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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

ADVOCATES FOR THE WEST,

Case No.: 3:20-cv-01028-AC

Plaintiff,

v.

**MOTION FOR PARTIAL SUMMARY
JUDGMENT AND
MEMORANDUM IN SUPPORT**

**BONNEVILLE POWER
ADMINISTRATION,**

Oral Argument Requested

Defendant.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, Plaintiff Advocates for the West hereby moves the Court to enter summary judgment in its favor on Claims for Relief One through Ten (inclusive) in its First Amended Complaint (ECF No. 8). Plaintiff also asks that this Court (1) enter an order requiring Defendant to release 5,000 pages a month to Plaintiff and (2) enter a declaratory judgment. Summary judgment is appropriate as Plaintiff's

claims involve no genuine disputes of material fact and Plaintiff is entitled to judgment as a matter of law. Counsel for Plaintiff and counsel for Defendant conferred by telephone on September 11, 2020 in a good-faith effort to resolve this dispute, but they were unable to do so. *See* Local Rule 7-1(a)(1)(A). This motion is being filed today (October 5, 2020) consistent with the Court's instructions. ECF No. 19.

This motion is supported by the accompanying memorandum in support; the declaration of Andrew Royce Missel and exhibits filed with that declaration; the First Amended Complaint in this matter; and such other and further material as may be presented to the Court before decision hereon.

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The Freedom of Information Act (“FOIA”) “does not condone agency personnel sitting behind accumulating mounds of FOIA requests and requiring each requester to ‘take a number’ and wait many months or years for the agency to comply.” *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 895 F.3d 770, 789 (D.C. Cir. 2018) (Pillard, J., concurring). And yet that is exactly what is happening here: the Bonneville Power Administration (“BPA”) has told Plaintiff Advocates for the West (“Advocates” or “Plaintiff”) that it must wait until the middle of 2022, at the earliest, for full responses to its five FOIA requests—two *years* from when Advocates sent those requests to BPA. BPA’s timeline for disclosure simply cannot be squared with FOIA’s “overarching mandate to make records ‘promptly available.’” *Id.* at 775 (majority opinion) (quoting 5 U.S.C. § 552(a)(3)(A)).

These delays are not simply technical violations of FOIA, nor are they merely inconvenient. Plaintiff and its clients and allies need the information sought by these requests to effectively understand and participate in ongoing public processes involving BPA. “The value of information is partly a function of time,” and the information sought by Plaintiff will be substantially less valuable if BPA is allowed to flout FOIA’s timelines and release that information years after being requested. *Fiduccia v. U.S. Dep’t of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999).

The Ninth Circuit has long recognized that the federal courts are “the enforcement arm of . . . FOIA,” and that they have a “duty to prevent . . . abuses” of the statute, including “unreasonable delays in disclosing non-exempt documents.” *Long v. U.S. Intern. Revenue Serv.*, 693 F.2d 907, 909–10 (9th Cir. 1982). Consistent with that duty, this Court should order BPA to release records to Plaintiff at a rate of 5,000 pages per month to remedy and prevent BPA’s

violations of FOIA. This Court should also enter a declaratory judgment that BPA is violating FOIA by failing to adhere to the statute's timelines.

STATEMENT OF FACTS

I. Plaintiff's Interest in BPA's Activities and Previous FOIA Requests

Plaintiff is a non-profit, public interest law firm headquartered in Boise, Idaho, with an office in Portland, Oregon. Missel Decl. ¶ 2. Plaintiff's mission is to defend western public lands, waterways, and wildlife on behalf of its clients, which include conservation groups, concerned citizens, and Indian tribes. *Id.* Plaintiff regularly represents its clients in litigation against federal government agencies, but Plaintiff also frequently furthers its clients' interests through other means, including public education campaigns and the exchange of information. *Id.*

Plaintiff has been interested in BPA's operations for some time because those operations have a substantial effect on the interests of Plaintiff's clients. BPA, together with the U.S. Army Corps of Engineers ("Corps") and the Bureau of Reclamation ("Reclamation"), manages the Columbia River System, a system of 14 dam and reservoir projects in the Pacific Northwest. Ex. 1, at 2.¹ The construction and continued operation of the Columbia River System has led to steep declines in populations of several species of salmon and steelhead throughout the Columbia River Basin, causing those species to be listed under the Endangered Species Act ("ESA"). *See, e.g.*, 56 Fed. Reg. 58,491, 58,622–23 (Nov. 20, 1991) (listing Snake River sockeye salmon as "endangered" under the ESA). Today, these species are "in a precarious state." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 821 (9th Cir. 2018) (internal quotation

¹ All exhibits submitted in support of this motion are attached to the Missel Declaration, which is filed as a separate docket entry per Local Rule 10-3. References to page numbers are to the page numbers supplied by the ECF system upon filing, *not* original page numbers in the documents.

marks omitted). For many of Plaintiff's clients, saving these species from extinction and finding ways to ensure their recovery is a high priority. Ex. 2, at 2–5.

In an effort to save species threatened by the Columbia River System, several of Plaintiff's clients have engaged Plaintiff to represent them in formal and informal BPA proceedings over the last few years. In September 2018, Plaintiff, on behalf of several Idaho-based conservation organizations, sent a letter to BPA raising concerns about the agency's negotiations of an extension to the Columbia Basin Fish Accords. Ex. 3. In late 2018 and 2019, Plaintiff represented Idaho Conservation League ("ICL"), Idaho Rivers United ("IRU"), and Columbia Riverkeeper ("CRK") in their successful effort to intervene and participate in BPA's biannual ratemaking process. *See* Ex. 2 (petition to intervene); Ex. 4 (granting intervention). And in July of this year, Plaintiff submitted comments on BPA's Integrated Program Review—the process during which BPA determines many of its costs for the upcoming two-year rate period—on behalf of ICL, IRU, and Great Old Broads for Wilderness–Pacific Northwest Broads Regional Advocacy Team. Ex. 5.

In November 2019, Plaintiff submitted two FOIA requests to BPA on behalf of CRK.² Missel Decl. ¶¶ 9–10. Nearly ten months later, BPA has released some records responsive to the first request, *see* Ex. 6, but has not released *any* records responsive to the second request. Missel Decl. ¶ 27. Indeed, BPA has twice pushed back the expected completion date for the response to the second request. Ex. 7, at 17–19, 23–25.

On April 16, 2020, after waiting nearly five months for BPA to properly respond to CRK's second request, Plaintiff filed an administrative appeal of BPA's constructive denial of

² These two FOIA requests are *not* at issue in this litigation. However, counsel for Plaintiff has often discussed these requests with BPA alongside the requests at issue in this case.

that request with DOE’s Office of Hearings and Appeals (“OHA”). Missel Decl. ¶ 20; Ex. 8, at 1. On April 21, 2020, OHA dismissed the appeal because BPA had not yet issued an appealable “determination.” Ex. 8, at 11–12.

