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8 ECOLOGICAL RIGHTS FOUNDATION

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA

11 ECOLOGICAL RIGHTS FOUNDATION, a  
12 non-profit corporation,

13 Plaintiff,

14 v.

15 NATIONAL OCEANIC AND  
16 ATMOSPHERIC ADMINISTRATION,

17 Defendant.

Civil Case No. 19-cv-6661

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

1 Plaintiff Ecological Rights Foundation (“EcoRights”) alleges as follows:

2 **INTRODUCTION**

3 1. EcoRights brings this action under the Freedom of Information Act (“FOIA”). FOIA,  
4 amongst other things, allows an aggrieved party to seek relief when records are unlawfully withheld and  
5 authorizes a reviewing court to enjoin the agency from withholding records and to order the production  
6 of any agency records improperly withheld from the complainant. 5 U.S.C. § 552(a)(4)(B). EcoRights  
7 seeks declaratory and injunctive relief for FOIA violations by the National Oceanic and Atmospheric  
8 Administration (“NOAA”). EcoRights submitted a FOIA request to NOAA through the FOIAOnline  
9 system on September 11, 2019 (“FOIA Request”), and this lawsuit addresses NOAA’s failure to comply  
10 with the requirements of FOIA with regards to that FOIA Request.

11 2. FOIA “is plainly written so as to disfavor any effort by agency officials to shirk their  
12 responsibilities to respond promptly and fully to requests for records.” *McGehee v. CIA*, 697 F.2d 1095,  
13 1101 n.18 (D.C. Cir. 1983), *vacated in part on other grounds*, 711 F.2d 1076 (1983) (citation omitted).  
14 Congress has shown “an increasing concern over the timeliness of disclosure, recognizing that delay in  
15 complying with FOIA requests may be tantamount to denial.” *Am. Civil Liberties Union v. Dep’t of*  
16 *Def.*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004) (citations omitted).

17 3. Given the time-sensitive nature of FOIA requests, FOIA litigation is subject to expedited  
18 judicial consideration. Unlike other civil litigation involving a federal agency, a responsive pleading is  
19 required within thirty days of service. 5 U.S.C. § 552(a)(4)(C) (“Notwithstanding any other provision of  
20 law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection  
21 within thirty days after service upon the defendant of the pleading in which such complaint is made,  
22 unless the court otherwise directs for good cause shown.”).

23 4. EcoRights’ FOIA Request seeks records related to alleged interference by President  
24 Donald Trump and other White House officials with NOAA’s forecasting of Hurricane Dorian to align it  
25 with President Trump’s debunked predication that the Hurricane would impact Alabama; President  
26 Trump’s map of the predicted course of Hurricane Dorian that appears to have been changed with a  
27 black marker to make it appear that Alabama would be impacted by the Hurricane; attempts by NOAA  
28 staff to control messaging about Hurricane Dorian and the altered map; and information related to

1 whether NOAA's forecasting of Hurricane Dorian and handling of its conflict with President Trump  
2 related to that forecasting violated any policies, including policies related to scientific integrity. FOIA  
3 Request (attached as Exhibit 1).

4 5. The records sought by EcoRights are crucial to inform the public about the conflict that  
5 arose when President Trump insisted that Hurricane Dorian could seriously impact Alabama. In the  
6 wake of President Trump's statements, NOAA appeared to abdicate its duty to provide the public with  
7 reliable storm reporting to avoid conflict with President Trump. This raises serious concerns about  
8 NOAA's independence as a scientific agency, the veracity of its weather predications, and its ability to  
9 provide independent weather predictions that keep the public safe. Incursions into these bedrock  
10 functions raise fundamental questions about whether NOAA can reliably comply with its statutory  
11 mandates.

12 6. For EcoRights' September 11, 2019 FOIA Request, NOAA has failed to issue a final  
13 determination on the FOIA Request in compliance with FOIA's mandatory timelines, improperly  
14 withheld agency records that are responsive to the FOIA Request, and failed to conduct an adequate  
15 search for records that are responsive to EcoRights' FOIA Request. NOAA's violations of FOIA at issue  
16 in this case have thwarted EcoRights' efforts to timely receive current information in NOAA's  
17 possession and have hampered EcoRights' efforts to serve as an effective public interest watchdog over  
18 governmental activities and to determine the extent to which it and the public can confidently rely on  
19 NOAA data and reports.

### 20 JURISDICTION

21 7. This Court has jurisdiction pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), which allows an  
22 aggrieved party to seek relief when documents are unlawfully withheld, and authorizes a reviewing  
23 court to enjoin the agency from withholding records and to order the production of any agency records  
24 improperly withheld from the complainant. This Court also has jurisdiction over this action pursuant to  
25 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1361 (action to compel an officer of the United  
26 States to perform his duty).

1 8. This Court has authority to grant declaratory relief pursuant to the Declaratory Judgment  
2 Act, 28 U.S.C. § 2201. This Court has authority to grant injunctive relief pursuant to 28 U.S.C. § 2202  
3 and 5 U.S.C. § 552(a)(4)(B).

