

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,**

Plaintiff,

V.

**U.S. ENVIRONMENTAL PROTECTION
AGENCY, et al.,**

Defendants.

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Civil Action No. 19-2181 (KBJ)

(consolidated with 19-2198 and 19-3270)

MOTION FOR LEAVE TO FILE SUR-REPLY

Defendants Environmental Protection Agency and Administrator Andrew Wheeler respectfully move this Court for leave to file a surreply in opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment in civil action number 19-3270, one of the cases in this consolidated action. "The district court routinely grants such motions when a party is 'unable to contest matters presented to the court for the first time' in the last scheduled pleading." *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003) (quoting *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001)); *Alexander v. F.B.I.*, 186 F.R.D. 21, 52 (D.D.C. 1998) ("Because plaintiffs have presented new evidence before the court . . . , good cause exists to permit [defendant] to file a surreply addressing the contents of this filing."); *Am. Vanguard Corp. v. Jackson*, 803 F. Supp. 2d 8, 13 (D.D.C. 2011) (plaintiff was permitted to file a surreply where new evidence was submitted in the agency's reply); accord *Flanagan v. Wyndham Int'l Inc.*, 231 F.R.D. 98, 101 (D.D.C. 2005). Because Plaintiffs' reply included new evidence in favor of Plaintiffs' summary judgment motion, a short surreply is appropriate.

Plaintiffs have filed the Second Declaration of Stuart Wilcox, ECF No. 31-1, and seven

supporting exhibits with their Reply in Support of Plaintiffs’ Cross-Motion for Partial Summary Judgment (“Reply”), ECF No. 31. Plaintiffs have also relied on that declaration and those exhibits to make an argument in their reply that they had not previously made. Specifically, Plaintiffs argue throughout their reply that their new exhibits show that “EPA withheld allegedly nonresponsive portions of responsive records from EcoRights mere days before it filed its brief in this case.” Reply at 12-13 (describing this as “the most damning piece of information”); *see also id.* at 14 (“Now that EPA has withheld records from EcoRights on responsiveness grounds, EPA cannot dispute that it has shown standing or indeed that it did not have standing before based on imminent harm[.]”); *id.* at 15-16. Plaintiffs contend that their new evidence supports their claim that EPA’s FOIA regulations authorize EPA personnel to withhold portions of responsive records on grounds of non-responsiveness. *See id.* at 12-13. Plaintiffs also cite evidence that they claim supports their argument that EPA’s centralization of FOIA intake “has already begun causing delays.” Reply at 4 (citing Second Wilcox Declaration). And Plaintiffs cite still further evidence that they argue indicate “that several of [Plaintiffs’] FOIA requests have been subject to ‘awareness review’” at EPA.” *Id.* Because Plaintiffs’ evidence was submitted for the first time with Plaintiffs’ reply, Defendants have not had an opportunity to address it.

Where, as here, “[a] moving party submits in a reply brief new reasons and evidence in support of its motion for summary judgment’ . . . the district court should allow the nonmoving party an opportunity to respond, particularly where the court’s decision relies on new evidentiary submissions.” *Mirando v. Dep’t of the Treas.*, 766 F.3d 540, 548 (6th Cir. 2014). The proposed sur-reply memorandum submitted herewith and the declarations and exhibits attached constitute Defendants’ response to Plaintiffs’ submission of “‘new reasons and evidence in support of [their] motion for summary judgment.’” *See id.* Because the short sur-reply would be “helpful to the

adjudication of the motion” and Plaintiffs would not “be unduly prejudiced if the court grants leave to allow the sur-reply,” leave should be granted here. *Akers v. Beal Bank*, 760 F. Supp. 2d 1, 3 (D.D.C. 2011).

Whether to grant or deny leave to file a surreply is ultimately “committed to the sound discretion of the court.” *Id.* (internal quotation omitted). The Court’s exercise of that discretion, like any use of its inherent powers, “should reflect our judicial system’s strong presumption in favor of adjudications on the merits.” *Shepherd v. Am. Broad. Cos., Inc.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995). If the Court wishes to consider the documents that Plaintiffs submitted with their Reply, it should do so with an understanding of Defendants’ view on the subject, which the surreply would provide.

Counsel for Defendants conferred with counsel for Plaintiffs in case number 19-3270, who indicated that Plaintiffs oppose the relief requested in this motion.

