IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREENPEACE, INC., Plaintiff, v. DEPARTMENT OF HOMELAND SECURITY, and NATIONAL PROTECTION AND PROGRAMS DIRECTORATE, Defendants.	Civil Action No. 1:17-cv-00479-CKK Judge Kollar-Kotelly

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiff Greenpeace, Inc. hereby moves for summary judgment in this case brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the Administrative Procedure Act (APA), 5 U.S.C. §§ 702 & 706, the Mandamus and Venue Act, 28 U.S.C. § 1361, and the All Writs Act, 28 U.S.C. § 1651, on the ground that there is no genuine issue of disputed material fact and plaintiff is entitled to judgment as a matter of law.

In support of this motion for summary judgment and in opposition to defendants' motion to dismiss or, in the alternative, for summary judgment, plaintiff submits the accompanying memorandum of points and authorities in support of plaintiff's motion for summary judgment and in opposition to defendants' motion to dismiss or, in the alternative, for summary judgment, statement of material facts as to which there is no genuine issue, response to defendants' statement

of material facts as to which there is no genuine issue and plaintiff's statement of additional material facts as to which there is no genuine issue, proposed order, and the declarations of Sean Sherman, Gerald Poje, Paul Orum, and Rick Hind and exhibits annexed thereto. Plaintiff also relies on those portions of defendants' declarations cited herein.

Dated: July 20, 2017

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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INTRODUCTION

In this Freedom of Information Act (FOIA) case, the plaintiff concededly prevailed in its appeal to the head of the agency challenging the agency's initial decision to claim that records were exempt from disclosure, but the agency withheld the records anyway. Nonetheless, the agency argues for the propriety of its withholding as if this were a run-of-the-mill case under FOIA, in which the plaintiff-requester calls on a federal district court to review *de novo* the agency's determination that requested records are exempt from disclosure.

This case presents a different and more fundamental question: Does FOIA permit agency staff to disregard an agency's appellate determination that requested records are *not exempt* from disclosure and withhold them anyway? The answer must be no.

Plaintiff Greenpeace, Inc. filed a FOIA request seeking a list of chemical facilities that the Department of Homeland Security (DHS) no longer considers high risk. DHS withheld the responsive records in full based in part on the conclusory assertion that FOIA exemption (7)(F) applied because the records could endanger someone's physical safety. Greenpeace pursued an administrative appeal, pursuant to FOIA and DHS regulations, to an administrative law judge (ALJ) who had been delegated the authority of the head of the agency to resolve FOIA appeals. Had the ALJ affirmed the initial decision of DHS's FOIA staff to withhold the records, Greenpeace might now be before this Court litigating the application of any claimed exemptions *de novo*. But that is not what happened.

Instead, the ALJ, acting with the full authority of the head of the agency, agreed with Greenpeace, concluded that the DHS employees' invocation of exemption (7)(F) and other exemptions was unjustified, and reversed the decision to withhold the records on that basis. DHS

regulations require the agency to reprocess the FOIA request in accordance with the appellate decision. That should have been the end of it.

In defiance of the decision of the head of the agency, and at the apparent instruction from someone in DHS's Office of General Counsel (OGC), DHS FOIA staff produced documents so heavily redacted as to be unintelligible. Each redaction was marked with the notation "(b)(7)f," one of the FOIA exemptions that the appeal decision had specifically rejected as a valid justification for withholding the requested records. When Greenpeace again appealed to seek redress, the ALJ assigned the new appeal pleaded helplessness. The ALJ stated that he was powerless to force the agency staff to obey the agency's own final decision. Because the earlier appeal had already decided that the claim of exemption was unwarranted, the ALJ dismissed the second appeal and notified Greenpeace of its right to sue.

DHS now claims that despite the delegation of authority to the ALJ to serve as head of the agency and issue final appellate decisions on the agency's behalf, the OGC nonetheless retained a secret veto, unbeknownst to Greenpeace or the ALJ, and unmentioned until DHS's motion, to overrule *sub silentio* any appeal decision with which it disagreed. OGC's heretofore-undisclosed claim of veto authority is flatly inconsistent with FOIA's requirements concerning appeals.

DHS asks this Court to ignore the appeals process established by FOIA and proceed with *de novo* review as if the head of the agency had *affirmed* the decision of the DHS FOIA staff. Greenpeace, however, is not seeking *de novo* review, though the ALJ's decision was correct. Rather, Greenpeace requests only that this Court compel DHS to comply with the decision of the head of the agency, with FOIA, and with DHS regulations, all of which require DHS to follow the ALJ's decision and provide the requested records unredacted.

BACKGROUND

I. DHS's Regulation of the Security of High Risk Chemical Facilities

Section 550 of the 2007 Department of Homeland Security Appropriations Act directed DHS to develop and adopt a regulatory framework to address the security of chemical facilities that DHS determines pose high levels of risk. *See* Pub. L. No. 109-295, § 550, 120 Stat. 1355, 1388. In response, DHS published an Interim Final Rule, known as the Chemical Facility Anti-Terrorism Standards (CFATS), on April 9, 2007. *See* 6 C.F.R. pt. 27 (2007). The CFATS program identifies and regulates high risk chemical facilities to ensure they have security measures in place to reduce the risks associated with the chemicals they house.[1]

On November 20, 2007, DHS published Appendix A to CFATS, which lists 322 chemicals of interest—including common industrial chemicals such as chlorine, propane, and anhydrous ammonia—as well as specialty chemicals, such as arsine and phosphorus trichloride. *See* 6 C.F.R. pt. 27 Appendix A (2007). Implementation of the CFATS regulation requires DHS to identify which facilities it considers high risk based on the quantity of chemicals of interest at the facilities, and then requires these facilities to complete Security Vulnerability Assessments, develop Site Security Plans, and implement protective measures necessary to meet risk-based performance standards established by DHS. *See* 6 C.F.R. pt. 27. CFATS is implemented by the National Protection and Programs Directorate (NPPD), a component of DHS.

On February 3, 2012, Mr. Rand Beers, NPPD Under Secretary, testified before the House Committee on Energy and Commerce, Subcommittee on Environment and the Economy, with

[1] The Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014, Pub. L. No. 113-254, 128 Stat. 2898 (codified at 6 U.S.C. § 621, *et seq.*), reauthorized the CFATS program for four years.

respect to the agency's progress in implementing CFATS. In that testimony, Mr. Beers stated that, "since CFATS' inception, more than 1,600 facilities completely removed their chemicals of interest, and more than 700 other facilities have reduced their holdings of chemicals of interest to levels resulting in the facilities no longer being considered high-risk." Ex. A.[2] He further testified that the changes at these facilities "have helped reduce the number of high risk chemical facilities located throughout the nation, and have correspondingly made the nation more secure." *Id.* Similarly, another NPPD official indicated that, as of February 2014, "more than 3,000 facilities have eliminated, reduced or modified their holdings of chemicals of interest," further reducing the number of high risk facilities. Ex. B.

II. Greenpeace's FOIA Request

On May 18, 2012, Greenpeace submitted a FOIA request to DHS seeking documents reflecting the lists of facilities referred to by Mr. Beers that DHS no longer considers high risk. Specifically, the request sought "documents and records that contain the most complete listing of chemical facilities that have reduced their holdings of threshold quantities of 'chemicals of interest' (COI) rendering them no longer 'high risk' facilities under CFATS." Ex. C.[3]

Nearly one year later, by letter dated March 13, 2013, DHS staff issued an interim response to Greenpeace's request. The response stated that a search of NPPD for responsive documents produced 123 pages of results, which the agency was withholding in full. The response justified

[2] References to "Ex." are to exhibits to the Declaration of Rick Hind, which is submitted in support of this motion.

[3] Greenpeace also requested "copies of any and all documents that describe any safer chemicals, processes or methods these same facilities adopted to no longer be classified as 'high risk' facilities under CFATS," but that request is not the subject of this action.

the withholding with conclusory citations to FOIA exemptions 5, 7(E), and 7(F). Ex. D.[4] As relevant here, DHS provided no explanation for invoking exemption (7)(F); it merely parroted the statutory text: "**FOIA Exemption 7(F)** permits the government to withhold all information about any individual when disclosure of information about him could reasonably be expected to endanger the life or physical safety of any individual. This exemption also protects physical security at critical infrastructure sites." *Id.*

III. FOIA and DHS Regulations for Appealing Adverse Decisions

FOIA provides that if a request is initially denied, the requester has "the right" to appeal "to the head of the agency," who must "make a determination with respect to any appeal within twenty days." 5 U.S.C. § 552(a)(6)(A)(i), (ii). DHS regulations implementing FOIA provide that a requester may "appeal any adverse determination denying [a] request to the Associate General Counsel (General Law), Department of Homeland Security, Washington, DC 20528," 6 C.F.R. § 5.9(a)(1) (2003).[5] DHS thus delegated "head of the agency" authority for all FOIA appeals to the Associate General Counsel (General Law), a position within the OGC.

Prior to July 2011, DHS's OGC had, "in turn, assigned … the responsibility of processing and adjudicating FOIA appeals" to the Transportation Security Administration. Ex. F. Pursuant to a July 8, 2011 memorandum, DHS reassigned this authority to the United States Coast Guard ALJ

[4] Because, as will be explained below, DHS staff ultimately relied solely on exemption (7)(F) to continue to withhold the documents following Greenpeace's successful appeal and invokes only that exemption in its motion for summary judgment, DHS's initial position with respect to exemptions 5 and (7)(E) is not relevant to this action.

[5] Effective December 22, 2016, DHS amended its FOIA regulations. *See* Freedom of Information Act Regulations, 81 Fed. Reg. 83625 (Nov. 22, 2016). All references to DHS FOIA regulations throughout this memorandum are to the prior version of the regulations that were in effect from 2003 through December 22, 2016. The prior regulations were in effect throughout the pendency of Greenpeace's FOIA request and subsequent administrative appeals.

program. *Id.* The July 2011 memorandum explained that, in an effort to decrease the number of backlogged FOIA appeals, DHS "concluded that the most efficient approach for addressing FOIA appeals resulting from FOIA requests to Headquarters Components is to assign them directly to the Coast Guard ALJ program." *Id.* Therefore, for purposes of FOIA, the Coast Guard ALJ was delegated the authority of the "head of the agency." 5 U.S.C. § 552(a)(6)(A)(i).

DHS regulations implementing FOIA provide that if an adverse determination is reversed or modified on appeal, the request "will be reprocessed in accordance with that appeal decision," *id.* § 5.9(b). The agency staff must make the records described in the appellate determination "promptly available." 5 U.S.C. § 552(a)(3)(A). The regulations do not provide for DHS staff to reject an appellate decision reversing or modifying an adverse determination.

IV. Greenpeace's Initial Appeal

On May 12, 2013, Greenpeace submitted an appeal of the interim response. Greenpeace's appeal argued that none of the cited FOIA exemptions provided grounds for withholding the information sought. Ex. E. Greenpeace explained that exemption 7(F) did not apply because the information Greenpeace requested—which is limited to only those facilities that are no longer regarded as "high risk"—does not endanger the life or physical safety of any person, and that DHS staff failed to identify with reasonable specificity the possible harm or danger that could result from the release of the records. *Id.*

Over one year later, by letter dated June 27, 2014, the Coast Guard ALJ assigned to the appeal issued a decision agreeing with Greenpeace and reversing DHS and NPPD's employees' decision to withhold the records. Ex. G. In accordance with the July 2011 memorandum, the ALJ explained that his decision was "the official appeal decision on behalf of the Department of Homeland Security." *Id.*

The ALJ's letter revealed that the one-year delay was caused, at least in part, by the ALJ's decision to give DHS an additional opportunity to provide a more detailed justification for its decision to invoke exemption 7(F). *Id.* Specifically, in a letter dated August 7, 2013, the ALJ told the NPPD's FOIA officer that the ALJ was "unable to determine … whether NPPD properly applied FOIA Exemptions" because the file contained "no explanation or justification as to how these exemptions are applicable." Fuentes Decl. Ex. G. The ALJ asked the FOIA officer to "provide a memo providing the justifications for withholding these records pursuant to the articulated FOIA Exemptions." *Id.* DHS subsequently provided additional information to the ALJ. *See* Ex. G.

Even with this additional information in hand, the ALJ held that "[a]fter a thorough review of [the] appeal and all applicable documents and the Agency's subsequent explanation … [t]he Agency has not provided adequate explanation as to why the requested records should be withheld pursuant to FOIA Exemptions (b)(5), (b)(7)(E) or (b)(7)(F)." *Id.* The ALJ informed Greenpeace that, pursuant to DHS regulation 6 C.F.R. § 5.9, Greenpeace's FOIA request would be "reprocessed in accordance with th[e] appeal decision." *Id.* He further stated, in accordance with the July 2011 memorandum, that his decision was "the final action of the Department of Homeland Security." *Id.*

V. DHS Staff's Claimed Secret Veto over ALJ Decisions.

The declarations in support of defendants' motion have revealed for the first time that DHS's OGC staff believes that the statutorily required FOIA appeal process is merely advisory. David Palmer, Chief of Staff in the OGC, claims that despite DHS's delegation of authority to the ALJs in the July 2011 memorandum, "[a]t no time did OGC divest itself of its authority for handling FOIA appeals or relinquish to the Coast Guard program ultimate authority over FOIA

appeals." Palmer Decl. ¶ 8. Palmer claims "OGC has retained the final authority to determine Department FOIA appeals, and may review any [ALJ] finding on a FOIA appeal," and that while "OGC does not review every [ALJ] response to FOIA appeals, [OGC] will do so when appropriate." *Id.* Palmer cites no documents memorializing OGC's secret veto authority.

Palmer states that without any notice to Greenpeace, the secret veto was exercised *after* issuance of the appeal decision—the agency's self-designated "final action"—to Greenpeace. Specifically, at some point after the ALJ reversed the FOIA staff's interim determination and ordered Greenpeace's request "reprocessed in accordance with th[e] appeal decision," someone at OGC reviewed the ALJ's decision and disagreed. *Id.* ¶ 11. A member of OGC staff concluded that exemption 7(F)—one of the exemptions that the ALJ decision on appeal had rejected—applied to any facility that could be identified, and directed NPPD's FOIA Office to withhold that information. *Id.* Greenpeace was not informed of this subsequent secret review by OGC staff. Hind Decl. ¶ 12.

VI. Defendants' Failure to Comply with their Own Agency's Appellate Decision.

Six months after the ALJ issued his decision, DHS staff responded to Greenpeace by letter dated December 15, 2014. In that letter, DHS personnel stated that they had "reprocessed the list of chemical facilities" and were "releasing *portions* of that list" to Greenpeace. Ex. H (emphasis added). In direct contravention of the designated agency head's appellate decision, but in accordance with OGC staff's subsequent secret veto, Palmer Decl. ¶ 12, NPPD FOIA staff redacted the produced records almost entirely based on exemption 7(F). In substance, DHS continued to withhold the documents in their entirety.