4 9. This Court has authority to award costs and attorney fees pursuant to 5 U.S.C. §  
5 552(a)(4)(E).

6 10. “In the event of noncompliance with the order of the court, the district court may punish  
7 for contempt the responsible employee, and in the case of a uniformed service, the responsible member.”  
8 5 U.S.C. § 552(a)(4)(G).

9 11. The FOIA claims made in this Complaint are ripe for judicial review and the harm  
10 NOAA has caused to EcoRights can be remedied by an order of this Court.

11 12. This Court has personal jurisdiction over NOAA and its officials because NOAA is an  
12 agency of the federal government operating within the United States.

13 **VENUE**

14 13. Venue in the United States District Court for the Northern District of California is proper  
15 under 5 U.S.C. § 552(a)(4)(B) because EcoRights’ principal place of business is located within the  
16 Northern District of California, specifically in Garberville, California in Humboldt County.

17 **THE PARTIES**

18 14. Plaintiff EcoRights is a non-profit, public benefit corporation, organized under the laws  
19 of the State of California, with its principal place of business located in Garberville, California.  
20 EcoRights is devoted to furthering the rights of all people to a clean, healthful, and biologically diverse  
21 environment. To further its environmental advocacy goals, EcoRights often requests information  
22 through FOIA that allows it to serve as a public interest watchdog and to ensure that the federal  
23 government is behaving ethically, that it is carrying out its duties responsibly, and that it is complying  
24 with the principles of good governance. EcoRights also actively seeks federal and state agency  
25 implementation of state and federal environmental laws and, as necessary, directly initiates enforcement  
26 actions on behalf of itself and its members. EcoRights brings this action on its own behalf and on behalf  
27 of its adversely affected staff and members.  
28

1           15. Any person who files a FOIA request is deemed to have standing to invoke the  
2 jurisdiction of the federal courts to carry out the judicial review provisions of FOIA. EcoRights filed the  
3 FOIA Request at issue and has standing to bring this FOIA suit.

4           16. EcoRights works in furtherance of its goals in part by acquiring information regarding  
5 federal programs and activities through FOIA. EcoRights then compiles and analyzes that information  
6 and, subsequently, disseminates that information to its membership, the general public, and public  
7 officials through various sources, including reports posted on its website and other websites and through  
8 television and radio interviews. EcoRights' successful efforts at educating the public on issues  
9 concerning federal government programs and activities contribute significantly to the public's  
10 understanding of governmental operations and activities. EcoRights also uses the information that it  
11 acquires through FOIA to participate in federal decision-making processes, to file administrative appeals  
12 and civil actions, and generally to ensure that federal agencies comply with federal laws.

13           17. EcoRights regularly uses FOIA as an important avenue for gaining information about  
14 agency activities. EcoRights is harmed when it is denied timely access to documents to which it is  
15 entitled, as it has been here. This harm is ongoing as EcoRights is still unable to use this information to  
16 educate the public.

17           18. EcoRights intends to continue its use of FOIA to access agency records in the possession  
18 of NOAA. Specifically, EcoRights has concrete plans to submit additional FOIA requests to NOAA as  
19 EcoRights' advocacy efforts continue, and to follow up on the information learned while reviewing  
20 agency records responsive to the present FOIA Request.

21           19. One of the purposes of FOIA is to promote the active oversight role of public advocacy  
22 groups incorporated in many federal laws applicable to federal agencies, including the Administrative  
23 Procedure Act. *See, e.g.*, 5 U.S.C. §§ 551, *et seq.* EcoRights uses FOIA to publicize activities of federal  
24 agencies and to mobilize the public to participate in advocacy to elected and other government officials.  
25 EcoRights intends to continue using FOIA requests to fulfill its oversight and advocacy role through  
26 scrutinizing agency records, a practice Congress intended to promote through the adoption of FOIA. The  
27 FOIA Request seeks to understand NOAA's actions and policies that appear to have violated the law  
28

1 and principles of good governance. This harm can be remedied in part by ensuring EcoRights has  
2 prompt access to public records going forward.

3 20. EcoRights, its staff, or one or more of its members have and will suffer direct injury by  
4 NOAA's failure to comply with the statutory requirements of FOIA, and a favorable outcome of this  
5 litigation will redress that injury. NOAA's refusals to provide timely FOIA access to agency records  
6 interferes with EcoRights' ability to participate as an informed watchdog, looking over NOAA's actions  
7 to ensure that it adequately follows the law.

8 21. Defendant NOAA is a federal agency of the United States within the U.S. Department of  
9 Commerce, and, as such, is an agency subject to the FOIA, pursuant to 5 U.S.C. § 552(f). FOIA charges  
10 NOAA with the duty to provide public access to agency records in its possession or control. NOAA  
11 possesses records responsive to EcoRights' FOIA Request. NOAA is denying EcoRights access to its  
12 records in contravention of federal law.

13 22. NOAA failed to lawfully make a determination on EcoRights' FOIA Request within the  
14 statutory twenty-working-day limit. As of the date of this filing, NOAA possesses, controls, and  
15 unlawfully withholds agency records responsive to EcoRights' FOIA Request that are not subject to a  
16 FOIA exemption. As of the date of this filing, NOAA has not completed a FOIA-compliant search for  
17 records responsive to EcoRights' FOIA Request.