A proposed order consistent with this motion is also attached.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MARCIA BERMAN
Assistant Branch Director, Federal Programs Branch

/s/ Joshua Kolsky
JOSHUA M. KOLSKY
Trial Attorney
D.C. Bar No. 993430
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW Washington, DC 20005
Tel.: (202) 305-7664
Fax: (202) 616-8470
E-mail: joshua.kolsky@usdoj.gov

Attorneys for Defendant

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Civil Action No. 19-2181 (KBJ)

(consolidated with 19-2198 and 19-3270)

**SUR-REPLY IN OPPOSITION TO PLAINTIFFS’
CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendants Environmental Protection Agency and Administrator Andrew Wheeler respectfully submit this surreply in opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment in civil action number 19-3270, one of the cases in this consolidated action. For the reasons discussed below, the new evidence submitted with Plaintiffs' Reply in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment ("Reply") does not support Plaintiffs' arguments.

I. Plaintiffs' New Evidence Does Not Suggest EPA's Changes to Its FOIA Regulations Have Caused Any Processing Delays for Plaintiffs' FOIA Requests

Plaintiffs argue that EPA’s centralization of FOIA intake procedures within EPA’s National FOIA Office (“NFO”) “has already begun causing delays.” Reply at 4. According to Plaintiffs, Plaintiff Ecological Rights Foundation (“ERF”) submitted a FOIA request to EPA on October 29, 2019, and “EPA did not communicate with Ecological Rights Foundation at all regarding this request until February 10, 2020 at which point EPA informed Ecological Rights Foundation that the request had been transferred from EPA Headquarters, the mandatory site of

intake to EPA region 9.” Second Declaration of Stuart Wilcox ¶ 2. Plaintiffs’ assertion is incorrect. In fact, EPA communicated numerous times with ERF, and indeed with Mr. Wilcox specifically, between the time the request was submitted on October 29, 2019, and December 27, 2019, when EPA informed ERF that the request would be reassigned to Region 9. Declaration of Timothy Epp ¶¶ 6-12.

Moreover, when ERF submitted the FOIA request, ERF selected EPA headquarters from a list (that also included each of EPA’s ten regions). *Id.* ¶ 5. Consistent with ERF’s selection and EPA’s determination that certain of the 14 parts of the FOIA request sought information from custodians in the Office of the Administrator, EPA initially assigned the request to the Office of the Administrator on November 19, 2019, *id.* ¶¶ 4, 5, 8, and later determined that it should be reassigned to Region 9, *id.* ¶ 12. While the request was at headquarters, EPA performed other work on the request, including issuing decisions on ERF’s requests for expedited processing and for a fee waiver. *See id.* ¶¶ 6-11. These facts contradict Plaintiffs’ assertion that EPA’s handling of this request is evidence that the centralization of intake is causing processing delays, rather than delays that would have occurred in any event if intake were decentralized. The same intake work would have to be done regardless of whether the system is centralized or decentralized.

II. Plaintiffs’ New Evidence Does Not Show Political Interference With Plaintiffs’ FOIA Requests

Next, Plaintiffs argue that they have “shown significant political interference with FOIA” because “EcoRights recently received records indicating that several of its FOIA requests have been subject to ‘awareness review[.]’” Reply at 4 (citing Wilcox Decl. ¶ 3, Ex. 2 at 5, Ex. 3 at 14); *see also id.* at 11 (“records obtained through FOIA show that at least two of EcoRights’ recent FOIA requests have been subjected to the aforementioned ‘awareness review process’ for ‘politically charged’ requests.”). What Plaintiffs call the “awareness review process” is actually

EPA’s November 16, 2018 Awareness Notification Process for Select Freedom of Information Act Releases, attached as Exhibit 4 to the Wilcox Declaration. Nothing about the Awareness Notification Process suggests “significant political interference with FOIA,” as Plaintiffs claim. By its terms, the notification process is “intended to inform senior officials of the release of information through FOIA that may be of particular interest to the press, the public and/or Congress” so that agency leadership can “respond efficiently to inquiries about such releases.” Wilcox Decl., Ex. 4 at 1. It is expressly “not an approval process, nor does it alter or eliminate any part of the agency’s existing procedures for collecting, reviewing or redacting documents, or preparing responses to FOIA requests.” *Id.* The process appropriately allows specified officials in offices that need to be aware of significant record releases (*e.g.*, the offices responsible for public affairs and congressional and intergovernmental relations) the opportunity to review documents that are scheduled to be released to the public. *Id.* at 2-3. Plaintiffs’ description of this process as “political interference” is unsupported and deeply mistaken. More importantly, for the purposes of Plaintiffs’ complaint in this case, the Awareness Notification Process predates EPA’s 2019 FOIA Rule and therefore could not possibly constitute evidence that *the Rule* has caused “political interference” with Plaintiffs’ FOIA requests.

