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Sent via certified mail and electronic mail

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue NW
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Re: Concerns Over EPA's "FOIA Regulations Update" Final Rule

Dear Administrator Wheeler,

The Environmental Integrity Project, Center for Biological Diversity, Chesapeake Bay Foundation, Earthjustice, Environmental Defense Center, Environmental Defense Fund, Essential Information, Food & Water Watch, Friends of the Earth, the Harvard Law School Emmet Environmental Law and Policy Clinic, Natural Resources Defense Council, Northwest Environmental Advocates, Our Children's Earth Foundation, Sierra Club, Southern Environmental Law Center, and Union of Concerned Scientists, (collectively, "Public Interest Groups"), respectfully write to express their strong concerns regarding the "FOIA Regulations Update" final rule promulgated by the Agency, without notice or an opportunity for public comment, on June 26, 2019 (the "Rule").[1]

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[2] Because "disclosure, not secrecy, is the dominant objective" of FOIA, it embodies a "philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language," and explicitly "seeks to permit access to official information long shielded unnecessarily from public view" and "to create a judicially enforceable right to secure such information from possibly unwilling official hands."[3]

Public Interest Groups are all non-profit organizations with a longstanding and continuing reliance on FOIA – both on their own behalf and/or on behalf of their members, clients, or partners – and are concerned that this new Rule will unduly impair the public's right and ability to apprise itself of important agency actions. While this letter summarizes some of our key substantive concerns regarding the new Rule, it is not an exhaustive list. We strongly

[1] 84 Fed. Reg. 30,028 (June 26, 2019).
[2] *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).
[3] *U.S. Dep't of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)).

urge EPA to delay implementation of the Rule until the Agency has conducted a sufficient period of notice and comment, in accordance with the requirements of the Administrative Procedure Act ("APA"). In brief, this letter addresses concerns with (i) the Rule's inappropriate authorization of political appointees to issue FOIA determinations; (ii) the Rule's requirement that all FOIA requests be submitted to, and reviewed by, EPA Headquarters; (iii) the Rule's apparent authorization of a new basis for withholding records based on their "responsiveness," which contradicts both FOIA and judicial precedent; and (iv) the lack of public notice and comment as required by the APA. These aspects of the Rule contravene not only the requirements of FOIA and the APA, but also the fundamental purpose of FOIA to ensure an informed public and transparency in government.

The Rule inappropriately authorizes political appointees to make FOIA determinations and significantly increases the potential for abuse of the FOIA process.

Any politicization of FOIA undermines its core functions of enabling the public to inform itself on what its government is up to, and to hold officials accountable for those actions. This is precisely why prior administrations, from both sides of the aisle, have historically taken pains to partition political appointees from FOIA processes. Under the Obama administration, political appointees at EPA were rarely involved in the FOIA response process at all, and participated only when they themselves had responsive records to provide.[4] Under former Administrator Scott Pruitt, EPA departed sharply from this longstanding bipartisan practice in implementing a "political awareness review" policy, under which political staff were not only authorized to issue FOIA determinations and overrule career FOIA staff, but were required to approve all FOIA requests.[5] In an interview with the House Oversight Committee, Chief of Staff Ryan Jackson indicated political staff had applied this review process to FOIA requests they deemed "politically charged."[6]

On November 16, 2018, Mr. Jackson issued an agency-wide Awareness Notification Process memorandum which explicitly superseded this political awareness review process.[7] The memo specifically stated that awareness review is "not an approval process," that reviewers are not permitted to issue or alter FOIA determinations made by career staff, and that only "FOIA staff, program staff, and program managers will… determine whether information should be

[4] U.S. EPA Office of Inspector General. *Report No. 15-N-0261: Response to Congressional Request Concerning Political Interference in Release of Documents Under the Freedom of Information Act.* August 20, 2015. https://www.epa.gov/sites/production/files/2015-09/documents/20150820-15-p-0261.pdf

[5] Letter from Ranking Member Elijah E. Cummings (now Chairman) of the House Oversight Committee, to former EPA Administrator Scott Pruitt. June 11, 2018. https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-06-11.EEC%20to%20Pruitt%20re.%20FOIA%20requests.pdf

[6] Subpoena Request from Ranking Member Cummings to Committee Chairman Trey Gowdy. July 13, 2018. https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-07-13.EEC%20to%20Gowdy%20re.FOIA%20Subpoena.pdf

[7] Memorandum from Ryan Jackson, EPA Chief of Staff, to all EPA staff re: Awareness Notification Process for Select Freedom of Information Act Releases. November 16, 2018. http://www.environmentalintegrity.org/wp-content/uploads/2018/11/epa-memo.pdf

released or withheld under FOIA's exemptions."[8] Political appointees were notably not identified as part of EPA's usual FOIA process in Mr. Jackson's memorandum.