II. The Requests at Issue Here

A. Plaintiff’s FOIA Requests

This case concerns five FOIA requests that Plaintiff submitted to BPA in April and May 2020 on behalf of itself and Columbia Rediviva.³ Ex. 9, at 1–6; Ex. 10, at 1–7; Ex. 11, at 1–6; Ex. 12, at 1–6; Ex. 13, at 1–7. The requests seek information related to two ongoing public processes involving BPA: (1) the agency’s decision whether and how to join the Western Energy Imbalance Market (“EIM”), a real-time centralized energy market used to dispatch power across the region; and (2) the development of a new environmental impact statement (“CRSO EIS”) and biological opinion (“CRSO BiOp”) for the operation of the Columbia River System.⁴

The EIM is a centralized energy market operating on the West Coast that allows participating resources to “bid in” generating capacity for sale and distribution across the region. Ex. 14, at 18–25. In September 2019, BPA signed an “Implementation Agreement” committing it to take certain steps to facilitate its entry into the EIM. *Id.* at 3–4. BPA has still not made a final decision to join the EIM; that decision will occur in late 2021. *Id.* at 3. Right now, BPA is in the process of determining how it will go about joining and participating in the EIM, and is

³ Columbia Rediviva is not a party to this litigation.

⁴ An environmental impact statement is a document that a federal agency must prepare when undertaking or authorizing a “major Federal action[] significantly affecting the quality of the human environment” that analyzes the likely environmental effects of that action. 42 U.S.C. § 4332(C). A biological opinion is a document prepared by an “expert agency” such as the U.S. Fish and Wildlife Service that analyzes how a proposed action is likely to affect an endangered or threatened species and its critical habitat. 16 U.S.C. § 1536(b). The CRSO EIS and CRSO BiOp analyze the likely effects of the overall “operation[], maintenance, and configuration of the” Columbia River System. Ex. 1, at 2.

holding public workshops to discuss those issues. Answer (ECF No. 13) ¶ 20; Ex. 15. BPA will continue to engage the public throughout the next year and a half as it decides whether and how to join the EIM. Answer ¶ 20. Along the way, BPA will make interim decisions related to its participation in the EIM. Ex. 14, at 38. For instance, BPA is currently deciding certain issues related to how it will bill its customers for EIM-related costs. *Id.* at 40–41; Ex. 15. BPA will make more decisions during its upcoming rate case, which is scheduled to begin in fall 2020 or winter 2021. *Id.* at 41–42; Answer ¶ 20.

The development of a new CRSO EIS and BiOp is the latest chapter in “a long-running dispute over salmon and steelhead species listed under the [ESA]” and how the Columbia River System is affecting those species. *Nat’l Wildlife Fed’n*, 886 F.3d at 811–12; Ex. 1, at 2. In 2016, Judge Simon of this Court held that the then-existing BiOp was unlawful and ordered the preparation of a new EIS and BiOp. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 949–50 (D. Or. 2016), *subsequent order aff’d in part*, 886 F.3d 803. In February 2020, BPA, the Corps, and Reclamation issued a draft EIS for public comment. Ex. 1, at 2. During the public comment period for the draft EIS, BPA officials communicated with the press in order to (in their view) “correct[] the record” regarding certain matters. Ex. 16, at 6, 10, 12, 16. The agencies have now released a final EIS and a new BiOp. Ex. 1; Ex. 17.

Plaintiff sent its first FOIA request to BPA on April 10, 2020, and it was received the same day. Missel Decl. ¶ 28; Ex. 9, at 1, 7. The first request sought information concerning the EIM. Ex. 9, at 1–6.

Plaintiff sent its second FOIA request to BPA on April 21, 2020, and it was received the same day. Missel Decl. ¶ 31; Ex. 10, at 1, 8. The second request sought information related to

BPA's communications with the media and others concerning the CRSO EIS and BiOp. Ex. 10, at 1–7.

Plaintiff sent its third FOIA request to BPA on April 30, 2020, and it was received the same day. Missel Decl. ¶ 34; Ex. 11, at 1, 7. The third request sought different information concerning the EIM. Ex. 11, at 1–6.

Plaintiff sent its fourth and fifth FOIA requests to BPA on May 15, 2020, and they were both received the same day. Missel Decl. ¶ 37; Ex. 12, at 1, 7; Ex. 13, at 1, 8. These requests also sought information concerning the EIM. Ex. 12, at 1–6; Ex. 13, at 1–7.

B. BPA's Acknowledgment Letters

On April 23, 2020, BPA acknowledged receipt of Plaintiff's first two FOIA requests. Ex. 9, at 7–8; Ex. 10, at 8–10. BPA assigned the first request—concerning the EIM—tracking number BPA-2020-00700-F. Ex. 9, at 7. BPA assigned the second request—concerning communications and records related to the CRSO EIS—tracking number BPA-2020-00719-F. Ex. 10, at 8.

On May 1, 2020, BPA acknowledged receipt of Plaintiff's third FOIA request, which sought records related to BPA's decision to sign the EIM Implementation Agreement. Ex. 11, at 7–8. BPA assigned the request tracking number BPA-2020-00739-F. *Id.* at 7.

On May 28, 2020, BPA acknowledged receipt of Plaintiff's fourth and fifth FOIA requests, both of which sought information related to the EIM. Ex. 12, at 7–8; Ex. 13, at 8–9. BPA assigned the requests tracking numbers BPA-2020-00783-F (fourth request) and BPA-2020-00784-F (fifth request). Ex. 12, at 7; Ex. 13, at 8.

Each of these “acknowledgment letters” sent by BPA stated that the request had been designated as “complex” because of the possible need to “review . . . the responsive records for

statutory exemptions and possible consults with third parties.” Ex. 9, at 7; Ex. 10, at 9; Ex. 11, at 7–8; Ex. 12, at 7; Ex. 13, at 8–9. For each request, BPA invoked the “unusual circumstances” safety valve of 5 U.S.C. § 552(a)(6)(B)(i).⁵ Ex. 9, at 8; Ex. 10, at 9; Ex. 11, at 8; Ex. 12, at 8; Ex. 13, at 9. Each of the letters contained an estimated date for BPA to “complete[] . . . a response to [the] request.” Ex. 9, at 8; Ex. 10, at 9; Ex. 11, at 8; Ex. 12, at 8; Ex. 13, at 9. Those original estimated completion dates are shown in the table below. None of the acknowledgment letters provided Plaintiff an opportunity to limit the scope of the request so that it could be processed within FOIA’s time limits, nor did any of the letters give Plaintiff an opportunity to arrange with BPA an alternative time frame for processing the request or a modified request. *See* Ex. 9, at 7–8; Ex. 10, at 8–10; Ex. 11, at 7–8; Ex. 12, at 7–8; Ex. 13, at 8–9. None of the acknowledgment letters notified Plaintiff of the right to seek dispute resolution services from the Office of Government Information Services (“OGIS”). *See id.*

Request	Date Received	Determination Deadline⁶	Date of Acknowledgment Letter	Estimated Completion Date from Letter
-00700-F	April 10, 2020	May 22, 2020	April 23, 2020	August 24, 2020
-00719-F	April 21, 2020	June 3, 2020	April 23, 2020	August 27, 2020
-00739-F	April 30, 2020	June 12, 2020	May 1, 2020	September 8, 2020
-00783-F	May 15, 2020	June 29, 2020	May 28, 2020	November 4, 2020
-00784-F	May 15, 2020	June 29, 2020	May 28, 2020	November 4, 2020

⁵ As explained in more detail *infra* pp. 17–18, the “unusual circumstances” safety valve gives agencies more time to respond to FOIA requests.

