

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNION PACIFIC RAILROAD COMPANY)

CASE NO. \_\_\_\_\_

Plaintiff,

vs.

**PLAINTIFF’S COMPLAINT FOR  
DECLARATORY JUDGMENT AND  
INJUNCTIVE RELIEF**

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and  
ADMINISTRATOR, LISA P. JACKSON,  
In Her Official Capacity,

Defendants.

Plaintiff Union Pacific Railroad Company (“Union Pacific”) files its Original Complaint for Declaratory Judgment and Injunctive Relief under the Freedom of Information Act (“FOIA”), the Administrative Procedure Act, and the Federal Records Act. Union Pacific discovered that the United States Environmental Protection Agency (“EPA”) has intentionally destroyed information Union Pacific requested under FOIA to avoid its production, prompting Union Pacific to also file a Motion for Temporary Restraining Order and Preliminary Injunction against the EPA and Lisa P. Jackson, in her official capacity as Administrator of the EPA.

**NATURE OF THE ACTION**

1. Union Pacific seeks injunctive and declaratory relief under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552; the Administrative Procedure Act (“APA”), 5 U.S.C. § 706; the Federal Records Act, 44 U.S.C. §§ 2101 *et seq.*, 3010 *et seq.*, and 3301 *et seq.* (which includes the Disposal of Records Act, 44 U.S.C. § 3301-3314), and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

2. Union Pacific has been forced to file this lawsuit to stop the EPA's intentional destruction of records to avoid complying with Union Pacific's FOIA requests concerning lead contamination at the Omaha Lead Superfund Site ("OLS" or "Site").

3. The source of the lead contamination in residential soils is a critical issue. The EPA contends that the contamination was caused by air emissions from two historic lead smelter and refinery facilities. One of the facilities was located on land originally leased from Union Pacific, but which Union Pacific sold 64 years ago. Union Pacific disagrees with the EPA, contending that the lead contamination was caused by deteriorated lead-based paint from the houses in the OLS.

4. The EPA has ordered Union Pacific to undertake over \$50 million in work related to the OLS. Union Pacific has declined to do so because it is not responsible for the lead at the OLS.

5. Because Union Pacific was concerned about the EPA's attempt to hold it responsible for cleaning up lead contamination that it did not cause, Union Pacific sought records under FOIA about the EPA's investigation, analysis and decisions regarding the OLS.

6. Since 2002, Union Pacific has submitted four FOIA requests to the EPA requesting records about the OLS, on May 1, 2002, May 21, 2003, May 25, 2004, and April 6, 2009. From email recently produced by the EPA in response to Union Pacific's April 6, 2009 request (the "FOIA Request"), Union Pacific has discovered that the EPA has intentionally destroyed records for years that it knew were responsive to Union Pacific's FOIA requests.

7. Union Pacific asks the Court to immediately enjoin the EPA and its agents, employees, contractors, and all those affiliated with the EPA, including EPA Administrator Lisa P. Jackson ("EPA Affiliates"), from removing, deleting, modifying, destroying, or tampering with records in their possession or control that may be responsive to Union Pacific's FOIA Request.

8. In addition, in light of the extraordinary circumstances presented by the EPA's knowing destruction of OLS records to avoid FOIA production, Union Pacific seeks the following relief through its Motion for Temporary Restraining Order and Preliminary Injunction ("Motion"):

- a. An immediate restraining order and permanent injunction to prevent the EPA and EPA Affiliates from further destruction of OLS records;
- b. Evaluation by a Court-supervised, independent certified computer forensic examiner of the EPA's OLS electronically stored information to determine what has been destroyed and whether it can be restored or recovered; and
- c. Immediate, limited discovery to determine the scope of the record destruction and its impacts.

9. Union Pacific also asks the Court to require the EPA to fully comply with FOIA, the Federal Records Act, and the APA. Union Pacific seeks an Order requiring the EPA and EPA Affiliates to produce the requested OLS records in their native format, produce a *Vaughn* index identifying withheld records, and reserves the right to seek further relief in the form of attorneys fees, costs, and sanctions.

10. Union Pacific has discovered that for years, EPA Region 7 has destroyed email and records about soil, air modeling and air monitoring at the OLS. The records Union Pacific uncovered show that EPA Region 7 knew the records that were destroyed were subject to FOIA and intentionally destroyed these files in a systematic effort to eliminate evidence sought by Union Pacific. Copies of certain records that the EPA did produce reflect that the EPA has knowingly and intentionally engaged in selective sampling, sample manipulation, and sample testing changes to support its predetermined remedy decision at the OLS.

11. Records received from the EPA show that since 2004, employees at the EPA and the EPA's primary contractor were instructed to destroy emails to avoid FOIA requests for OLS records

from Union Pacific and the OLS Community Advisory Group (“CAG”), a non-profit public interest group formed to follow developments at the OLS. The instructions all came from Robert W. Feild, the EPA’s OLS Project Coordinator. As Project Coordinator, Feild is responsible for managing the OLS remediation project, managing EPA contractors conducting the OLS sampling and remediation, directing EPA employees and EPA Affiliates working on the OLS, meeting with federal, state, and local regulatory and elected officials and the public to inform them of the OLS status and receive their comments. Feild is also responsible for supervising the management and preservation of all records concerning the OLS, as well as responding to FOIA requests for those records.

12. In an email to EPA employee Don Bahnke, dated November 19, 2004, Feild stated:

I hope everone [sic] is deleting these types of messages after they are received, since they will be releasable, if saved, for the next FOIA from Patton-Boggs [Union Pacific’s attorneys].

(Ex. A at 1.) Eight other EPA employees were copied on the e-mail: Bryant Burnett, Daniel Garvey, Debbie King, Eric Nold, Gene Gunn, Joe Davis, Robert Donna and Steven Sanders. Their titles and positions are set forth in Exhibit B. The email explains how EPA tampered with the OLS soil samples by removing visible paint chips from the samples before testing to avoid showing that the lead came from lead-based paint. Feild directed that the emails be deleted and the EPA changed the sampling procedure after August 2004 to analyze only samples from which the paint chips were first removed to avoid future analysis discrepancies.

13. The practice of deleting emails favorable to Union Pacific’s position continued, as on August 25, 2005, Mr. Feild again instructed Mr. Bahnke as follows:

Don -- as these emails are subject to FOIA and probably discovery requests later, delete messages like this one after they are sent so you don’t end up getting subpoenaed. Is this document part of the administrative record?

(Ex. C at 1.) This email chain documents that the EPA’s air modeling could not be used to predict

lead concentrations or the extent of lead contamination—both critical OLS issues.

14. Bahnke twice notified Gene Gunn, Feild's and Bahnke's supervisor and head of the Special Emphasis and Remedial Branch, about the record destruction. On November 19, 2004, Bahnke tells Gunn:

Bob indicates below that he wants everyone including me to delete email messages like the one below. I just don't think I can do this because I still have people complaining to you and those above you about things I have not done. . . .

