UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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| LOWER PASSAIC RIVER STUDY AREA COOPERATING PARTIES GROUP, | ) | |
| vs. | ) | |
| U.S. ENVIRONMENTAL PROTECTION AGENCY, 1200 Pennsylvania Avenue NW Washington, DC 20460 | ) | Civil Action No. _____ |
| Defendant. | ) | **COMPLAINT** |

Plaintiff, the Lower Passaic River Study Area Cooperating Parties Group ("CPG"), by and through its undersigned attorneys, comes forth and alleges as follows:

## PRELIMINARY STATEMENT

1. The CPG, by and through counsel, brings this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552 *et seq.*, as amended, and the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, to compel the United States Environmental Protection Agency ("EPA") to disclose agency records it has wrongfully withheld from the CPG after multiple FOIA requests and subsequent appeals.

2. The subject FOIA requests seek records from EPA related to the Diamond Alkali Superfund Site (EPA Site NJD980528996).

3. The Diamond Alkali Superfund Site is the subject of EPA's *Superfund Proposed Plan for the Lower Eight Miles of the Lower Passaic River Part of the Diamond Alkali Superfund Site* (the "Proposed Plan") based upon the multi-year Focused Feasibility Study ("FFS") of an eight-mile section of the Lower Passaic River to evaluate cleanup options to address contaminated sediment in the river.

4. The CPG conducted an 8-year remedial investigation under EPA's oversight, at a cost of over $130 million, and was tasked with completing a feasibility study to determine a cost-effective and adequate remedy in accordance with the National Contingency Plan and CERCLA. EPA appears to have ignored much of this data, however, and proposed a technically questionable, costly, and massive bank-to-bank dredge-and-cap remedy in its Proposed Plan. EPA has estimated the remedy will cost over $1.7 billion. It is expected to disrupt the regional economy and community due to, for example, bridge openings, barge-movement restrictions, and vehicular and rail traffic delays.

5. EPA failed to produce agency records related to the FFS and the Proposed Plan that were sought by the CPG in the FOIA requests. And EPA improperly asserted privileges to avoid producing all of the requested records. The records requested included information that was necessary and important for the CPG to effectively evaluate and comment effectively on the Proposed Plan, and when it is issued, the Record of Decision ("ROD"), and to understand what EPA did or did not consider with respect to the Proposed Plan. EPA has not even responded to properly and timely filed administrative appeals of these improper FOIA denials.

6. EPA's responses to the CPG's record requests and appeals failed to provide all of the requested records and erroneously and unlawfully claimed certain documents were privileged and exempted from disclosure.

7. EPA ignored the statutory mandate to respond to the properly filed FOIA administrative appeals.

8. EPA's conduct is arbitrary and capricious and amounts to a flat denial of the CPG's FOIA Requests.

9. The CPG has exhausted its administrative remedies related to the subject FOIA requests.

## JURISDICTION AND VENUE

10. This Court has subject-matter jurisdiction and personal jurisdiction over the parties based on 5 U.S.C. § 552 (a)(4)(B). This Court also has jurisdiction over this action under 28 U.S.C. § 1331.

11. This Court has the authority to grant declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*

12. This Court has the authority to grant injunctive relief under FOIA, 5 U.S.C. § 552 (a)(4)(B).

13. The Court has the authority to award attorney fees and litigation costs under FOIA, 5 U.S.C. § 552 (a)(4)(E).

14. Venue is proper in this Court pursuant to 5 U.S.C. § 552 (a)(4)(B) and 28 U.S.C. § 1391(e).

## PARTIES

15. The Lower Passaic River Study Area Cooperating Parties Group ("CPG") is an unincorporated, voluntary association of more than 60 companies whose purpose, *inter alia*, is to conduct a Remedial Investigation and Feasibility Study ("RI/FS") within the 17-mile Lower Passaic River Study Area ("LPRSA").

16. EPA is an agency of the United States and has possession and control of the records at issue here.

## FACTUAL BACKGROUND

17. The Diamond Alkali Superfund Site was added to the National Priorities List in 1984 and includes the former pesticides manufacturing plant and surrounding properties at 80 and 120 Lister Avenue in Newark, New Jersey, the Lower Passaic River Study Area, and the Newark Bay Study area. The EPA Site ID number is NJD980528996.

18. Pursuant to a 2004 settlement agreement with EPA Region 2, as amended, the CPG provided EPA with over $13,000,000 in funding for a Remediation Investigation/Feasibility Study ("RI/FS") of the entire 17-mile LPRSA.