### 18 STATUTORY AND REGULATORY BACKGROUND

19 23. FOIA was amended in 2007 to reaffirm that Congress, through FOIA, continues to seek  
20 to "ensure that the Government remains open and accessible to the American people and is always based  
21 not upon the 'need to know' but upon the fundamental 'right to know.'" Pub. L. No. 110-175, 121 Stat.  
22 2524, Section 2 ¶ 6 2007).

23 24. Administrative remedies are deemed exhausted whenever an agency fails to comply with  
24 the applicable time limits of FOIA, and this puts all questions of FOIA compliance, including but not  
25 limited to failure to comply with the twenty-business-day determination deadline, within the jurisdiction  
26 of the federal courts. 5 U.S.C. § 552(a)(6)(C)(i).

27 25. FOIA requires that an agency disclose records to any person except where the record falls  
28 under a specifically enumerated exemption. 5 U.S.C. § 552. The courts have emphasized the narrow

1 scope of these exemptions and “the strong policy of the FOIA that the public is entitled to know what its  
2 government is doing and why.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C.  
3 Cir. 1980).

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

8 27. The FOIA Improvement Act of 2016 made significant amendments to FOIA, effective as  
9 of enactment on June 30, 2016. *See* Department of Justice Office of Information Policy Summary of the  
10 FOIA Improvement Act of 2016, available at [https://www.justice.gov/oip/oip-summary-foia-](https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016)  
11 [improvement-act-2016](https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016) (“OIP FOIA 2016 Summary”). The amendments include changes to the standard  
12 by which NOAA must evaluate potential withholdings. The FOIA Improvement Act of 2016 dictates  
13 that agencies shall withhold information only if disclosure would harm an interest protected by an  
14 exemption – what is referred to as the “foreseeable harm standard” – even if that information is arguably  
15 subject to an exemption claim by the agency. 5 U.S.C. § 552(a)(8)(A)(i); OIP FOIA 2016 Summary.  
16 This represents an additional thumb on the scale in favor of disclosure.

17 28. 5 U.S.C. § 552(a)(6)(A)(i) requires that the agency provide enough information,  
18 presented with sufficient detail, clarity, and verification, so that the requester can fairly determine what  
19 has not been produced and “the reasons therefore.”

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

23 30. An agency’s process for processing FOIA requests constitutes “withholding” if its net  
24 effect is to significantly impair the requester’s ability to obtain the records or significantly increase the  
25 amount of time he or she must wait to obtain them. *McGehee*, 697 F.2d at 1110.

26 31. FOIA requires that an agency, upon any request for records, shall promptly make the  
27 records available. 5 U.S.C. § 552(a)(3)(A). An agency shall make a determination whether to comply  
28 with a request within twenty business days after the receipt of the request and shall immediately notify

1 the party making the request of such determination, the reasons for the determination, and the party's  
2 right to appeal. 5 U.S.C. § 552(a)(6)(A)(i).

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

6 33. FOIA disputes are normally resolved on summary judgment, with the burden of proving  
7 FOIA compliance falling on the agency. The agency must carry its burden of demonstrating all elements  
8 of FOIA compliance. The agency may meet its litigation burdens by providing declarations, and  
9 disclosing contravening evidence in its possession, that address, among other things: a broad  
10 interpretation of the FOIA Request, lawful search, lawful cut-off date for each search for documents  
11 responsive to the request, and the justification for withholding any agency record or part thereof in a  
12 "*Vaughn Index*."

### 13 **FACTUAL BACKGROUND**

14 34. On September 11, 2019, EcoRights submitted the FOIA Request to NOAA via  
15 FOIAOnline.gov. This FOIA Request, and NOAA's violations of FOIA related to it, is the basis for this  
16 lawsuit.

17 35. EcoRights' FOIA Request seeks several specific categories of records relating to  
18 NOAA's reporting of Hurricane Dorian and how that may have been compromised by interference from  
19 President Trump and/or others in the White House. The documents EcoRights requests constitute the  
20 best available evidence of this potentially unethical and illegal activity.

21 36. On information and belief, NOAA has never attempted to or made contact with  
22 EcoRights related to the FOIA Request.

23 37. EcoRights contacted NOAA on October 10, 2019 to inquire into the status of the FOIA  
24 Request. EcoRights made it clear that NOAA's determination was now overdue and that EcoRights  
25 would bring a lawsuit to remedy this violation of FOIA if NOAA did not produce all records within one  
26 week. NOAA completely failed to respond to this email, necessitating this lawsuit.

27 38. As of the filing date of this Complaint, EcoRights has not received NOAA's final  
28 determination on the FOIA Request.



1 39. As of the filing date of this Complaint, NOAA currently possesses or controls, and is  
2 withholding, agency records responsive to EcoRights' FOIA Request that are not subject to a FOIA  
3 exemption. NOAA's withholding of agency records is unlawful.