⁶ As explained *infra* p. 18, the “determination deadline” for each request was 30 working days from the date of receipt.

C. Subsequent Communications and Attempts to Reach an Agreement

On June 5, 2020, following an inquiry from Plaintiff, BPA sent Plaintiff an email about the status of the five FOIA requests. Ex. 18, at 1. That email stated that BPA was still “gathering records” responsive to the second, third, and fourth requests, and was “identifying record custodians to collect records” responsive to the fifth request. *Id.* As for the remaining request—BPA-2020-00700-F, the first request sent—BPA informed Plaintiff that there were 15,000 records potentially responsive to the request, and invited Plaintiff to confer via telephone to discuss the request in order “to better understand what records” Plaintiff was seeking so that BPA could “better respond to [the] request.” *Id.*

Plaintiff and BPA conferred by telephone on June 15, 2020, and discussed possible ways to make processing the records for the first request (BPA-2020-00700-F) more manageable. Missel Decl. ¶ 45. One possible strategy discussed during that conference was the use of “search terms” to either reduce the number of records or create a priority “batch” of records to be processed first. *Id.*

By late June 2020, Plaintiff and CRK had waited over seven months for BPA to complete its responses to the two CRK requests, and BPA had pushed back the estimated completion dates for those requests to August 2020. Ex. 6, at 20–21; Ex. 7, at 19. BPA had also failed to make “determinations” as to Plaintiff’s first three FOIA requests by the statutory deadlines. *See supra* p. 7 (table). To remedy these legal violations and obtain the records sought, Plaintiff filed this lawsuit on June 26, 2020. ECF No. 1.

In the middle of July, to allow time to discuss a possible resolution of this case, Plaintiff consented to BPA’s motion for an extension of time to file an answer. Ex. 18, at 3. On July 24, 2020, Plaintiff and BPA conferred by telephone for the purpose of discussing possible ways to

speed up the processing and disclosure of records responsive to Plaintiff's requests. Missel Decl. ¶ 48. In advance of that meeting, Plaintiff sent an email to counsel for BPA with a few questions concerning BPA's FOIA process and the possibility of releasing records in batches and/or using an "over-redaction" method⁷ to speed up the release of records. *Id.* ¶ 47; Ex. 18, at 4. During the phone call, Plaintiff and BPA discussed both of those (and other) possible ways of speeding up the release of records, but did not reach agreement as to the feasibility or utility of any particular method. Missel Decl. ¶ 48. The parties agreed to talk again on July 30. *Id.*

During the July 24 phone call, BPA had agreed to send Plaintiff more information concerning the agency's FOIA process, as well as information about the number of pages potentially responsive to Plaintiff's requests that the agency had gathered. *Id.* BPA sent Plaintiff an email on July 27 with that information. *Id.* ¶ 49; Ex. 18, at 5. The email stated that records had been collected for all five of Plaintiff's requests, and reported the following number of pages potentially responsive to each request:

- BPA-2020-00700-F: 4900 pages
- BPA-2020-00719-F: 9800 pages
- BPA-2020-00739-F: 4600 pages
- BPA-2020-00783-F: 1040 pages
- BPA-2020-00784-F: 1100 pages

Ex. 18, at 5. BPA's email also stated that there were "13 requests in [the] queue in front of" Plaintiff's requests. *Id.*

⁷ The parties eventually agreed to test the over-redaction method on one of the requests that Plaintiff had sent on behalf of CRK. Ex. 6, at 24.

On July 30, Plaintiff and BPA conferred by telephone for a second time. Missel Decl. ¶ 50. During that meeting, the parties once again discussed possible ways to speed up the processing and release of records. *Id.* BPA also gave Plaintiff an updated estimate of the time needed to fully process and complete responses to the first three FOIA requests: April 2022 for the first request, December 2022 for the second request, and December 2021 for the third request. *Id.*; Ex. 18, at 8. BPA did not provide estimates for the time needed to respond to the fourth and fifth requests. Missel Decl. ¶ 50; *see also* Ex. 18, at 8, 17.

During the July 30 meeting, Plaintiff agreed to provide BPA with a list of search terms for each request. Missel Decl. ¶ 50. The parties agreed that BPA would “run” those search terms on the records gathered for each request and separate out a set of records for each request containing one or more search terms—a “first batch” or “priority batch” of records. *Id.*; Ex. 18, at 6, 8. This would help determine whether dividing the records into “batches” would be a feasible way to speed up processing and release. Ex. 18, at 6, 8, 11. On August 12, Plaintiff provided BPA with search terms, *id.* at 10–16, and BPA agreed to “run” the search terms and provide estimates for how long it would take to process the first batch of records for the first three requests, *id.* at 17. Plaintiff consented to another extension of the answer deadline so that BPA could run the search terms. *Id.* at 10.

On August 27, BPA sent Plaintiff estimates for how long it would take the agency to process and release the first batch of records for each of the first three requests. *Id.* at 18–19. BPA did not provide anticipated completion times for these first batches, but rather estimated the time it would take to process each batch from beginning to end: eleven months for the first batch of records for request BPA-2020-00700-F, twenty months for request -00719-F, and six months for request -00739-F. *Id.* BPA did not indicate when it would start processing each batch. *See id.*

Even if BPA were to start processing records today, it would not finish processing the first batches of records until twenty months from now, in mid-2022.

On August 28, Plaintiff consented to another extension of the time to file an answer. *Id.* at 20.

For each of the first three requests, BPA sent Plaintiff a letter on the original estimated completion date (in late August or early September 2020) providing a new estimated completion date. The new estimated completion dates largely track the dates provided to Plaintiff in the July 30 phone call. *See* Ex. 9, at 10 (new estimated completion date for the first request of April 6, 2022); Ex. 10, at 12 (new estimated completion date for the second request of April 1, 2022⁸); Ex. 11, at 10 (new estimated completion date for the third request of November 21, 2021).