EPA's new Rule, however, **explicitly** authorizes political appointees – including (but not limited to) yourself, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, and Deputy Regional Administrators, and any of "those individuals' delegates" – to make FOIA determinations. 40 C.F.R. § 2.103(b). The Rule effectively permits political appointees – including EPA Administrators – to circumvent the awareness notification process entirely by assuming the direct authority to deny FOIA requests themselves. Since the purported purpose of the November 2018 memorandum and the procedures it espouses was to insulate EPA's FOIA review from precisely this kind of interference, it is difficult to see how these policies can be reconciled, or how the new Rule can be seen as "promoting transparency and building public trust" in the Agency's FOIA process. To the contrary, because recent FOIAs by Public Interest Groups and others have revealed numerous embarrassing and even career-ending scandals for former Administrator Pruitt and others, EPA's changes to 40 C.F.R. § 2.103(b) suggest that EPA is attempting to limit transparency and grant more control over records to political staff in response – a suspicion necessarily bolstered by EPA's failure to allow any opportunity for public comment.

While the new Rule's explicit grant of FOIA authority to political appointees is concerning enough, EPA's deliberate omission of any appreciable limitations regarding who may be "delegated FOIA decision making authority" compounds the potential for abuse of the FOIA process by political appointees. The Agency's conclusion that "it is not necessary to set forth such delegations, and limitations, in Agency regulations," is especially puzzling as the Agency explicitly states that it was necessary to revise § 2.103(b) in the first place "because the term 'division director' is not easily interpreted across the Agency."[9] If the term "division director" was so inscrutable to Agency staff as to require an explicitly codified definition, surely the term "division director's designee" merits a similarly explicit clarification. It is difficult to see how the Rule's express authorization of political appointees to not only make FOIA determinations, but to also delegate that authority to *anyone*, including other political appointees, can meaningfully insulate the FOIA process from potential abuse. Public Interest Groups respectfully submit that such an intentionally ill-defined delegation loophole all but ensures that the question is not whether the FOIA process will be abused, but only how pervasive such future abuses will be.

Requiring all FOIA requests to be submitted to, and reviewed by, EPA Headquarters increases the potential for political abuse of the FOIA process.

The potential for political staff to abuse the FOIA process is only exacerbated by the Rule's substantial revision of 40 C.F.R. § 2.101(a) *requiring* all FOIA requests to be submitted directly to EPA Headquarters in Washington, D.C. – the precise office where the majority of political appointees are located. Aside from this requirement intuitively granting political staff

[8] *Id.*
[9] *See* 84 Fed. Reg. at 30,031.

heightened opportunities to interfere with FOIA requests, it is difficult to see how this change could possibly improve the Agency's FOIA efficiency or enhance the public's lawful access to information. EPA's own internal audit of its FOIA program in 2016, which included agency-wide interviews and surveys of hundreds of career FOIA staff, found that career staff strongly preferred improving centralization of FOIA processes within regions themselves, over attempting to centralize FOIA at EPA HQ.[10] Those same career staff also expressed wide concern that the Agency lacked the resources or staff actually necessary to support any successful centralization effort. As EPA has been experiencing pervasive issues meeting its FOIA obligations in the past two years as it is, and has frequently invoked a lack of resources and staff to justify its delays in processing FOIA requests, the wisdom of adding these additional procedural hurdles – which are neither necessary nor recommended by EPA's own FOIA staff – is highly questionable. Indeed, the new rules seem all but certain to both encourage inappropriate political interference and create unnecessary bottlenecks.

The FOIA does not permit agencies to withhold records, or portions of records, based on a determination of "non-responsiveness."

The Rule attempts to extend the Agency's ability to withhold records beyond the nine exemptions enumerated under FOIA. More specifically, the Rule revises 40 C.F.R. § 2.103(b) to impermissibly allow authorized individuals to "issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA, and to issue 'no records' responses" (emphasis added). The addition of this new language is troubling because § 2.104(h), which requires the Agency to notify the requester of any "adverse determination" under FOIA and provide the requester an opportunity to challenge said determination, expressly does *not* include determinations to "release or withhold a record or a portion of a record on the basis of responsiveness" within the definition of "adverse determinations."

As the D.C. Circuit has explicitly (and recently) held, the law is clear that FOIA does not permit agencies to withhold a record or a portion of a record "on the basis of responsiveness."[11] Once an agency has identified a record within the scope of a search, it must determine whether it falls under any of FOIA's enumerated exemptions, and promptly inform the requester of the basis for its determination. The U.S. Department of Justice's Office of Information Policy (OIP) FOIA guidance as far back as 1995 not only strongly discouraged agencies from asserting any determinations of "non-responsiveness" in the first place, but also stated that in any instance in which a requester disagrees, "the document pages involved should be included without question by the agency."[12] The 1995 guidance also states that in all cases, at a minimum requesters *must* be informed of, and given an adequate opportunity to challenge, any determinations that a record or portion of a record is "non-responsive." As the 1995 guidance indicates, even prior to *Am.*

[10] *See* U.S. EPA, Office of Environmental Information. *Evaluation of EPA's FOIA Program: Final Report*. February 12, 2016. https://www.epa.gov/sites/production/files/2016-12/documents/evaluation-foia-program-2-12-2016.pdf
[11] *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016).
[12] U.S. DOJ. *OIP Guidance: Determining the Scope of a FOIA Request, FOIA Update*, Vol. XVI, No. 3 (1995), at page 2-4.