Despite the ALJ's decision rejecting invocation of exemption 7(F), the 123 pages produced to Greenpeace were thoroughly redacted with the phrase "(b)(7)f" on each redaction. Ex. H. The

records are so replete with redactions that they are useless and unintelligible. Indeed, OGC Chief of Staff Palmer has admitted that the redactions were intended to make it "impossible to identify the specific facility." Palmer Decl. ¶ 11. Thus, the redactions were designed to replicate the complete withholding of the list that the first appeal had held was unjustified, while creating the appearance that the records had been reprocessed in accordance with the appeal decision, as the agency had told Greenpeace they would be. DHS staff did not provide any explanation for these redactions and did not mention that OGC staff had instructed them to disobey the ALJ's decision. Instead, DHS staff stated in conclusory terms similar to those that had been rejected by the ALJ, that "[t]he redacted information is being withheld pursuant to 5 U.S.C. § 552(b)(7)(F) because it constitutes information compiled for law enforcement purposes the disclosure of which could reasonably be expected to endanger the life or physical safety of any individual." Ex. H.

Although the responsive document should have reflected a list of approximately 3,000 facilities that are no longer considered high risk, the few words that appear to reference facilities in the 123 almost-wholly-redacted pages produced by DHS personnel reflect a small portion of that number. Based on its review, Greenpeace has concluded that the parts of the records that have not been completely redacted only include 418 line entries, and that only 248 of these could reflect parts of the names of chemical facilities, though without the redacted information even those are almost completely useless. Hind Decl. ¶¶ 11, 13. For example, such entries as "AG Warehouse," "Highway Division," "Farm #5—Myaka City, Florida," "The Ranch," and "Store No. 2339" are simply titles devoid of content.[6] The other 170 entries provide meaningless information such as

[6] From internet searches, Greenpeace determined that the following entries, among others, may reflect identifiable facilities: "Ankeny," "Union County Water Treatment Facility," "Cargill," "Firebaugh," "LISE/Gordon McKay Building Complex," "Pest Elimination Pflugerville Warehouse," "Applied Process," "Metaldyne-Twinsburg," "Codexis Redwood City," "IPL Eagle

the names of cities or states (for example, "Florida," "Salem," "Grant Nebraska," or "Greenwood Mississippi"), street names (such as "College Street" or "Frenz Drive"), or useless out-of-context references (for example, "Industry," "Headquarters," or "Physical Education Building"). *Id.* Additionally, DHS's response contains 20 *blank* pages, without citation to a FOIA exemption or even any marking to indicate redaction. *See id.* ¶ 11; *id.* Ex. H.

VII. Greenpeace's Second Appeal and the Designated Agency Head's Asserted Inability to Compel the Defendants' Compliance.

On February 13, 2015, Greenpeace appealed the second response. Greenpeace argued that the response ignored the ALJ's order resolving the previous appeal, was indecipherable due to the excessive redactions, and failed to provide an adequate explanation for the redactions as required by law and by the prior appellate order. Ex. I. Greenpeace explained that the DHS FOIA staff's invocation of exemption 7(F) throughout the redacted records, despite the prior appellate order, was unsupportable because Greenpeace was requesting information only about facilities that no longer maintain threshold quantities of the chemicals of interest under CFATS. *Id.*

By letter dated August 25, 2015, a second ALJ responded to Greenpeace but pleaded helplessness. The letter reiterated that the ALJs were delegated the authority to render the official and final decisions on FOIA appeals: "Pursuant to a memorandum of agreement, the [ALJ] is reviewing FOIA appeals for the Department of Homeland Security General Counsel's office. Therefore, the [ALJ] renders decisions on FOIA appeals on behalf of [DHS]." Ex. J. The second ALJ further stated that the first ALJ's decision "constitute[d] final agency action," and concluded

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Valley," "Moccasin Creek Trout Hatchery," "Kelly Aviation Center," and "Southern States Standard Service." However, several of these had numerous results (e.g., Cargill), and with the physical addresses redacted, it is impossible for Greenpeace to confirm whether the facilities that Greenpeace's searches have revealed are the same facilities reflected in the records produced. Hind Decl. ¶¶ 11, 13.

that although "NPPD is obligated to comply" with that prior decision, the second ALJ "ha[s] no ability to force compliance if an Agency does not adequately obey our appellate decisions." *Id.* Accordingly, the letter stated that the appeal was dismissed, that the letter "constitute[d] administrative exhaustion," and that Greenpeace "may now appeal NPPD's actions to federal court." *Id.*

The second ALJ's decision included no indication that he was aware that OGC staff had directed NPPD FOIA staff to disregard the prior ALJ's decision. Chief of Staff Palmer has now claimed that the second ALJ's statement that the first ALJ's decision "constituted final agency action" was "incorrect[]" and an "error." Palmer Decl. ¶¶ 15, 16. Palmer claims that the OGC staff's subsequent secret review was actually the final action of the Department. *Id.* ¶¶ 14, 16.

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). All reasonable inferences should be drawn in favor of the non-movant. *Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 514 (D.C. Cir. 1996).[7]

[7] Defendants style their motion as a motion to dismiss or alternatively for summary judgment, but throughout the sections of the brief dealing with Greenpeace's FOIA and APA claims, defendants refer to documents outside of the Complaint. *See, e.g.*, Defs. Br. 6, 7, 10, 11, 12 (FOIA claim); *id.* 14, 15 (APA claim). Therefore, under Federal Rule of Civil Procedure 12(d), defendants' motion must be treated as one for summary judgment, at least with respect to those claims. There is no genuine argument that Greenpeace's Complaint does not adequately state claims under the standard enunciated in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

ARGUMENT

I. Defendants Have Improperly Withheld Agency Records Under FOIA.

"[F]ederal agencies must obey all federal laws," *FCC v. NextWave Pers. Commc'ns*, 537 U.S. 293, 299 (2003), and "must follow their own rules," *SEC v. Selden*, 445 F. Supp. 2d 11, 14 (D.D.C. 2006) (internal quotation marks and citation omitted); *see United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). This "fundamental principle," *NextWave*, 537 U.S. at 299, is fully applicable to cases involving FOIA, which Congress enacted to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). "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." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted). Were agency personnel able to ignore their agencies' final FOIA determinations and disregard their own rules and regulations for responding to FOIA requests, the vital role FOIA plays in furthering government transparency would be gravely diminished.

Here, the agency's "final action" was the decision of the official exercising the delegated power of the head of the agency to decide appeals. That decision was that the records are not subject to the exemption claimed by the agency's staff and that Greenpeace is entitled to release of the records. The agency staff's refusal to abide by the agency's own final decision to produce the records violates FOIA and the agency's own regulations, in the process making a mockery of the statutory appeal process. The Court should enforce the agency's final decision on Greenpeace's appeal, which reasonably determined that the records requested are not subject to exemption 7(F).

A. The DHS staff's secret veto of the agency's final appeal decision violates FOIA.

FOIA provides that a requester may file suit "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). This provision vests courts with "broad equitable authority." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 846 F.3d 1235, 1241 (D.C. Cir. 2017) (*CREW v. DOJ*). FOIA and DHS regulations require agency staff to comply with an agency head's order on appeal. Here, the undisputed facts demonstrate that the defendants' intentional failure to comply with the ALJ's order to produce unredacted the requested records to Greenpeace constitutes the "improper withholding" of records, in violation of FOIA and DHS regulations.

1. FOIA's text and structure require agency staff to promptly release records that the head of the agency determines on appeal are subject to release.

FOIA mandates that agencies make records responsive to requests "'promptly available to any person' unless the requested records fall within one of the statute's nine exemptions." *Loving v. Dep't of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008) (quoting 5 U.S.C. § 552(a)(3)(A)). When agency staff initially withhold records they determine are exempt from disclosure, FOIA provides a requester with the right to appeal that initial determination "to the head of the agency." 5 U.S.C. § 552(a)(6)(A)(i); *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990) ("The statutory scheme in the FOIA specifically provides for an administrative appeal process following an agency's denial of a FOIA request."). The agency head (or an official delegated the agency head's authority) is then required to "make a determination with respect to any appeal within twenty days" after the appeal is filed. 5 U.S.C. § 552(a)(6)(A)(ii). A "determination" is made when the agency head "determine[s] and communicate[s] the scope of the documents it intends to produce and withhold, and the reasons." *Citizens for Responsibility & Ethics in Washington v. Fed. Election*

Comm'n, 711 F.3d 180, 188 (D.C. Cir. 2013) (*CREW*) (describing "determination" as defined in § 552(a)(6)(A)(i)). After the agency head has made an appellate determination and communicated it to the requester, the agency must make the records described in the appellate determination "promptly available." *Id.* at 188-89 (quoting 5 U.S.C. § 552(a)(3)(A)). Thus, the statutory structure demonstrates that the appellate decision released to the requester is the agency decision, and the agency must comply with this decision.

The administrative appeal process is a mandatory and integral component of FOIA, for agencies, requesters, and the courts. For an agency, if a requester does not pursue an administrative appeal, a subsequent FOIA suit will be dismissed for failure to exhaust administrative remedies. *Oglesby*, 920 F.2d at 61 ("Courts have consistently confirmed that [] FOIA requires exhaustion of this appeal process before an individual may seek relief in the courts."). The exhaustion requirement is critical because "allowing a FOIA requester to proceed immediately to court to challenge an agency's initial response would cut off the agency's power to correct or rethink initial misjudgments or errors." *Id.* at 65.[8] For a requester, the right to appeal an adverse determination is equally important, as it could lead to full satisfaction of the request without the need for litigation. And for the courts, the administrative appeal process provides a record reflecting the full benefit of an agency's experience and expertise. *See Wilbur v. CIA*, 355 F.3d 675, 677 (D.C. Cir. 2004). Thus, administrative appeals assure each of the relevant stakeholders that the agency

[8] If an agency's initial determination fails to notify a requester of the right to appeal, the requester is deemed to have exhausted her administrative remedies and may proceed to file suit in federal district court immediately, but appeal is required to preserve judicial remedies if the requester receives a proper response that provides notification of appeal rights. *See Oglesby*, 920 F.2d at 65; *In Def. of Animals v. Nat'l Inst. of Health*, 543 F. Supp. 2d 83, 97 (D.D.C. 2008).

head, rather than her subordinates, has had the opportunity to fully consider and definitively determine whether requested records should be exempt from disclosure.

Where the head of the agency determines on appeal that agency staff have made "initial misjudgments or errors," *Oglesby*, 920 F.2d at 61, and concludes that requested records are not exempt from disclosure, FOIA requires agency staff to make the responsive records "promptly available." 5 U.S.C. § 552(a)(3)(A). The statute is explicit that it "does not authorize withholding of information … except as specifically stated in [FOIA]," 5 U.S.C. § 552(d), and agency staff are prohibited from continuing to withhold records once they are determined not to be exempt from disclosure, *see Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016) ("[FOIA] does not provide for withholding responsive but non-exempt records or for redacting nonexempt information within responsive records."); *see also Aviation Consumer Action Project v. Civil Aeronautics Bd.*, 418 F. Supp. 634, 638 (D.D.C. 1976) (concluding that, after the court had previously determined that records were not exempt from disclosure, the agency had to release records promptly and could not delay based on desire to make the record publicly available on a mass distribution basis). Indeed, were agency staff authorized under FOIA to continue to withhold records after an adverse determination by the agency head, there would be no reason for requiring administrative appeals, because further agency reflection would neither obviate the need for litigation by correcting "initial misjudgments or errors," *Oglesby*, 920 F.2d at 61, nor create a final decision suitable for potential judicial review.

DHS regulations implementing FOIA further demonstrate that agency staff must comply with the decision of the head of the agency to release non-exempt records. DHS regulations echo FOIA by providing that a FOIA requester has the right to appeal a denial "to the head of the agency," 6 C.F.R. § 5.9(b), and go on to delegate the power of the agency head to the Associate

General Counsel (General Law), *id.* § 5.9(a). Pursuant to the July 2011 memorandum, DHS further delegated the agency head's appellate authority to the United States Coast Guard ALJ program. Ex. F. DHS regulations also provide that if an adverse determination is reversed on appeal, the FOIA request "will be reprocessed in accordance with that appeal decision." *Id.* § 5.9(b). The reprocessing requirement effects FOIA's imperative that records deemed responsive and not exempt be made available promptly. 5 U.S.C. § 552(a)(3)(A).

2. DHS's noncompliance with the appeal decision violates FOIA and requires an order compelling DHS to release the records.

In light of these principles, the undisputed facts here demonstrate that DHS staff have improperly withheld records in violation of FOIA and DHS regulations. After DHS employees reached an interim determination to withhold responsive records in full under exemption 7(F), Greenpeace appealed to the delegated head of the agency, the ALJ. The ALJ issued a determination constituting the agency's final decision, which reversed the interim determination of DHS staff and concluded that the invocation of exemption (7)(F) was unjustified. He ordered the request "reprocessed in accordance with [the] appeal decision." Ex. G (quoting 6 C.F.R. § 5.9(b)). Although the ALJ's decision was "the official appeal decision on behalf of the Department of Homeland Security," Ex. G, agency staff did not comply.

Once the ALJ concluded that the records were not exempt and ordered their release, FOIA and DHS regulations required DHS employees to release them promptly in a manner conforming to his decision. *See CREW,* 711 F.3d at 188-89. Instead, the agency staff flouted FOIA's requirement that an agency provide an appeal to the head of the agency by (1) continuing to withhold the records in their entirety by, as the agency admits, Palmer Decl. ¶ 11, deliberately redacting them to the point of incomprehensibility, and (2) redacting the records based on the very same exemption that the agency head had already determined was not justified. The second ALJ's

opinion acknowledges that the agency staff's redactions invoking exemption 7(F) had not "adequately obey[ed]" the earlier opinion, because they were made on the same basis that the first ALJ had determined was unjustified. Ex. J. That the second ALJ dismissed the appeal on grounds of futility rather than addressing any new issues clearly reflects his determination that the agency staff's continued invocation of exemption 7(F) was not in accordance with the final decision issued by the first appeal, but was in defiance of it.[9]

The Court should remedy this misconduct by ordering the requested records released unredacted. FOIA "confers jurisdiction on the federal district courts to order the release of improperly withheld or redacted information," *Penny v. Dep't of Justice*, 662 F. Supp. 2d 53, 56 (D.D.C. 2009), and "imposes no limits on courts' equitable powers in enforcing its terms," *Payne Enter., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). Where, as here, agency

[9] The defendants incorrectly claim that DHS regulations do not allow multiple appeals. *See* Defs. Mem. in Support of Defs. Mot. to Dismiss or for Summ. J. (Defs. Br.) 15. To the contrary, the regulations *require* multiple appeals in this circumstance. DHS regulations specify that a requester "dissatisfied with a component's response" may appeal, and mandate that if a requester wishes to seek review by a court of "*any* adverse determination, [she] must first appeal it under this section." 6 C.F.R. § 5.9(a), (c) (emphasis added). Thus, where a requester is "dissatisfied with a component's response" upon reprocessing, the requester is required to appeal again to allow eventual review by a court. *Id.* § 5.9(a)(1). The second ALJ's opinion recognized this, stating that his decision "constitute[d] administrative exhaustion," and that Greenpeace "may now appeal NPPD's actions to federal court." *Id.* Defendants' position, if accepted, would allow DHS staff to ignore adverse appellate decisions by invoking exemptions upon reprocessing, and would then require the requester, despite winning on appeal, to file suit in federal court without a further appeal—a process that would deny the requester, the court, and the agency the benefits of the administrative appeal process. *See supra* pp. 14-15. Moreover, there is little doubt that if a requester followed this approach, the agency would argue that he had failed to exhaust administrative remedies.