(Ex. D at 1.) Nearly a year later, on August 29, 2005, Bahnke again advises his supervisor Gene Gunn, in an email titled, "deleting Emails . . . . Again" about the ongoing record destruction. In that email, Mr. Bahnke states:

I have sent you an email similar to the one below before. I just want to alert you, again, that I really cannot delete emails and continue to do my job effectively. I have needed to use old emails to recreate and document past events many times over the last three or four years. I know that my need for old emails will not end while I am on the Omaha Lead team. That is why I keep old emails.

(Ex. E at 1.) The EPA has failed to produce any response from Gunn, as Feild's and Bahnke's supervisor, countermanding Feild's directions to purge the record or responding to Bahnke's concerns.

15. Feild continued his practice of instructing EPA employees to destroy relevant information. In an email dated July 20, 2006 addressed to Leland Grooms with a copy to Bryant Burnett and Daniel Garvey, Feild states:

The CAG will undoubtedly want to observe the monitoring while it's happening and scrutinize the final report (the CAG is supported by MFG which provides litigation support to the primary PRP, Union Pacific Railroad). It will be critical that every i is dotted and t crossed since we are under a microscope. please [sic] delete this message after reading -- we receive regular FOIA requests from Union Pacific for our e-mails. thanks, Bob F.

(Ex. F at 1.) In a later email that same day, Feild again instructs Mr. Grooms to "again, please delete

this after reading, thanks, Bob.” (Ex. G at 1.) This email chain discusses air monitoring in connection with excavations in the OLS. Feild again directed that the records be destroyed to avoid disclosure to the OLS CAG and the public.

16. On October 25, 2006, Feild, in an email to Daniel Garvey, Don Bahnke, Bryant Burnett and Vickie Damm, states:

Whoops! didn't realize an earlier e-mail intended as a joke was in this e-mail string -- please delete this and the original e-mail below from your in-box and trash. We get FOIAs every year for all of our e-mails. thanks, Bob F.

(Ex. H at 1.) The email addressed identification of yards to include in a treatability study the EPA was conducting for purposes of selecting the final remedy for the OLS.

17. The EPA did not produce other email documenting Feild's practice of deleting email, but it is apparent that the practice is continuing. In a March 11, 2009 message, Kathy Montalte, the Freedom of Information Officer for EPA Region 7, wrote Rich Hood, the Associate Regional Administrator for Media and Intergovernmental Relations, and Hattie Thomas, Deputy Director, at Region 7 concerning the overdue responses to Union Pacific's FOIA from 2004 and a March 21, 2005 FOIA request from Jennifer Rawley, on behalf of the OLS CAG (the only two outstanding FOIAs for Region 7 at the time) stating:

My fear is that the longer this FOIA remains open, the greater chance responsive e-mails will be deleted. If this happens, the ramifications will be far greater than the FOIA being overdue. (Remember the Landmark case??)

(Ex. I at 2.)

18. In the March 11, 2009 email, Kathy Montalte, admitted: (i) that these were proper requests under FOIA for records regarding the OLS; (ii) that Region 7 had not produced the requested records; (iii) that the EPA's responses to Union Pacific and the CAG were overdue by approximately three and two and one-half years, respectively; and (iv) that Region 7 might be

destroying responsive records. Her email acknowledged and reminded the Associate Regional Administrator of the seriousness of the ramifications that could result.

19. The importance of the EPA's violations of FOIA, the Federal Records Act, and the APA are underscored by the public pronouncements of President Obama, Attorney General Eric Holder, and EPA Administrator Lisa Jackson. All affirmed their commitment to FOIA and transparency in government. President Obama issued the *Presidential Memorandum for the Heads of Executive Departments and Agencies on the Freedom of Information Act*, 74 Fed. Reg. 4683 (January 26, 2009). On March 19, 2009, Attorney General Holder issued a memorandum to all federal agencies holding each agency fully accountable for its proper administration of FOIA. Upon taking office, Administrator Lisa P. Jackson, also documented her commitment that the EPA would fully comply with FOIA.

20. Also on March 19, 2009, armed with the troubling report from Region 7's FOIA Officer, the EPA's Associate Regional Administrator, Rich Hood, communicated with David Cozad, the EPA's Regional Counsel, the chief legal officer for Region 7, regarding handling of the Union Pacific and CAG FOIA requests. (See relevant EPA Region 7 organizational charts, attached as Ex. B.) Acknowledging that Region 7's Deputy Regional Administrator, William W. Rice, was aware that FOIA responses to two requests were seriously late, the EPA's Associate Regional Administrator sought legal guidance "on ways we can keep these from coming back to haunt us." (Ex. I at 1.) Rather than complying with the law and the clear mandates from President Obama and Attorney General Holder for prompt and open disclosure and transparency in government, the EPA instead responded by trying to find a way to keep its FOIA improprieties from coming to light.

21. The recently obtained EPA Region 7 emails reveal that the EPA intentionally violated the law by instructing employees to destroy information so that it would not have to be produced in response to Union Pacific's and the CAG's FOIA requests. The production of these

records to Union Pacific could undermine the EPA's current clean-up of the OLS and the EPA's claims against Union Pacific.

22. The EPA is attempting to hold Union Pacific liable for hundreds of millions of dollars in costs for the OLS while the EPA both destroys evidence documenting that Union Pacific has no liability, and prevents Union Pacific from obtaining EPA records that would help Union Pacific defend its position. The EPA's actions also raise obstruction of justice and infringement of due process rights issues.

23. The legal and financial stakes about the OLS are enormous for Union Pacific and the EPA, as well as the residents of Omaha. The EPA has estimated the total costs of the OLS remedy will exceed \$400 million. Disputed issues include:

- a. Whether the source of lead in residential soils in the OLS comes from historic industrial sources (as the EPA contends) or residential lead-based paint (as the Site data shows);
- b. Whether the EPA is illegally removing lead-based paint under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601, *et seq.*;
- c. Whether Union Pacific is a potentially responsible party at the OLS; and
- d. The merit of the various enforcement actions about the OLS that the EPA has taken against Union Pacific, one of which remains pending since 2005.

Union Pacific is clearly entitled under FOIA to see the information upon which the EPA relies to support its decisions and actions at the OLS. Yet, Union Pacific may have already been denied that opportunity forever, given the EPA's systematic destruction of information that contradicts the EPA's theories.

24. Faced with the potentially far-reaching scope of the EPA's record purging activities and the irreparable harm being sustained, Union Pacific has no choice but to ask this Court to provide emergency relief from the EPA's violations of FOIA, the Federal Records Act, and the APA



and to issue a temporary restraining order and permanent injunction halting the EPA's illegal destruction of information concerning the Omaha Lead Superfund Site.

## **I. PARTIES**

25. Union Pacific is a Delaware corporation with its principal place of business in Omaha, Nebraska.

26. Defendant EPA is a federal agency within the meaning of 5 U.S.C. § 552(f)(1) and 5 U.S.C. § 702. The EPA administers the federal government's Superfund program, which is designed to identify and remedy uncontrolled hazardous waste sites. The EPA is in possession or control of the records that Union Pacific requested under FOIA.

27. Defendant Lisa P. Jackson (the "Administrator") is the Administrator of the EPA. As agency head, she has mandatory statutory duties under the Federal Records Act to maintain safeguards to prevent the removal or destruction of EPA records. The Administrator must also notify the Archivist of any threatened destruction or removal of EPA records and initiate enforcement actions through the Attorney General to recover unlawfully removed records. 44 U.S.C. § 3101, 3301.