The table below summarizes the status of the five requests as of today October 5, 2020:

Request	Date Received	Determination Deadline	Expected Completion Date	First Batch Processing Time
-00700-F	April 10, 2020	May 22, 2020	April 6, 2022	11 months
-00719-F	April 21, 2020	June 3, 2020	April 1, 2022	20 months
-00739-F	April 30, 2020	June 12, 2020	November 21, 2021	6 months
-00783-F	May 15, 2020	June 29, 2020	?	?
-00784-F	May 15, 2020	June 29, 2020	?	?

⁸ It is possible that this estimated date is an error, as it does not make sense that BPA could process *all* records responsive to the second request by April 2022—20 months from August 2020—but will need 20 months to process just the first batch of records. Perhaps BPA confused the first and second requests, and the actual estimated completion date for the second request remains December 2022, the date originally provided to Plaintiff. *See* Ex. 18, at 8, 19.

To date, BPA has yet to inform Plaintiff of the scope of the documents that it intends to withhold in response to Plaintiff's five requests, any reasons for withholding certain documents, or of Plaintiff's right to appeal any adverse determination. Missel Decl. ¶ 56.

III. BPA's FOIA Workload and Processing Times

BPA is an agency within the Department of Energy ("DOE"), 16 U.S.C. § 832a, but it has its own FOIA office, 10 C.F.R. §§ 1004.1–2. BPA's FOIA office, like almost all FOIA offices, has elected to use "multitrack" processing of FOIA requests. *See* 5 U.S.C. § 552(a)(6)(D)(i) (authorizing multitrack processing); Ex. 19 (describing BPA's separate queues). Under that system, incoming requests are assigned to either a "simple" or "complex" track or queue according to the expected processing and response time. Ex. 19.

Like all federal agencies, BPA is required to submit an annual report to the Department of Justice ("DOJ") detailing its FOIA workload.⁹ 5 U.S.C. § 552(e). That report includes information such as the number of requests received, *id.* § 552(e)(1)(D); the average and median number of days taken to respond to simple and complex FOIA requests, *id.* § 552(e)(1)(E), (F); and "the number of full-time staff of the agency devoted to processing requests for records[] . . . and the total amount expended by the agency for processing such requests," *id.* § 552(e)(1)(O). DOJ, for its part, must submit an annual report to Congress listing all FOIA litigation commenced in the prior fiscal year. *Id.* § 552(e)(6)(A). These reports are publicly available. *Id.* § 552(e)(3), (4); § 552(e)(6)(B).

⁹ Technically, it is DOE that submits the report, but the report includes separate data for each DOE component, including BPA. 5 U.S.C. § 552(e)(2).

The last five annual reports—covering fiscal years 2015–2019—reflect the following concerning BPA’s FOIA workload (see table below):¹⁰

	FY 2019	FY 2018	FY 2017	FY 2016	FY 2015
# requests received	58	57	94	86	105
# requests processed	62	70	93	80	134
# complex requests processed	41	43	60	39	67
avg. time to respond (complex)	121.15 days	158.09 days	133.55 days	204.92 days	124.76 days
staffing levels	4.77 FTE	6.6 FTE	5.65 FTE	6.1 FTE	6.5 FTE

Compared to many federal agencies, BPA carries a light FOIA load. The FBI, for instance, receives over 15,000 FOIA requests each year. Ex. 25, at 63. The Bureau of Land Management receives around 1,000 FOIA requests each year. Ex. 26, at 39. Even rather obscure agencies such as the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) receive more FOIA requests than BPA. *See id.* (showing 175 and 148 requests received by OSMRE in 2018 and 2019, respectively). BPA is also involved in very little FOIA litigation: since the beginning of fiscal year 2015, BPA has been sued just a handful of times (including this case) under FOIA. Missel Decl. ¶¶ 66–70.

Despite having a relatively light FOIA workload and almost no FOIA litigation, BPA has consistently been slower to respond to “complex” FOIA requests than many other agencies. The table on the next page compares BPA’s response times and staffing levels over the last five

¹⁰ The full DOE reports are Exhibits 20 (2019 Report), 21 (2018 Report), 22 (2017 Report), 23 (2016 Report), and 24 (2015 Report) to the Missel Declaration.

completed fiscal years with four other federal agencies: the Tennessee Valley Authority (“TVA”), perhaps the only federal agency with a similar profile to BPA, *see* 16 U.S.C. § 831 *et seq.*; OSMRE; Reclamation, which works closely with BPA in managing the Columbia River System, Ex. 1, at 2; and the Drug Enforcement Agency (“DEA”), which, like many law enforcement agencies, receives many more requests than BPA.¹¹ Each box in the table shows, for a given year and agency, (1) the average time to respond to complex requests (top line), (2) the total number of requests processed that year/the number of complex requests processed that year (middle line), and (3) the number of full-time equivalent FOIA staff (bottom line).

	2019	2018	2017	2016	2015
BPA	121.15 days (62/41) 4.77 FTE	158.09 days (70/43) 6.6 FTE	133.55 days (93/60) 5.65 FTE	204.92 days (80/39) 6.1 FTE	124.76 days (134/67) 6.5 FTE
TVA	76 days (197/76) 1.25 FTE	59 days (212/85) 1.5 FTE	62.5 days (201/61) 1.5 FTE	40 days (213/53) 1.5 FTE	68 days (195/69) 1.5 FTE
OSMRE	70 days (126/120) 2.75 FTE	81 days (159/150) 2.58 FTE	43 days (95/82) 2.73 FTE	63 days (74/36) 1.49 FTE	40 days (116/95) 2.25 FTE
BOR	23 days (229/189) 13 FTE	32 days (254/213) 14 FTE	22 days (297/196) 7.15 FTE	27 days (234/164) 7.15 FTE	26 days (345/219) 7.8 FTE
DEA	70.51 days (1,278/631) 24 FTE	69.39 days (1,787/611) 18 FTE	61.92 days (1,787/628) 20 FTE	95.73 days (1,824/681) 23 FTE	79.22 days (1,677/892) 22 FTE

¹¹ The data for the non-BPA agencies is taken from those agencies’ annual FOIA reports. In the interest of reducing the volume of material filed with the Court, the reports themselves have not been included as exhibits to the Missel Declaration. Instead, the Missel Declaration contains a statement (under penalty of perjury) that the data from those reports has been reviewed and that the numbers in this motion accurately reflect the reports. Missel Decl. ¶ 65. The Missel Declaration also states where the reader can find the full reports. *Id.* Plaintiff would be happy to file copies of the full reports with the Court if the Court wishes. *Cf.* Fed. R. Evid. 1006 (“The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. . . .”).

As the table shows, BPA’s response times to complex requests are far longer than these other four agencies, despite BPA having a greater number of staff per request. For instance, in fiscal year 2019, BPA processed just 8.6 complex requests per full-time equivalent employee, as compared to 60.8 complex requests for each TVA full-time equivalent employee. But BPA took an average of 121.15 days to process each complex request—60% longer than TVA.