In any event, whether a requester may or must take a second appeal is largely irrelevant given that it is undisputed that Greenpeace has exhausted its remedies, that the withholding of the records here was contrary to the final decision provided by the agency to Greenpeace on its first appeal, and that this lawsuit is timely even if Greenpeace's ability to sue was triggered by the agency's release of the redacted records rather than by the second ALJ's dismissal of the second appeal.

employees fail to follow a decision of an agency head with respect to FOIA, courts must step in to provide relief. *See id.* In *Payne*, the requester sold information about government contracts that it obtained largely through FOIA requests for bid abstracts from Air Force Logistics Command (AFLC) bases. *Id.* at 488. After fifteen years in which Payne regularly received these abstracts, officers at several bases began to routinely refuse to supply them, citing a new AFLC policy letter and FOIA exemptions 4 and 5. After each denial, Payne appealed to the head of the agency, the Secretary of the Air Force, who always reversed the AFLC officers' decisions, concluded that no exemptions applied, and not only released the relevant documents,[10] but asked the AFLC to revise its policy to prevent these unnecessary and time consuming appeals. *Id.* at 489.

Payne ultimately brought suit for declaratory and injunctive relief to force the AFLC staff to cease their practice of routinely denying its FOIA requests on grounds that the head of the agency had already definitively rejected. The D.C. Circuit held that the lower level employees' noncompliance with FOIA, despite the determination by the head of the agency that the records were not exempt from disclosure, entitled Payne to declaratory relief. *Id.* at 494 ("The Secretary's inability to deal with AFLC officers' noncompliance with the FOIA … entitle[s] Payne to declaratory relief."). The court of appeals further explained that if the district court concluded on remand that the agency would continue with its efforts to frustrate Payne's FOIA requests, the district court should also order injunctive relief. *Id.* at 495.

[10] Unlike our case, in *Payne*, the agency released the documents that were the subject of the particular FOIA requests as to which the requester had successfully appealed, avoiding the situation presented here, where the requester is forced to bring suit even to obtain the records as to which he prevailed on appeal because the agency's staff have refused altogether to comply with the agency's appellate decision. *See* 837 F.2d at 494.

Although *Payne* dealt with a pattern of FOIA abuse, and not a one-time occurrence, the basic facts are analogous: As in *Payne*, agency employees are disregarding the agency's final appellate decision that records are not exempt. The difference between *Payne* and this case is reflected in the different remedies sought in each. In *Payne*, because the requester was concerned with continued FOIA abuse in the future, the plaintiff sought declaratory and injunctive relief preventing the same behavior from continuing. Here, because of the one-time nature of the violation, plaintiff seeks only the specific documents that DHS wrongfully continues to withhold. Indeed, as compared to *Payne*, in which the requester sought prospective injunctive relief to prohibit an agency practice, the one-time relief sought here is far less invasive and plainly falls within the Court's authority to compel the release of documents improperly withheld under 5 U.S.C. § 552(a)(4)(B); *see Payne*, 837 F.2d at 494.

3. The OGC staff's purported secret veto does not comport with FOIA.

The defendants' new litigation position—that OGC staff retained a secret veto—rings hollow in law and fact. As a matter of law, inherent in FOIA's statutory appeals process is the fundamental idea that the appellate "determination" communicated to the requester is the decision of the agency. *See CREW*, 711 F.3d at 188-89. The text and structure of FOIA and DHS regulations, as well as the July 2011 memorandum, demonstrate that the first ALJ was the final authority, the written decision issued by the first ALJ was the agency "determination," and DHS staff were obligated to comply with this decision and make the unredacted records "promptly available." *See id.*; *see supra* pp. 13-14. Agency staff cannot turn the "production" phase of the appeal process into another bite at the apple for making a "determination." *See CREW*, 711 F.3d at 188-89. The defendants have failed to explain how the secret veto can comport with FOIA without turning the statutory appeals process into kabuki theatre.

Factually, the defendants have produced no documentary evidence of the secret veto nor any evidence that it has ever before been exercised. The course of events further contradicts the defendants' claim to a secret veto vested in OGC staff. Defendants cannot explain why they endeavored to make it appear they were complying with the first ALJ's decision if they did not believe it was binding. And defendants cannot explain why, if OGC staff were acting pursuant to their lawfully retained veto authority, they never informed Greenpeace or the second ALJ of this retained authority, instead leaving both to believe that the agency was simply not complying with the first ALJ's final decision on behalf of the agency.[11]

Greenpeace acted in accordance with FOIA and DHS regulations. The defendants have not. Pursuant to the agency's final appellate decision, and as confirmed by the dismissal of Greenpeace's second appeal on the ground that its entitlement to the records was already resolved in the first appeal, Greenpeace has a right to the requested records without the redactions that the officer exercising the authority of the head of the agency determined to be improper. The defendants have no legal basis to withhold the records, in whole or in part, following the adverse determination by the ALJ on appeal. The DHS staff's subsequent redactions to the records are in contravention of the ALJ's decision, FOIA, and DHS regulations. Because the pertinent facts are not subject to any genuine dispute, the Court should grant Greenpeace's motion for summary judgment to compel the production of the unredacted requested records.

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[11] Greenpeace believes that because any purported secret veto authority is in contravention of FOIA, DHS regulations, and the July 2011 memorandum, any factual dispute over whether the agency in fact had a practice of retaining veto authority over final appellate decisions issued on its behalf is not material, and Greenpeace is entitled to summary judgment. If the Court concludes that whether OGC retained a secret veto authority is a material fact, Greenpeace respectfully requests the opportunity to take discovery on this issue because the facts are not sufficiently developed to allow the agency's position to be treated as undisputed absent discovery. *See* Sherman Decl. ¶¶ 3-7; Fed. R. Civ. P. 56(d).

B. The Court should enforce the ALJ's reasonable and correct conclusion that exemption 7(F) was inapplicable.

Defendants now claim that releasing the requested records could cause "untold" danger. Defs. Br. 5. That is literally true: Despite numerous opportunities, defendants never before "told" anyone—neither the plaintiffs nor the ALJs—how the release of the requested records could endanger physical safety. Indeed, after the first ALJ gave DHS staff the opportunity to supplement their explanation and conducted "a thorough review of [the] appeal and all applicable documents and the Agency's subsequent explanation," the agency's final decision on Greenpeace's appeal concluded that "[t]he Agency has not provided [an] adequate explanation as to why the requested records should be withheld pursuant to FOIA Exemption[] … (b)(7)(F)." Ex. G. Although FOIA "directs district courts to determine *de novo* whether *non-disclosure* was permissible," *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 777 F.3d 518, 522 (D.C. Cir. 2015) (emphasis added), where, as here, the head of the agency reasonably concludes that the non-disclosure was *not* permissible, the court should enforce, and not reexamine, that decision.

In any event, even if *de novo* review were appropriate here, the agency's appellate decision concluded correctly that the information Greenpeace seeks cannot "reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). Greenpeace seeks only a list of facilities that no longer maintain threshold quantities of chemicals of interest rendering them no longer "high risk" under CFATS. Merely providing the names of these facilities cannot reasonably be expected to pose the risks to life or physical safety that DHS now alleges. *See* Hind Decl. ¶¶ 16-17; Orum Decl. ¶¶ 8, 10, 14; Poje Decl. ¶ 12.

1. Defendants' speculative and conclusory declarations do not satisfy exemption 7(F).

Defendants' declarations are filled with "conclusory assertions" and "unsupported speculation," which "cannot serve as a justification for withholding information under Exemption 7(F)." *Long v. U.S. Dep't of Justice*, 450 F. Supp. 2d 42, 79-80 (D.D.C. 2006). Defendants speculate that facilities that are no longer "high risk" *may* still house chemicals of interest, and then further speculate that releasing the names of these facilities *could* possibly lead to attacks or theft of chemicals. Falcon Decl. ¶¶ 4, 8; *see also* Fuentes Decl. ¶¶ 28, 32; *see also* Falcon Decl. Ex. A (*Vaughn* index). But defendants have put forth no evidence in support of these broad assertions. Falcon Decl. ¶ 9. *Cf. EPIC*, 777 F.3d at 523 (concluding exemption 7(F) applied to emergency plan developed in direct response to 2005 bombing of London transportation system); *Public Employees for Environmental Responsibility v. U.S. Section, International Boundary & Water Commission, U.S.-Mexico,* 740 F.3d 195, 2016 (D.C. Cir. 2014) (*PEER*) (concluding exemption 7(F) applied to dam inundation maps where government included in record an intelligence alert from the Department of Homeland Security describing an alleged plot by drug traffickers to blow up a dam).

The identity of facilities that may house small amounts of unspecified chemicals of interest—amounts similar to those held by thousands of other facilities across the nation—does not pose a reasonable threat to public safety, and that information therefore is not exempt from release under FOIA. *See* Hind Decl. ¶¶ 16-17; Orum Decl. ¶¶ 8, 10, 14; Poje Decl. ¶ 12. But even if that were not so, according to defendants' description of the list, it includes only the facility names and the number of chemicals of interest at or above the CFATS screening threshold quantity as of June 2012, including, for the overwhelming majority, zero. *See* Falcon Decl. ¶ 20. The list does not identify the types of chemicals that each facility currently or formerly housed. *See id.*

Thus, the list would provide no basis for a malicious actor to conclude (a) that any specific chemical was contained at any specific facility in June 2012, (b) that the chemical remains at the facility five years later, or (c) that the facility is even still in operation. *See* Hind Decl. ¶ 16. Releasing the names of facilities that as of June 2012 had removed hazardous chemicals sufficient to make them no longer "high risk," without identifying the types of chemicals housed at each facility, cannot reasonably be expected to endanger the life or physical safety of individuals. Rather, the more likely consequence of greater awareness of such reductions in inventories of dangerous chemicals is that, like other government programs involving hazardous chemicals where regulated facilities are publicly disclosed, disclosure creates an incentive for reductions, and more facilities will reduce their inventories of chemicals of interest, increasing safety. *See* Poje Decl. ¶¶ 10-12; Orum Decl. ¶¶ 7, 12.

Defendants employ a scare tactic, claiming that facilities listed in the 123 pages of records "hold as many as 19 chemicals of interest at CFATS screening threshold quantity." Defs. Statement of Material Facts ¶ 12. But of the facilities listed in the 65 pages of records that include chemical counts, only a single one of the unidentified facilities meets that description. *See* Ex. H at 125. By contrast, the vast majority—40 pages out of 65 pages worth of facilities—have zero chemicals of interest at the CFATS screening threshold quantity. *See* Ex. H at 61-102. And with respect to the 59 pages of facilities that do not include chemical counts at all, defendants have represented that those facilities also have zero chemicals of interest above the CFATS screening threshold quantity. *See* Fuentes Decl. ¶ 18. Thus, out of 123 pages of facilities defendants have produced, 109 pages describe facilities that have *zero* chemicals of interest that meet the screening threshold. *See* Ex. H. Although it is possible that those facilities *may* have smaller quantities of some dangerous chemical (just as it is possible that *any* facility known to the public may have

some listed chemical below the threshold level), the list would not disclose to anyone that facilities in the "zero" category retain any dangerous chemical in any amount.

Recognizing the weakness of their arguments with respect to the danger posed by facilities that are not "high risk" under CFATS, Defendants engage in another round of speculation when they claim that if the list of facilities is provided, would-be attackers could FOIA the list at different times, compare the lists, through a process of elimination identify facilities that have been reclassified as "high risk," and target those facilities. Defendants have failed to provide any evidence that the same or similar list of facilities has ever been sought by any other requester under FOIA or will be in the future, or any other basis to support this attenuated chain of events. Further, should a subsequent FOIA request seek this information, defendants could, if the threat it now hypothesizes were genuine, redact or withhold the facilities that have previously been included and provide only the additions, thus limiting the ability of any would-be bad actors from comparing the complete lists at various times.

Moreover, defendants' invocation of the words "critical infrastructure" is not a magic bullet to avoid their statutory obligations under FOIA. Although defendants correctly note that "documents relating to critical infrastructure … will ordinarily be able to satisfy Exemption 7(F)," Defs. Br. 8 (quoting *PEER*, 740 F.3d at 205-06), the court of appeals explained in *PEER* that "documents relating to critical infrastructure" are limited to records such as "blueprints, maps, and emergency plans" for "bridges, airports, railroad tracks, dams, and research facilities." *Id.* at 199, 206 (seeking maps for two dams); *see also EPIC*, 777 F.3d at 520 (seeking emergency plans for shutting down wireless networks during critical emergencies). Nothing in defendants' declarations or *Vaughn* index suggest that any of the records relate to "critical infrastructure" as construed by *PEER*. *See* Orum Decl. ¶ 13.

2. The identity of facilities that possess dangerous chemicals is already in the public domain to a significant extent.

Defendants' arguments are largely foreclosed by the public domain doctrine because the names and locations of many of the facilities with threshold quantities of chemicals regulated under CFATS, as well as the amounts of specific chemicals housed at those facilities, have already been disclosed pursuant to regulations promulgated by the Environmental Protection Agency (EPA). "Under [the] public domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (collecting cases). "The logic of this doctrine is that where information requested is truly public, the enforcement of an exemption cannot fulfill its purposes." *Am. Immigration Lawyers Ass'n v. U.S. Dep't of Homeland Sec.*, 852 F. Supp. 2d 66, 74 (D.D.C. 2012) (internal quotation marks and citations omitted). Here, defendants claim that they cannot reveal the names and locations of facilities that previously housed high levels of chemicals of interest under CFATS. DHS's argument is not that the information that these facilities *reduced* their holdings poses the asserted threat, but that the possible threat comes from the disclosure that they may still have smaller quantities of dangerous chemicals. But the names, locations, and amounts of specific chemicals contained at many of these same facilities have been publicly disclosed pursuant to other government chemical safety programs whose lists of chemicals overlap with CFATS Appendix A. Therefore, DHS's mere release of the names of those facilities that formerly had quantities of the chemicals sufficient to render them "high risk" cannot reasonably be expected to endanger the life or physical safety of anyone.