19. On May 8, 2007, the CPG and EPA Region 2 entered into a Settlement Agreement and Administrative Order on Consent ("RI/FS AOC") under which the CPG agreed to complete the RI/FS of the entire 17-mile LPRSA, including the lower eight miles of the LPRSA that are the subject of the Proposed Plan.

20. Since 2007, the CPG has spent more than $130 million on the RI/FS, which complies with the National Contingency Plan (NCP) and was submitted to EPA in 2015. The RI/FS is a mandatory step in the remedy selection process required by the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC 9601 *et seq.* (CERCLA), and the NCP.

21. At the same time the CPG was conducting the RI/FS of the Diamond Alkali Superfund Site, EPA conducted a study it called a "Focused Feasibility Study" for the lower eight-mile section of the LPRSA to evaluate cleanup options to address contaminated sediment in the river. (Ex. 1, EPA, *Cleaning Up the Lower Passaic River: An Overview of EPA's Proposal for the Lower Eight Miles* (May 2014), *available at* http://www.epa.gov/region02/passaicriver/pdf/prap_overview_fact_sheet_english_june_2014.pdf

(last visited on July 24, 2015).)

22. In 2012, the sampling performed as part of the RI/FS process identified a mudflat with elevated concentrations of 2,3,7,8-tetrachlorodibenzo-p-dioxin (2,3,7,8-TCDD or TCDD) and other contaminants in the vicinity of RM 10.9. In response, the CPG entered into another settlement with EPA Region 2 to conduct the RM 10.9 Removal Action, which was a time-critical action to remove and cap sediment contaminated with TCDD at RM 10.9.

23. On or around April 11, 2014, EPA released for public review and comment the *Superfund Proposed Plan for the Lower Eight Miles of the Lower Passaic River Part of the Diamond Alkali Superfund Site* (the "Proposed Plan") to remove 4.3 million cubic yards of sediment from the lower eight miles of the Passaic River. Massive in scale, scope, and cost, EPA described the Proposed Plan as the "largest cleanup in EPA history." (EPA News Release (Apr. 11, 2014), *available at* http://yosemite.epa.gov/opa/admpress.nsf/8b770facf5edf6f185257359003fb69e/cf9f96c6f99f225b85257cb700635826!OpenDocument (last visited on July 24, 2015).)

24. The deadline for commenting on the Proposed Plan was August 20, 2014. (Ex. 1, EPA, *Cleaning Up the Lower Passaic River: An Overview of EPA's Proposal for the Lower Eight Miles* (May 2014), *available at* http://www.epa.gov/region02/passaicriver/pdf/prap_overview_fact_sheet_english_june_2014.pdf (last visited on July 24, 2015).)

25. The CPG timely submitted comments to the Proposed Plan (comments *available at* http://www.lowerpassaiccpg.com/index.php/component/edocman/?view=document&id=14 (last visited July 27, 2015)), challenging the appropriateness of EPA Region 2's FFS and Proposed Plan on many grounds, albeit without the benefit of a review of the FOIA-requested

material that EPA has refused to produce.

26. Through a series of FOIA requests submitted in April, May, and June 2014, which are described below in this Complaint, the CPG sought EPA agency records that should have been considered—and perhaps were—by EPA as part of its supporting analysis in preparing the Proposed Plan and the FFS. The requested records therefore should have been part of the administrative file and ultimately the administrative record.

27. Because the requested information was not part of the administrative file, the CPG and other members of the public were not able to adequately comment (as they were entitled to) on all aspects of the massive Proposed Plan and FFS by the August 20, 2014 deadline.

28. Because the requested information has not been provided by EPA, the CPG and the public remain unable to fully understand the basis for the Proposed Plan, which is estimated by EPA to cost $1.731 billion, and the FFS.

29. The colossal scale and cost of the preferred alternative remedy described in the Proposed Plan require a far more rigorous approach to the development and screening of remedial alternatives, the comparative analysis of those alternatives, and the determination of the overall costs and benefits of the Preferred Alternative, than has been presented in the 2014 FFS and the Proposed Plan. As importantly, for the purposes of this lawsuit, EPA cannot fail to release, or in fact even respond to proper appeals for, appropriately requested information that is critical to evaluating EPA's massive Proposed Plan.