Immigration Lawyers, "non-responsiveness" determinations were heavily disfavored by DOJ. After *Am. Immigration Lawyers*, OIP revised its 2017 FOIA guidance accordingly to explicitly clarify that "it is not permissible to redact information within a record as 'non-responsive,'" and that once an agency's search has identified a record, the agency "must process it in its entirety for exemption applicability. Only those portions of the record that are exempt can be redacted."[13]

In press releases following the Rule's issuance, EPA has stated that the Rule does not authorize any agency action which would contradict the judicial precedent and DOJ's longstanding interpretation of FOIA's requirements described above.[14] However, the plain text of the Rule's revised § 2.103(b), which states that the Agency may "issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness," contradicts both. If the Agency's position is that § 2.103(b) cannot actually permit the Agency to make these determinations, it is unclear why the Agency amended § 2.103(b) to explicitly add this language. In order to ensure consistency and prevent unnecessary confusion regarding the Rule, Public Interest Groups respectfully request that EPA revise the Rule to either remove this language from § 2.103(b), or amend § 2.104(h) to explicitly include any "responsiveness" determinations within the definition of "adverse determinations."

The Rule should have been issued with appropriate notice and comment as required by the Administrative Procedure Act.

We strongly disagree with EPA's assertion that public discussion of this rulemaking is "impracticable, unnecessary, or contrary to the public interest," as well as EPA's characterization of this Rule as making "minor and purely ministerial changes" within the scope of the procedural exemption.[15] These changes are patently substantial, and EPA cannot validly claim that requiring all FOIA requests to be submitted directly to EPA Headquarters in Washington, D.C. is a mere "procedural" rule exempt from notice and comment. EPA's invocation of the "good cause" exemption, which is "narrowly construed and only reluctantly countenanced,"[16] on the grounds that "the agency lacks discretion to reach a different outcome in response to comment" is similarly befuddling. The 2016 FOIA Amendments require only that agencies periodically review and update their FOIA regulations. They certainly do not mandate many of the changes actually made by this Rule.

Notice and comment requirements serve two equally important purposes. The first is to ensure that citizens have a meaningful opportunity to provide input and objections regarding substantive agency rules that could affect the public – which this Rule plainly does. Second, and equally important, is to ensure that an agency has actually considered all relevant factors and concerns before acting, and is issuing its rules in a deliberative manner. EPA's circumvention of these normal procedures fundamentally fails to serve either purpose, and clarifying the effect and scope of a rule through intermittent press releases – as EPA is currently doing – is precisely the

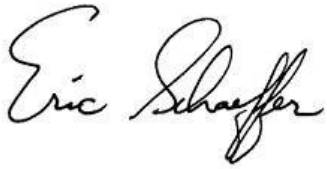
[13] https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia
[14] https://www.epa.gov/newsreleases/hill-gets-it-wrong-new-epa-foia-regulation
[15] 84 Fed. Reg. at 30,029
[16] *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).

sort of haphazard implementation and inconsistent, confusing guidance that notice and comment procedures are intended to prevent.

As you are aware, EPA's FOIA response and compliance rates have declined substantially in the past few years, which has significantly damaged the public's trust in the Agency and resulted in multiple Congressional inquiries regarding EPA's FOIA program.[17] Regardless of the Agency's views on the matter, it is clear that wide portions of the public, as well as members of Congress, have significant concerns that this new Rule will only serve to make that program even more cumbersome, and ultimately make it more difficult for the public to obtain the information that is its right by law. As you yourself emphasized in a November 13, 2018 memo to all EPA staff, FOIA "is both a statutory obligation and an important tool for promoting transparency and building public trust in agency actions."[18] Yet EPA's circumvention of the notice and comment process not only further undermines the public's faith in the integrity of EPA's FOIA procedures, but raises significant doubts as to whether EPA has proceeded with due care and consideration, as all agencies should prior to taking substantive actions.

We respectfully call on EPA to withdraw this illegally adopted Rule and remove the Rule's impermissibly provisions. EPA should only move forward with a revised Rule if it contains revisions that would actually improve the FOIA process, and the Agency must submit any revised Rule for appropriate notice and comment procedures, in order to ensure that both public and the Agency have an opportunity to meaningfully evaluate its contents. To do otherwise would contravene not only the APA, but basic tenets of good governance, rational decision-making, and your stated commitment to transparency and re-establishing the public trust in EPA's actions.

Sincerely,



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[17] June 11, 2018 Letter from Cummings to former Administrator Pruitt, *supra* note 3.
[18] November 16, 2018 Awareness Notification Process Memo, *supra* note 5.

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