4 40. As of the filing date of this Complaint, NOAA continues to withhold agency records  
5 responsive to the FOIA Request. NOAA has not made and communicated a final determination on the  
6 FOIA Request. NOAA has not completed a FOIA-compliant search. NOAA has not provided the "cut-  
7 off date" used for any search, thereby frustrating EcoRights' intent to file a follow-up FOIA request.  
8 NOAA has provided no sufficient basis for withholding any of the specific agency records being  
9 withheld in full or in part.

10 41. EcoRights now turns to this Court to provide relief that ensures EcoRights, its  
11 membership, and the public have the prompt public access to agency records guaranteed by FOIA. 5  
12 U.S.C. § 552(a)(6).

### 13 **FIRST CLAIM FOR RELIEF**

#### 14 **Violation of FOIA: Constructive Denial and Unlawfully Withholding**

#### 15 **Agency Records Responsive to the FOIA Request**

16 42. EcoRights repeats and incorporates by reference the allegations in the above paragraphs  
17 and all paragraphs of this Complaint.

18 43. NOAA has not communicated to EcoRights the scope of the documents it intends to  
19 produce and withhold in response to the FOIA Request or its reasons for withholding any documents,  
20 and has not disclosed to EcoRights records responsive to the FOIA Request.

21 44. NOAA violated FOIA (5 U.S.C. § 552(a)) by failing to provide a lawful determination  
22 and response to EcoRights' September 11, 2019, FOIA Request within the statutory twenty-day period.  
23 5 U.S.C. § 552(a)(6)(A)(i).

24 45. This failure to make a lawful determination on EcoRights' FOIA Request within the time  
25 frame required by FOIA is a constructive denial and wrongful withholding of the records EcoRights  
26 requested in violation of FOIA. 5 U.S.C. § 552(a)(6)(A)(i); 5 U.S.C. § 552(a)(6)(C)(i).

27 46. NOAA continues to violate FOIA by not making responsive records promptly available  
28 to EcoRights. 5 U.S.C. § 552(a).



1 B. Enter findings and declare that NOAA violated FOIA by unlawfully withholding agency  
2 records responsive to EcoRights' FOIA Request;

3 C. Enter findings and declare that NOAA violated FOIA by failing to conduct a search  
4 reasonably calculated to locate the records responsive to EcoRights' FOIA Request;

5 D. Direct by injunction that NOAA provide EcoRights a lawful determination on EcoRights'  
6 FOIA Request by a date certain;

7 E. Direct by order that NOAA conducts a lawful search for responsive records;

8 F. Direct by order that NOAA provides proof that it conducted a lawful search with a cutoff  
9 date set as the date of such order;

10 G. Direct by injunction that NOAA promptly provide all agency records responsive to  
11 EcoRights' FOIA Request that are not subject to withholding pursuant to one of the nine recognized  
12 FOIA exemptions;

13 H. Direct by order that NOAA provide EcoRights with a detailed statement justifying each  
14 withholding of an agency record, or portions thereof, in accordance with the indexing requirements of  
15 *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974);

16 I. Direct by order that NOAA provide EcoRights with all responsive agency records by a  
17 date certain, within twenty working days of any such order;

18 J. Grant EcoRights' costs of litigation, including reasonable attorney fees as provided by  
19 FOIA, 5 U.S.C. § 552(a)(4)(E); and,

20 K. Provide such other relief as the Court deems just and proper.  
21

22 **DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

23 Based on Plaintiff's knowledge to date, pursuant to Civil Local Rule 3-15, the undersigned  
24 certifies that, as of this date, other than the named parties, there is no such interest to report.

25 Dated: October 17, 2019

Respectfully submitted,

26  
27 By:

*Christopher a. sproul*

Christopher Sproul  
Counsel for Ecological Rights Foundation  
28

**ENVIRONMENTAL ADVOCATES**  
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September 9, 2019

*Submitted via email*

Andre Sivels  
Records Officer  
NOAA Corporate Services  
[Andre.sivels@noaa.gov](mailto:Andre.sivels@noaa.gov)

CC: Jerry McNamara ([Jerome.mcnamara@noaa.gov](mailto:Jerome.mcnamara@noaa.gov))

**RE: Freedom of Information Act Request and Fee Waiver Request**

Dear Mr. Sivels:

This request is made pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and 40 C.F.R. pt. 2, on behalf of Ecological Rights Foundation (“EcoRights”). Consistent with its mission, EcoRights hereby requests copies of the following records,<sup>1</sup> from the National Oceanic and Atmospheric Association *and* the National Weather Services’ Birmingham Office (collectively “NOAA”):

1. All records reflecting or relating to any communications with President Donald Trump, any White House official, or anyone providing a message from those individuals or acting on their behalf related to whether Hurricane Dorian would impact Alabama or addressing the extent to which it would or may impact Alabama.
2. All records reflecting or relating to any discussions with President Donald Trump, any White House official, or anyone providing a message from those individuals or acting on their behalf directing NOAA to say or endorse the claim that Hurricane Dorian would or might impact Alabama or related to the potential severity of any impact.
3. Any communications within NOAA or with individuals outside of NOAA discussing

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<sup>1</sup> This request defines “records” broadly to include all documents, books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics. “Documents,” as used herein, refers to paper documents and/or electronically stored information, including writings, correspondence, emails, records of phone conversations, notes, meeting minutes, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations, stored in any medium.

whether to amend, edit, or otherwise change any Hurricane Dorian forecast as a result of President Donald Trump's statement that it would impact Alabama.