Pursuant to the EPA's Risk Management Plan (RMP) rule, facilities holding more than a threshold quantity of any regulated substances are required to register and submit RMPs to the EPA. The list of substances and threshold quantities regulated under the RMP rule significantly

overlaps with Appendix A of CFATS. *See* Ex. K (chart of overlap). The Houston Chronicle hosts a searchable database of facilities that currently maintain or previously maintained threshold quantities of regulated substances under the RMP. *See* The Right-to-Know Network, http://www.rtk.net (last visited July 19, 2017). Similarly, under EPA's Toxic Release Inventory (TRI), facilities that manufacture or process more than 25,000 pounds of regulated chemicals or use more than 10,000 pounds are required to send reports to the EPA. The chemicals reported under the TRI also overlap with Appendix A of CFATS. *See* Ex. K. EPA hosts a searchable database of every facility that has sent a report to EPA about a covered chemical since 1987. *See* TRI Search, https://www.epa.gov/enviro/tri-search (last visited July 19, 2017). Thus, the names and locations of facilities that have housed chemicals that overlap with CFATS Appendix A, including those that have housed amounts that exceed the CFATS threshold quantities, are already in the public domain. *See* Hind Decl. ¶¶ 17-21; Orum Decl. ¶¶ 13-15; Poje Decl. ¶¶ 10-13.

Illustratively, one of defendants' only two examples of the asserted risk of disclosure is their claim that they cannot release the names of facilities that no longer house threshold quantities of nitromethane, a fuel used in racecars, because it can cause a risk of physical harm. *See* Falcon Decl. ¶ 6. However, nitromethane is also regulated under the TRI, and querying the TRI database produces a list of facilities that currently or previously have housed thousands of pounds of the substance. *See* Hind Decl. ¶ 19. Similarly, phosgene, a chemical that was used as a chemical weapon during World War I, is regulated under both CFATS and the RMP rule at a threshold quantity of 500 pounds. *See* Hind Decl. ¶ 18. Although defendants will not release the names of those facilities that *no longer* hold 500 pounds of phosgene because they claim it could risk safety, the Houston Chronicle database includes the names and addresses of 23 facilities in the United States that currently or previously *have held* at least 500 pounds of phosgene. *See* Hind Decl. ¶ 18.

Thus, even if the Court concludes that the public disclosure doctrine does not foreclose defendants' argument, the fact that EPA has publicly provided the names and addresses of facilities that *currently exceed* CFATS' thresholds renders implausible defendants' claim that the disclosure of facilities that *no longer exceed* CFATS' thresholds could somehow cause harm.[12]

3. Defendants have failed to provide reasonably segregable portions of the withheld records.

FOIA requires that "[a]ny reasonably segregable portion of [the] record shall be provided to any person requesting such record after deletion of the portions which are exempt," 5 U.S.C. § 552(b), and "an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Ctr. for Pub. Integrity v. U.S. Dep't of Energy*, No. 1:15-CV-01314 (APM), 2017 WL 176268, at *12 (D.D.C. Jan. 17, 2017) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). An agency must provide a "detailed justification" and not just make "conclusory statements" to support its segregability determination. *Id.* (quoting *Mead Data Cent.*, 566 F.2d at 261); *see Gamboa v. Exec. Office for U.S. Attorneys*, 65 F. Supp. 3d 157, 170 (D.D.C. 2014) (explaining there must be "some nexus between disclosure and possible harm and whether the deletions were narrowly made to avert the possibility of such harm.").

The defendants claim that because some facilities may vacillate between regulated and unregulated status under CFATS, any facility could possibly at some point become regulated again, and therefore they cannot release the identifiable name of a single facility. But if, for

[12] Defendants' only other example of a chemical that may pose a risk below the threshold quantity is bromine trifluoride. Even if defendants could plausibly claim that facilities housing *any* quantity of that substance need not be disclosed—a claim they have not substantiated beyond conclusory assertions—that does not provide defendants license to fail to disclose the thousands of facilities listed that have never housed that substance.

example, a facility has no chemicals of interest and has never once returned to regulated status under CFATS, the defendants have no basis to conclude that the facility poses a risk to anyone. *See* Orum Decl. ¶¶ 10-11; Poje Decl. ¶ 12. And if a facility that was "high risk" has ceased to operate, then that facility also poses no risk to anyone. *See* Hind Decl. ¶ 16.

Defendants provide only one example of a substance (nitromethane) that facilities often stock above and below the CFATS threshold. *See* Falcon Decl. ¶ 6. Putting aside the public disclosure of nitromethane facilities, *see supra* p. 26, as defendants themselves admit, nitromethane is legal and is used in racecars, *see* Falcon Decl. ¶ 6. Defendants have no reason to believe that criminals would choose to attack a facility with nitromethane rather than purchase the substance legally. Nor do they have reason to think that a person who wished to attack a nitromethane facility would need the information on this list to locate one.

Similarly, defendants insist that because, under a new methodology, five percent of untiered facilities will be reclassified as "high risk," defendants must withhold the names of every identifiable facility. Falcon Decl. ¶ 7. Although there *might* be a reasonable basis to withhold the names of those facilities that will be deemed "high risk" under this new standard, this possibility does not satisfy the high bar for withholding every name of every identifiable facility that has previously been regulated under CFATS.

Finally, defendants themselves do not contend that any risk would be created by releasing the names of facilities that have *no* chemicals of interest at all, but they claim that they have no way of determining whether any specific facility falls into that category and therefore cannot segregate and release information even as to facilities that have no chemicals of interest. Defs. Br. 11-12. However, CFATS requires DHS to document the basis for a decision to delist any facility from CFATS. *See* Orum Decl. ¶ 10 (citing CFATS § 2102(e)(3), codified at 6 U.S.C. § 622(e)(3)).

Under this section, DHS determines the basis for each delisting—for example, whether a facility is delisted by virtue of having *entirely* removed chemicals of interest or by holding one or more chemicals of interest below a screening threshold reportable amount. Orum Decl. ¶ 10. Thus, NPPD Under Secretary Beers was able to testify before Congress in 2012 that "since CFATS' inception, more than 1,600 facilities completely removed their chemicals of interest," Ex. A, and another NPPD official was able to state in 2014 that "more than 3,000 facilities have *eliminated,* reduced or modified their holdings of chemicals of interest." Ex. B (emphasis added). Because DHS has the capability, at a minimum, of releasing the identities of facilities that have completely removed chemicals of interest without posing any risk—even under its own incorrect view of what constitutes a risk—DHS has failed to demonstrate that that it has released all reasonably segregable, non-exempt information. Ultimately, the defendants' blanket redactions do not reflect the narrow and "detailed justifications" that FOIA requires.

II. Defendants' Failure to Abide by the ALJ's Decision Violates the APA.

In the alternative, should the Court conclude that FOIA does not afford an adequate remedy for defendants' complete failure to abide by FOIA, DHS regulations, and the agency's appeal decision, Greenpeace is entitled to summary judgment under the APA. *See* 5 U.S.C. § 704. The APA provides that a reviewing court shall "compel agency action unlawfully withheld." 5 U.S.C. § 706(1). A claim under the "unlawfully withheld" provision can proceed where a government agency failed to take a "discrete agency action that it is required to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). "[R]equired agency action … includes, of course, agency regulations that have the force of law." *Id.* at 65; *see Sai v. Dep't of Homeland Sec.*, 149 F. Supp. 3d 99, 119 (D.D.C. 2015) (compelling agency to comply with regulation requiring response to administrative complaint within 180 days under § 706(1)).

FOIA's text and structure, as well as DHS regulations and the July 2011 memorandum, required the defendants to "reprocess[]" Greenpeace's FOIA request "in accordance with th[e] appeal decision." 6 C.F.R. § 5.9(b); *see* 5 U.S.C. § 552(a)(6)(A). The ALJ's decision rejected the application of FOIA exemption (7)(F) and mandated the unredacted production of records to Greenpeace. After the appellate decision, the OGC staff had no discretion to instruct the FOIA staff to continue to withhold records on the basis that the head of the agency had determined to be improper. The failure to comply with the agency head's decision on appeal constitutes unlawfully withheld agency action and warrants an order compelling production under section 706(1) of the APA.

Further, while an agency "is free to alter its past rulings and practices even in an adjudicatory setting," *Airmark Corp. v. FAA*, 758 F.2d 685, 691-92 (D.C. Cir. 1985), the Supreme Court has explained that the agency must "display awareness that it *is* changing position" and cannot "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "This permits [courts] to ensure the agency's 'prior policies and standards are being deliberately changed, not casually ignored.'" *Dillmon v. National Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009) (citation omitted). Failure to do so violates the APA's prohibition against arbitrary and capricious decision-making. *See id.* at 1091 (concluding that agency decision to depart, without explanation, from precedent of deferring to ALJ credibility determinations was arbitrary and capricious).

Here, DHS's asserted policy of secretly reviewing and overruling FOIA appeal decisions, and excusing itself from reprocessing requests in accordance with those decisions, reflects exactly such an unexplained departure from its published regulations and policies. DHS claims that despite the established DHS policy that the ALJ is responsible for "processing and adjudicating" FOIA

appeals and that the ALJ's decision is the "final action…on behalf of [DHS]," Exs. G, J, the OGC retained the authority to secretly veto any appellate decision with which it disagreed. Greenpeace was wholly unaware of OGC's secret veto until Defendants' motion, and it is apparent that the ALJs were similarly uninformed. *See supra* pp. 8-11; Hind Decl. ¶ 12.[13] OGC's purported secret veto authority is in conflict with the established DHS policy embodied in the July 2011 memorandum, as well as with the text and structure of FOIA and DHS FOIA regulations. *See supra* pp. 13-20. The agency's unexplained and unacknowledged decision to depart from its announced policies and procedures *sub silentio* because it disagreed with the ALJ's decision is arbitrary and capricious, in violation of the APA. *See Dillmon*, 588 F.3d at 1091.

Moreover, the agency's explanation of its action has itself changed from the explanation it provided during the administrative process and cannot be credited under *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). The agency's explicitly stated position when Greenpeace's first appeal was resolved was that the ALJ's appeal decision was its final action. Even in disobeying that decision by withholding information on grounds rejected in that appeal, the NPPD FOIA staff's stated basis for its action was not that the appellate decision had been overruled, but that DHS had "reprocessed the list" "[i]n light of the response on administrative appeal." Ex. H. And in response to the second appeal, the ALJ reiterated on behalf of the agency that the first appellate decision was the agency's final action, and that the agency staff was not "adequately obey[ing]" the appellate decision. Ex. J. Thus, throughout the process, the agency's stated position was that the ALJ decisions reflected its

[13] Defendants attempt to cast the blame for Greenpeace's "confusion" on the second ALJ's "mistaken impression" that the first ALJ's decision was final agency action. Defs. Br. 16 n.2. This is simply untrue; both the first ALJ and the second ALJ correctly noted that the first ALJ's decision was the "final action of [DHS]." Exs. G (first ALJ decision), J (second ALJ decision). Neither ALJ was mistaken about the authority delegated in the July 2011 memorandum.

final determinations with respect to Greenpeace's appeal. Now, however, defendants explain that they always had the authority to overrule the first ALJ pursuant to a secret veto policy. This new *post hoc* explanation is in contravention of *Chenery*.

The defendants mainly argue that an APA claim is inappropriate because FOIA provides an adequate remedy. Defs. Br. 13-14. But Greenpeace makes this argument in the alternative, with the understanding that relief under the APA is only available if there is no other adequate remedy under FOIA. *See* 5 U.S.C. § 704; *Kenney v. U.S. Dep't of Justice*, 603 F. Supp. 2d 184, 190 (D.D.C. 2009); *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 308–09 (D.D.C. 2007). This case is therefore unlike *CREW v. DOJ*, 846 F.3d at 1239, where the plaintiff proceeded solely under the APA. Here, Greenpeace is proceeding principally under FOIA and believes the relief it seeks is available under FOIA. *See supra* Part I. However, if the Court finds that FOIA does not allow it to enforce the agency's compliance with FOIA's appeal provisions, DHS's own appeal regulations, and the agency's appeal decision, then FOIA does not satisfy the holding of *CREW v. DOJ* that a FOIA remedy must be "adequate" in order to displace the availability of APA review because, if so limited, the FOIA remedy would not necessarily allow Greenpeace to "gain access to all the records it seeks." *CREW v. DOJ*, 846 F.3d at 1246.[14]

III. Defendants' Failure to Comply with their Nondiscretionary Obligations Under FOIA and DHS Regulations Warrants a Writ of Mandamus.

The undisputed facts demonstrate that, if Greenpeace is not entitled to relief under FOIA or the APA, Greenpeace has a clear right to mandamus relief. "To adequately plead a claim for relief under the Mandamus Act, 28 U.S.C. § 1361, a plaintiff must allege that: (1) the plaintiff has

[14] Moreover, Greenpeace does not only seek the records themselves, but also seeks a declaration "that defendants' failure to provide the requested records … in accordance with the ALJ decision is unlawful." Compl., Prayer for Relief, at A.

a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *See In re Medicare Reimbursement Litig.*, 414 F.3d 7, 10 (D.C. Cir. 2005). After the ALJ's decision rejecting the invocation of exemption 7(F) and ordering the production of records to Greenpeace, defendants had a clear duty to act under FOIA and DHS regulations. Greenpeace has an undisputable right to the records without the redactions determined to be improper in the initial appeal, and defendants have no legal basis for failing to provide those records. Defendants' failure to comply with the ALJ decision and DHS regulations warrants a writ of mandamus.

Like the APA claim, defendants argue that the mandamus claim is foreclosed by FOIA. Defs. Br. 16. Again, however, Greenpeace makes this argument in the alternative, with the understanding that mandamus relief is only available if there is no other adequate remedy under FOIA or the APA. *See Am. Chemistry Council, Inc. v. U.S. Dep't of Health & Human Servs.*, 922 F. Supp. 2d 56, 66 (D.D.C. 2013). [15]

[15] Further, as mentioned above, *supra* p. 32, Greenpeace seeks both the records themselves and a declaration "that defendants' failure to provide the requested records … in accordance with the ALJ decision is unlawful." Compl., Prayer for Relief, at A.

CONCLUSION

This Court should grant plaintiff's motion for summary judgment, deny defendants' motion to dismiss or, in the alternative, for summary judgment, declare that defendants' failure to provide the requested records is unlawful, and order defendant to disclose the unredacted records immediately.