**FOIA Request No. 1 – EPA-R2-2014-005768 (April 21, 2014)**

30. On or around April 21, 2014, the CPG, through counsel, submitted a FOIA Request with EPA Region 2 seeking records relating to the Diamond Alkali Superfund Site and

the Proposed Plan. Among other information, this request sought records related to bioaccumulation samples; data sets and technical documentation used in regression models, biota analysis, human health and ecological risk assessments, and other reports; and correspondence and documents related to the Contaminated Sediments Technical Advisory Group, Proposed Remedial Action Plan, and Focused Feasibility Study. (Ex. 2, CPG April 21, 2014 FOIA Request and Appendices.). These are key pieces of technical information essential for developing and considering the Focused Feasibility Study, and such materials are clearly required to be produced under FOIA.

31. On or around April 21, 2014, the EPA confirmed receipt of the April 21, 2014 FOIA request, which the EPA identified as EPA-R2-2014-005768. (Ex. 3, April 21, 2014 Request Confirmation.)

32. Among other communications regarding the FOIA requests, including numerous calls, emails, and other communications with EPA in attempts to obtain the requested records, on or around June 17, 2014, the CPG, through counsel, submitted a letter to the Assistant Regional Counsel for EPA Region 2 to follow up on the FOIA requests described in this Complaint, including FOIA Request EPA-R2-2014-005768 (Apr. 21, 2014). The letter explained that the EPA's responses to the FOIA requests had been inadequate and that the CPG needed the requested information and records in order to evaluate the Proposed Plan and prepare comments during the public comment period. (Ex. 4, Letter from William Hyatt, Jr. to Sarah Flanagan (June 17, 2014).)

33. On or around October 10, 2014, EPA Region 2 informed the CPG that information responsive to FOIA request EPA-R2-2014-005768 had been released and that certain documents were publicly available. EPA purported that its response to the FOIA request

was complete and that EPA was withholding certain responsive information that allegedly is exempt from disclosure. (Ex. 5, Letter from Eric Schaaf, EPA Regional Counsel, to Robert Paul La Gravenis, K&L Gates (Oct. 10, 2014) and Log of Withheld Documents.)

34. EPA's response to the CPG's April 21, 2014 FOIA request, number EPA-R2-2014-005768, was inadequate, incomplete, and improper.

35. EPA failed to produce all materials responsive to FOIA Request No. EPA-R2-2014-005768. Among other things, EPA failed to provide:

- electronic files that identify biota tissue sample IDs and locations;
- datasets used to generate the normalized tissue and sediment concentration data pairs that EPA used in turn to generate a regression model and BSAF curve presented in the FFS;
- correspondence between EPA and NJDEP discussing NJDEP's angler surveys that included sites on the LPRSA, or any data or analysis from those surveys;
- technical bases (analyses, calculations, modeling files and results, mapping, and any other relevant materials) used to develop the capping area footprints for Alternative 4; and
- the dataset used in the Ecological Risk assessment.

(Ex. 6, Letter from William Hyatt, Jr., K&L Gates, to National Freedom of Information Officer (Nov. 7, 2014); Ex. 7, Letter from William Hyatt, K&L Gates, to Nat'l Freedom of Information Officer, EPA (Nov. 26, 2014).)

36. EPA has improperly withheld requested agency records under FOIA Exemption 5 (*e.g.*, deliberative process privilege, attorney-client privilege), even though many of the withheld documents are factual in nature and not privileged. Moreover, EPA has not met its burden to justify the withholding of the records the agency claims are exempt under FOIA.

37. Examples of improperly withheld documents include:

- A 2012 e-mail between EPA employees regarding additional site data (DASS00000032, Dec. 5, 2012, re: additional site data for next Wed.).

- A 2012 ingestion technical memorandum (FOIA_05768_00009015, 2012-01-25 Fish-Crab Ingestion Tech Memo.docx).
- A 2014 e-mail between EPA employees regarding cost effectiveness (DASS00004239, Jan. 14, 2014, re: Cost effectiveness).
- A 2014 e-mail between EPA employees regarding a meeting with members of the Community Advisory Group (DASS00003645, Mar. 2, 2014, re: Meeting with Ana Bautista and Debbie Mans, Passaic CAG).

(Ex. 5, Letter from Eric Schaaf, EPA Regional Counsel, to Robert Paul La Gravenis, K&L Gates (Oct. 10, 2014) and Log of Withheld Documents.)