## **II. JURISDICTION AND VENUE**

28. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the EPA pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i) and 5 U.S.C. § 702, which gives the Court jurisdiction over agency actions where an aggrieved party has suffered a legal wrong because of agency action, or is adversely affected or aggrieved by agency action within the meaning of a "relevant statute," here FOIA and the Federal Records Act. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

29. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 703.

30. As is set forth below, Union Pacific has exhausted its applicable and available administrative remedies.

### III. STATEMENT OF FACTS

#### A. The EPA, Union Pacific, and the Omaha Lead Site

31. The Omaha Lead Site is an approximately 27-square-mile area of Omaha, Nebraska defined by the EPA to comprise only residential and residential-type properties where surface soils have been contaminated with lead. The source of the lead contamination is the subject of a dispute between the EPA and Union Pacific and others. The EPA contends that the lead came from industrial particles emitted from the smoke stacks of two former lead processing operations, the American Smelting and Refining Company, Inc. (“ASARCO”) lead refinery and the Aaron Ferer & Sons Company (“Aaron Ferer”) battery recycling and secondary lead smelter, which was later acquired and operated by Gould Electronics, Inc. (“Gould”). Both properties have been cleaned up and are now parks. The former ASARCO site is owned by the City of Omaha and the former Aaron Ferer/Gould site is owned by Douglas County. Both former lead processing properties are located at least three quarters of a mile away from the nearest Site boundary. Union Pacific contends the primary source of the lead in OLS yards is from lead-based paint.

32. The EPA initiated soil sampling at the OLS in March 1999, under CERCLA. The EPA added the OLS to the National Priorities List (“NPL”), 40 C.F.R. Part 300, App. B, on April 30, 2003. The OLS is the largest residential Superfund site in the country.

33. The EPA proceeded under CERCLA Section 104, 42 U.S.C. § 9604(a), to investigate and take clean-up action at the OLS. Before the EPA can select a site remedy, it must comply with the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”) and conduct a remedial investigation (“RI”), a feasibility study (“FS”), a Human Health Risk Assessment (“HHRA”), and issue a Proposed Plan. CERCLA Section 104, 42 U.S.C. § 9604 and 40 C.F.R.

§ 300.430. The EPA is required to maintain an administrative record to support its actions and decisions at the OLS (“[d]uring all phases of response, the lead agency shall complete and maintain documentation to support all actions taken under the NCP and to form the basis for cost recovery.” 40 C.F.R. §§ 300.160(a)(1)). *See* CERCLA Section 104, 42 U.S.C. § 9604 and 40 C.F.R. §§ 300.160(a)(1) and 300.800, *et seq.* The EPA was also required to afford the public opportunities to provide comments on the RI, FS, HHRA, and Proposed Plan. CERCLA Section 104, 42 U.S.C. § 9604 and 40 C.F.R. §§ 300.155, 300.415, and 300.430, *et seq.*

34. In approximately 2001, the EPA identified Union Pacific as a potentially responsible party as defined by Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

35. The EPA has never suggested that Union Pacific was directly responsible for lead in the OLS. The EPA contends that Union Pacific is liable under CERCLA because Union Pacific historically leased to ASARCO a portion of the land occupied by ASARCO’s refinery operations (the remaining portion was owned by the City of Omaha). Union Pacific sold its leased parcel to ASARCO in 1946. At no time did Union Pacific ever operate the refinery or generate any lead emissions from the property.

36. On December 15, 2004, the EPA issued an Interim Record of Decision (“Interim ROD”), the document the EPA used to publish its interim clean-up decision or remedy for the OLS. On December 16, 2004, the EPA sent Union Pacific a Special Notice Letter requesting payment of the EPA’s past costs and performance of work under the Interim ROD. The EPA also issued Special Notice Letters to ASARCO, Aaron Ferer, and Gould.

37. Effective December 16, 2005, the EPA took CERCLA enforcement action against Union Pacific by issuing a Unilateral Administrative Order (“UAO”). The UAO directed Union Pacific to implement the EPA’s selected interim remedy at the OLS at an estimated cost of \$50 million. Pursuant to 42 U.S.C. §§ 9606(b) and 9607(c)(3), failure to comply with a UAO without

sufficient cause may subject a party to daily penalties and punitive damages. Union Pacific has objected to the EPA's science in addition to the EPA's unprecedented theory of liability against a passive landlord for its lessee's alleged contamination of distant properties that did not result from the contamination of the landlord's own property. Because Union Pacific has sufficient cause to believe that the damage has been caused by lead-based paint and that it has no liability for any contribution to the harm from ASARCO's air emissions, it refused to accede to the EPA's demands that it implement the December 16, 2005 UAO to implement the interim ROD. However, the UAO remains in effect as a continuing administrative enforcement matter—a ticking time bomb—that can only be finally resolved by a Court after the EPA initiates judicial enforcement.

38. The EPA selected a final remedy for the OLS that is described in the EPA's May 13, 2009 Record of Decision ("ROD") and is estimated by the EPA to cost over \$400 million (including costs for the Interim ROD, for which the EPA spent approximately \$100 million). On July 31, 2009, the EPA again requested Union Pacific to participate in the Special Notice procedure as set forth in 42 U.S.C. § 9622(e), this time at an estimated cost of \$200 million. On October 2, 2009, Union Pacific again refused to accede to the EPA's demand for the reasons stated in Paragraph 37.

39. Starting in May 2004 to the present, Union Pacific has sought information from the EPA under FOIA, to enable Union Pacific to evaluate all of the EPA's actions at the OLS. Instead of responding forthrightly to Union Pacific's FOIA requests, the EPA has delayed responding, destroyed evidence, and obfuscated fundamental Site facts. The EPA's failure to timely produce records relating to the OLS and its practice of instructing employees to destroy records related to the OLS has restricted Union Pacific's ability to evaluate the EPA's actions at the OLS or engage in informed negotiations with the EPA about the EPA's incorrect assertions of Union Pacific liability.

40. At significant cost and great effort, Union Pacific has independently conducted limited Site investigations and data evaluations—including evaluations of the EPA's data. Union

Pacific's work shows that the lead in the OLS comes from lead-based paint used on Omaha homes within the Site. Douglas County Assessor data show that seventy-nine percent of OLS homes were constructed prior to 1950, many are more than 100-years old, and some are now in poor condition. Even the EPA's analysis documents that nearly 60% of the homes where the EPA is removing soil have deteriorated and peeling paint. That peeling paint will continue to contaminate the soil if it is not removed or stabilized. Evidence in the ASARCO bankruptcy showed paint peeling from the exterior walls of the homes caused the high lead levels in the OLS residential soils. Representative photographs are attached as Exhibit J.