Dated: July 20, 2017

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREENPEACE, INC., Plaintiff, v. DEPARTMENT OF HOMELAND SECURITY, and NATIONAL PROTECTION AND PROGRAMS DIRECTORATE, Defendants.	Civil Action No. 1:17-cv-00479-CKK Judge Kollar-Kotelly

PLAINTIFF'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

1. On February 3, 2012, Mr. Rand Beers, National Protection and Programs Directorate (NPPD) Under Secretary, testified before the House Committee on Energy and Commerce, Subcommittee on Environment and the Economy that "since [the Chemical Facility Anti-Terrorism Standards' (CFATS)] inception, more than 1,600 facilities completely removed their chemicals of interest, and more than 700 other facilities have reduced their holdings of chemicals of interest to levels resulting in the facilities no longer being considered high-risk." Hind Decl. ¶ 4, Ex. A.

2. Mr. Beers further testified that the changes at these facilities "have helped reduce the number of high-risk chemical facilities located throughout the nation, and have correspondingly made the nation more secure." Hind Decl. ¶ 4, Ex. A.

3. On February 27, 2014, Ms. Caitlin Durkovich, NPPD Office of Infrastructure Protection Assistant Secretary, testified before the House Committee on Homeland Security with respect to H.R. 4007, the CFATS Authorization and Accountability Act of 2014. She testified that as of February 2014, "more than 3,000 facilities have eliminated, reduced or modified their holdings of chemicals of interest," further reducing the number of high-risk facilities. Hind Decl. ¶ 5, Ex. B.

4. On May 18, 2012, plaintiff Greenpeace, Inc. submitted a FOIA request to Department of Homeland Security (DHS) seeking "all releasable documents and records that contain the most complete listing of chemical facilities that have reduced their holdings of threshold quantities of 'chemicals of interest' (COI) rendering them no longer 'high risk' facilities under CFATS." Hind Decl. ¶ 6, Ex. C.

5. By letter dated March 13, 2013, DHS staff issued an interim response to Greenpeace's request, stating that a search of NPPD for responsive documents produced 123 pages of results, but that DHS was withholding those documents in full, citing FOIA exemptions (b)(5), (b)(7)(E), and (b)(7)(F). Hind Decl. ¶ 7, Ex. D.

6. DHS staff provided the following reason for the application of exemption (b)(7)(F): "FOIA Exemption 7(F) permits the government to withhold all information about any individual when disclosure of information about him could reasonably be expected to endanger the life or physical safety of any individual. This exemption also protects physical security at critical infrastructure sites." Hind Decl. Ex. D.

7. On May 12, 2013, Greenpeace submitted an appeal of the interim response and argued that none of the cited FOIA exemptions provided grounds for withholding the information sought. Hind Decl. ¶ 8, Ex. E.

8. Greenpeace's appeal letter explained that exemption (b)(7)(F) did not apply because the information Greenpeace requested—which is limited to only those facilities that are no longer regarded as "high-risk"—is of no meaningful use to those who may wish to attack a chemical plant, and that DHS failed to identify with reasonable specificity the possible harm or danger that could result from the release of the records. Hind Decl. Ex. E.

9. Pursuant to a July 8, 2011 Memorandum, DHS delegated appellate authority to the United States Coast Guard Administrative Law Judge (ALJ) program. Hind Decl. ¶ 9, Ex. F.

10. By letter dated June 27, 2014, a Coast Guard ALJ to whom Greenpeace's appeal had been assigned pursuant to DHS's delegation of authority issued a decision agreeing with Greenpeace and reversing the staff decision to withhold the records. Hind Decl. ¶ 10, Ex. G.

11. The ALJ explained that "[a]fter a thorough review of [the] appeal and all applicable documents and the Agency's subsequent explanation…[t]he Agency has not provided adequate explanation as to why the requested records should be withheld pursuant to FOIA Exemptions (b)(5), (b)(7)(E) or (b)(7)(F)." Hind Decl. ¶ 10, Ex. G.

12. The ALJ informed Greenpeace that, pursuant to DHS regulation 6 C.F.R. § 5.9, Greenpeace's FOIA request would be "reprocessed in accordance with th[e] appeal decision." Hind Decl. ¶ 8, Ex. G. He further stated, in accordance with the July 2011 memorandum, that his decision was "the final action of the Department of Homeland Security." Hind Decl. ¶ 10, Ex. G.

13. On remand, after an additional six-month delay, DHS staff responded to Greenpeace by letter dated December 15, 2014, stating that they had "reprocessed the list of chemical facilities" and were "releasing portions of that list" to Greenpeace. Hind Decl. ¶ 11, Ex. H.

14. DHS's response did not mention that there had been another round of review of the ALJ's decision by DHS's Office of General Counsel. Hind Decl. ¶ 12.

15. Greenpeace was unaware until DHS filed its motion in this litigation that DHS staff claimed to have exercised a second level of appellate review and to have determined to reverse the decision of the ALJ. Hind Decl. ¶ 12.

16. The 123 pages produced to Greenpeace with the December 15, 2014, letter were thoroughly redacted and the phrase "(b)(7)f" appeared by each redaction. Hind Decl. ¶¶ 11, 13, Ex. H.

17. Although the responsive document should have reflected a list of approximately 3,000 facilities that are no longer considered high risk, the 123 almost wholly redacted pages produced by DHS staff reflect a small portion of that number. Hind Decl. ¶¶ 11, 13, Ex. H.

18. DHS staff's response contained 20 blank pages, without any redaction information, claimed exemptions, or explanation. Hind Decl. ¶ 11, Ex. H.

19. No facility can be definitely identified from the 123 pages produced. *See* Hind Decl. ¶¶ 11, 13; Palmer Decl. ¶ 11.

20. The redacted list includes for each facility the number of chemicals of interest at or above the screening threshold as of June 2012 but does not indicate which specific chemicals of interest were contained at each specific facility. *See* Fuentes Decl. ¶¶ 16-23.

21. The redacted list does not indicate whether any specific chemical is currently housed at any specific facility. *See* Fuentes Decl. ¶¶ 16-23.

22. If a facility has a "3" listed next to it, even if the name of the facility was provided, it would be impossible to tell from the list which three chemicals of the hundreds included in CFATS Appendix A were contained at the facility in 2012, and it would be impossible to tell

whether those unidentified chemicals were still contained at the facility today. *See* Fuentes Decl. ¶¶ 16-23.

23. On February 13, 2015, Greenpeace again appealed DHS staff's response. Hind Decl. ¶ 14, Ex. I.

24. In its 2015 appeal, Greenpeace argued that DHS staff's response ignored the ALJ's order, was indecipherable due to the excessive redactions, and failed to provide an adequate explanation for the redactions as required by law and the prior appellate order. Hind Decl. ¶ 14, Ex. I.

25. Greenpeace's appeal explained that the agency staff's invocation of exemption (b)(7)(F) throughout the redacted records, despite the prior appellate order, made no sense because Greenpeace was only requesting information about facilities that no longer maintain threshold quantities of the chemicals of interest under CFATS. Hind Decl. Ex. I.

26. Therefore, Greenpeace explained, the information could not pose a security risk or threaten lives. Hind Decl. Ex. I.

27. By letter dated August 25, 2015, the ALJ responded to Greenpeace and stated that the prior appellate decision "constitute[d] final agency action," and that although "NPPD is obligated to comply" with that prior decision, the ALJ "ha[s] no ability to force compliance if an Agency does not adequately obey our appellate decisions." Hind Decl. ¶ 15, Ex. J.

28. The ALJ's August 2015 letter further provided that the appeal was dismissed and that Greenpeace "may now appeal NPPD's actions to federal court." Hind Decl. ¶ 15, Ex. J.

29. Releasing the names of facilities that are no longer considered "high risk" under CFATS cannot reasonably be expected to endanger the life or physical safety of any individuals. *See* Hind Decl. ¶¶ 16-21; Orum Decl. ¶¶ 8-15; Poje Decl. ¶¶ 9-13.

30. In 1986, Congress passed the Emergency Planning and Community Right-to-Know Act (EPCRA) to support and promote emergency planning and to provide the public with information about releases of toxic chemicals in their community. *See* Poje Decl. ¶ 10.

31. Section 313 of EPCRA established the Toxic Release Inventory (TRI), a public database that identifies facilities that release certain hazardous chemicals into the environment. *See* Poje Decl. ¶ 10.

32. The public database is located on the EPA's website and is searchable. *See* Hind Decl. ¶ 19.

33. Under the TRI program, certain facilities must report annually how much of each chemical is released to the environment and/or managed through recycling, energy recovery and treatment. *See* Poje Decl. ¶ 10.

34. By making information about industrial management of toxic chemicals available to the public, TRI creates a strong incentive for companies to improve environmental performance. *See* Poje Decl. ¶ 10.

35. Over the past thirty years, the TRI program's public disclosures have led to a substantial reduction in the number of facilities housing hazardous chemicals, producing significant safety benefits to the communities surrounding those facilities. *See* Poje Decl. ¶ 10.

36. The TRI list of reportable chemicals overlaps with the chemicals of interest included in CFATS Appendix A. *See* Hind Decl. ¶¶ 19-21, Ex. K; Poje Decl. ¶ 13.

37. Nitromethane is both a chemical of interest under CFATS Appendix A and a reportable chemical under the TRI. *See* Hind Decl. ¶ 19, Ex. K.

38. Chlorine is both a chemical of interest under CFATS Appendix A and a reportable chemical under the TRI. *See* Hind Decl. ¶ 19, Ex. K.

39. Pursuant to the EPA's Risk Management Plan (RMP) rule, facilities holding more than a threshold quantity of any regulated substances are required to register and to submit RMPs to the EPA. Hind Decl. ¶ 18.

40. The list of substances and threshold quantities regulated under the RMP rule overlaps with Appendix A of CFATS. Hind Decl. ¶ 18.

41. The Houston Chronicle hosts a searchable database of facilities that currently maintain or previously maintained threshold quantities of regulated substances under the RMP. Hind Decl. ¶ 18.

42. For example, phosgene, a chemical that was used as a chemical weapon during World War I, is regulated under both CFATS and the RMP rule at a threshold quantity of 500 pounds. Hind Decl. ¶ 18.

43. The Houston Chronicle database includes the names and addresses of 23 facilities in the United States that currently hold or previously have held at least 500 pounds of phosgene. Hind Decl. ¶ 18.

44. The names of facilities that have been de-registered from the RMP program because they no longer hold a threshold quantity of any substance regulated under the RMP rule are publicly available through FOIA. *See* Hind Decl. ¶ 18.

45. To the extent facilities have chemicals listed in CFATS Appendix A that overlap with chemicals in the TRI program or RMP program, the fact that those facilities have some quantity of the chemicals in question has already been publicly disclosed in the TRI public database and the Houston Chronicle database, or through FOIA requests. *See* Hind Decl. ¶¶ 17-21; Orum Decl. ¶¶ 13-15; Poje Decl. ¶¶ 10-13.

46. Therefore, the release by DHS of information that those facilities formerly had quantities of the chemicals sufficient to render them "high risk" cannot reasonably be expected to endanger the life or physical safety of anyone. *See* Hind Decl. ¶¶ 17-21; Orum Decl. ¶¶ 13-15; Poje Decl. ¶¶ 10-13.

47. Releasing the names of facilities that have removed hazardous chemicals, without even providing the types of chemicals housed at each facility, cannot reasonably be expected to endanger the life or physical safety of individuals. *See* Hind Decl. ¶¶ 16-21; Orum Decl. ¶¶ 8-15; Poje Decl. ¶¶ 9-13.

48. Rather, the more likely consequence of greater awareness of such reductions in inventories of dangerous chemicals is that, like other government programs involving hazardous chemicals where regulated facilities are publicly disclosed, disclosure creates an incentive for reductions, and more facilities will reduce their inventories of chemicals of interest, increasing safety. *See* Poje Decl. ¶¶ 10-12; Orum Decl. ¶¶ 7, 12.

49. Some of the facilities that are no longer "high risk" may also no longer be operating, and the revelation of those former facilities could not reasonably be expected to endanger anyone. *See* Hind Decl. ¶ 16.

50. Facilities that no longer contain threshold levels of chemicals of interest under CFATS are indistinguishable from common facilities throughout the United States that house small quantities of hazardous chemicals. *See* Hind Decl. ¶ 17; Orum Decl. ¶¶ 13-14.

51. For example, hundreds of thousands of gasoline stations pose significant hazards to their communities and are regulated to prevent leakage by EPA's underground storage tank program. Lists of underground storage tanks are publicly available on state websites, such as the Pennsylvania regulated tank list. *See* Hind Decl. ¶ 17; Orum Decl. ¶¶ 13-14.

52. Many non-CFATS facilities such as a dairy farms with small quantities of ammonia, chlorine, propane, and gasoline tanks, pose similar risks. *See* Hind Decl. ¶ 17; Orum Decl. ¶¶ 13-14.

53. These facilities can be easily identified through the public domain, through methods such as internet searches. *See* Hind Decl. ¶ 17; Orum Decl. ¶¶ 13-14.

54. These former CFATS facilities pose no particular danger to individuals different from the dangers posed by any of the thousands of other facilities that are unregulated by CFATS. *See* Hind Decl. ¶ 17; Orum Decl. ¶¶ 13-14.

55. CFATS covers many facilities that are not in any way related to the nation's critical infrastructure, and providing only the names and locations of these facilities would not reveal anything about "critical infrastructure." *See* Orum Decl. ¶ 13.

56. DHS is required by law to keep records of the reasons for delisting high risk facilities under CFATS section 2102(e)(3), which requires DHS to "document the basis for each instance in which (i) tiering for a covered facility is changed; or (ii) a covered facility is determined to no longer be subject to the requirements under this title." *See* Orum Decl. ¶ 9 (citing § 2102(e)(3), codified at 6 U.S.C. § 622(e)(3)).

57. Under this section, DHS determines the basis for each delisting, e.g., whether a facility is delisted by virtue of having entirely removed chemicals of interest or by holding one or more chemicals of interest below a screening threshold reportable amount. *See* Orum Decl. ¶ 10.

58. Formerly high-risk facilities that have completely and permanently removed chemicals of interest cannot be expected to fluctuate between statuses under CFATS. *See* Orum Decl. ¶ 11.