ARGUMENT

BPA has violated FOIA by failing to make timely “determinations” as to Plaintiff’s five FOIA requests and by failing to “promptly” release records responsive to those requests. Even worse, absent relief from this Court, BPA will not finish releasing records responsive to Plaintiff’s requests until April 2022. Such “unreasonable delays in disclosing non-exempt documents violate the intent and purpose of . . . FOIA.” *Long*, 693 F.2d at 910. Accordingly, Plaintiff is entitled to summary judgment on its 10 claims¹² concerning the five individual FOIA requests at issue in this case.

Plaintiff asks this Court, as the “enforcement arm” of FOIA, to carry out its “duty to prevent [BPA’s] abuses” of the statute. *Id.* at 909–10. In particular, Plaintiff seeks (1) an order requiring BPA to release 5,000 pages a month to Plaintiff and (2) a declaratory judgment stating that BPA has violated FOIA by failing to make timely determinations and promptly release records.¹³

¹² There are two claims associated with each individual FOIA request: (1) a claim that BPA has failed to make a timely “determination” as to the request and (2) a claim that BPA is violating and will continue to violate FOIA’s prohibition on “unreasonable delays” (or, equivalently, its requirement of “prompt” disclosure) in releasing responsive records. *See* First Amended Complaint ¶¶ 60–89. At this time, Plaintiff is not moving for summary judgment on its “pattern or practice” claim. *See id.* ¶¶ 90–98.

¹³ “Most FOIA cases are resolved by the district court on summary judgment, with the district court entering judgment as a matter of law.” *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 990 (9th Cir. 2016) (en banc) (per curiam).

I. General FOIA Background.

“[A] democracy cannot function unless the people are permitted to know what their government is up to.” *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1171 (9th Cir. 2000) (citation omitted). With that principle in mind, Congress enacted FOIA “to create a broad right of access to official information.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (internal quotation and citation omitted). “FOIA . . . adopt[ed] a baseline presumption that information in the hands of the government belongs to the people. . . .” *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1131 (9th Cir. 2014), *abrogated on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 988 (9th Cir. 2016) (en banc) (per curiam). Accordingly, FOIA “requires that federal agencies make records within their possession promptly available to citizens upon request.” *Tuffly v. U.S. Dep’t of Homeland Sec.*, 870 F.3d 1086, 1092 (9th Cir. 2017) (citing 5 U.S.C. § 552(a)(3)).

Of course, a right of access to government information, however broad, means little if the government is permitted to unreasonably delay the release of information. *See Judicial Watch, Inc. v. DHS*, 895 F.3d at 781 (“Excessive delay by the agency in its response is often tantamount to denial.” (citation and alteration omitted)). Recognizing this, Congress included in FOIA a “requirement of *prompt* disclosure.” *Fed. Open Market Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 354 (1979) (emphasis added). “[T]he statute does not condone agency personnel sitting behind accumulating mounds of FOIA requests and requiring each requester to ‘take a number’ and wait many months or years for the agency to comply.” *Judicial Watch, Inc. v. DHS*, 895 F.3d at 789 (Pillard, J., concurring). Rather, FOIA’s “overarching mandate of prompt availability” requires agencies to take steps to ensure that information is quickly released to requesters. *Id.* at 781 (majority opinion); *see also* 5 U.S.C. § 552(a)(3)(A) (“each agency,

upon any [proper] request for records[,] . . . shall make the [non-exempt] records promptly available to any person”).

II. BPA Failed to Make Timely “Determinations” as to Plaintiff’s Requests.

When an agency receives a proper FOIA request, it ordinarily has 20 working days to determine whether to comply with the request. *Hajro v. U.S. Citizenship & Imm. Servs.*, 811 F.3d 1086, 1092 (9th Cir. 2016); 5 U.S.C. § 552(a)(6)(A). In order to make a “determination” as to a FOIA request, an agency must “(i) gather and review the documents” that are potentially responsive to the request, “(ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents” and “(iii) inform the requester that it can [administratively] appeal whatever portion of the ‘determination’ is adverse.” *Citizens for Responsibility and Ethics in Washington v. Fed. Election Com’n*, 711 F.3d 180, 188 (D.C. Cir. 2013) (“*CREW*”).¹⁴ It is not enough for the agency to simply “state . . . its future intent to eventually produce documents and claim exemptions”; rather, the agency must “inform the requester of the scope of the documents [it] will produce, as well as the scope of the documents that the agency plans to withhold,” and “the specific exemptions that may apply to certain withheld records.” *Id.* at 186.

An agency can extend the “determination” deadline in “unusual circumstances” by giving “written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i); *Hajro*, 811 F.3d at 1092. BPA may use the “unusual circumstances” safety

¹⁴ The D.C. Circuit “has particular FOIA expertise.” *Whitaker v. Dep’t of Commerce*, 970 F.3d 200, 206 (2d Cir. 2020).

valve to extend the “determination” deadline by at most 10 working days, leading to a “determination” deadline 30 working days from the date of receipt. 10 C.F.R. § 1004.5(d)(1)(iii).

A failure to make a “determination” before the deadline is by itself a violation of FOIA. *See Hajro*, 811 F.3d at 1106–07 (discussing a “pattern of delay in contravention of” determination time limits as an “alleged pattern or practice of FOIA violations”); *Our Children’s Earth Found. v. Nat’l Marine Fisheries Serv.*, 85 F. Supp. 3d 1074, 1089 (N.D. Cal. 2015) (“an agency’s failure to comply with the FOIA’s time limits is, by itself, a violation of the FOIA” (quoting *Gilmore v. U.S. Dep’t of Energy*, 33 F. Supp. 2d 1184, 1187 (N.D. Cal. 1998))).

Despite these firm statutory deadlines, BPA did not make a timely determination as to *any* of the five requests at issue in this case. Instead, BPA sent acknowledgement letters in response to Plaintiff’s FOIA requests that did not convey the information required to constitute a determination. Months later, BPA has *still* not made a determination as to any of the requests.

Because BPA invoked the “unusual circumstances” safety valve for each request, *see supra* p. 7, each “determination” deadline was 30 working days from the date BPA received the request. *See* 10 C.F.R. § 1004.5(d)(1)(iii). Thus, the determination deadlines were May 22, 2020 (first request); June 3, 2020 (second request); June 12, 2020 (third request); June 29, 2020 (fourth request); and June 29, 2020 (fifth request). *See supra* p. 7 (table).