41. The EPA's own OLS data shows that lead-based paint—not airborne emissions—caused the elevated lead levels in OLS residential yard soil. There is a direct correlation between lead-based paint on the home, the age of the home, and the level of yard contamination. OLS data documents that the older the home, the more likely the yard will have elevated lead levels. The EPA conducted four studies that also show residential lead soil concentrations are driven by lead-based paint. The EPA sampled soil throughout Omaha parks and reported the results in two studies: the *Small Park Surface Soil Investigation Report, Omaha Lead Site* (U.S. EPA, 2009) (“Small Park Study”), and the *Large Park Surface Soil Investigation Report, Omaha Lead Site* (U.S. EPA, 2009) (“Large Park Study”)(collectively, the “Parks Studies”). The EPA reported the Parks Studies in April 2009 as Appendix J and K, respectively, to the EPA's Final Remedial Investigation Report for the OLS (“RI”). See [http://www.epa.gov/region7/cleanup/npl\\_files/omaha\\_lead/public\\_review/remedial\\_omaha\\_lead.htm](http://www.epa.gov/region7/cleanup/npl_files/omaha_lead/public_review/remedial_omaha_lead.htm) (site last visited June 16, 2010) for a copy of the RI. For the two park studies, the EPA collected over 2,400 soil samples from both small (less than ten acres) and large parks (more than ten acres) across the City. Only 5 soil samples exceeded 400 parts per million (“ppm”) lead and none of these was in a high child-impact area. In short, there are no elevated lead soil concentrations in the parks—located in areas away from residential peeling paint. The EPA also

conducted a site-specific Final Drip Zone Width Study (Appendix I to the RI) and determined that in Omaha, the impacts of peeling lead-based paint extend out at least six feet away from the foundation of each residence. The EPA also determined, through a Lead-Based Paint Recontamination Study (Appendix L to the RI) that lead-based paint can peel into a cleaned up yard at a rate that could re-contaminate the yard and require a new clean-up within two years. All of these EPA studies show that lead-based paint is the primary cause of the lead in residential yards at the OLS.

42. The extent and cause of the lead contamination at the OLS does not just have legal implications. It also determines whether the EPA's clean-up plan will really eliminate—or even reduce—the amounts of lead to which OLS residents are exposed. If the EPA is wrong on the cause of the contamination, it is wrong on the clean-up. If the EPA is wrong, the hundreds of millions of dollars that the EPA has spent on the clean-up will have been wasted and Omaha residents will remain at risk of unsafe lead exposure.

43. The EPA cannot use CERCLA authority or CERCLA money to conduct clean-up of products in consumer use or released from residential buildings, such as lead-based paint. 42 U.S.C. §§ 9604(a)(3) and 9601(9); *see also* 40 C.F.R. § 300.400(b)(2). At the OLS, the EPA is using CERCLA authority to try to make someone else pay for the cost of the OLS work. Therefore, the EPA must take the position that the lead in OLS yards is not from lead-based paint, but must be from industrial sources. Otherwise, the EPA's case will fail.

44. Union Pacific has repeatedly shared its scientific information and analysis with the EPA. Union Pacific has documented that the EPA's own Site data demonstrate that lead-based paint, not historic industrial air emissions, is responsible for the elevated lead levels in OLS yards. Union Pacific has shown the EPA that it has improperly interpreted its Site data to favor industrial emissions as the lead source and ignored data to the contrary. Union Pacific has shown that the

EPA has skewed sampling and testing data to ensure that the results support the EPA's theory. The EPA has denied or ignored all of these contentions.

45. Union Pacific filed four FOIA requests to obtain records that it believes will show that the EPA tampered with the soil samples, including removing paint chips from soil samples before testing, in an attempt to avoid showing that the lead came from lead-based paint. The EPA has stalled Union Pacific's FOIA requests for more than three years.

46. It is only through persisting in its FOIA requests that Union Pacific has discovered that records responsive to its FOIA requests have intentionally been destroyed. Recently uncovered emails reveal an ongoing pattern and practice since at least 2004 within EPA Region 7 to destroy evidence that Union Pacific and the public have requested under FOIA.

**B. The EPA's Special Emphasis and Remedial Branch**

47. The OLS Superfund Site is managed by EPA Region 7 in Kansas City. Region 7 has responsibility for Iowa, Kansas, Missouri, and Nebraska. Within EPA Region 7, Superfund sites are managed by Cecelia Tapia, Director of the Superfund Division, and she in turn, assigned the OLS to the "Special Emphasis and Remedial Branch" which is supervised by Gene Gunn. The Project Manager at the EPA who has day-to-day responsibility for clean-up and remediation of the OLS was initially Don Bahnke, but has been Robert Feild since sometime in 2003. Feild's title is now Project Coordinator. Feild worked with Don Bahnke, Pauletta France-Isetts, Dan Garvey, and others within that department. The EPA's primary remediation contractor for the OLS is Black & Veatch Special Projects Corporation ("B&V"), an environmental remediation consulting firm. B&V's OLS project manager is now David Sanders but for a number of years was WT Dudley. These individuals, including those at B&V who work on the OLS for EPA, will be referred to as the "EPA Special Emphasis Branch." The names and titles of those persons that were likely at least aware, if not

responsible, for the violations by EPA Region 7 of FOIA, the Federal Records Act, and the APA are shown in the Region 7 organization charts attached as Exhibit B.

48. As Project Coordinator for the OLS, Feild is a key EPA employee whose responsibilities include determining the project requirements, performing project oversight, supervising other EPA employees and EPA contractor personnel working on the OLS, communicating with the public, the State of Nebraska, Douglas County, the City of Omaha and members of the Nebraska Congressional delegation, and recommending sampling approaches and remedy implementation. Feild regularly attends CAG meetings. The EPA has vested Feild with substantial authority and power concerning the approach and outcomes at the OLS. Feild is also responsible for responding to OLS FOIA requests and managing and preserving OLS records. Feild reports directly to Gene Gunn, who reports to Superfund Division Director, Cecilia Tapia. Feild has devoted substantial effort to managing the data collected concerning the Site to support the EPA's theory that lead in residential soils at the OLS largely comes from industrial airborne emissions, to the point of manipulating the data to minimize evidence of lead-based paint impacts.

49. At all times relevant to this Complaint, Feild acted with the knowledge of his superiors at the EPA who either directly approved of his actions or failed to correct Feild's FOIA, Federal Records Act, and APA violations. On information and belief, the actions of the other EPA agents described below were also taken with the knowledge of their superiors either at Region 7 or the EPA Headquarters in Washington D.C. In the alternative, the EPA, including its current Administrator, failed to provide any meaningful supervision, guidance, or enforcement of FOIA and Federal Records Act compliance, resulting in FOIA, Federal Records Act, and APA violations and destruction of records.



**C. Union Pacific's FOIA Requests**

50. Union Pacific has submitted four FOIA requests to the EPA on May 1, 2002, May 21, 2003, May 25, 2004, and April 6, 2009, requesting records related to various aspects of the OLS. The EPA provided records in response to each of the FOIA requests, but did not provide all records responsive to the May 25, 2004 request and therefore the request remained open until late 2009 or early 2010. It now appears that in the EPA records EPA has subsumed the May 25, 2004 request into the April 6, 2009 request. Union Pacific is unable to verify whether the EPA has fully complied with FOIA in responding to Union Pacific's May 25, 2004 request. The April 6, 2009 request is clearly still pending.