III. EPA Did Not Withhold Nonresponsive Portions of Responsive Documents From Plaintiffs

Lastly, Plaintiffs argue that their new evidence shows that “EPA withheld allegedly nonresponsive portions of responsive records from EcoRights mere days before it filed its brief in this case.” Reply at 12-13 (describing this as “the most damning piece of information”); *see also id.* at 14-16; *see also* Wilcox Decl. ¶ 6 & Ex. 7. But EPA did not withhold nonresponsive portions of a FOIA record in Plaintiffs’ Exhibit 7. Instead, EPA redacted records that were not part of the requested record contained in Exhibit 7. *See* Declaration of Elizabeth White ¶¶ 8-9.

Specifically, EcoRights’ FOIA request sought Administrator Wheeler’s electronic calendar from the Outlook software program, among other records. *Id.* ¶ 7. EPA determined that a particular Outlook calendar constitutes a single record for purposes of EcoRights’ FOIA request. Because an Outlook calendar is a computer software application, the requested calendar must be converted into a format that can be produced to the requester. As discussed in the White Declaration, the technical process used to convert the calendar into a PDF format for FOIA production *adds* additional information to the PDF containing the calendar record – information that is *not* contained in the Outlook version of the calendar. *Id.* ¶¶ 8-9. Specifically, in order to create the PDF version of Administrator Wheeler’s Outlook calendar, an EPA employee exported the calendar from Outlook and emailed themselves the Outlook calendar and then converted that email attachment to PDF. *Id.* ¶ 8. When the calendar was printed to PDF, it was embedded in an email from the employee who printed the calendar. *Id.* As a result, the final PDF product included a header with the name of the employee who generated the PDF of the calendar and the subject line of the email and a footer of the same employee’s name and signature block. *Id.* ¶¶ 8-9; *see also* Pls.’ Ex. 7 (non-responsive header and footer blocks). Accordingly, the single PDF contains additional records beyond the calendar itself.

Contrary to Plaintiffs’ argument, EPA’s redaction of records added through the PDF conversion process and contained in the PDF printout did not violate *American Immigration Lawyers Association v. Executive Office for Immigration Review*, 830 F.3d 667 (D.C. Cir. 2016). In that case, the D.C. Circuit left open “the antecedent question of what constitutes a distinct ‘record’ for FOIA purposes[.]” *Id.* at 678 (explaining that “agencies . . . in effect define a ‘record’ when they undertake the process of identifying records that are responsive to a request”); *see also* *Shapiro v. CIA*, 247 F. Supp. 3d 53, 73-75 (D.D.C. 2017) (concluding that the FBI did not violate

AILA where it withheld non-responsive portions of a multi-topic document based on the FBI's determination of what constitutes a record). But the Court need not determine whether EPA properly determined that the calendar is a complete record. For purposes of this case, the relevant point is that EPA redacted information because it determined that the non-responsive records were not part of the requested record. EPA did not withhold that information because EPA decided that it was appropriate under EPA's regulations to withhold a nonresponsive portion of a responsive record, as Plaintiffs surmise. Accordingly, these withholdings do not support Plaintiffs' view that EPA interprets its regulations to allow it to withhold a nonresponsive portion of a responsive record.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MARCIA BERMAN
Assistant Branch Director, Federal Programs Branch

/s/ Joshua Kolsky
JOSHUA M. KOLSKY
Trial Attorney
D.C. Bar No. 993430
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E-mail: joshua.kolsky@usdoj.gov

Attorneys for Defendant

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DECLARATION OF TIMOTHY R. EPP

I, Timothy R. Epp, state the following:

1. I declare that the following statements are true and correct to the best of my knowledge, and are based on my personal knowledge, information acquired by me in the course of performing my duties, information contained in the records of the United States Environmental Protection Agency (EPA or Agency), and information supplied to me by current and former EPA employees including employees under my direction. This declaration is filed in support of EPA's Surreply in opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment.
2. I am the Associate General Counsel who manages the National Freedom of Information Office (NFO) within the EPA's Office of General Counsel (OGC). I have held this position on an acting basis starting in August 2018 and on a permanent basis since August 2019.