For each request, BPA sent Plaintiff an “acknowledgment letter” by the statutory “determination” deadline, *see id.*, but those letters were not “determinations.” None of the acknowledgment letters gave any indication of how many records or pages were responsive to the request or which records might be subject to which FOIA exemptions. Ex. 9, at 7–8; Ex. 10, at 8–10; Ex. 11, at 7–8; Ex. 12, at 7–8; Ex. 13, at 8–9. Nor did any of the letters notify Plaintiff of its right to an administrative appeal. *Id.* Thus, the acknowledgment letters did not (1)

“determine and communicate the scope of the documents [BPA] intends to produce and withhold, and the reasons for withholding any documents” or (2) “inform [Plaintiff] that it can appeal whatever portion of the ‘determination’ is adverse.” *CREW*, 711 F.3d at 188; *see also* 5 U.S.C. § 552(a)(6)(A). Furthermore, the letters invoked the unusual circumstances safety valve to push back the “determination” deadlines, which would not have been necessary had the letters themselves constituted “determinations.” *See* 5 U.S.C. § 552(a)(6)(B)(i) (“unusual circumstances” allow an agency to “extend[]” the “determination” time limit). In short, the acknowledgment letters amounted to “statement[s] of a future intent to produce non-exempt responsive documents,” not “determinations.” *CREW*, 711 F.3d at 186.

It is useful to compare the acknowledgement letters sent to Plaintiff with an actual determination letter sent by BPA to another requester. In that determination letter, BPA (1) listed the number of pages it had gathered that were responsive to the request, (2) explained which pages it was releasing in full and which pages were being released with redactions applied under a FOIA exemption, (3) explained why the exemptions had been applied, and (4) informed the requester of his appeal rights. Ex. 16, at 1–3. That letter thus “determine[d] and communicate[d] the scope of the documents [BPA] intends to produce and withhold, and the reasons for withholding any documents” and “inform[ed] the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *CREW*, 711 F.3d at 188.

In case there was any lingering doubt that BPA’s acknowledgment letters to Plaintiff were not “determinations,” BPA itself admitted that a substantially identical acknowledgment letter sent in response to the first CRK FOIA request was not a “determination.” Ex. 6, at 13. Similarly, the administrative appeal of the constructive denial of the second CRK FOIA request was dismissed because BPA had not yet issued a “determination” as of April 2020, meaning that

BPA's acknowledgment letter in response to that request was not a "determination." Ex. 8, at 11–12. BPA cannot credibly change its position and argue that its acknowledgement letters in response to Plaintiff's requests were actually determinations.

Because BPA's acknowledgment letters were not "determinations," BPA failed to make a timely "determination" as to any of Plaintiff's FOIA requests by the statutory deadlines.¹⁵

Months after these deadlines, Plaintiff is *still* waiting for BPA to make and send a determination as to any the requests. Accordingly, BPA has violated and continues to violate FOIA.

III. BPA Has Not and Will Not "Promptly" Release Records

FOIA requires agencies to make responsive non-exempt records "promptly available" upon request. 5 U.S.C. § 552(a)(3)(A). As the Ninth Circuit has put it, "unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses." *Long*, 693 F.2d at 910.¹⁶

FOIA's requirement of "prompt" disclosure must be read in conjunction with the statute's "determination" requirements. As discussed *supra* pp. 17–18, a "determination" must be made within 20 working days of receipt of a request unless there are "unusual circumstances" that justify an extension. Once a determination is made, "the agency may still need some additional time to physically redact, duplicate, or assemble for production the documents that it has already

¹⁵ Because BPA failed to make a timely determination and failed to make a determination before the complaint or amended complaint were filed, Plaintiff has constructively exhausted administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

¹⁶ As several courts have noted, an unreasonable delay in releasing responsive records amounts to an "improper withholding" of those records under FOIA. *See Peralta v. U.S. Att'y's Office*, 136 F.3d 169, 175 (D.C. Cir. 1998) (discussing how a policy that "significantly . . . increase[s] the amount of time" that a requester must wait for records amounts to an "improper withholding" absent a reasonable explanation from the agency); *Gilmore*, 33 F. Supp. 2d at 1187 ("an agency's failure to comply with the FOIA's time limits is . . . an improper withholding of the requested documents").

gathered and decided to produce.” *CREW*, 711 F.3d at 189. That process must be done “promptly,” “which . . . typically would mean within days or a few weeks of [the] ‘determination,’ not months or years.” *Id.* at 188–89. Thus, FOIA contemplates that the total time from receipt of a request until the production of responsive, non-exempt records should typically be two or three months (30 working days for a determination plus “a few weeks”).

BPA has *already* violated FOIA by failing to “promptly” release any records in response to Plaintiff’s requests, which were received by the agency approximately five to six months ago. *See supra* p. 7 (table). But BPA has promised that these delays will end up being truly egregious, with a full release of records delayed until April 2022¹⁷—*two years* from when BPA received Plaintiff’s first request. *Id.*

As of the filing of this summary judgment motion, Plaintiff’s requests have been pending before the agency for the following lengths of time, *see id.*:

- BPA-2020-00700-F: nearly six months
- BPA-2020-00719-F: five and a half months
- BPA-2020-00739-F: over five months
- BPA-2020-00783-F: nearly five months
- BPA-2020-00784-F: nearly five months

This is bad enough: FOIA contemplates that an agency should typically be able to complete its response to a FOIA request within a few months of receipt. *CREW*, 711 F.3d at 188–89. Thus, BPA has already violated (and continues to violate) FOIA’s requirement of “prompt” disclosure by unreasonably delaying the release of records responsive to Plaintiff’s requests. *See S. Yuba*

¹⁷ As discussed *supra* note 8, there is reason to think that the correct estimated completion date for Plaintiff’s second request is actually December 2022, not April 2022.

River Citizens League v. Nat'l Marine Fisheries Serv., Case No. S-06-2845 LKK/JFM, 2008 WL 2523819, at *6 (E.D. Cal. June 20, 2008) (holding that a six-month delay in fully responding to a request violated FOIA); *Or. Nat. Desert Ass'n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (holding that an eight-month delay amounted to an “improper withholding” under FOIA), *later judgment rev'd in part on other grounds sub nom. Or. Nat. Desert Ass'n v. Locke*, 572 F.3d 610 (9th Cir. 2009); *see also Gilmore*, 33 F. Supp. 2d at 1185, 1188 (holding that a five-month delay in denying a request violated FOIA).

The biggest problem, though, is not the delays that have already occurred, but the egregious delays that BPA has promised. Under its current schedule, BPA will not finish responding to Plaintiff's requests until *April 2022*—*two years* after receiving Plaintiff's first requests. Ex. 9, at 10; Ex. 18, at 19. Even the earliest anticipated release date provided by BPA (for Plaintiff's third request, BPA-2020-00739-F) is November 2021, which is *19 months* after the request was received.¹⁸ Ex. 11, at 10; Ex. 18, at 19. There is no doubt that such delays are “unreasonable” and violate FOIA. *See Long*, 693 F.2d at 910 (characterizing a 17-month delay as “unreasonable” and violative of FOIA); *Munger, Tolles & Olson LLP ex rel. Am. Mgmt Servs. LLC v. U.S. Dep't of the Army*, 58 F. Supp. 3d 1050, 1055–56 (C.D. Cal. 2014) (“A total unjustified delay of over a year is egregious.” (internal quotations omitted)). “[U]nreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses.” *Long*, 693 F.3d at 910.