51. Union Pacific had a right to obtain timely the information under its May 25, 2004 FOIA request. More particularly, Union Pacific needed the information to respond to the EPA Special Emphasis Branch's Interim Proposed Plan (the draft Interim ROD) and the December 16, 2005 UAO the EPA issued to Union Pacific requesting that Union Pacific implement an estimated \$50 million of the Interim remedy for the OLS. The EPA did not object to the request, but failed to comply with FOIA, as the EPA did not provide a timely response. Consequently, Union Pacific did not receive the information it requested and was hampered in its ability to respond to the Proposed Plan and the EPA's first Special Notice Letter.

52. On April 6, 2009, Union Pacific, through counsel, submitted its fourth FOIA request (the "FOIA Request") to the EPA for various records relating to the OLS. (Ex. K.) The FOIA Request asked for electronic documents, email, and "all 'records' currently in the possession of EPA's contractors, subcontractors, experts, or technical assistants which EPA could obtain through a similar request to such contractors, subcontractors, experts, and technical assistants." (*Id.* at 2.)

53. The EPA Region 7 FOIA Officer, Kathleen A. Montalte, acknowledged receipt of the fourth FOIA request by letter dated April 7, 2009 (Ex. L) and assigned the request No. HQ-RIN-01075-09. National FOIA Officer Larry F. Gottesman also acknowledged receipt of the fourth request and the partial transfer from Region 7 to the Office of Solid Waste and Emergency Response (“OSWER”) for processing. (Ex. M.)

54. The EPA’s response to Union Pacific’s FOIA Request was due in 20 working days, by May 5, 2009. 5 U.S.C. § 552(a)(6)(A)(ii). The EPA failed to produce any records by this date. Via a draft letter dated May 4, 2009 (Ex. N at 1), EPA Senior Counsel Steven L. Sanders advised counsel for Union Pacific that “[t]he total costs of the FOIA request could exceed \$10,000 and would take a minimum of six months to complete.” On May 8, 2009, counsel for Union Pacific agreed to a 30-day extension for the EPA to respond to Union Pacific’s FOIA request.

55. On May 21, 2009, counsel for the EPA informed Union Pacific that “[b]ecause of the large volume of potentially responsive records . . . it would take a minimum of six months (and perhaps longer) to collect and review all documents” and that the agency considered the “request to meet the meaning of ‘unusual circumstance,’” relying on 5 U.S.C. § 552(a)(6)(B) and 40 C.F.R. § 2.104(d). Union Pacific did not agree to a six-month extension.

56. FOIA precludes federal agencies from withholding requested records unless one or more specific statutory exemptions apply and requires that the agency detail the basis for any withholding. Despite repeated requests for a list of records withheld and the basis for withholding, the EPA has not provided that information. Union Pacific also requested the records in native format, consistent with 5 U.S.C. § 552(a)(3)(B) and 40 C.F.R. § 2.107(b)(3). The EPA has refused to do so. A detailed chronology of Union Pacific’s FOIA requests and the actions of the EPA and Union Pacific’s appeals is attached as Exhibit O.

57. Beginning in September of 2009, the EPA has provided partial responses to Union Pacific's 2009 FOIA request. The responses have included 206 CDs containing 509,000 pages and one hard drive (produced May 25, 2010) containing 630,063 pages, for a total of approximately 1,139,063 pages. Buried among the more than one million pages, Union Pacific discovered the damaging emails that form the basis for this action and Union Pacific's Motion for temporary restraining order and preliminary injunction.

58. Union Pacific has timely appealed each of the EPA's partial responses beginning on October 23, 2009. The EPA has failed to respond to any of Union Pacific's administrative appeals by the expiration of the statutorily required twenty (20) business day response period. 5 U.S.C. § 552(a)(6)(A)(ii). Union Pacific's last administrative appeal was sent on June 14, 2010. The EPA's response to Union Pacific's eighth administrative appeal is due June 24, 2010 and its response to the ninth administrative appeal is due July 13, 2010. All other EPA response deadlines are long-since passed.

59. Union Pacific's administrative appeals contest the EPA's delayed production and its failure to provide the records in the requested format. Union Pacific has received no records from the EPA Headquarters or OSWER. Union Pacific repeatedly contested the EPA's narrow scope of records search because, upon information and belief, the EPA only instructed employees to search for records containing the phrase "Omaha Lead." Responsive records may contain numerous alternative search terms, such as "OLS," or the EPA's Superfund Site designation number, "EPA ID# NESFN070348." Union Pacific also objected to the EPA's failure to identify records withheld pursuant to a FOIA exemption and the identification of the specific claimed FOIA exemption(s).

60. Union Pacific is harmed by the EPA's failure to comply with FOIA because that failure inhibits Union Pacific's ability to evaluate whether actions taken by the EPA and its contractors and subcontractors at the OLS are in conformance with CERCLA. The EPA's failure to

comply with FOIA also hampers Union Pacific's ability to document that it does not have liability for the OLS.

**D. The EPA Special Emphasis Branch Pattern and Practice of Destruction of Evidence**

61. Union Pacific did not get the information it requested because the EPA Special Emphasis Branch is deliberately destroying records and refusing to provide complete responses to Union Pacific's FOIA requests. Hidden within the thousands of records and over one-million pages that the EPA finally produced in 2010 are the emails that escaped the deletion button and were produced to Union Pacific. These emails reveal the outlines of the scope and purpose of the EPA's practice of destroying records and information.

**1. Destruction of Evidence and Tampering with Soil Samples**

62. In November 2004, the Special Emphasis and Remedial Branch sent an email to its members about discrepancies in its soil sample results. This email exchange involved the entire Special Emphasis Branch and their outside consulting firm, B&V. In this email, Don Bahnke (one of the members of the Special Emphasis Branch) described the EPA's method of removing lead-based paint chips from samples before testing for lead concentrations. (Ex. P at 2.) In so doing, the Special Emphasis Branch made a conscious decision to remove evidence that the lead concentrations in the OLS came from paint, not industrial emissions.

63. After removing the paint chips from the samples, the EPA then ran its analysis, and not surprisingly concluded that the test results were consistent with their theory that the lead in OLS soils came from ASARCO. Bahnke sent a follow-up email to the Special Emphasis Branch to explain why the EPA was getting different readings from OLS soil samples now, compared to those before the EPA's manipulation of the soil samples. Bahnke stated: "My main purpose for sending the email below was to stop the suspicions some people still have about the quality of the data that B&V and ENSV have provided to us." (*Id.* at 1.) Bahnke sent the email so the others could

understand that the inconsistent soil sample tests for the OLS were not caused by the incompetence of their outside consultants but because the Special Emphasis Branch had decided to manipulate and alter the samples, thus skewing the results to support the EPA's theories.