4. Any communications within NOAA or with individuals outside of NOAA discussing or relating to the tweet by the National Weather Service Birmingham Office that "Alabama will NOT see any impacts from #Dorian. We repeat, no impacts from Hurricane #Dorian will be felt across Alabama" or any similar tweet or communication expressing doubt or stating that Hurricane Dorian would not impact Alabama or related to the severity of any impact, including but not limited to, any communications within NOAA or with individuals outside of NOAA relating to the accuracy of the aforementioned tweet.
5. Any communications from NOAA, any NOAA official, or anyone providing a message from those individuals or acting on their behalf, to the National Weather Service Birmingham Office related to their tweet that "Alabama will NOT see any impacts from #Dorian. We repeat, no impacts from Hurricane #Dorian will be felt across Alabama" or any similar tweet or communication expressing doubt or stating that Hurricane Dorian would not impact Alabama or related to the severity of any impact.
6. Any communications from President Donald Trump, any White House official, or anyone providing a message from those individuals or acting on their behalf to the National Weather Service Birmingham Office addressing their tweet that "Alabama will NOT see any impacts from #Dorian. We repeat, no impacts from Hurricane #Dorian will be felt across Alabama" or any similar tweet or communication expressing doubt or stating that Hurricane Dorian would not impact Alabama or related to the severity of any impact.
7. All records reflecting or relating to the NOAA internal memorandum of September 1, 2019, which states, among other things, that NOAA personnel should "only stick with official National Hurricane Center forecasts if questions arise from some national level social media posts which hit the news this afternoon."
8. All records reflecting or relating to the preparation of the map showing the path of Hurricane Dorian displayed by President Donald Trump at a press briefing at the Oval Office on Wednesday, September 4, 2019, including but not limited to, the identity of the person or persons responsible for the inclusion of an additional cone, marked by what appeared to be a black marker, showing the path of the hurricane extending into Alabama.
9. All records relating to the NOAA internal memorandum of September 4, 2019, which, on information and belief, encouraged NOAA personnel not to speak publicly concerning the map showing the path of Hurricane Dorian displayed by President Donald Trump at President Donald Trump's press briefing on September 4, 2019 referred to in paragraph 8 above.
10. Any communications within NOAA or with individuals outside of NOAA, occurring after the press briefing of President Donald Trump at the Oval Office on Wednesday, September 4, 2019 referred to in paragraph 8 above, that refer or relate to the map showing the path of Hurricane Dorian displayed by President Donald Trump at the press briefing, including but not limited to, any records that relate to the accuracy of the map and the inclusion of an additional cone, marked by what appeared to be a black marker, showing the path of the hurricane extending into Alabama.
11. Any communications within NOAA or with individuals outside of NOAA relating to the investigation by Craig McLean, the acting chief scientist of NOAA, into whether NOAA violated any policies, including but not limited to, NOAA's Administrative Order on

Scientific Integrity, when it issued a press release on September 6, 2019, stating, among other things, that the National Weather Service Birmingham Office statement referred to in paragraph 4 above “spoke in absolute terms that were inconsistent with probabilities from the best forecast products available at the time.”

EcoRights requests all records dated before fulfillment of this FOIA request. Please tender responsive records in digital format whenever possible.

\* \* \*

Please identify and inform us of all responsive or potentially responsive records within the 20 working days as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the basis of any claimed exemptions or privilege, including the specific responsive or potentially responsive records(s) to which such exemption or privilege may apply. *See Citizens for Responsibility and Ethics in Wash. v. Federal Election Comm’n*, 711 F.3d 180, 182-83 (D.C. Cir. 2013) (holding that the agency must identify the exemptions it will claim with respect to any withheld documents within the time frame prescribed by FOIA). The Supreme Court has stated that FOIA establishes a “strong presumption in favor of disclosure” of requested information, and that the burden is on the government to substantiate why information may not be released under FOIA’s limited exemptions. *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991). Congress affirmed these tenets of FOIA in legislation as recently as December 2007, stating that government remains accessible to the American people and “is always based not upon the ‘need to know’ but upon the fundamental ‘right to know.’” Pub. L. No. 110-175, 121 Stat. 2524, 2525 (Dec. 31, 2007).

If your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.” *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979). A *Vaughn* index must (1) identify each document or portion of document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure of the document or portion of document would damage the interests protected by the claimed exemption. *See Citizens Comm’n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). “The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document,” in order to provide “the requestor with a realistic opportunity to challenge the agency’s decision.” *Oglesby v. U.S. Dep’t of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Such explanation will be helpful in deciding whether to appeal a decision to withhold documents and may help to avoid unnecessary litigation.