¹⁸ Even the estimated times for processing the first “batches” of records responsive to Plaintiff's requests lead to unreasonably long delays. Assuming that BPA were to begin processing records today, Plaintiff would not receive the first “batches” of records until September 2021 (BPA-2020-00700-F), June 2022 (-00719-F), and April 2021 (-00739-F), corresponding to total response times of approximately 17 months, 26 months, and 11 months, respectively. *See supra* pp. 10–12; Ex. 18, at 19. And, of course, there would still be more records for BPA to process after that.

BPA cannot seriously contend that response times of 24 months (BPA-2020-00700-F and BPA-2020-00719-F) and 19 months (BPA-2020-00739-F) comply with FOIA’s requirement of “prompt” disclosure. BPA is “requiring [Plaintiff] to ‘take a number’ and wait many months or years” for the records it has requested. *Judicial Watch, Inc. v. DHS*, 895 F.3d at 789 (Pillard, J., concurring). FOIA “does not condone” such behavior. *Id.* BPA has violated FOIA’s requirement of “prompt” disclosure, its violations grow worse with each passing day, and, without relief from this Court, it has promised to end up engaging in egregious violations of the statute.

IV. This Court Should Enter a Production Order and Award Declaratory Relief

If this Court concludes that BPA has violated and continues to violate FOIA due to its delayed responses to Plaintiff’s requests, the question becomes what remedy to award Plaintiff. “FOIA imposes no limits on courts’ equitable powers in enforcing its terms.” *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1998). This Court “may use its equitable powers to require [BPA] to process documents according to a court-imposed timeline.” *Clemente v. FBI*, 71 F. Supp. 3d 262, 269 (D.D.C. 2014). Indeed, this Court has a “duty to prevent” “unreasonable delays in disclosing non-exempt documents.” *Long*, 693 F.2d at 910. This Court can also award declaratory relief. *Hajro*, 811 F.3d at 1101. Accordingly, Plaintiff asks this Court, as the “enforcement arm” of FOIA, *Long*, 693 F.2d at 909, to enter (1) a production order requiring BPA to release 5,000 pages a month of responsive records and (2) a declaratory judgment that BPA has violated and is violating FOIA.

A. This Court Should Enter a Production Order Requiring BPA to Release 5,000 Pages a Month to Plaintiff

“[A] court . . . may use its equitable powers to require the agency to process documents according to a court-imposed timeline.” *Clemente*, 71 F. Supp. 3d at 269; *see also Animal Legal Def. Fund v. U.S. Dep’t of Agric.*, 935 F.3d 858, 873 (9th Cir. 2019) (“To ensure district courts

live up to th[eir] special obligation [to enforce FOIA], we have specifically instructed district courts to consider equitable relief when necessary to bar future FOIA violations.”). In evaluating the propriety of a particular production schedule, courts typically take into account several factors: (1) the total length of time that it would take to respond to the requests under the schedule, and how well that length of time comports with FOIA’s emphasis on prompt disclosure, *e.g.*, *Seavey v. Dep’t of Justice*, 266 F. Supp. 3d 241, 245–48 (D.D.C. 2017); (2) whether there is a pressing need for the requested information, *Clemente*, 71 F. Supp. 3d at 268–69; and (3) the burden on the agency from the schedule viewed in light of the agency’s FOIA workload, *Middle East Forum v. U.S. Dep’t of Homeland Sec.*, 297 F. Supp. 3d 183, 184–85 (D.D.C. 2018). Overall, the goal is to “‘strik[e] a proper balance between [a] [requester’s] right to receive information on government activity in a timely manner’ and [agency] concerns.” *Open Society Justice Initiative v. CIA*, 399 F. Supp. 3d 161, 166 (S.D.N.Y. 2019) (quoting *ACLU v. Dep’t of Def.*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004)). Of course, when striking that balance, courts must always keep in mind FOIA’s “overarching mandate of prompt availability” of non-exempt records. *Judicial Watch, Inc. v. DHS*, 895 F.3d at 781.

Plaintiff asks this Court to enter a production order requiring BPA to release 5,000 pages a month to Plaintiff.¹⁹ Given FOIA’s emphasis on the “prompt” disclosure of records, Plaintiff’s need for the information sought in the requests at issue here, and BPA’s relatively light FOIA workload, a schedule of 5,000 records a month “‘strik[es] a proper balance between [Plaintiff’s]

¹⁹ For Plaintiff’s first three requests, BPA has already identified which records are responsive to Plaintiff’s proposed search terms, *supra* pp. 10–11, so those records should be given higher priority for processing. Plaintiff has also informed BPA that the second request (BPA-2020-00719-F) should be given first priority, followed by the first request and then the second request. Ex. 18, at 13. Plaintiff requests that any production order entered by the Court reflect these priorities.

right to receive information on government activity in a timely manner’ and [agency] concerns.” *Open Society Justice Initiative*, 399 F. Supp. 3d at 166 (quoting *ACLU v. Dep’t of Def.*, 339 F. Supp. 2d at 504).

First, a rate of 5,000 pages a month would come much closer to vindicating Plaintiff’s right to “prompt” disclosure of requested records than the pace that BPA has set for itself. *See Sierra Club v. U.S. Env’tl. Prot. Agency*, Case No. 18-cv-03472-EDL, 2018 WL 10419238, at *5–*7 (N.D. Cal. Dec. 26, 2018) (adopting the plaintiff’s production schedule because the agency’s schedule was “a very far cry from making [records] ‘promptly available’ as required by FOIA”). According to BPA, there are approximately 21,440 pages responsive to Plaintiff’s requests that need to be processed, Ex. 18, at 5, so Plaintiff’s requested schedule would result in Plaintiff receiving all responsive records in just over four months. Given that Plaintiff’s requests were sent to BPA in April and May 2020, *see supra* pp. 5–7, and that any production order would not be entered by the Court for at least a few months from the date of this motion, Plaintiff’s production schedule would result in Plaintiff receiving records no sooner than ten months after being requested—not “prompt,” by any stretch of the imagination, but much better than BPA’s current estimate, which would not result in a full release of records until 2022. *See Sierra Club*, 2018 WL 10419238, at *5–*7.