64. Bahnke copied the OLS Project Coordinator, Feild, on his email about the soil samples. Feild was not concerned about his co-employees rigging the soil sampling test against Union Pacific, a test that the EPA would then use to argue that Union Pacific was liable for over \$200 million in clean-up costs. Nor was Feild concerned about misleading the public. Rather, he was only concerned that Union Pacific might find out about it. He was so concerned that he sent an email to everyone in the Special Emphasis Branch who received Bahnke's email stating: "I hope everone [sic] is deleting these types of messages after they are received . . ." (*Id*) He then went on to state that the messages are "releasable," and that if anyone saves them, they will have to turn them over to Union Pacific's attorney. He then questions the validity of all the soil samples taken prior to the EPA's decision to remove all visible paint chips from samples in August 2004. What Feild did not put in his email was that the EPA had already received a FOIA request from Union Pacific in May 2004 that the EPA FOIA compliance office concluded would require production of emails like Bahnke's; meaning **there was a pending FOIA request to which Don Bahnke's emails were responsive, yet Feild requested deletion of the responsive correspondence—from the entire record.**

65. Feild copied Gene Gunn, head of the Special Emphasis and Remedial Branch, the outside consultants, and Steven Sanders, an attorney at EPA Region 7 on his email. (*Id*) Union Pacific has found no evidence that any of these people countermanded or objected to Feild's instructions to destroy "these types of messages," ones that would assist Union Pacific in establishing the true cause of the lead contamination. The records produced by the EPA to Union Pacific indicate that many of the ten recipients of Feild's email apparently did destroy their copy per

Feild's instructions, reflecting the magnitude of the evidence that the Special Emphasis Branch has willfully destroyed since 2004.

66. Feild was correct that the emails and information he wanted destroyed would damage the EPA's efforts to establish liability against Union Pacific. Feild's instruction to his fellow Special Emphasis Branch members and EPA's contractor to destroy information violated FOIA, the Federal Records Act, Feild's job responsibilities, his federal employee code of ethics, and other federal statutes. His directions impeded an accurate determination of the cause of lead contamination in the OLS and have prevented the community from learning the truth.

## **2. Destruction of Harmful Evidence on Air Modeling**

67. One of the central disputes between the EPA and Union Pacific is whether the EPA is correct that airborne industrial emissions from ASARCO's refinery traveled against prevailing winds and deposited lead in residential yards in the OLS, while selectively skipping over intervening public parks and cemeteries. See the Parks Studies. In August 2005, Bahnke sent an email to Feild in which he provided a copy of a report done in 1998 from the EPA's National Exposure Research Laboratory which conducted a computer model on airborne emissions from the ASARCO refinery. The report shows the EPA's own analysis of the primary wind directions along which emissions from the ASARCO refinery would have been dispersed. Bahnke explained in his email that the EPA's own National Exposure Research Laboratory was "really trying to warn me that there was no way he could produce any results that were predictive of concentrations or extent of contamination." In other words, the EPA's own air modeling expert told the Special Emphasis Branch that it could not use air modeling to corroborate that emissions from the ASARCO refinery were consistent with the EPA's theory that the refinery was the source of the lead contamination in the OLS. Disclosure of Bahnke's statements clearly would undermine the EPA's claim against Union Pacific and the EPA's overall theory of the Site.

68. Feild understood the damage that his coworker's email might cause to the EPA's claim against Union Pacific and within thirty minutes of receiving the email wrote to Bahnke: "Don -- as these e-mails are subject to FOIA and probably discovery requests later, delete messages like this one after they are sent so you don't end up getting subpoenaed. Is this document part of the administrative record?" (Ex. C.) Feild's email reveals his ongoing campaign to destroy emails that are harmful to the EPA's claim against Union Pacific, **during the pendency of a FOIA request from Union Pacific** (Union Pacific's May 25, 2004 FOIA request was still pending) and while the EPA's UAO administrative enforcement action against Union Pacific was pending. Feild's question about the administrative record also showed that he was aware of the EPA's obligations to maintain the OLS administrative record. *See* CERCLA Section 104, 42 U.S.C. § 9604 and 40 C.F.R. §§ 300.160(a)(1) and 300.800, *et seq.*

69. Bahnke forwarded Feild's email to Gene Gunn, the head of the Special Emphasis Branch with the subject line identifying the email's topic as "deleting emails....Again." Bahnke complained to Gunn about Feild's continuing instructions to destroy email regarding the OLS, stating: "I have sent you an email similar to the one below before. I just want to alert you, again, that I really cannot delete emails and continue to do my job effectively." (Ex. E.) Bahnke did not complain to Gunn because Feild repeatedly instructed him to violate federal law and destroy evidence of an ongoing departmental investigation, all to Union Pacific's detriment. Instead, as he explained further, he was concerned that he would not be able to use his old emails to, as he put it, "recreate" documents and events. If Gunn, head of the Special Emphasis Branch, took any action regarding his subordinates instructing each other to destroy evidence or "recreate" events, it may have been destroyed along with countless other pieces of evidence that would be helpful to Union Pacific and would confirm the EPA's wrongful conduct. In any event, such evidence has not been produced to Union Pacific.

**3. Destruction of Air Monitoring Information of Interest to the Public**

70. In July 2006, in connection with an air monitoring effort during excavation work within the OLS, Feild directed the air monitoring specialist from Region 7, Leland Grooms, twice to delete their discussion:

I understand that you have extensive experience and I look forward to a successful project -- just pointing out that we are dealing with many different EJ communities with special needs and expectations and that this site is on a lot of people's radar screen. We have gotten in trouble before with going in to the Omaha communities thinking we knew what to expect. again, [sic] please delete this after reading.

(Ex. G. at 1.) Feild was particularly concerned that the discussion might be disclosed to the CAG so he directed it to be purged from the record to avoid FOIA disclosure, even as he explained the keen interest of the CAG in the overall project, the work plan, the monitoring, and the final report.

Feild's destruction orders came **while the March 21, 2005 CAG FOIA request was still open and pending.**

**4. Involvement of the EPA FOIA Officer and Regional Counsel**

71. The EPA's actions to avoid FOIA and violate the Federal Records Act by destroying evidence were known to the Special Emphasis Branch, the Region 7 FOIA officer, the Deputy Regional Administrator, and the Office of Regional Counsel. In April 2009, the EPA was scheduled to release the Omaha Lead Site Final Feasibility Study ("FS"). Concurrently, the EPA withheld records and destroyed requested key information for which Union Pacific had been waiting for years. The RI, the FS, the HHRA, the Proposed Plan, and other records the EPA issued in April 2009 had been subject to public notice and comment, under the NPL. 40 C.F.R. Part 300. The EPA's destruction of records requested by Union Pacific's pending FOIA precluded Union Pacific from ever obtaining relevant information from the EPA to make fully informed and meaningful comments on these key records. Yet, the EPA based critical, final OLS remedy decisions on these records. The EPA's action in intentionally withholding and destroying relevant records invalidates



the integrity of the entire decision-making process, as well as the decisions and remedies selected for the OLS that relied upon those records.

72. One month before, in March 2009, Kathy Montalte, the EPA Region 7 Freedom of Information Officer, sent an email to the Associate Regional Administrator of the Office of Public Affairs, Rich Hood, in which she discussed the Region's outstanding FOIA requests. In that email, she identified the only two overdue FOIA requests in Region 7—Union Pacific's May 25, 2004 FOIA request and the CAG's March 21, 2005 FOIA request—both for information about the OLS. In other words, in Region 7's four-state area, the EPA was current on all FOIA requests except for those regarding the OLS. Montalte casually notes that one request is over three years old and another is 974 days overdue. According to her email, Montalte had previously asked Feild to gather the records to respond to both requests when they were received.