59. A fluctuating status does not in any case provide a reliable indicator of target potential. *See* Orum Decl. ¶ 11.

Dated: July 20, 2017

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREENPEACE, INC., Plaintiff, v. DEPARTMENT OF HOMELAND SECURITY, and NATIONAL PROTECTION AND PROGRAMS DIRECTORATE, Defendants.	Civil Action No. 1:17-cv-00479-CKK Judge Kollar-Kotelly

PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS TO WHICH THERE IS NO GENUINE ISSUE AND PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

I. Plaintiff's Response to Defendants' Statement of Material Facts as to which there is No Genuine Issue.

1. Greenpeace, Inc. ("Plaintiff") submitted a Freedom of Information Act ("FOIA") Request to the Department of Homeland Security ("DHS" or "the Department") dated May 18, 2012. Fuentes Decl. ¶ 6, Ex. B. The FOIA request sought "all releasable documents and records that contain the most complete listing of chemical facilities that have reduced their holdings of threshold quantities of 'chemicals of interest' (COI) rendering them no longer 'high risk' facilities under [Chemical Facility Anti-Terrorism Standards ("CFATS")]." Fuentes Decl. ¶ 6, Ex. B.

Response: Admitted.

2. The CFATS program identifies and regulates security at high-risk chemical facilities. Chemical facilities are regulated under the CFATS program if they possess specified

quantities (a "screening threshold quantity") of certain chemicals ("chemicals of interest") that are listed on Appendix A of the CFATS regulation, 6 C.F.R. part 27. Chemicals of interest are listed on Appendix A under three security concerns: (1) Release, (2) Theft/Diversion, and (3) Sabotage/Contamination. Fuentes Decl. ¶ 29; 6 C.F.R. part 27, App. A. Release chemicals of interest are chemicals that, if released, could create large explosions, fires, and/or toxic clouds that would harm both people in the facility and the surrounding community. Fuentes Decl. ¶ 29. Theft/diversion chemicals of interests are chemicals that terrorists could use to make chemical weapons, weapons of mass effect, and/or improvised explosive devices. Fuentes Decl. ¶ 29. Sabotage/contamination chemicals of interest are chemicals that a terrorist could tamper with before shipment to create a toxic cloud along the shipping route or at the shipment destination. Fuentes Decl. ¶ 29.

Response: Denied. Greenpeace directs the Court to the CFATS regulations. *See* 6 C.F.R. § 27.100 (providing the purpose of the regulations); 72 Fed. Reg. 17688, 17696 (2007) (defining releases, theft/diversion, and sabotage/contamination concerns). Under CFATS regulations, release chemicals are "certain quantities of toxic, flammable, or explosive chemicals or materials, [which] if released from a facility, have the potential for significant adverse consequences for human life or health." 72 Fed Reg. at 17696. Theft/diversion chemicals are "certain chemicals or materials, [which] if stolen or diverted, have the potential to be used as weapons or easily converted into weapons using simple chemistry, equipment or techniques in order to create significant adverse consequences for human life or health." *Id.* Sabotage/contamination chemicals are "certain chemicals or materials, [which] if mixed with readily available materials, have the potential to create significant adverse consequences for human life or health." *Id.*

3. If a facility has a chemical of interest at or above the screening threshold quantity listed on Appendix A, the facility must provide information to the Department on a report called a Top-Screen. Falcon Decl. ¶ 4. The Department uses the information reported by chemical facilities to identify facilities that pose a high level of risk to the American people based on chemical holdings that could be used by an adversary in a terrorist attack. Falcon Decl. ¶ 4. A determination that a facility is high-risk is made using a risk methodology. Falcon Decl. ¶ 4. The CFATS risk methodology categorizes certain chemical facilities as higher security risks than others based on the potential consequences of an attack using the facility's chemicals; their inherent vulnerability to an attack; and threat, which is informed by the intelligence community. Falcon Decl. ¶ 4. If a facility is determined to be high-risk, it is placed into one of four tiers based on the Department's assessment of its risk. Falcon Decl. ¶ 4. The facility is then required to put in place security measures commensurate with the facility's risk tier to protect those chemicals from use or exploitation by a terrorist. Falcon Decl. ¶ 4.

Response: Admitted.

4. The Infrastructure Security Compliance Division ("ISCD") of the DHS National Protection and Program Directorate's ("NPPD") Office of Infrastructure Protection, which administers the CFATS program, conducted the search for records responsive to Plaintiff's May 18, 2012, FOIA request and did so with the assistance of the contractor that maintains and secures the database housing the records at issue. Fuentes Decl. ¶ 14. The Chemical Security Assessment Tool ("CSAT"), an electronic system used by the Department to maintain data and records related to CFATS, contains all information submitted by facilities pursuant to CFATS and is the only database within DHS that stores the information necessary to produce a complete and contemporaneous listing of chemical facilities that have reduced their holdings of threshold

quantities of chemicals of interest, thereby rendering them no longer high risk facilities under the CFATS program. Fuentes Decl. ¶ 16.

Response: Admitted.

5. The ISCD search for responsive records produced two spreadsheets that totaled 123 pages when converted to PDF. Fuentes Decl. ¶¶ 17, 22. The records, the "6-28-12 Untiered Facilities List" and the "6-27-12 Unregulated Facilities List" (the "untiered lists"), are comprised of information submitted by facilities to comply with CFATS and information created by the Department to implement and enforce the CFATS program. Vaughn Index; Falcon Decl. ¶ 5. Both records were produced from June 2012 queries of CSAT. Fuentes Decl. ¶¶ 16-20. The queries of CSAT were necessary to respond to Plaintiff's request because ISCD did not maintain a record of the lists of facilities Plaintiff requested. Fuentes Decl. ¶ 19.

Response: Admitted.

6. The "6-28-12 Untiered Facilities List" (the untiered list) is a list of 2,733 facilities that the Department had, at one time, determined to be high risk under the CFATS program, but that, on the date the list was created, were not considered high risk. Fuentes Decl. ¶¶ 17 and 20. The number of chemicals of interest at or above the screening threshold quantity at the facility as of June 28, 2012, appears next to the facility's name under the column named "Chem_Count." Vaughn Index; Fuentes Decl. ¶ 20.

Response: Admitted.

7. The "6-27-12 Unregulated Facilities List" (the unregulated list) is a list of 1,687 facility names. Vaughn Index; Fuentes Decl. ¶ 20. The facilities on this list are a subset of facilities on the "6-28-12 Untiered Facilities List" that as of June 27, 2012, had reported to the Department that they did not hold any chemicals of interest at or above the screening threshold quantity and

were still in operation. Fuentes Decl. ¶ 20. These facilities may still hold chemicals of interest below the CFATS screening threshold quantity. Falcon Decl. ¶ 9.

Response: Admitted.

8. The facility names on the untiered lists are the names that were provided by the facilities to the Department when they registered their facility in CSAT. Fuentes Decl. ¶ 21. Chemical facilities that report to DHS pursuant to CFATS choose the name of the facility that populates the CSAT database. Fuentes Decl. ¶ 21. The facility can name the facility within CSAT as they see fit. Fuentes Decl. ¶ 21. The name does not have to be unique to that facility. Fuentes Decl. ¶ 21.

Response: Admitted.

9. By letter dated March 13, 2013, the NPPD FOIA Office provided an interim response to Plaintiff's FOIA request. Fuentes Decl. ¶ 21. The letter stated that the search for documents responsive to Plaintiff's request for the lists of chemical facilities produced a total of 123 pages of responsive records and that DHS was withholding the 123 pages in full pursuant to FOIA Exemptions (b)(5), (b)(7)(E), and (b)(7)(F). Fuentes Decl. ¶ 7, Ex. D.

Response: Admitted.

10. The NPPD FOIA Office withheld information from the untiered lists under FOIA Exemption (b)(7)(F) because publicly releasing unredacted versions of the untiered lists would allow terrorists to identify the exact locations of facilities that possess, or are likely to possess, chemicals that present release, theft/diversion, and/or sabotage/contamination security concerns and could reasonably be expected to endanger individuals' lives or physical safety. Fuentes Decl. ¶¶ 26, 28-29. In particular, releasing the information would endanger the following citizens: populations near facilities that present a release security concern; people traveling, living, and

working along transportation routes from the facilities that ship chemicals with the sabotage/contamination security concern; people in the vicinity of high-value terrorist targets where a terrorist might employ a chemical weapon or explosive device made of chemicals that were stolen or diverted from a chemical facility; people working at any of the facilities on the lists who would be endangered in an attack by a terrorist seeking or gaining access to chemicals of interest at the facility; and the lives or physical safety of emergency first responders. Fuentes Decl. ¶ 32.

Response: Denied. To the extent this paragraph purports to state the reasons that documents were withheld, those reasons were stated in the interim response, which stated the following reason for the application of exemption (b)(7)(F): "FOIA Exemption 7(F) permits the government to withhold all information about any individual when disclosure of information about him could reasonably be expected to endanger the life or physical safety of any individual. This exemption also protects physical security at critical infrastructure sites." Hind Decl. ¶ 7, Ex. D. To the extent that this paragraph might be construed to assert not only that these claimed risks were the reasons for the FOIA Office's actions, but also that the risks genuinely exist, the paragraph is disputed on the grounds that the release of the information could not reasonably be expected to pose any of the risks described, and that the defendants' declarants do not provide nonspeculative information sufficient to carry the burden of establishing the existence of such risk, particularly in light of information otherwise available to the public about the use of dangerous chemicals at comparable facilities. *See* Hind Decl. ¶¶ 16-21; Orum Decl. ¶¶ 8-15; Poje Decl. ¶¶ 9-13.

11. Facilities that are not high-risk under CFATS may still possess chemicals in quantities that can be used in a terrorist attack. Falcon Decl. ¶¶ 8 and 9. The CFATS program regulates security at "chemical facilit[ies] that, in the discretion of the Secretary of Homeland

Security, presents a high risk of significant adverse consequences for human life or health, national security and/or critical economic assets if subjected to terrorist attack, compromise, infiltration, or exploitation." 6 C.F.R. § 27.105. Although the Department uses threat, vulnerability, and consequence to determine risk, the risk methodology is largely driven by consequence, particularly loss of human life. Falcon Decl. ¶ 8. The risk thresholds used in the Department's assessment, including the threshold for how many lives could be lost as a result of an attack using the chemicals, are classified; however, an attack using the chemicals at facilities that are not designated as "high-risk" and do not tier into the program could reasonably result in the loss of human life and certainly harm to individuals in the vicinity of such an attack. Falcon Decl. ¶ 8.

Response: Admitted that facilities that are not "high risk" may still possess chemicals. Denied to the extent defendants claim that these statements satisfy exemption (b)(7)(F). Providing the list of chemical facilities that are no longer "high risk" under CFATs cannot reasonably be expected to endanger anyone. *See* Hind Decl. ¶¶ 16-21; Orum Decl. ¶¶ 8-15; Poje Decl. ¶¶ 9-13.

12. The untiered list provides the names of facilities that are identified on the list as holding as many as 19 chemicals of interest at the CFATS screening threshold quantity. Fuentes Decl. ¶ 30, Ex. J. A malicious actor could use the untiered facility list requested by Plaintiff to identify and target facilities that definitively have chemicals of interest and are not required to have security measures to secure those chemicals because the facilities did not score high enough in the CFATS risk methodology to result in a determination of high-risk. Falcon Decl. ¶¶ 4 and 8.

Response: Admitted that the list identifies the number of chemicals of interest at the CFATS screening threshold quantity in 2012. Admitted that a single facility had 19 chemicals of interest at the CFATS screening threshold quantity in 2012. *See* Hind Decl. Ex. H. However, forty pages of facilities had zero chemicals of interest at the CFATS screening threshold quantity in

2012. *See id.* Denied that anyone could determine from the list that any facility definitively has any chemicals of interest today. *See* Hind Decl. ¶ 16. Denied to the extent defendants claim that these statements satisfy exemption (b)(7)(F). Providing the list of chemical facilities that are no longer "high risk" under CFATs cannot reasonably be expected to endanger anyone. *See* Hind Decl. ¶¶ 16-21; Orum Decl. ¶¶ 8-15; Poje Decl. ¶¶ 9-13. The list does not say which chemicals are housed at which facilities, *see* Fuentes Decl. ¶ 20, and there is no basis to believe that any of the facilities from the 2012 list would continue to have chemicals or would still be in operation, *see* Hind Decl. ¶ 16.

13. The lists could also be used to identify facilities the Department has determined are high-risk since June of 2012. Falcon Decl. ¶¶ 6 and 7. Facilities may, and do, move between regulated and unregulated status, and tiered and untiered status, in the CFATS program based on fluctuations in their chemical holdings and other factors that affect the Department's risk assessment of the facility. Falcon Decl. ¶¶ 6 and 7; Fuentes Decl. ¶ 31. The most common reason a facility's status changes in CFATS is because the facility has filed a new Top-Screen, per 6 C.F.R. § 27.210, reporting a change in the number or quantity of chemicals of interest at the facility. Falcon Decl. ¶ 6. Therefore, a facility that is listed on the untiered list or unregulated list generated in 2012 for the Greenpeace request may now be classified by the Department as a high-risk facility. Falcon Decl. ¶¶ 6 and 7; Fuentes Decl. ¶ 31. If the Department were to release the lists requested by Plaintiff on a regular basis, malicious actors could compare the lists to find and target facilities that had come into possession of screening threshold quantities of chemicals of interest or that were once again determined to be high risk by the Department. Falcon Decl. ¶ 6; Fuentes Decl. ¶ 31.

Response: Denied. The list requested would not identify any determinations the Department has made since June 2012. Greenpeace's request seeks only the names of facilities that are not considered "high risk" under CFATS as of the date of Greenpeace's FOIA request. *See* Hind Decl. ¶ 6. Defendants have produced no evidence that anyone has requested the same list on a regular basis and there is no evidence that malicious actors intend to do so. Further, should a subsequent FOIA request seek this information, defendants could, if the threat it now hypothesizes were genuine, redact or withhold the facilities that have previously been included and provide only the additions, thus limiting the ability of any would-be bad actors to compare the complete lists at various times.

14. DHS FOIA regulations state that all FOIA appeals to the Department should be directed to the Office of the General Counsel ("OGC"). OGC holds the authority to review FOIA appeals on behalf of the Department, and an adverse determination by OGC on a FOIA appeal is the final action of the Department on a FOIA request. *See* 6 C.F.R. § 5.9 (a)(2) (2003) (amended by 81 Fed. Reg. 83625 (2016)).

Response: Denied because this is not a statement of fact, but a statement of legal propositions. Pursuant to the memorandum of July 8, 2011, DHS delegated the authority over FOIA appeals to the Coast Guard Administrative Law Judge Program. *See* Hind Decl. Ex. F. Greenpeace further directs the Court to the text of FOIA and DHS FOIA regulations. *See* 5 U.S.C. § 552; 6 C.F.R. § 5.9 (a)(2) (2003) (amended by 81 Fed. Reg. 83625 (2016)). Greenpeace disputes as a matter of law that OGC has the authority to review FOIA appeals that have already been decided and issued as final agency actions by the Coast Guard Administrative Law Judge that has been delegated the authority to decide them.

15. During the time period relevant to the Greenpeace FOIA request at issue, the DHS FOIA regulations stated that the authority to review Department FOIA appeals rested with the Associate General Counsel for General Law. *See* 6 C.F.R. § 5.9 (a)(2).

