by notice and comment rulemaking.

The 2019 Regulations significantly affect a number of substantive rights. For example, as discussed above, EPA relies on the procedural exception for its change purporting to provide the Administrator with authority to make initial FOIA determinations that are not subject to appeal. 84 Fed. Reg. at 30,029. This eliminates a statutorily prescribed appeal process and inserts political interference into certain FOIA determinations. *See* Section III, *supra*. EPA also relies on the procedural exception to alter the way that requesters submit FOIA requests. 84 Fed. Reg. at 30,029. Should a requester inadvertently fail to comply with these requirements, their request will not be considered submitted, a decision that the 2019 Regulations do not require EPA to relay to the requester. *See id.* at 30,030, 30,032-33. This could lead to significant delays before the requester even discovers that EPA has taken the position that it need not act on their request. These changes fundamentally interfere with requesters' ability to obtain records through FOIA, which is the bedrock purpose of the law. *See, e.g., EPA v. Mink*, 410 U.S. 73, 80 (1973). These examples, and the other substantive challenges that EcoRights brings in this case, make clear that the 2019 Regulations are not within the procedural exception.

The 2019 regulations are also not procedural because they encode a substantive value judgment. In *W.C. v. Heckler*, 629 F. Supp. 791 (W.D. Wash. 1985), the court was faced with a change to regulations that would compromise the independence of

administrative law judges that were assigned to determine individuals' rights. The court held that the challenged regulation was not procedural "because the ultimate purpose of the program was to change the outcome of agency decisions." *Id.* at 798. The court held that "reduction of allowances is a substantive policy, not merely a matter of procedure." *Id.* at 799. The Court looked at several ways in which the program would accomplish this substantive policy, *Id.* at 799-800, and then explained that characterization of the program "must be based on the program's essential purpose and reasonably foreseeable consequences." *Id.* at 800. The court also explained that its "conclusion need not rest on a finding that such influence was demonstrably effective." *Id.* at 801.

Throughout this Motion, EcoRights has described numerous ways in which EPA's 2019 Regulations are designed to, and/or in fact will, ensure that requesters will submit fewer perfected FOIA requests and that EPA will exert more political influence on FOIA determinations, respond to FOIA requests more slowly, and produce less records. This reflects EPA's apparent belief that FOIA compliance should be subject to political whims instead of being objective. It also indicates that EPA is willing to create additional FOIA processing delays to further its own interests. These are substantive value judgments about the fundamental transparency interests underlying FOIA. Accordingly, the 2019 Regulations are not procedural.

The D.C. Circuit also considers several other factors relevant to determining whether a regulation is procedural, which further cut against EPA here. These additional factors include whether the agency has published the rule in the Code of Federal Regulations and whether the rule effectively amends a prior legislative rule. *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). If *any* of

these apply then the regulation is not procedural and must be promulgated by notice and comment. *Id.* Here, EPA published the 2019 Regulations in the Code of Federal Regulations. *See* 40 C.F.R. § 2.101-108. Additionally, as discussed above, the 2019 Regulations amend the 2002 Regulations, which were indisputably a prior legislative rule. *See* Section VI.B, *supra*. These are additional reasons why the procedural exception cannot apply to EPA's promulgation of the 2019 Regulations.

D. EcoRights has standing to bring this claim.

EcoRights has explained why the various changes in the 2019 Regulations cause it harm and substantial risk of harm that is not common to all members of the public. As a result, EcoRights has standing to challenge EPA's failure to comply with mandatory notice and comment procedures.

As discussed above, for procedural injuries, plaintiffs need only show that the agency action threatens a concrete interest that is not merely common to all members of the public. *Mendoza*, 754 F.3d at 1010. Where plaintiff satisfies this threshold burden, "the normal standards for immediacy and redressability are relaxed." *Id.* (citation omitted). EcoRights has detailed the numerous ways in which the 2019 Regulations threaten its concrete interests. *See* Section I, *supra* (all claims); Section II.A, *supra* (centralization); Section III.D, *supra* (Administrator determinations); Section V.B, *supra* (responsiveness redactions). Additionally, EcoRights has made clear that, based on, *inter alia*, its history of submitting politically charged FOIA request to EPA and intention to continue submitting those requests into the future, these injuries are not common to all members of the public. *See, e.g., Mendoza*, 754 F.3d at 1010; Scher Decl. ¶¶ 5-6, 21-30;

Beaman Decl. ¶¶ 5-7. As a result, EcoRights has proven that it more than satisfies the injury requirements for this claim.

EPA also attempts to challenge EcoRights' standing related to EPA's failure to provide notice and an opportunity to comment on the portions of the 2019 Regulations that address topics that have a notice and comment requirement codified into FOIA separately. MTD at 31. EPA attempts to downplay the significance of its changes, but EPA's apparent opinion is irrelevant because, as discussed in Section VI.A, *supra*, unlike the APA notice and comment requirements, there are no exceptions to the FOIA notice and comment requirements. Furthermore, EcoRights is harmed by EPA's failure to provide a comment opportunity for its regulations addressing aggregation of certain requests, the schedule of fees applicable to the processing of requests, expedited processing of requests, and multi-track processing because it prevented EcoRights from providing comments that could have improved EPA implementation of these vital FOIA provisions. *See* Dkt. 1 at 6 (citing 5 U.S.C. § 552(a)(6)(B)(iv) (aggregation); 5 U.S.C. § 552(a)(4)(A)(i) (schedule of fees); 5 U.S.C. § 552(a)(6)(E)(i) (expedited processing); 5 U.S.C. § 552(a)(6)(D)(i) (multi-track processing)). This is not a procedural right *in vacuo* because these regulations address provisions of FOIA that directly affect how quickly EcoRights will get the records it requests and how much it will have to pay to get them, fundamental interests under FOIA. *See* Section VI.A, *supra*. As discussed in Section VI.A, *supra*, EcoRights would have requested that EPA, *inter alia*, provide additional categories of requests that would qualify for expedited processing. EcoRights has been denied expedited processing in the past, which often hampers its ability to timely get records necessary for its advocacy activities. Scher Decl. ¶ 27. EcoRights would have

also provided comments encouraging EPA to curtail instances where EPA will attempt to recover fees even where it fails to comply with FOIA's statutory determination deadline. Should EPA charge EcoRights fees even though it has failed to comply with FOIA, this will obviously injure EcoRights. Scher Decl. ¶ 23. These injuries surely exceed the "identifiable trifle" minimum required for standing. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) ("We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax."); *see Chevron Nat. Gas v. FERC*, 199 F. App'x 2, 4 (D.C. Cir. 2006) ("[E]ven . . . rather insignificant burdens are an 'identifiable trifle' constituting Article III injury."). As a result, EcoRights adequately alleges injury from EPA's failure to provide the notice and comment opportunity required by FOIA as well.

CONCLUSION

For the reasons stated above, EcoRights respectfully requests that the Court deny EPA's Motion to Dismiss, grant EcoRights' Cross-Motion for Partial Summary Judgment, issue declaratory relief remedying EPA's violations of the law, and vacate the 2019 Regulations.

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Respectfully submitted,

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