73. Montalte placed Feild, the OLS Project Coordinator and the same person who directed his co-workers in the Special Emphasis Branch to destroy harmful emails and evidence, in charge of complying with Union Pacific's and the CAG's FOIA request. In the three years since she assigned him that task, Feild had not complied with FOIA and during those years, she failed to take the necessary action to get him to do so.

74. Long before Montalte raised her concerns to Associate Regional Administrator Hood, Don Bahnke had contacted Steven L. Sanders, the Associate Regional Counsel, about the status of the EPA's response to Union Pacific's May 25, 2004 FOIA Request. Bahnke asked Sanders by email on June 20, 2005: "[d]oes EPA have any intention of responding to this FOIA from UP? I have collected about 5 or 6 hundred pages of material. I have had it on my desk for a long time now. Should I just recycle this stuff?" Replying to Sanders' response ("I believe, Kathy Montalte is the FOIA officer and I think Superfund has a FOIA coordinator (Pat Maxwell, perhaps?)," Bahnke noted he had already spoken to Kathy who said "Bob has thousands of emails to review." Union

Pacific never received Bahnke's 500 to 600 pages of responsive material or any email in response to its May 25, 2004 FOIA request. (Ex. Q.)

75. After reviewing the outstanding FOIA requests, Montalte informed Associate Regional Administrator Hood that the EPA has three "options" in responding to these overdue FOIA requests. According to her, answering the requests as required by FOIA—the statute she was charged with enforcing—was but one of three options. Another "option" was for the EPA to contact Union Pacific to see if it would give them more time and thereby "remove the accrued backlogged days." The third "option" she identified amounted to fabricating an objection to the requests to see if Union Pacific would withdraw the requests. Montalte notes that Feild has told her that searching for the requested records would be overly burdensome so she suggested that the EPA tell Union Pacific the requests are overly burdensome and ask them to withdraw the requests. Montalte indicates that she does not agree with Feild since the request is limited to an identifiable set of emails and other records.

76. Montalte then makes the startling admission: "My fear is that the longer this FOIA remains open, the greater chance responsive e-mails will be deleted. If this happens, the ramifications would be far greater than the FOIA being overdue. (Remember the Landmark Case??)" (Ex. I.) *See Landmark Legal Foundation v. Environmental Protection Agency*, 272 F.Supp.2d. 70 (D.D.C. 2003). She is correct. The ramifications were far greater than an overdue FOIA request. In fact, Feild had already instructed the Special Emphasis Branch to destroy incriminating emails about their altered soil samples and the EPA's own determination that it cannot use air modeling to support its case against Union Pacific or its theory of the OLS site.

77. Montalte also reveals her true concern about the outstanding FOIA requests. She was not concerned that Union Pacific's rights to the records had been violated. She was not concerned about why pending requests remained unanswered for years. She was not concerned

about ensuring compliance. Rather, she was concerned about getting the requests off of the EPA backlog list for overdue FOIA requests. In her own words, “when a new Regional Administrator comes on board, it would be nice to be able to report a ‘0’ backlog.”

78. Hood, Region 7’s chief public spokesperson, sent Montalte’s email to David Cozad, Regional Counsel for EPA Region 7. Hood also discussed the situation with the William Rice, the Deputy Regional Administrator and second in command at the Regional office. Both Rice and Hood would have understood that Region 7 has FOIA requests that have not been answered for over three years, that the FOIA compliance officer had taken no action to get the records produced, and that Region 7 was risking destroying responsive records and facing sanctions for doing so.

79. In the face of this information and the directive from Attorney General Holder making it clear that FOIA information must be produced promptly and openly, Hood’s immediate response is to forward the email to Cozad, Region 7’s Chief Counsel. When he forwarded Montalte’s email to Cozad, Hood asks him for “guidance on ways we can keep these from coming back to haunt us.” Hood then volunteered to carry the guidance to the Director of Region 7’s Superfund Department, Cecelia Tapia.

80. Cozad’s guidance on hiding overdue FOIA requests and Tapia’s participation have either been withheld from production or destroyed. Yet, Hood’s request to obtain legal advice from counsel potentially in furtherance of a crime or fraud is critical evidence for this Court to determine the depth of the practice and should not be subject to any protections governing communications with an attorney.

81. The EPA’s casual disregard for Union Pacific’s (and the public’s) rights is shocking by itself. The EPA’s violation of FOIA, the Federal Records Act, and the APA have far broader implications. During the period from 1999 through December 2009, the EPA was spending

taxpayers' money to implement the OLS remedy, based upon manufactured data and false pretenses. The EPA may never recover tens of millions of public dollars Region 7 has illegally spent.

#### **5. The EPA's Pattern of Inadequate OLS FOIA Responses**

82. From the outset of its involvement at the OLS, the EPA has identified ASARCO as the primary potentially responsible party. On August 9, 2005, ASARCO filed for Chapter 11 bankruptcy protection in U.S. Bankruptcy Court in the Southern District of Texas, Corpus Christi Division. The EPA filed a claim for its estimated total OLS remediation costs (\$406 million) in the ASARCO bankruptcy case. ASARCO challenged the EPA's OLS claim, but eventually settled it in December 2009 for \$212,723,816.65.

83. On April 22, 2008, ASARCO Incorporated ("ASARCO, Inc.") (the parent corporation of the bankruptcy debtor), sent a FOIA request to the EPA for any records regarding the Recontamination Study the EPA had conducted at the OLS. (The EPA eventually issued the Final Lead-Based Paint Recontamination Study in April 2009 as Appendix L to the RI.) Kathy Montalte responded May 15, 2008 saying that there were no responsive records. ASARCO, Inc. pursued the matter because both Gene Gunn and Bob Feild had testified in an August 6, 2007 bankruptcy hearing about the Recontamination Study. ASARCO, Inc. filed its administrative appeal May 29, 2008 to which the EPA did not timely respond. ASARCO, Inc. filed action in U.S. District Court for the District of Columbia for declaratory and injunctive relief, ASARCO, Inc. v. United States Environmental Protection Agency, Civil Action No. 08-1332 (EGS-JMF) (D.D.C.) ((the "ASARCO, Inc. FOIA Action"). After two court orders and many months later, the EPA ultimately produced approximately 100 responsive records.

84. The ASARCO, Inc. FOIA Action is material to this case for a number of reasons. The U.S. District Court for the District of Columbia **twice** found that EPA Region 7's search for responsive records was inadequate—because the EPA's search was too narrow in terms of the

records searched and the search terms used. The court further found that the EPA's search documentation was inadequate and, as noted, twice ordered the EPA to conduct a new, broader search. The ASARCO, Inc. FOIA Action is also material because in that case, it was also Robert W. Feild that was responsible for the EPA Region 7's inadequate FOIA response to ASARCO, Inc.

**E. The Federal Records Act and the EPA's Destruction of Records**

85. The Federal Records Act establishes the framework for records management programs in federal agencies, ensuring "[a]ccurate and complete documentation of the policies and transactions of the Federal Government," as well as "[j]udicious preservation and disposal of records." 44 U.S.C. § 2902.

86. To fulfill this purpose, the Federal Records Act requires the head of each agency to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency." 44 U.S.C. § 3101. Under the Federal Records Act, each agency must also "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency," 44 U.S.C. § 3102. The recordkeeping must enable "ready retrieval" of records, including electronic records. The Federal Records Act also requires each agency to "establish safeguards against the removal or loss of records." 44 U.S.C. § 3105.