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. *See* 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Cent. v. U.S. Dep’t of the Air Force*, 455 F.2d 242, 261 (D.C. Cir. 1977). Claims of non-segregability must be made with the



same detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

FOIA requires federal agencies to make their records “promptly available” to any person who makes a proper request for them. 5 U.S.C. § 552(a)(3)(A) (as amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524).

### **Presumption of Openness and “Foreseeable Harm” Standard**

On his first full day in office President Obama demonstrated his commitment to the ideals of transparency and openness by issuing a Memorandum to the heads of all Executive Branch Departments and agencies by calling on them to “renew their commitment to the principles embodied in FOIA.” *See* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the FOIA, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President directed all agencies to administer the FOIA with a clear presumption in favor of disclosure, to resolve doubts in favor of openness, and to not withhold information based on “speculative or abstract fears.” *Id.* In addition, the President called on agencies to ensure that requests are responded to in “a spirit of cooperation,” that disclosures are made timely, and that modern technology is used to make information available to the public even before a request is made. *Id.*

In accordance with the President’s directives, on March 19, 2009, Attorney General Holder issued new FOIA guidelines, calling on all agencies to reaffirm the government’s “commitment to accountability and transparency.” Memorandum from Att’y Gen. Eric Holder for Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>. The Guidelines stress that the FOIA is to be administered with the presumption of openness called for by the President. *Id.* at p. 1.

The Attorney General “strongly encourage[d] agencies to make discretionary disclosures of information.” *Id.* He specifically directed agencies not to withhold information simply because they may do so legally and to consider making partial disclosures when full disclosures are not possible. *Id.* He also comprehensively addressed the need for each agency to establish effective systems for improving transparency. *Id.* at p. 2. In doing so he emphasized that “[e]ach agency must be fully accountable for its administration of the FOIA.” *Id.*

In issuing these new guidelines, Attorney General Holder established a new “foreseeable Harm” standard for defending agency decisions to withhold information. Under this new standard, the U.S. Department of Justice will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *Id.* As a result, “agencies must now include the ‘foreseeable harm’ standard as part of the FOIA analysis at the initial request stage and the administrative appeal stage.” Department of Justice Guide to the FOIA (2009), p. 25, available at [http://www.justice.gov/oip/foia\\_guide09.htm](http://www.justice.gov/oip/foia_guide09.htm).

This presumption of openness was enshrined in law when Congress passed, and President Obama signed, the FOIA Improvement Act of 2016, Pub. L. No. 114-185, which added a new section to FOIA that states:

- (8)(A) An agency shall –
  - (i) withhold information under this section only if –
    - (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or
    - (II) disclosure is prohibited by law; and
  - (ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and
    - (II) take reasonable steps necessary to segregate and release nonexempt information; and

5 U.S.C. § 552(a)(8).

#### **Request for Fee Waiver**

FOIA was designed to grant a broad right of access to government information, with a focus on the public’s “right to be informed about what their government is up to,” thereby “open[ing] agency action to the light of public scrutiny.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). A key component of providing public access to those records is FOIA’s fee waiver provision, 5 U.S.C. § 552(a)(4)(A)(iii), which provides that “[d]ocuments shall be furnished without any charge or at a [reduced] charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

FOIA’s fee waiver requirement is to be “liberally construed.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dep’t of the Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver amendments of 1986 were designed specifically to provide organizations such as EcoRights access to government documents without the payment of fees. As one Senator stated, “[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298 (statement of Senator Leahy). Indeed, FOIA’s waiver provision was intended “to prevent government agencies from using high fees to discourage certain types of requesters and requests, in clear reference to requests from journalists, scholars, and . . . non-profit public interest groups.” *Better Gov’t Ass’n v. Dep’t of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984)).

EcoRights, a non-commercial requester, hereby requests a waiver of all fees associated with this request because disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 15 C.F.R. § 4.11(d). This request



satisfies both statutory and regulatory requirements for granting a fee waiver, including fees for search, review, and duplication.<sup>2</sup> Below, stated first in bold, are the criteria considered by NOAA under its regulations in assessing requests for fee waivers, followed by an explanation of EcoRights' satisfaction of those requirements. *See* 15 C.F.R. § 4.11.<sup>3</sup> Fee waiver requests must be evaluated based on the face of the request. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 125 (D.D.C. 2009).

- (1) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government. The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote or attenuated.**

The requested records concern NOAA's independence as a scientific agency, the veracity of its weather predications and its ability to provide independent weather predictions that keep the public safe. The subject matter of the requested records directly and specifically concerns identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote.

The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government. *See* Department of Justice Guide to the FOIA (2009), p. 25. This requirement is clearly met in this case.

- (2) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be likely to contribute to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding.**

The requested records are meaningfully informative about government operations or activities and are "likely to contribute" to an increased public understanding of those operations or activities. The records requested will provide us with the ability to communicate to the public about NOAA's independence as a scientific agency, the veracity of its weather predications and its ability to provide independent weather predictions that keep the public safe. The actions and

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<sup>2</sup> Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iv), no fee may be charged for the first two hours of search time or for the first one hundred pages of duplication.