Second, there is a pressing need for the information sought by Plaintiff. As explained *supra* pp. 4–6, the five requests seek information relevant to two separate public processes that BPA is involved in—the issuance of a new EIS and BiOp for the Columbia River System and the decision whether and how to join the EIM. BPA’s current schedule has the agency completing its responses to Plaintiff’s EIM-related requests by April 2022, at the earliest, by which time BPA will have already made the decision whether and on what terms to join the EIM. *See supra* pp. 4–

6. And under the current schedule, the EIS/BiOp-related records will also not be fully released until April 2022. Ex. 10, at 12. Whatever utility those records might have will be severely diminished by that time. *See Fiduccia*, 185 F.3d at 1041 (“The value of information is partly a function of time.”); *see also Judicial Watch, Inc. v. DHS*, 895 F.3d at 781 (“Excessive delay by the agency in its response is often tantamount to denial.” (citation and alteration omitted)). Plaintiff’s proposed production schedule ensures that the information to which Plaintiff is entitled is released in time to be useful. *See Sierra Club*, 2018 WL 10419238, at *7 (“Because Plaintiff has already experienced a significant delay in receiving records and the information Plaintiff is requesting may be stale or useless if not provided soon, the Court finds that Plaintiff’s proposed schedule is more appropriate than Defendant’s.”).

Third, a production rate of 5,000 pages a month would not impose too high a burden on BPA. Frankly, BPA has a very light FOIA load—Plaintiff’s requests alone constitute a not-insignificant share of the agency’s FOIA requests. *See supra* pp. 13–15; *see also* ECF No. 15, at 7 (BPA’s statement that “the BPA FOIA Office has 26 open cases” as of September 14, 2020). *Cf. Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006) (“[T]he DOJ components at issue in this case carry relatively small FOIA caseloads and handle very few, if any, expedited requests. . . . Therefore, requiring expedited processing of the requests at issue should not be unduly burdensome to DOJ . . .”). Moreover, the factors that typically cause courts to refrain from imposing ambitious production schedules are absent here: BPA has not seen a dramatic uptick in FOIA requests recently, *see supra* p. 14 (table); ECF No. 15, at 7; and the agency is currently litigating just one FOIA case aside from this case, Missel Decl. ¶ 70. *See Middle East Forum*, 297 F. Supp. 3d at 185–86 (discussing factors that courts typically consider

“when analyzing the burden on an agency of meeting deadlines for review and production of FOIA material”).

Courts have imposed similar production schedules on agencies far more burdened with FOIA responsibilities than BPA. In *Sierra Club*, the court ordered EPA to begin processing the plaintiff’s requests at a rate of approximately 2,000 *records* (not pages) per month. 2018 WL 10419238, at *5–*7. In *NRDC v. Department of Energy*, the court gave the agency just over a month to produce to the plaintiff “the vast majority of” 7,500 pages of responsive records. 191 F. Supp. 2d 41, 43–44 & 43 n.5 (D.D.C. 2002). And in *American Civil Liberties Union of Washington v. U.S. Department of Justice*, the court ordered the agency to process over 24,000 pages and nearly 200 audio tapes in just under two months. Case No. C09-0642RSL, 2010 WL 11692313, at *1, *3 (W.D. Wash. Jan. 19, 2010).²⁰

In light of the delays already experienced by Plaintiff and the further excessive delays promised by BPA, the fact that the information sought will have substantially diminished utility if its release is delayed, and BPA’s relatively light FOIA load, Plaintiff’s production schedule “‘strik[es] a proper balance between [Plaintiff’s] right to receive information on government activity in a timely manner’ and [agency] concerns.” *Open Society Justice Initiative*, 399 F. Supp. 3d at 166 (quoting *ACLU v. Dep’t of Def.*, 339 F. Supp. 2d at 504). This Court should enter an order requiring BPA to release 5,000 pages a month to Plaintiff.

²⁰ There are many other examples. In *Clemente*, for instance, the court ordered the FBI “to process 5,000 documents per month responsive to the plaintiff’s request.” 71 F. Supp. 3d at 269. And in *Seavey*, the court ordered the FBI to process 2,850 pages per month and noted that such a rate was “well within the range of what other courts ha[d] ordered.” 266 F. Supp. 3d at 247–48. It should be noted that the FBI receives over 15,000 FOIA requests each year, Ex. 25, at 63, which is over 200 times more requests than BPA receives each year, *supra* p. 13 (table).

B. This Court Should Enter Declaratory Relief

Courts may also award declaratory relief in FOIA cases, *Hajro*, 811 F.3d at 1101, which is particularly appropriate “when [an] agency has violated the time limits in responding to a particular set of requests, the agency’s violations are consistent, and they may recur.” *Our Children’s Earth Found.*, 85 F. Supp. 3d at 1089 (citations omitted); *see also S. Yuba River Citizens League*, 2008 WL 2523819, at *6 (“When an agency has ignored . . . deadlines imposed by statute, a declaratory judgment may be merited.” (citation omitted)).

Plaintiff requests that this Court enter a declaratory judgment that BPA (1) violated FOIA by failing to make timely “determinations” as to Plaintiff’s requests and (2) has failed to “promptly” disclose non-exempt responsive records, resulting in an improper withholding of those records. BPA failed to make timely “determinations” and has failed to “promptly” release records for all of the requests at issue in this case, which strongly suggests that BPA will commit similar FOIA violations in response to future requests that Plaintiff intends to submit. *See* Missel Decl. ¶¶ 71–73 (discussing Plaintiff’s intent to send more FOIA requests to BPA). Indeed, for the one FOIA request that Plaintiff has submitted to BPA since commencement of this lawsuit, BPA has given Plaintiff an estimated completion date of October 2021—more than a year from when the request was received by the agency. *Id.* ¶¶ 71–72. These facts alone justify declaratory relief. *See Ecological Rights Found. v. Fed. Emergency Mgmt. Agency*, Case No. 16-cv-05254-MEJ, 2017 WL 5972702, at *1, *10 (N.D. Cal. Nov. 30, 2017) (granting declaratory relief based on an agency’s untimely response to three requests because of “[t]he recurring nature of the[] violations and the possibility that they might reoccur with [the plaintiff’s] future FOIA requests”), *appeal dismissed*, Appeal No. 17-17539 (9th Cir. Jan. 12, 2018).

But the five requests at issue here tell only a part of the story. For one thing, BPA utterly failed to make timely determinations as to the two requests made on behalf of CRK, and BPA still has not released *any* documents in response to one of those requests over ten months after receiving it. *See supra* pp. 3–4; Ex. 6; Ex. 7. Moreover, BPA’s FOIA statistics over the last few years show a clear pattern of prolonged delays in responding to “complex” requests. *See supra* pp. 13–15. Given that BPA “has violated the time limits in responding to [Plaintiff’s] set of requests” as well as many other requests and that “the agency’s violations are consistent, and they may recur,” declaratory relief is appropriate. *Our Children’s Earth Found.*, 85 F. Supp. 3d at 1089.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant its motion for summary judgment and enter (1) an order requiring BPA to release 5,000 pages a month to Plaintiff and (2) a declaratory judgment.

Dated: October 5, 2020

Respectfully submitted,

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