Response: Denied because this is not a statement of fact, but a statement of legal propositions. Pursuant to the memorandum of July 8, 2011, DHS delegated the authority over FOIA appeals to the Coast Guard Administrative Law Judge Program. *See* Hind Decl. Ex. F. Greenpeace further directs the Court to the text of FOIA and DHS FOIA regulations. *See* 5 U.S.C. § 552; 6 C.F.R. § 5.9 (a)(2) (2003) (amended by 81 Fed. Reg. 83625 (2016)). Greenpeace disputes as a matter of law that OGC has the authority to review FOIA appeals that have already been decided and issued as final agency actions by the Coast Guard Administrative Law Judge that has been delegated the authority to decide them.

16. When OGC receives a FOIA appeal, the DHS Privacy Office acknowledges the appeal on behalf of OGC and assigns a tracking number to the appeal. Palmer Decl. ¶ 7.

Response: Admitted.

17. OGC refers all FOIA appeals resulting from FOIA requests to DHS Headquarters Components, including NPPD, to the United States Coast Guard Administrative Law Judge program (Coast Guard program) for administrative review. Palmer Decl. ¶ 8, Ex. A.

Response: Greenpeace admits this statement to the extent that if avers as a factual matter that FOIA appeals are assigned to Coast Guard ALJs. To the extent that the statement characterizes this assignment as a "referral" for "administrative review," it is a legal characterization rather than a statement of fact, and Greenpeace disputes defendants' position that "referring" FOIA appeals left it with authority to overrule the decisions made by the Coast Guard Administrative Law Judges. Pursuant to the memorandum of July 8, 2011, DHS delegated the authority over FOIA

appeals to the Coast Guard Administrative Law Judge Program. *See* Hind Decl. Ex. F. Greenpeace further directs the Court to the text of FOIA and DHS FOIA regulations. *See* 5 U.S.C. § 552; 6 C.F.R. § 5.9 (a)(2) (2003) (amended by 81 Fed. Reg. 83625 (2016)). Greenpeace disputes as a matter of law that OGC has the authority to review FOIA appeals that have already been decided and issued as final agency actions by the Coast Guard Administrative Law Judge that has been delegated the authority to decide them.

18. OGC retains the final authority to determine Department FOIA appeals and may review any Coast Guard response on a FOIA appeal resulting from a FOIA request to a DHS Headquarters Component. Palmer Decl. ¶ 8.

Response: Denied because this is not a statement of fact, but a legal conclusion. Pursuant to the memorandum of July 8, 2011, DHS delegated the authority over FOIA appeals to the Coast Guard Administrative Law Judge Program. *See* Hind Decl. Ex. F. Greenpeace further directs the Court to the text of FOIA and DHS FOIA regulations. *See* 5 U.S.C. § 552; 6 C.F.R. § 5.9 (a)(2) (2003) (amended by 81 Fed. Reg. 83625 (2016)). Greenpeace disputes as a matter of law that OGC has the authority to review FOIA appeals that have already been decided and issued as final agency actions by the Coast Guard Administrative Law Judge that has been delegated the authority to decide them.

19. By letter addressed to the DHS Office of the General Counsel and dated May 12, 2013, Plaintiff appealed the March 13, 2013, response from the NPPD FOIA Office. Palmer Decl. ¶ 9; Fuentes Decl. ¶ 8, Ex. E.

Response: Admitted.

20. The DHS Privacy Office acknowledged the Greenpeace FOIA appeal on behalf of OGC by letter on May 17, 2013. Palmer Decl. ¶ 10, Ex. B.

Response: Admitted.

21. OGC referred the Greenpeace FOIA appeal to the Coast Guard program for review. Palmer Decl. ¶ 10.

Response: Admitted that the FOIA appeal was sent to the Coast Guard ALJ for decision. To the extent OGC claims that "referring" Greenpeace's appeal for "review" left it with authority to overrule the decision made by the Coast Guard Administrative Law Judge, this paragraph is a disputed legal proposition, not a statement of fact. Pursuant to the memorandum of July 8, 2011, DHS delegated the authority over FOIA appeals to the Coast Guard Administrative Law Judge Program. *See* Hind Decl. Ex. F. Greenpeace further directs the Court to the text of FOIA and DHS FOIA regulations. *See* 5 U.S.C. § 552; 6 C.F.R. § 5.9 (a)(2) (2003) (amended by 81 Fed. Reg. 83625 (2016)).

22. By letter dated June 27, 2014, the Coast Guard program stated that the NPPD FOIA Office's decision to withhold the records "in their entirety" was being reversed because the Department had not provided adequate explanation as to why the requested records should be withheld. Fuentes Decl. ¶ 11, Ex. H; Palmer Decl. ¶ 11, Ex. C.

Response: Admitted.

23. OGC reviewed the Coast Guard attorney's response to Plaintiff's appeal. Palmer Decl. ¶ 11.

Response: Greenpeace lacks the information to confirm or dispute whether OGC reviewed the Coast Guard's response to justify its opposition. *See* Sherman Decl. ¶¶ 3-7; Fed. R. Civ. P. 56(d). But Greenpeace disputes this statement as a legal matter to the extent OGC claims that it had authority to overrule the decision made by the Coast Guard Administrative Law Judge. Pursuant to the memorandum of July 8, 2011, DHS delegated the authority over FOIA appeals to

the Coast Guard Administrative Law Judge Program. *See* Hind Decl. Ex. F. Greenpeace further directs the Court to the text of FOIA and DHS FOIA regulations. *See* 5 U.S.C. § 552; 6 C.F.R. § 5.9 (a)(2) (2003) (amended by 81 Fed. Reg. 83625 (2016)).

24. OGC determined that FOIA Exemption (b)(5) did not apply to the responsive records; that Exemption (b)(7)(F) did not apply to the numbers list in the "Chem_Count" column of the "6-28-12 Untiered Facilities" list; and that Exemption (b)(7)(F) did not apply to facility names on either list if the specific facility was not identifiable. Palmer Decl. ¶ 11. OGC determined that Exemption (b)(7)(F) did apply "where the information was sufficient to allow a terrorist to identify the specific facility because the release of this information could reasonably be expected to endanger the physical safety or life of an individual" and that NPPD had properly withheld the names of the identifiable facilities. Palmer Decl. ¶ 11.

Response: Greenpeace lacks the information to confirm or dispute whether OGC made any determination. *See* Sherman Decl. ¶¶ 3-7; Fed. R. Civ. P. 56(d). But Greenpeace disputes this statement to the extent OGC claims that it had authority to overrule the decision made by the Coast Guard Administrative Law Judge. Pursuant to the memorandum of July 8, 2011, DHS delegated the authority over FOIA appeals to the Coast Guard Administrative Law Judge Program. *See* Hind Decl. Ex. F. Greenpeace further directs the Court to the text of FOIA and DHS FOIA regulations. *See* 5 U.S.C. § 552; 6 C.F.R. § 5.9 (a)(2) (2003) (amended by 81 Fed. Reg. 83625 (2016)). Greenpeace also disputes that the exemption applies, which is a legal conclusion, not a statement of fact.

25. The NPPD FOIA Office reprocessed the records in accordance with OGC's determination of Plaintiff's FOIA appeal, redacting all facility names where the information was sufficient to identify the specific facility. Fuentes Decl. ¶ 13; Palmer Decl. ¶ 12.

Response: Admitted that defendants redacted all information sufficient to identify any facility on the list. Denied to the extent that the reprocessing was "in accordance with OGC's determination of Plaintiff's FOIA appeal." The NPPF FOIA Office's letter sending the reprocessed list to Greenpeace states that the reprocessing was "[i]n light of the [ALJ's] response on administrative appeal," Hind Decl. Ex. H, not in accordance with a purported OGC resolution of the appeal. To the extent that the statement asserts that OGC had "determin[ed]" Greenpeace's FOIA appeal, it incorporates a conclusion of law that Greenpeace disputes, namely that OGC had and exercised the authority to overrule the decision made by the Coast Guard Administrative Law Judge and released to Greenpeace as the agency's final decision. Pursuant to the memorandum of July 8, 2011, DHS delegated the authority over FOIA appeals to the Coast Guard Administrative Law Judge Program. *See* Hind Decl. Ex. F. Greenpeace further directs the Court to the text of FOIA and DHS FOIA regulations. *See* 5 U.S.C. § 552; 6 C.F.R. § 5.9 (a)(2) (2003) (amended by 81 Fed. Reg. 83625 (2016)). Greenpeace lacks the information to confirm or dispute whether defendants' determination was in accordance with a determination by OGC staff. *See* Sherman Decl. ¶¶ 3-7; Fed. R. Civ. P. 56(d).

26. The NPPD FOIA Office released the partially redacted records to Plaintiff via letter on December 15, 2014. Fuentes Decl. ¶ 13, Ex. I; Palmer ¶ 12. The letter stated that the Department was withholding portions of the responsive records pursuant to FOIA Exemption (b)(7)(F). Fuentes Decl. ¶ 13. The letter further stated that the release was the final action of the Department with respect to Plaintiff's FOIA request and that Plaintiff had the right to seek judicial review of the Department's response. Fuentes Decl. ¶ 13, Ex. I; Palmer ¶ 12.

Response: Denied to the extent defendants allege that the redactions were "partial" as opposed to "total." Defendants have stated that the redactions were designed to make it impossible

to identify any facility on the list. *See* Palmer Decl. ¶ 11. Thus, defendants intended to replicate the earlier decision to withhold the list in its entirety pursuant to exemption (b)(7)(F) and the redactions left Greenpeace unable to identify any single facility. *See* Hind Decl. ¶¶ 11, 13. Except to this extent, admitted.

27. By letter dated February 13, 2015, Plaintiff sent a second appeal to the Department regarding its May 18, 2012, FOIA request. Palmer ¶ 13. The appeal was addressed to OGC and appealed OGC's decision to redact the names of identifiable chemical facilities from the records responsive to Plaintiff's request. Palmer ¶ 13. Plaintiff concluded the letter by requesting the unredacted records. Palmer Decl. ¶ 13, Ex. F.

Response: Admitted.

28. The DHS FOIA regulations do not provide for a second appeal, nor do they provide for an appeal of OGC's final decisions. *See* 6 C.F.R. § 5.9(a)(2); Palmer Decl. ¶ 14.

Response: This is a disputed statement of a legal conclusion, not a statement of fact. DHS FOIA regulations permit and may require multiple appeals in this circumstance. DHS regulations specify that a requester "dissatisfied with a component's response" may appeal, and mandate that if a requester wishes to seek review by a court of "*any* adverse determination, [she] must first appeal it under this section." 6 C.F.R. § 5.9(a), (c) (emphasis added). Further disputed to the extent OGC claims that it had authority to overrule the decision made by the Coast Guard Administrative Law Judge. Pursuant to the memorandum of July 8, 2011, DHS delegated the authority over FOIA appeals to the Coast Guard Administrative Law Judge Program. *See* Hind Decl. Ex. F. Greenpeace further directs the Court to the text of FOIA and DHS FOIA regulations. *See* 5 U.S.C. § 552; 6 C.F.R. § 5.9 (a)(2) (2003) (amended by 81 Fed. Reg. 83625 (2016)).

29. The Coast Guard program sent a letter to Plaintiff dated August 25, 2015, in response to Plaintiff's second appeal. Palmer Decl. ¶ 13, Ex. G. The letter stated that the Coast Guard program was dismissing the appeal and informed Plaintiff that it could appeal the Department's response to its FOIA request in federal court. Palmer Decl. ¶ 15, Ex. G.

Response: Admitted, however, the letter further provided that the prior appellate decision "constitute[d] final agency action," and stated that although "NPPD is obligated to comply" with that prior decision, the ALJ "ha[s] no ability to force compliance if an Agency does not adequately obey our appellate decisions." The letter further stated that the appeal was dismissed, and that Greenpeace "may now appeal NPPD's actions to federal court." *See* Hind Decl. Ex. J.

30. DHS could not segregate the names of the facilities—if there are any such facilities— on the lists that do not hold any quantity of a chemical of interest. Fuentes Decl. ¶ 34. Small amounts of chemicals of interest can be used to harm an individual. Falcon Decl. ¶ 9. However, when a facility reports that it no longer maintains a screening threshold quantity of a chemical of interest, DHS has no more information with respect to the quantity of chemicals of interest the facility may or may not have, because the Department is only authorized to regulate facilities under CFATS if they hold a screening threshold quantity of a chemical of interest. Fuentes Decl. ¶ 34. Therefore, any number of the 1,687 facilities on the unregulated list, the names of which also appear on the untiered list, may maintain multiple chemicals of interest, very few chemicals of interest, or no chemicals of interest. Fuentes Decl. ¶ 34. Accordingly, NPPD FOIA was unable to segregate and release the names of the facilities on the lists that do not hold any chemicals of interest because it does not know which facilities, if any, on the lists have no chemicals of interest on site. Fuentes Decl. ¶ 34. Releasing the lists of all of these facilities would

identify those facilities with chemicals of interest that would compromise law enforcement objectives or endanger the life or physical safety of individuals. Fuentes Decl. ¶ 33.

Response: Disputed that DHS cannot reasonably segregate facilities. CFATS section 2102(e)(3) requires DHS to document the basis for delisting a facility that no longer holds a screening threshold quantity of a chemical of interest. Orum Decl. ¶¶ 9-10 (citing CFATS § 2012(e)(3), codified at 6 U.S.C. § 622(e)(3)). Under this section, DHS determines the basis for each delisting, e.g., whether a facility is delisted by virtue of having entirely removed chemicals of interest or by holding one or more chemicals of interest below a screening threshold reportable amount. *Id.* Thus, NPPD Under Secretary Rand Beers was able to testify before Congress in 2012 that "since CFATS' inception, more than 1,600 facilities completely removed their chemicals of interest," Hind Decl. Ex. A, and another NPPD official was able to state in 2014 that "more than 3,000 facilities have *eliminated*, reduced or modified their holdings of chemicals of interest." Hind Decl. Ex. B (emphasis added). Given this record keeping requirement, DHS has not provided all non-exempt, reasonably segregable information. Orum Decl. ¶¶ 9-10. Further disputed that releasing the list of facilities would compromise law enforcement objectives or endanger the life or physical safety of individuals. Greenpeace seeks the names of those facilities that are no longer considered "high risk" under CFATS. *See* Hind Decl. ¶ 6. Providing the list of chemical facilities that are no longer "high risk" under CFATs cannot reasonably be expected to endanger anyone. *See* Hind Decl. ¶¶ 16-21; Orum Decl. ¶¶ 8-15; Poje Decl. ¶¶ 9-13. Rather, the more likely consequence of greater awareness of such reductions in inventories of dangerous chemicals is that, like other government programs involving hazardous chemicals where regulated facilities are publicly disclosed, disclosure creates an incentive for reductions, and more facilities will reduce their inventories of chemicals of interest, increasing safety. *See* Poje Decl. ¶¶ 10-12; Orum Decl.