38. On or around November 7, 2014, the CPG, though counsel, timely filed a FOIA administrative appeal of the April 21, 2014 FOIA request. (Ex. 6, Letter from William Hyatt, Jr., K&L Gates, to National Freedom of Information Officer (Nov. 7, 2014); Ex. 7, Letter from William Hyatt, K&L Gates, to Nat'l Freedom of Information Officer, EPA (Nov. 26, 2014).)

39. On or around November 12, 2014, EPA acknowledged receipt of the FOIA appeal related to FOIA request R2-2014-005768. (Ex. 8, Letter from Barbara Bruce, FOIA Specialist, to William Hyatt (Nov. 12, 2014).)

40. More than 20 business days (in fact more than 11 months) have passed since EPA received the agency appeal of FOIA Request EPA-R2-2014-005768, and EPA has not ruled on the appeal.

**FOIA Request No. 2 – EPA-R2-2014-006018 (April 28, 2014)**

41. On or around April 28, 2014, the CPG, through counsel, submitted a FOIA request with EPA Region 2 seeking records relating to the Diamond Alkali Superfund Site. The request sought the following:

> [A]ny and all emails, correspondence, and other documents relating to: (1) EPA's 2008 Conceptual Site Model ("CSM") and Empirical Mass Balance Model ("EMBM") developed as part of the LPRSA lower 8 mile Focused Feasibility Study ("FFS") and any comments, revisions or changes to the CSM that were considered by EPA in the development and issuance of the Proposed Plan for the

> lower 8 miles of the LPRSA; and (2) EPA's June 2008 peer review of the CSM and EMBM.

(Ex. 9, CPG April 28, 2014 FOIA Request.) The requested records include key technical materials that are needed for evaluating the Focused Feasibility Study.

42. Among other communications regarding the FOIA requests, including numerous calls, emails, and other communications with EPA in attempts to obtain the requested records, on or around June 17, 2014, the CPG, through counsel, submitted a letter to the Assistant Regional Counsel for EPA Region 2 to follow up on the FOIA requests described in this Complaint, including FOIA Request EPA-R2-2014-006018 (Apr. 28, 2014). The letter explained that the EPA's responses to the FOIA requests had been inadequate and that the CPG needed the requested information and records in order to evaluate the Proposed Plan and prepare comments during the public comment period. (Ex. 4, Letter from William Hyatt, Jr. to Sarah Flanagan (June 17, 2014).)

43. On or around January 5, 2015, EPA notified the CPG, through counsel, that EPA had completed its response to the April 28, 2014 FOIA request. EPA withheld certain responsive records and improperly claimed that the withheld documents were exempt under the deliberative process privilege, attorney-client privilege, and attorney work-product doctrine and that disclosure would interfere with enforcement proceedings. (Ex. 10, Letter from Eric Schaaf, EPA Regional Counsel, to Robert Paul La Gravenis, K&L Gates (Jan. 5, 2015), and Log of Withheld Documents.)

44. EPA's response to FOIA Request EPA-R2-2014-006018 was inadequate, incomplete, and improper.

45. Specifically, EPA failed to produce the 2008 CSM and EMBM developed as part of the FFS and Proposed Plan, or to provide comments, revisions or changes to the CSM that

were considered by EPA in the development and issuance of the Proposed Plan. (Ex. 11, Letter from William Hyatt, K&L Gates, to Nat'l Freedom of Info. Officer, EPA (Feb. 4, 2015).)

46. EPA has also improperly withheld requested agency records under FOIA Exemption 5 (*e.g.*, deliberative process privilege, attorney-client privilege), even though many of the withheld documents are factual and not privileged. Moreover, EPA has not met its burden to justify the withholding of the records the agency claims are exempt under FOIA.

47. Among other things, examples of improperly withheld documents include:

- 2007 memoranda regarding data sources and high resolution cores (11 & 12/2007, Technical Advisory Committee members; Data Sources and High Resolution Cores);
- 2007 information regarding sampling and modeling data (emails and documents created in 2007, including "Data Sources and High Resolution Cores; Sediment Transport Modeling; Additional Sampling . . . .");
- "86 emails and documents transmitted in 2008 between EPA-R2 and EPA-HQ, including CSTAG members" that included modeling information (1,2,3,4,5,7,8 & 9/2008); and
- 2009 Passaic River sampling information ("31 emails and documents created in 2009 within EPA-R2," 1,3,4,6,7,10,11 & 12/2009, Sampling in Passaic Newark Bay . . .).