3. I am familiar with the FOIA request designated EPA-HQ-2020-000662. The purpose of this declaration is to provide background on EPA's communication with the requester in initial intake and processing of this FOIA request.
4. On October 29, 2019, Christopher Sproul, on behalf of Ecological Rights Foundation (Plaintiff or ERF), submitted a FOIA request to EPA through FOIAonline, which FOIAonline designated as EPA-HQ-2020-000662. This request contained fourteen parts, seeking records on a number of topics, including, for example: records related to the Administrator's letter to California Governor Newsom regarding exceedances under the National Pollution Discharge Elimination System (NPDES) and the Safe Drinking Water Act (SDWA); correspondence responding to the Administrator's letter; emails accompanying any drafts of the Administrator's letter; NPDES monitoring reports; information regarding enforcement actions; communications between EPA and entities in California; communications with the White House; records created after the issuance of the Administrator's letter to Governor Newsom, explaining EPA's rationale for sending the letter; and letters or evidence of draft letters to other states concerning NPDES or SDWA exceedances.
5. Because FOIAonline assigned the FOIA request a tracking number with an "HQ" prefix, EPA-HQ-2020-000662, it is apparent that Mr. Sproul selected "EPA-HQ" as the Sub Agency from a list in FOIAonline that also included each of EPA's ten regional offices.
6. On November 1, 2019, EPA issued to Christopher Sproul a denial of the requester's expedited processing request. Exh. A.

7. On November 12, 2019, Stuart Wilcox contacted EPA's FOIA Public Liaison, asserting that "EPA has violated FOIA's deadline for making a determination on EcoRights' request for expedited processing for EPA-HQ-2020-000662." Exh. B.
8. On November 19, 2019, consistent with ERF's selection of "EPA-HQ" and based on EPA's analysis that parts of EPA-HQ-2020-000662 sought information from custodians located in the Office of the Administrator, EPA informed Mr. Sproul that EPA-HQ-2020-000662 was assigned to the Office of the Administrator for processing. Exh. C.
9. On November 20, 2019, EPA responded to Mr. Wilcox's November 12, 2019, request for Public Liaison assistance by informing him that EPA had previously denied ERF's expedited processing request on November 1, 2019, and notified Mr. Sproul of that denial. Exh. D.
10. On November 27, 2019, EPA informed Mr. Sproul that unusual circumstances applied to EPA-HQ-2020-000662. EPA explained, "Given the scope of the request, EPA anticipates that the response will require a search and collection of records from multiple EPA offices that are separate from the office processing the request, and require a significant amount of resources and time to appropriately examine the voluminous amount of records necessary to complete this request. Pursuant to 40 C.F.R. § 2.104(d), an extension of time required to respond to your request is necessary." The due date was extended ten working days, from December 18, 2019, to January 3, 2020. Exh. E.
11. On December 5, 2019, EPA informed Mr. Sproul that EPA had granted Plaintiff's fee waiver request. Exh. F.
12. On December 27, 2019, after further analysis of the request by the Office of the Administrator and taking into account that office's assessment of where the majority of

records would likely be located, EPA informed Mr. Sproul that EPA reassigned EPA-HQ-2020-000662 to Region 9 and requested that Plaintiff agree to a new due date of January 24, 2020. On December 28, 2019, Plaintiff denied EPA's request to extend the due date. Exh. G.

13. As of the date of this declaration, EPA has issued to ERF interim releases of records from both Region 9 and the Office of the Administrator in response to EPA-HQ-2020-000662.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the forgoing declaration is true and correct.

Executed this June 12, 2020.

Timothy R. Epp
Associate General Counsel, National FOIA Office
Office of General Counsel
U.S. Environmental Protection Agency

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV - 1 2019

OFFICE OF
GENERAL COUNSEL

Mr. Christopher Sproul
Environmental Advocates, Attorneys At Law
5135 Anza Street
San Francisco, CA 94121

RE: Request Number EPA-HQ-2020-000662

Dear Mr. Sproul:

This is in response to your request for expedited processing in connection with your Freedom of Information Act (FOIA) request received by the U.S. Environmental Protection Agency (EPA), National FOIA Office (NFO) on October 29, 2019 in which you are seeking the following records: "All records that EPA relied on for the factual assertions in the attached letter from EPA Administrator Andrew Wheeler to California Governor Gavin Newsom ("the Letter") related to exceedances of National Pollution Discharge Elimination System ("NPDES") permits and health-based exceedances of the Safe Drinking Water Act ("SDWA") (both discussed on page 3 of the Letter)."