¶¶ 7, 12. To the extent the CFATS Appendix A chemicals overlap with chemicals in other programs that publicly disclose the facilities (such as EPA's Toxic Release Inventory or Risk Management Plan programs), there is no basis to withhold those facilities. *See* Hind Decl. ¶¶ 17-21; Orum Decl. ¶¶ 13-15; Poje Decl. ¶¶ 10-13.

II. Plaintiff's Statement of Additional Material Facts as to which there is No Genuine Issue.

31. On February 3, 2012, Mr. Rand Beers, National Protection and Programs Directorate (NPPD) Under Secretary, testified before the House Committee on Energy and Commerce, Subcommittee on Environment and the Economy that "since [the Chemical Facility Anti-Terrorism Standards' (CFATS)] inception, more than 1,600 facilities completely removed their chemicals of interest, and more than 700 other facilities have reduced their holdings of chemicals of interest to levels resulting in the facilities no longer being considered high-risk." Hind Decl. ¶ 4, Ex. A.

32. Mr. Beers further testified that the changes at these facilities "have helped reduce the number of high-risk chemical facilities located throughout the nation, and have correspondingly made the nation more secure." Hind Decl. ¶ 4, Ex. A.

33. On February 27, 2014, Ms. Caitlin Durkovich, NPPD Office of Infrastructure Protection Assistant Secretary, testified before the House Committee on Homeland Security with respect to H.R. 4007, the CFATS Authorization and Accountability Act of 2014. She testified that as of February 2014, "more than 3,000 facilities have eliminated, reduced or modified their holdings of chemicals of interest," further reducing the number of high-risk facilities. Hind Decl. ¶ 5, Ex. B.

34. On May 18, 2012, plaintiff Greenpeace, Inc. submitted a FOIA request to Department of Homeland Security (DHS) seeking "all releasable documents and records that

contain the most complete listing of chemical facilities that have reduced their holdings of threshold quantities of 'chemicals of interest' (COI) rendering them no longer 'high risk' facilities under CFATS." Hind Decl. ¶ 6, Ex. C.

35. By letter dated March 13, 2013, DHS staff issued an interim response to Greenpeace's request, stating that a search of NPPD for responsive documents produced 123 pages of results, but that DHS was withholding those documents in full, citing FOIA exemptions (b)(5), (b)(7)(E), and (b)(7)(F). Hind Decl. ¶ 7, Ex. D.

36. DHS staff provided the following reason for the application of exemption (b)(7)(F): "FOIA Exemption 7(F) permits the government to withhold all information about any individual when disclosure of information about him could reasonably be expected to endanger the life or physical safety of any individual. This exemption also protects physical security at critical infrastructure sites." Hind Decl. Ex. D.

37. On May 12, 2013, Greenpeace submitted an appeal of the interim response and argued that none of the cited FOIA exemptions provided grounds for withholding the information sought. Hind Decl. ¶ 8, Ex. E.

38. Greenpeace's appeal letter explained that exemption (b)(7)(F) did not apply because the information Greenpeace requested—which is limited to only those facilities that are no longer regarded as "high-risk"—is of no meaningful use to those who may wish to attack a chemical plant, and that DHS failed to identify with reasonable specificity the possible harm or danger that could result from the release of the records. Hind Decl. Ex. E.

39. Pursuant to a July 8, 2011 Memorandum, DHS delegated appellate authority to the United States Coast Guard Administrative Law Judge (ALJ) program. Hind Decl. ¶ 9, Ex. F.

40. By letter dated June 27, 2014, a Coast Guard ALJ to whom Greenpeace's appeal had been assigned pursuant to DHS's delegation of authority issued a decision agreeing with Greenpeace and reversing the staff decision to withhold the records. Hind Decl. ¶ 10, Ex. G.

41. The ALJ explained that "[a]fter a thorough review of [the] appeal and all applicable documents and the Agency's subsequent explanation…[t]he Agency has not provided adequate explanation as to why the requested records should be withheld pursuant to FOIA Exemptions (b)(5), (b)(7)(E) or (b)(7)(F)." Hind Decl. ¶ 10, Ex. G.

42. The ALJ informed Greenpeace that, pursuant to DHS regulation 6 C.F.R. § 5.9, Greenpeace's FOIA request would be "reprocessed in accordance with th[e] appeal decision." Hind Decl. ¶ 8, Ex. G. He further stated, in accordance with the July 2011 memorandum, that his decision was "the final action of the Department of Homeland Security." Hind Decl. ¶ 10, Ex. G.

43. On remand, after an additional six-month delay, DHS staff responded to Greenpeace by letter dated December 15, 2014, stating that they had "reprocessed the list of chemical facilities" and were "releasing portions of that list" to Greenpeace. Hind Decl. ¶ 11, Ex. H.

44. DHS's response did not mention that there had been another round of review of the ALJ's decision by DHS's Office of General Counsel. Hind Decl. ¶ 12.

45. Greenpeace was unaware until DHS filed its motion in this litigation that DHS staff claimed to have exercised a second level of appellate review and to have determined to reverse the decision of the ALJ. Hind Decl. ¶ 12.

46. The 123 pages produced to Greenpeace with the December 15, 2014, letter were thoroughly redacted and the phrase "(b)(7)f" appeared by each redaction. Hind Decl. ¶¶ 11, 13, Ex. H.

47. Although the responsive document should have reflected a list of approximately 3,000 facilities that are no longer considered high risk, the 123 almost wholly redacted pages produced by DHS staff reflect a small portion of that number. Hind Decl. ¶¶ 11, 13, Ex. H.

48. DHS staff's response contained 20 blank pages, without any redaction information, claimed exemptions, or explanation. Hind Decl. ¶ 11, Ex. H.

49. No facility can be definitely identified from the 123 pages produced. *See* Hind Decl. ¶¶ 11, 13; Palmer Decl. ¶ 11.

50. The redacted list includes for each facility the number of chemicals of interest at or above the screening threshold as of June 2012 but does not indicate which specific chemicals of interest were contained at each specific facility. *See* Fuentes Decl. ¶¶ 16-23.

51. The redacted list does not indicate whether any specific chemical is currently housed at any specific facility. *See* Fuentes Decl. ¶¶ 16-23.

52. If a facility has a "3" listed next to it, even if the name of the facility was provided, it would be impossible to tell from the list which three chemicals of the hundreds included in CFATS Appendix A were contained at the facility in 2012, and it would be impossible to tell whether those unidentified chemicals were still contained at the facility today. *See* Fuentes Decl. ¶¶ 16-23.

53. On February 13, 2015, Greenpeace again appealed DHS staff's response. Hind Decl. ¶ 14, Ex. I.

54. In its 2015 appeal, Greenpeace argued that DHS staff's response ignored the ALJ's order, was indecipherable due to the excessive redactions, and failed to provide an adequate explanation for the redactions as required by law and the prior appellate order. Hind Decl. ¶ 14, Ex. I.

55. Greenpeace's appeal explained that the agency staff's invocation of exemption (b)(7)(F) throughout the redacted records, despite the prior appellate order, made no sense because Greenpeace was only requesting information about facilities that no longer maintain threshold quantities of the chemicals of interest under CFATS. Hind Decl. Ex. I.

56. Therefore, Greenpeace explained, the information could not pose a security risk or threaten lives. Hind Decl. Ex. I.

57. By letter dated August 25, 2015, the ALJ responded to Greenpeace and stated that the prior appellate decision "constitute[d] final agency action," and that although "NPPD is obligated to comply" with that prior decision, the ALJ "ha[s] no ability to force compliance if an Agency does not adequately obey our appellate decisions." Hind Decl. ¶ 15, Ex. J.

58. The ALJ's August 2015 letter further provided that the appeal was dismissed and that Greenpeace "may now appeal NPPD's actions to federal court." Hind Decl. ¶ 15, Ex. J.

59. Releasing the names of facilities that are no longer considered "high risk" under CFATS cannot reasonably be expected to endanger the life or physical safety of any individuals. *See* Hind Decl. ¶¶ 16-21; Orum Decl. ¶¶ 8-15; Poje Decl. ¶¶ 9-13.

60. In 1986, Congress passed the Emergency Planning and Community Right-to-Know Act (EPCRA) to support and promote emergency planning and to provide the public with information about releases of toxic chemicals in their community. *See* Poje Decl. ¶ 10.

61. Section 313 of EPCRA established the Toxic Release Inventory (TRI), a public database that identifies facilities that release certain hazardous chemicals into the environment. *See* Poje Decl. ¶ 10.

62. The public database is located on the EPA's website and is searchable. *See* Hind Decl. ¶ 19.

63. Under the TRI program, certain facilities must report annually how much of each chemical is released to the environment and/or managed through recycling, energy recovery and treatment. *See* Poje Decl. ¶ 10.

64. By making information about industrial management of toxic chemicals available to the public, TRI creates a strong incentive for companies to improve environmental performance. *See* Poje Decl. ¶ 10.

65. Over the past thirty years, the TRI program's public disclosures have led to a substantial reduction in the number of facilities housing hazardous chemicals, producing significant safety benefits to the communities surrounding those facilities. *See* Poje Decl. ¶ 10.

66. The TRI list of reportable chemicals overlaps with the chemicals of interest included in CFATS Appendix A. *See* Hind Decl. ¶¶ 19-21, Ex. K; Poje Decl. ¶ 13.

67. Nitromethane is both a chemical of interest under CFATS Appendix A and a reportable chemical under the TRI. *See* Hind Decl. ¶ 19, Ex. K.

68. Chlorine is both a chemical of interest under CFATS Appendix A and a reportable chemical under the TRI. *See* Hind Decl. ¶ 19, Ex. K.

69. Pursuant to the EPA's Risk Management Plan (RMP) rule, facilities holding more than a threshold quantity of any regulated substances are required to register and to submit RMPs to the EPA. Hind Decl. ¶ 18.

70. The list of substances and threshold quantities regulated under the RMP rule overlaps with Appendix A of CFATS. Hind Decl. ¶ 18.

71. The Houston Chronicle hosts a searchable database of facilities that currently maintain or previously maintained threshold quantities of regulated substances under the RMP. Hind Decl. ¶ 18.

72. For example, phosgene, a chemical that was used as a chemical weapon during World War I, is regulated under both CFATS and the RMP rule at a threshold quantity of 500 pounds. Hind Decl. ¶ 18.

73. The Houston Chronicle database includes the names and addresses of 23 facilities in the United States that currently hold or previously have held at least 500 pounds of phosgene. Hind Decl. ¶ 18.

74. The names of facilities that have been de-registered from the RMP program because they no longer hold a threshold quantity of any substance regulated under the RMP rule are publicly available through FOIA. *See* Hind Decl. ¶ 18.

75. To the extent facilities have chemicals listed in CFATS Appendix A that overlap with chemicals in the TRI program or RMP program, the fact that those facilities have some quantity of the chemicals in question has already been publicly disclosed in the TRI public database and the Houston Chronicle database, or through FOIA requests. *See* Hind Decl. ¶¶ 17-21; Orum Decl. ¶¶ 13-15; Poje Decl. ¶¶ 10-13.

76. Therefore, the release by DHS of information that those facilities formerly had quantities of the chemicals sufficient to render them "high risk" cannot reasonably be expected to endanger the life or physical safety of anyone. *See* Hind Decl. ¶¶ 17-21; Orum Decl. ¶¶ 13-15; Poje Decl. ¶¶ 10-13.

77. Releasing the names of facilities that have removed hazardous chemicals, without even providing the types of chemicals housed at each facility, cannot reasonably be expected to endanger the life or physical safety of individuals. *See* Hind Decl. ¶¶ 16-21; Orum Decl. ¶¶ 8-15; Poje Decl. ¶¶ 9-13.

78. Rather, the more likely consequence of greater awareness of such reductions in inventories of dangerous chemicals is that, like other government programs involving hazardous chemicals where regulated facilities are publicly disclosed, disclosure creates an incentive for reductions, and more facilities will reduce their inventories of chemicals of interest, increasing safety. *See* Poje Decl. ¶¶ 10-12; Orum Decl. ¶¶ 7, 12.

79. Some of the facilities that are no longer "high risk" may also no longer be operating, and the revelation of those former facilities could not reasonably be expected to endanger anyone. *See* Hind Decl. ¶ 16.

80. Facilities that no longer contain threshold levels of chemicals of interest under CFATS are indistinguishable from common facilities throughout the United States that house small quantities of hazardous chemicals. *See* Hind Decl. ¶ 17; Orum Decl. ¶¶ 13-14.

81. For example, hundreds of thousands of gasoline stations pose significant hazards to their communities and are regulated to prevent leakage by EPA's underground storage tank program. Lists of underground storage tanks are publicly available on state websites, such as the Pennsylvania regulated tank list. *See* Hind Decl. ¶ 17; Orum Decl. ¶¶ 13-14.

82. Many non-CFATS facilities such as a dairy farms with small quantities of ammonia, chlorine, propane, and gasoline tanks, pose similar risks. *See* Hind Decl. ¶ 17; Orum Decl. ¶¶ 13-14.

83. These facilities can be easily identified through the public domain, through methods such as internet searches. *See* Hind Decl. ¶ 17; Orum Decl. ¶¶ 13-14.

84. These former CFATS facilities pose no particular danger to individuals different from the dangers posed by any of the thousands of other facilities that are unregulated by CFATS. *See* Hind Decl. ¶ 17; Orum Decl. ¶¶ 13-14.

85. CFATS covers many facilities that are not in any way related to the nation's critical infrastructure, and providing only the names and locations of these facilities would not reveal anything about "critical infrastructure." *See* Orum Decl. ¶ 13.

86. DHS is required by law to keep records of the reasons for delisting high risk facilities under CFATS section 2102(e)(3), which requires DHS to "document the basis for each instance in which (i) tiering for a covered facility is changed; or (ii) a covered facility is determined to no longer be subject to the requirements under this title." *See* Orum Decl. ¶ 9 (citing § 2102(e)(3), codified at 6 U.S.C. § 622(e)(3)).

87. Under this section, DHS determines the basis for each delisting, e.g., whether a facility is delisted by virtue of having entirely removed chemicals of interest or by holding one or more chemicals of interest below a screening threshold reportable amount. *See* Orum Decl. ¶ 10.

88. Formerly high-risk facilities that have completely and permanently removed chemicals of interest cannot be expected to fluctuate between statuses under CFATS. *See* Orum Decl. ¶ 11.

89. A fluctuating status does not in any case provide a reliable indicator of target potential. *See* Orum Decl. ¶ 11.

Dated: July 20, 2017

Respectfully submitted,

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