<sup>3</sup> *See also Department of Justice Fee Waiver Guidance to Agency Heads From Stephan Markman, Assistant Att'y Gen.* (Apr. 2, 1987) (advising agencies of factors to consider when construing fee waivers), available at [http://www.justice.gov/oip/foia\\_updates/Vol\\_VIII\\_1/viii1page2.htm](http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm).

assessments of NOAA regarding this issue are of concern to the public. Disclosure of the requested records will enhance the public's knowledge of these issues and support public oversight of federal agency operations. These records will also illuminate in a clear and direct way, the operations and activities of NOAA to fulfill important Congressional mandates. There is a logical connection between the content of the records we have requested and the government's operations and activities related to protection of human health and the environment.

Furthermore, the information being requested is new. Although the full contents of the information requested are currently unknown to us, EcoRights does not request any documents previously provided to us by the government. The information EcoRights is requesting is not, to our knowledge, publicly available. The government may omit sending us requested records that are available in publicly accessible forums such as on the internet or in published materials that are routinely available at public or university libraries so long as the government provides us with adequate references and/or website links so that we may obtain these materials on our own. However, the requested materials will otherwise not be available unless we receive them from the government in response to this FOIA request.

- (3) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered.**

Disclosure of the records will promote the understanding of the general public in a significant way because EcoRights will analyze the information and make its conclusions known to our members, other environmental groups nationwide, and the public at large via press releases, newsletters, and by posting our analyses of the information on one or more internet web sites or citizen group email broadcast "systems." There has been significant national media attention related to President Trump's struggle against acknowledging science and here it appears that he attempted to influence a storm warning because he did not want NOAA to say that his initial predictions were wrong. The documents requested are expected to shed light on whether this is true and whether any such attempts were effective. Because EcoRights has the intention to analyze these records and disseminate the contents to its membership and the public at large, this requirement is easily met.

These activities publicizing and distributing information received through FOIA requests demonstrate EcoRights' intention to disseminate the information to the public with the goal of disclosing material that will inform, or has the potential to inform, the public. *See also Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) (finding an online newsletter and maintenance of a website sufficient to show how the requester will disseminate information); *Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203-04 (D.D.C. 2009) (finding public interest organization's "website [and] newsletter . . . are an adequate means of disseminating information," and noting the organization's "stature as [an] advocacy group . . . len[t] credence" to its dissemination argument). EcoRights will use the information obtained

through this FOIA request in the methods described herein, therefore it will contribute to “public understanding.”

- (4) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. The public’s understanding of the subject in question prior to the disclosure must be significantly enhanced by the disclosure.**

Disclosure of the requested information will significantly contribute to public understanding of government operations. Specifically, the information will demonstrate whether NOAA in maintaining its independence as a scientific agency, the veracity of its weather predications, and its ability to provide independent weather predictions that keep the public safe. In short, these records to go the core values and purposes of NOAA and whether NOAA is still carrying those out.

The threats related to these records could affect the health and safety of millions of Americans. EcoRights has a demonstrated ability to disseminate the problematic features of government activities to a wider public audience, by litigation as well as the other means. Factors indicating an ability to disseminate information to the public include publication on an organization website and the ability to obtain media coverage. *Judicial Watch v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003).

EcoRights’ analyses will be disseminated via press releases as well as posted on EcoRights’ web site (<http://www.ecorights.org>) and likely the web sites of other environmental and other public interest groups. EcoRights has a proven track record of obtaining press coverage of the issues it publicizes. Generally, EcoRights obtains press coverage in the local and national media, including newspapers and radio stories. For example, EcoRights’ recent filing of an ESA citizen suit concerning Stanford University’s operations in the San Francisquito Creek watershed was covered by several San Francisco Bay Area newspapers, KQED radio, and a local television station. EcoRights regularly issues press releases and includes them on its website. EcoRights has demonstrated its ability to disseminate information to the public, as evidenced by its upkeep of its website and social media, its mention on other public interest groups’ web sites, and its ability to attract press coverage for its various lawsuits.

- (5) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.**

EcoRights is a community-based educational nonprofit corporation committed to the protection, preservation, and restoration of the environment and endangered and threatened species. For over 15 years, EcoRights has been devoted to furthering the rights of all people to a clean, healthful, and biologically diverse environment. To further EcoRights’ environmental advocacy goals, EcoRights actively seeks federal and state agency implementation of state and federal laws, and as necessary, directly initiates enforcement actions on behalf of itself and its members. Accordingly, EcoRights has no commercial interest in the information requested.

EcoRights seeks the information solely to determine NOAA's independence as a scientific agency, the veracity of its weather predications and its ability to provide independent weather predictions that keep the public safe. Not only does this have public health and safety implications, but, as a scientific agency, this has great implications for environmental science and policy issues which could cause serious, lasting, and potentially permanent harm to the environment. This information will therefore aid in EcoRights' efforts to advocate that the appropriate state, federal, or private entities take needed actions to protect our environment and natural resources.

EcoRights has no financial interest in the information sought or any enforcement actions that may result. EcoRights goal in urging enforcement of environmental laws is not private financial gain, but rather vindication of the larger public interest in ensuring that NOAA is operating in such a way that it will protect, and contribute to the protection of public health, wildlife, and the environment.