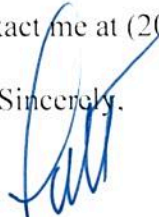
Your request for expedited processing was evaluated as to whether there is an urgency to inform the public about an actual or alleged Federal government activity by a person primarily engaged in disseminating information to the public and whether a lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. Your request does not show that it was submitted by a person primarily engaged in disseminating information to the public. Your request also does not contain enough information to support a finding that a lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. Therefore, I find that neither standard is met by your request, and your request for expedited processing is denied. This request will be processed as expeditiously as possible by the EPA.

This letter concludes our response to your request for expedited processing. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460 (U.S. Postal Service Only) or through FOIAonline if you are an account holder. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Ave., N.W., Room 5315, Washington, DC 20460. Your appeal must be made in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day.

The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202)566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; e-mail, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769. Should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulations, located at 40 C.F.R., Part 2.104.

If you have any questions, please contact me at (202) 566-1667.

Sincerely,



Larry F. Gottesman
National FOIA Officer

EXHIBIT B

From: [Stuart Wilcox](#)
To: [FOIA HQ](#); [Chris Sproul](#)
Subject: EPA-HQ-2020-000662 Missed Expedited Processing Determination Deadline
Date: Tuesday, November 12, 2019 1:07:53 PM

Dear FOIA Liaison,

I am writing to inform you that EPA has violated FOIA's deadline for making a determination on EcoRights' request for expedited processing for EPA-HQ-2020-000662. EcoRights submitted EPA-HQ-2020-000662, including a request for expedited processing, on 10/29/19, and EPA's expedited processing determination was therefore due on 11/8/19 (10 calendar days after the request). 5 U.S.C. § 552(a)(6)(E)(ii)(I). EPA-HQ-2020-000662 identified a "compelling need" for expedited processing because "failure to obtain requested records on an expedited basis ... could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," as explained in the request. 5 U.S.C. § 552(a)(6)(E)(v). EcoRights requests that EPA immediately make a legally-compliant determination as to expedited processing and communicate that determination to us. Should EPA continue to fail to make this expedited processing determination then EcoRights will consider all of its options to remedy this violation of the law, up to and including litigation.

Please feel free to contact me if you have any questions.

Sincerely,
Stuart Wilcox

EXHIBIT C

Freedom of Information Act Request, EPA-HQ-2020-000662

Linda F
Person

Christopher
Sproul

11/19/2019

November 19, 2019 Mr. Christopher Sproul Environmental Advocates 5135 Anza Street San Francisco, CA 94121 RE: Request Number EPA-HQ-2020-000662 This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA), National FOIA Office (NFO) on October 29, 2019. You are seeking the following records: "All records that EPA relied on for the factual assertions in the attached letter from EPA Administrator Andrew Wheeler to California Governor Gavin Newsom ("the Letter") related to exceedances of National Pollution Discharge Elimination System ("NPDES") permits and health-based exceedances of the Safe Drinking Water Act ("SDWA") (both discussed on page 3 of the Letter)." Your FOIA request is being assigned to EPA's Office of the Administrator (AO) for processing. If you have any questions about the processing of your request, please contact the above-mentioned office and reference your request tracking number. You may contact AO's Jonathan Newton at (202) 564-6164 or newton.jonathan@epa.gov. You may also contact the National FOIA Office at (202) 566-1667. If you need further assistance or would like to discuss any aspect of your request, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or call (202) 566-1667. You may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8610 Aldelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. Sincerely, Linda F. Person National FOIA Office

EXHIBIT D

From: Hill, Kevin W. **On Behalf Of** FOIA HQ
Sent: Wednesday, November 20, 2019 2:34 PM
To: 'Stuart Wilcox' <stuart.wilcox5@gmail.com>; Chris Sproul <csproul@enviroadvocates.com>
Subject: RE: EPA-HQ-2020-000662 Missed Expedited Processing Determination Deadline

Good Afternoon Mr. Wilcox,

Regarding FOIA request EPA-HQ-2020-000662, the expedited processing determination was emailed to the requester Christopher Sproul on November 1, 2019. A copy of the letter is attached.