(Ex. 10, Letter from Eric Schaaf, EPA Regional Counsel, to Robert Paul La Gravenis, K&L Gates (Jan. 5, 2015), and Log of Withheld Documents.)

48. On or around February 4, 2015, the CPG, through counsel, timely appealed EPA's decision to improperly withhold agency records pursuant to the April 28, 2014 FOIA request to EPA's National Freedom of Information Officer. (Ex. 11, Letter from William Hyatt, K&L Gates, to Nat'l Freedom of Info. Officer, EPA (Feb. 4, 2015).)

49. On or around February 6, 2015, EPA's Office of General Counsel acknowledged receipt of the FOIA appeal related to FOIA Request EPA-R2-2014-006018 (HQ-APP-2015-003894). (Ex. 12, Letter from Shirley Blair, General Law Office, to Robert Paul La Gravenis,

K&L Gates (Feb. 6, 2015).)

50. More than 20 business days (in fact, more than eight months) have passed since EPA received the agency appeal of FOIA Request EPA-R2-2014-006018, and EPA has not ruled on the appeal.

**FOIA Request No. 3 – EPA-R2-2014-006476 (May 14, 2014)**

51. On or around May 14, 2014, the CPG, through counsel, submitted a FOIA request with EPA Region 2 seeking records relating to the Diamond Alkali Superfund Site NJD980528996. Among other things, the request sought records related to funds spent in developing the April 11, 2014 Proposed Plan for the Lower Eight Miles of the Lower Passaic River Study Area; communications about the LPRSA between EPA personnel, including the Region 2 Administrator, Judith Enck, and members of the public or community advisory groups; documents from a public hearing held on May 7, 2014; and records related to the designation of any portion of the Site as an operable unit. (Ex. 13, CPG May 14 2014 FOIA Request Confirmation with Request & Appendices.)

52. On or around May 14, 2014, the EPA confirmed receipt of the May 14, 2014 FOIA request, which the EPA identified as EPA-R2-2014-006476. (Ex. 13, *id.*)

53. On or around May 15, 2015, the CPG submitted an Amended Appendix A to the May 14, 2014 FOIA Request. The amendment appendix included an added request for information about samples EPA used to define upriver (above the Dundee Dam) surface sediment background conditions. (Ex. 14, CPG May 14 2014 FOIA Request Modification.)

54. Among other communications regarding the FOIA requests, including numerous calls, emails, and other communications with EPA in attempts to obtain the requested records, on or around June 17, 2014, the CPG, through counsel, submitted a letter to the Assistant Regional

Counsel for EPA Region 2 to follow up on the FOIA requests described in this Complaint, including FOIA Request EPA-R2-2014-006476 (May 14, 2014; amended May 15, 2014). The letter explained that the EPA's responses to the FOIA requests had been inadequate and that the CPG needed the requested information and records in order to evaluate the Proposed Plan and prepare comments during the public comment period. (Ex. 4, Letter from William Hyatt, Jr. to Sarah Flanagan (June 17, 2014).)

55. Among other communications regarding the FOIA requests, including numerous calls, emails, and other communications with EPA in attempts to obtain the requested records, on or around November 4, 2014, the CPG, through counsel, submitted a letter to EPA to review the status of the FOIA requests and information that remained outstanding. Regarding FOIA Request No. 3, EPA-R2-2014-006476, the CPG informed EPA that, apart from scheduling-related emails, EPA had not produced "any substantive email communications between Judith Enck and members of the community (on either personal or official email accounts)." The CPG asked EPA to confirm that no such emails existed. (Ex. 15, Letter from William Hyatt, Jr., to Sarah Flanagan, EPA Asst. Regional Counsel (Nov. 4, 2014).)

56. On or around November 13, 2014, EPA responded that it had provided information responsive to the FOIA request for communications between members of the public and Administrator Enck and dismissively and incorrectly stated that that it was "beyond the scope of [EPA's] FOIA review" to determine whether or not the communications released were "substantive." (Ex. 16, Letter from Sarah Flanagan, EPA Asst. Regional Counsel, to William Hyatt, Jr. (Nov. 13, 2014).)

57. On or around March 20, 2015, EPA released more documents and purported that its response to FOIA Request EPA-R2-2014-006476 was complete. (Ex. 17, Letter from Eric Schaaf, EPA Regional Counsel, to Robert Paul La Gravenis, K&L Gates (Mar. 20, 2015).)