**(6) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.**

EcoRights has no commercial interest in the requested information, as discussed above. Accordingly, the identified public interest in the disclosure of the requested information discussed above necessarily outweighs any commercial interest in this request. For the above reasons, EcoRights respectfully requests a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107 for all copying costs, mailing costs, and other costs related to locating and tendering the documents.

We also base our request for a fee waiver on the following additional authorities.

The law **requires** that records be furnished without charge or at a reduced charge when requesters are able to demonstrate that (1) disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(4)(a)(iii); 40 C.F.R. § 2.107(l)(1); *Judicial Watch, Inc. v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003) (emphasis added).

**(a) Rule of liberal construction.** FOIA's fee waiver provision is to be liberally construed in favor of noncommercial requesters. *Judicial Watch, Inc. v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). The major purpose of the 1986 amendments to FOIA was to remove roadblocks and technicalities that agencies have used to deny fee waivers. *McClellan*, 835 F.2d at 1284. A request for fee waiver need only be reasonably specific and nonconclusory. *Judicial Watch, Inc. v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003).

Requesters make a prima facie case for a fee waiver when they specify why they want the records, what they intend to do with the information, and to whom they will distribute the

information. *Friends of the Coast Fork v. U.S. Dep't of Interior*, 110 F.3d 53, 55 (9th Cir. 1997). The burden then shifts to the agency to establish that the denial is warranted. *Id.* In denying a fee waiver request, the agency may not “hang [its] hat on a single factor” but must assess all of the pertinent factors. *Id.* Moreover, a reviewing court owes no particular deference to an agency’s restrictive interpretation of FOIA. *See Tax Analysts v. Commissioner*, 117 F.3d 607, 613 (D.C. Cir. 1997).

(b) **Public interest purpose.** EcoRights falls squarely within the category of “public interest” requesters intended to benefit from the 1986 amendments of FOIA, which expanded FOIA fee waiver provisions. This amendment was intended precisely to facilitate informational access by citizen watchdog groups that will monitor and challenge government activities. *See Better Govt. Ass’n v. Dep’t of State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986). Indeed, this provision should be construed as a presumption that such requesters are entitled to a fee waiver, especially if the requesters will publish the information or otherwise make it available to the general public. *See Ettlinger v. Fed. Bureau of Investigation*, 596 F. Supp. 867, 873 (D. Mass. 1984).

The legislative history of the fee waiver provision indicates that “A requester is likely to contribute significantly to public understanding if the information is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.” 132 Cong. Rec. H94646 (Reps. English and Kindness). Courts have cited this legislative intent as a standard for determining that a requester qualifies for a fee waiver. *See McClellan*, 835 F.2d at 1284-86.

For the above reasons, EcoRights respectfully requests pursuant to 5 U.S.C. section 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107 a fee waiver for all copying costs, mailing costs, and other costs related to locating and tendering the documents.

In the event that your agency denies EcoRights a fee waiver, please send a written explanation for the denial along with a cost estimate. Please contact us for authorization before incurring any costs in excess of \$25.

I look forward to your determination on this FOIA request within twenty days, as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and 40 C.F.R. § 2.104. The twenty-day statutory deadline is also applicable to EcoRights’ fee waiver request. *See, e.g., Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (finding where an agency “fails to answer the [fee waiver] request within twenty days,” judicial review is appropriate).

*Please direct all correspondence and responsive records to:*

Christopher Sproul  
5135 Anza Street  
San Francisco, CA 94121  
(415) 533-3375  
Fax: (415) 358-5695  
E-mail: [csproul@enviroadvocates.com](mailto:csproul@enviroadvocates.com)

Thank you for your attention to this request. If you have any questions about the requested documents or the requested fee waiver, please do not hesitate to contact me at the phone or email below.

Sincerely,

Christopher Sproul  
5135 Anza Street  
San Francisco, CA 94121  
(415) 533-3375  
Fax: (415) 358-5695  
E-mail: [csproul@enviroadvocates.com](mailto:csproul@enviroadvocates.com)



Stuart Wilcox &lt;stuart.wilcox5@gmail.com&gt;

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**DOC-NOAA-2019-002194**

1 message

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**Stuart Wilcox** <stuart.wilcox5@gmail.com>

Thu, Oct 10, 2019 at 12:52 PM

To: FOIA@noaa.gov

Cc: Chris Sproul &lt;csproul@enviroadvocates.com&gt;

Dear NOAA FOIA Officer,

I am contacting you on behalf of my client Ecological Rights Foundation, the requester for DOC-NOAA-2019-002194. Ecological Rights Foundation submitted this request to NOAA on September 11, 2019 and a determination for this request was due yesterday, October 9, 2019. NOAA's determination on this request is now past FOIA's statutory deadline and Ecological Rights Foundation is now well within its rights to bring a lawsuit to force compliance with FOIA. Please provide a determination and produce all records for this request within one week or we will be forced to file a lawsuit to push for timely production of these time-sensitive records.

Thank you for your attention to this matter and we look forward to a determination and production of records soon.

Sincerely,  
Stuart Wilcox