Sincerely,
Kevin

Kevin W. Hill
EPA National FOIA Office

From: Stuart Wilcox [<mailto:stuart.wilcox5@gmail.com>]
Sent: Tuesday, November 12, 2019 1:08 PM

To: FOIA HQ <FOIA_HQ@epa.gov>; Chris Sproul <csproul@enviroadvocates.com>
Subject: EPA-HQ-2020-000662 Missed Expedited Processing Determination Deadline

Dear FOIA Liaison,

I am writing to inform you that EPA has violated FOIA's deadline for making a determination on EcoRights' request for expedited processing for EPA-HQ-2020-000662. EcoRights submitted EPA-HQ-2020-000662, including a request for expedited processing, on 10/29/19, and EPA's expedited processing determination was therefore due on 11/8/19 (10 calendar days after the request). 5 U.S.C. § 552(a)(6)(E)(ii)(I). EPA-HQ-2020-000662 identified a "compelling need" for expedited processing because "failure to obtain requested records on an expedited basis ... could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," as explained in the request. 5 U.S.C. § 552(a)(6)(E)(v). EcoRights requests that EPA immediately make a legally-compliant determination as to expedited processing and communicate that determination to us. Should EPA continue to fail to make this expedited processing determination then EcoRights will consider all of its options to remedy this violation of the law, up to and including litigation.

Please feel free to contact me if you have any questions.

Sincerely,
Stuart Wilcox

EXHIBIT E

FOIA EPA-HQ-2020-000662

Victor Farren

Christopher Sproul

11/27/2019

Re: Freedom of Information Act Request No. EPA-HQ-2020-000662 Dear Mr. Sproul: This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on October 29, 2019, in which you requested records related to the September 26, 2019 letter from Administrator Wheeler to California Governor Newsom regarding Clean Water Act and Safe Drinking Water Act compliance. Given the scope of the request, EPA anticipates that the response will require a search and collection of records from multiple EPA offices that are separate from the office processing the request, and require a significant amount of resources and time to appropriately examine the voluminous amount of records necessary to complete this request. Pursuant to 40 C.F.R. § 2.104(d), an extension of time required to respond to your request is necessary. The new due date is January 3, 2020, ten working days from December 18, 2019. For an update on the status of your FOIA request, please call me at (202) 564-0808 or access FOIAonline. If you would like to modify or narrow your request so that it may be processed sooner, please contact me at the number above or at farren.victor@epa.gov . Sincerely, Victor Farren

EXHIBIT F

FOIA Fee Waiver Disposition Reached for EPA-HQ-2020-000662

System Christopher
Sproul

12/05/2019

Your request for Fee Waiver for the FOIA request EPA-HQ-2020-000662 has been fully granted. Additional details for this request are as follows: Request Created on: 10/29/2019 Request Description: See attached for details Fee Waiver Original Justification: See attached for details Fee Waiver Disposition Reason: N/A

EXHIBIT G

Person, Linda

From: Chris Sproul <envirosproul@gmail.com>
Sent: Saturday, December 28, 2019 12:59 PM
To: Person, Linda
Cc: Stuart Wilcox
Subject: Re: Freedom of Information Act (FOIA) Request, EPA-HQ-2020-000662

Ms. Person:

Thank you for your message updating us as to the status of EPA's response to its request. My client is somewhat disappointed that it has taken two months to hear from EPA concerning the request and it will be another month before we get a response. My client is disinclined to agree to a formal extension of EPA's statutory deadline for its response, but I can represent that we will not file suit to compel EPA's response should EPA meet its own late internal January deadline. We hope and trust that this will be the case.

Thanks again for updating us and our thanks as well for your work and the work of others at EPA on our request.

Can you please copy Stuart Wilcox on any further correspondence on this request.

Chris Sproul

On 12/27/2019 4:57 AM, Person, Linda wrote:

Good morning Mr. Sproul,

This email is in regards to the above FOIA request, originally submitted to the EPA on October 29, 2019. Your request was assigned to the EPA's Office of the Administrator (AO) for response. After further review by the AO, your request will be reassigned to our Region 9 FOIA Office for response. The Region 9 office is in need of additional time to respond to your request. We are requesting an additional 15 days to provide you with a response from the agency. Your new due date would be January 24, 2020 if you agree to the additional time. Please let me know if you can agree to the new due date.