58. EPA's response to FOIA Request EPA-R2-2014-006476 was inadequate, incomplete, and improper.

59. Among other things, EPA failed to produce:

- an accounting of funds spent or committed to be spent in developing the Proposed Plan and the reports and appendices thereto, including but not limited to the Remedial Investigation and Focused Feasibility Study;
- documents authorizing the expenditure of funds for the Proposed Plan;
- documents that explain EPA's decision to designate of any portion of the Diamond Alkali Superfund Site as an operable unit; and
- all responsive emails between Administrator Enck, including responsive emails from her official email account and responsive emails from personal email accounts.

(Ex. 18, Letter from William Hyatt, K&L Gates, to Nat'l Freedom of Info. Officer, EPA (Apr. 17, 2015).)

60. EPA improperly withheld a responsive document under the deliberative process privilege, which contains a submission to the National Remedy Review Board by other federal agencies. (Ex. 17, Letter from Eric Schaaf, EPA Regional Counsel, to Robert Paul La Gravenis, K&L Gates (Mar. 20, 2015).) EPA has failed to justify this claimed privilege.

61. The information requested in FOIA Request EPA-R2-2014-006476 is critical for the CPG and the public to understand the bases for the Proposed Plan and the development of EPA's Conceptual Site Model from the time of EPA's initial release of the draft FFS in 2007 through its release of the revised FFS and Proposed Plan in April 2014.

62. On or around April 17, 2015, the CPG, through counsel, timely appealed EPA's decision to improperly withhold agency records in response to the May 14, 2014 FOIA request to EPA's National Freedom of Information Officer. (Ex. 18 Letter from William Hyatt, K&L Gates, to Nat'l Freedom of Info. Officer, EPA (Apr. 17, 2015).)

63. More than 20 business days (in fact more than six months) have passed since the CPG filed its administrative appeal of FOIA Request EPA-R2-2014-006476, and EPA has neither acknowledged receipt of nor ruled on the appeal.

**FOIA Request No. 4 – EPA-R2-2014-007546 (June 17, 2014)**

64. On or around June 17, 2014, the CPG, through counsel, submitted a FOIA request with EPA Region 2 seeking records relating to the Diamond Alkali Superfund Site NJD980528996. Among other things, the request sought records relating to the technical basis for New Jersey Department of Environmental Protection's Fish Advisory Levels, on which EPA's Proposed Plan relies. (Ex. 19, CPG June 17, 2014 FOIA Request.).

65. On or around June 17, 2014, the EPA confirmed receipt of the June 17, 2014 FOIA request, which the EPA identified as EPA-R2-2014-007546. (Ex. 20, June 17, 2014 Email Confirmation.)

66. Among other communications regarding the FOIA requests, including numerous calls, emails, and other communications with EPA in attempts obtain the requested records, on or around June 17, 2014, the CPG, through counsel, submitted a letter to the Assistant Regional Counsel for EPA Region 2 to follow up on the FOIA requests described in this Complaint, including FOIA Request EPA-R2-2014-007546 (June 17, 2014). The letter explained that the EPA's responses to the FOIA requests had been inadequate and that the CPG needed the requested information and records in order to evaluate the Proposed Plan and prepare comments

during the public comment period. (Ex. 4, Letter from William Hyatt, Jr. to Sarah Flanagan (June 17, 2014).)

67. On or around June 19, 2014, EPA responded to the CPG's June 17, 2014 letter regarding "the four [FOIA] requests that the Cooperating Parties Group ("CPG") has submitted to EPA in the last two months." The letter purported that EPA had processed the CPG's FOIA requests, had provided some responsive information, and that more responsive information would be forthcoming. (Ex. 21, Letter from Sarah Flanagan to William Hyatt, Jr. (June 19, 2014).)

68. On or around November 13, 2014, EPA sent a letter to the CPG purporting that all responsive information to FOIA Request EPA-R2-2014-007546 had been released. (Ex. 22, Nov. 13, 2014 Letter.)

69. EPA's response to FOIA Request EPA-R2-2014-007546 was inadequate, incomplete, and improper. In particular, EPA did not provide documentation relating to the technical basis of the "trigger levels," including toxicity values and exposure assumptions, that are listed in the FFS.

70. On or around November 26, 2014, the CPG, through counsel, timely appealed EPA's decision to improperly withhold agency records in response to the June 17, 2014 FOIA Request (EPA-R2-2014-007546) to EPA's National Freedom of Information Officer. (Ex. 7, Letter from William Hyatt, K&L Gates, to Nat'l Freedom of Information Officer, EPA (Nov. 26, 2014).)