Thank you,

Linda F. Person

**HQ Freedom of Information Act (FOIA) Office
Office of General Counsel**

202-566-1661 (Direct)

202-566-1667 (Main HQ FOIA Line)

"Kindness, a simple act that will bring powerful results."



National FOIA Office
EPA Office of General Counsel

--
Christopher A. Sproul

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,**

Plaintiff,

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**U.S. ENVIRONMENTAL PROTECTION
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Defendants.

$$\begin{array}{c}) \\) \\) \\) \\) \\) \\) \\) \\) \\) \\) \end{array}$$

Civil Action No. 19-2181 (KBJ)

(consolidated with 19-2198 and 19-3270)

DECLARATION OF ELIZABETH WHITE

I, Elizabeth White, state the following:

1. I declare that the following statements are true and correct to the best of my knowledge, and are based on my personal knowledge, information acquired by me in the course of performing my duties, information contained in the records of the United States Environmental Protection Agency (EPA or Agency), and information supplied to me by current and former EPA employees including employees under my direction.
2. I am the Director of the Office of Executive Secretariat (OEX) within the Office of the Administrator of the EPA. I have held this position since September 2017. My office oversees Freedom of Information Act (FOIA) request processing in the Office of the Administrator; manages the records management program for the Office of the Administrator; manages the Administrator's and Deputy Administrator's executive correspondence; and administers the EPA's Correspondence Management System.
3. I am familiar with the FOIA request designated EPA-HQ-2018-011071. The purpose of this declaration is to discuss EPA's response to this FOIA request and the materials

related to the request that are appended as Exhibit 7 to the Second Declaration of Stuart Wilcox that Plaintiff, Ecological Rights Foundation (ERF), filed in support of its Reply in Support of Plaintiff's Cross-Motion for Summary Judgment.

FOIA Request EPA-HQ-2018-011071

4. Plaintiff submitted a FOIA request to EPA on August 30, 2018. The request sought records on a number of topics, including Administrator Wheeler's full calendar, meeting schedule, and meeting notes since July 5, 2018.
5. EPA assigned the FOIA request tracking number EPA-HQ-2018-011071. The National FOIA Office assigned the request to the Office of the Administrator.
6. On April 8, 2019, Plaintiff filed a complaint alleging that EPA had failed to respond to FOIA request EPA-HQ-2018-011071.
7. Before Plaintiff filed its FOIA litigation, on March 15, 2019, the Agency provided Plaintiff with an interim production of records that included Administrator Wheeler's calendars from July 5, 2018 through August 31, 2018. Shortly thereafter, on March 29, 2019, the Agency produced Administrator Wheeler's calendars from September 1, 2018 through December 21, 2018. On March 25, 2020, in accordance with the parties' agreed upon production schedule, EPA produced Administrator Wheeler's calendar for the entire date range of the request: the months of April 2018 through March 2019. *See* August 14, 2019 Joint Status Report (Document 13), *see also* April 27, 2020 Joint Status Report (Document 14). A portion of the calendar and nonresponsive records are attached as Exhibit 7 to the Second Declaration of Stuart Wilcox.
8. In order to produce the Outlook calendar in response to the FOIA request, EPA converted the calendar from an Outlook format to a PDF format. To complete the conversion, an employee emailed themselves the Outlook calendar, and then converted that email

attachment to PDF. The resultant PDF contained the calendar records, as well as headers with the name of the employee who generated the calendar and the subject line of the email and footers of the employee's name and signature block. The headers and footers that resulted from the conversion are separate records which are not responsive to the FOIA request and have therefore been redacted.

9. Exhibit 7 to the Wilcox Declaration includes redactions of separate non-responsive records which are not a part of the calendar records sought through the FOIA request noted above. The non-responsive record redactions are to the headers and footers that resulted from the conversion of the calendar from an Outlook format to a PDF format. That header includes the subject line of the email and the name of the employee who generated Administrator Wheeler's calendar for the FOIA production. The footer includes the name and signature block of the employee who generated the calendar. The Administrator's calendar in Outlook does not include the information redacted in the headers and footers; this information occurred solely as the result of the conversion from an Outlook format to a PDF format, as described above.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the forgoing declaration is true and correct.

Executed this June 11, 2020.

Elizabeth White
Director, Office of the Executive Secretariat
Office of the Administrator
U.S. Environmental Protection Agency