71. More than 20 business days (in fact over 11 months) have passed since the CPG filed its administrative appeal of FOIA Request EPA-R2-2014-007546, and EPA has neither acknowledged receipt of nor ruled on the appeal.

## LEGAL BACKGROUND

72. FOIA provides that EPA or any other agency upon request "shall make [] records promptly available to any person." 5 U.S.C. § 552(a)(3)(A).

73. FOIA "focuses on the citizens" right to be informed about "what the government is up to," by fostering the release of "[o]fficial information that sheds light on the agency's performance of its statutory duties." *DOJ v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation omitted). "[D]isclosure, not secrecy, is the dominant objective" of FOIA. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (internal quotation marks and citations omitted).

74. One of President Obama's first acts after taking office was to state his administration's policy regarding FOIA, instructing agency managers that "[t]he Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails….Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve." Presidential Memorandum, Freedom of Information Act, 74 Fed. Reg. 4,683 (Jan. 21, 2009).

75. Upon receiving a FOIA request, EPA or any other agency "shall … determine within twenty days … whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons thereof, and of the right of such person to appeal to the head of the agency any adverse decision." 5 U.S.C. § 552(a)(6)(A)(i).

76. "In denying a request for records … an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request ..." 5 U.S.C. § 552(a)(6)(F).

77. If an agency denies a claim or fails to act on a request, the person requesting the records can make an administrative appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

78. EPA is required by law to rule on an appeal within 20 business days of receiving the appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

79. If the agency fails to provide a requestor with a determination within the statutory time limits, the entity making the request to the agency will be deemed to have exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

80. A federal district court reviews the agency's action *de novo*, and the burden is on the agency to justify its withholding of agency records. 5 U.S.C. § 552(a)(4)(B).

81. A federal district court has authority, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

82. The deliberative-process privilege is not a blanket exemption. Instead, the deliberative-process privilege exempts from disclosure "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

83. The burden is upon the agency to show that information withheld under the deliberative-process privilege satisfies the requirements of the privilege, including that the information is both pre-decisional and deliberative.

**Count I: Violation of the Freedom of Information Act – Failure to Provide Responsive Records**

84. The CPG repeats and re-alleges the allegations in paragraphs 1 through 83.

85. The CPG made clear and adequate FOIA requests pursuant to 5 U.S.C. § 552(a)(3)(A) and EPA's published rules.

86. EPA's responses to the CPG's FOIA requests were inadequate, incomplete, and improper.

87. EPA is improperly withholding requested agency records in violation of FOIA, 5 U.S.C. §§ 552 *et seq.*

88. On information and belief, the records requested by the CPG and withheld by EPA are not protected by the deliberative-process privilege or other asserted privileges.

89. EPA's failure to provide responsive documents, perform a thorough search, and its erroneous and unlawful assertion of the deliberative-process privilege and other privileges demonstrate bad faith and constitute violations of FOIA, 5 U.S.C. §§ 552 *et seq.*

90. EPA's failure to respond to the CPG's administrative appeals within 20 days demonstrated bad faith and constitutes a violation of FOIA, 5 U.S.C. §§ 552 *et seq.*

**Count II: Violation of the Administrative Procedure Act – Arbitrary and Capricious Behavior**

91. The CPG repeats and re-alleges the allegations in paragraphs 1 through 90.

92. EPA's failure to disclose responsive documents, perform a thorough search, and its erroneous and unlawful assertion of the deliberative-process privilege and other privileges, demonstrated bad faith and was arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*

93. EPA's failure to respond to the CPG's administrative appeals within 20 days demonstrated bad faith and was arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*

**RELIEF REQUESTED**

WHEREFORE, the CPG respectfully requests and prays that this Court:

1. Enter an Order declaring that EPA has wrongfully withheld requested agency records and wrongfully failed to respond to the CPG appeals;

2. Enter an Order declaring that EPA has acted in an arbitrary and capricious manner in withholding such requested agency records and failing to respond to the CPG appeals.

3. Issue an injunction directing EPA to disclose to the CPG all wrongfully withheld documents;

4. Award the CPG its attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and

5. Grant such other and additional relief to which the CPG may be entitled, as this Court deems just and proper.

Respectfully submitted,

Dated October 30, 2015

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