87. The Federal Records Act prescribes the exclusive mechanism for the disposal of federal "records," which are defined to include:

all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

44 U.S.C. § 3301. No records may be “alienated or destroyed” except pursuant to the disposal provisions of the Federal Records Act. 44 U.S.C. § 3314.

88. The provisions of the Federal Records Act are administered by the National Archives and Records Administration (“NARA”) under the direction of the National Archivist. 44 U.S.C. §§ 2102 and 2904.

89. An agency wishing to dispose of records must first submit to the Archivist either lists of records the agency head determines are “not needed by [the agency] in the transaction of its current business,” 44 U.S.C. § 3303(2), or “schedules proposing the disposal after the lapse of specified period of time of records of a specified form or character” that the agency determine following that specified period of time will not have “sufficient administrative, legal, research, or other value to warrant their further preservation by the Government.” 44 U.S.C. § 3303(3).

90. The Archivist, following receipt of a request for destruction, must issue a notice of public comment on the agency’s proposal and must conduct an independent assessment of the value of the records the agency is proposing to destroy. 44 U.S.C. § 3303a(a). If the Archivist agrees with the agency’s evaluation of the value of the records, he may then authorize agency disposal.

91. If an agency head learns of “any actual, impending, or threatened unlawful removal . . . or destruction of records in the custody of the agency,” she is required to “initiate action through the Attorney General for the recovery of records [she] knows or has reason to believe have been unlawfully removed from [her] agency . . .” 44 U.S.C. § 3106.

92. Upon information and belief, all of the email records that Feild directed to be destroyed are subject to NARA approved schedules for record retention and were not scheduled for deletion.

93. Upon information and belief, Feild’s decision to destroy email records was made in anticipation of FOIA requests and litigation with Union Pacific, constituted the culmination of the

EPA's decisionmaking process on this issue, and conclusively determined the rights and obligations of Union Pacific and EPA as they relate to the destroyed records.

94. Upon information and belief, the EPA did not seek permission from the Archivist for destruction of any of these particular emails prior to Mr. Feild's instruction that they be deleted.

95. In light of these emails, on June 11, 2010, Union Pacific sent a letter to EPA Administrator Lisa P. Jackson with a copy to Mr. David Ferriero, the National Archivist, requesting that pursuant to 44 U.S.C. § 3106, the EPA commence an immediate investigation to assess the extent and duration of the EPA's practice of purging OLS records to avoid FOIA requests and subpoenas for testimony. Union Pacific further requested that the Administrator initiate action through the Attorney General for the recovery of records believed to have been unlawfully removed from the EPA. (Ex. R.)

96. Union Pacific has not received a response to its request.

## V. CLAIMS FOR RELIEF

### Count 1:

#### **Violation of 5 U.S.C. § 552 for Failure to Timely Produce Responsive Records (Against the EPA)**

97. Union Pacific repeats and re-alleges paragraphs 1-96 of this Complaint as if fully set forth herein.

98. Union Pacific properly requested records within the custody or control of the EPA.

99. Union Pacific is entitled by law to access to the records requested under FOIA, unless the EPA makes an explicit and justified statutory exemption claim.

100. Union Pacific has exhausted the applicable and available administrative remedies with respect to its FOIA request and the EPA's response.

101. The EPA violated FOIA's mandate to release agency records to the public by failing to conduct a reasonable search and failing to timely produce all non-exempt records responsive to Union Pacific's fourth FOIA request. 5 U.S.C. §§ 552(a)(3)(A) and 552(a)(3)(C).

102. The EPA further violated FOIA's mandate by failing to provide the documents in the format requested by Union Pacific and in failing to "maintain its records in forms or formats that are reproducible for purposes of this section." 5 U.S.C. § 552(a)(3)(B).

103. Union Pacific is entitled to injunctive and declaratory relief with respect to the release and disclosure of the requested records.

**Count 2:**  
**Violation of FOIA for Failure to Timely Respond to Plaintiff's Administrative Appeal  
(Against the EPA)**

104. Union Pacific repeats and re-alleges paragraphs 1-103 of this Complaint as if fully set forth herein.

105. Union Pacific has exhausted the applicable and available administrative remedies with respect to its FOIA Request and the EPA's response.

106. The EPA's failure to timely respond to Union Pacific's administrative appeal violates FOIA, 5 U.S.C. § 552(a)(6)(A)(ii), and the corresponding agency regulations.

107. Union Pacific is entitled to injunctive and declaratory relief with respect to its administrative appeal.

**Count 3:**  
**Failure to Take Enforcement Action in Violation of the Federal Records Act  
(Against Administrator Jackson)**

108. Union Pacific repeats and re-alleges paragraphs 1-107 of this Complaint as if fully set forth herein.



109. Under the Federal Records Act, the Administrator of the EPA has a mandatory duty, after notice, to initiate an action through the Attorney General to prevent the actual, threatened or impending removal or destruction of records in the agency's custody. 44 U.S.C. § 3106.

110. The electronic records that EPA employees create when they use EPA computer systems to conduct official agency business are records within the meaning of the Federal Records Act, 44 U.S.C. § 3301. Accordingly, any agency policy or practice regarding preservation of these records must conform to the requirements of the Federal Records Act.

111. The practice of the EPA in instructing employees to delete emails that could become or are subject to a FOIA request is violative of the Federal Records Act.

112. Pursuant to 44 U.S.C. § 3106, Union Pacific requested that the head of the EPA initiate action through the Attorney General for the recovery of records believed to have been removed from the EPA's records or to halt the further destruction of records responsive to the FOIA Request.

113. The Administrator has not responded to this request.

114. In failing to act, the Administrator has violated her mandatory, non-discretionary duty to initiate enforcement actions through the Attorney General to recover unlawfully removed records.

115. Union Pacific is irreparably harmed by the Administrator's failure to seek the initiation of an enforcement action through the Attorney General, as this failure threatens to keep the public from accessing important records with administrative, legal, research, and other value.

**Count 4:**  
**Intentional Spoliation of Evidence Contrary to Law Under the APA**  
**(Against the EPA)**

116. Union Pacific repeats and re-alleges paragraphs 1-115 of this Complaint as if fully set forth herein.

117. On December 16, 2005, the EPA's UAO went into effect and required Union Pacific to perform certain work at the OLS. The EPA has never rescinded the UAO; it is still in effect and has been pending since its effective date, subject to judicial enforcement.

118. The EPA subsequently issued a separate Special Notice Letter to Union Pacific. Until the EPA has completed the OLS remedy and recovered all of its costs of response, there is a continuing likelihood that the EPA will take further enforcement action against Union Pacific.

119. The EPA has willfully and systematically destroyed information responsive to Union Pacific's third and fourth FOIA requests and relevant to Union Pacific's defense against EPA judicial enforcement of the UAO and likely future enforcement actions. The EPA destroyed this evidence with the purpose and intent of depriving Union Pacific of the use of this information, acting in anticipation of litigation with Union Pacific.

120. As a practical matter, the EPA's decisions to engage in the intentional spoliation of evidence relevant to imminent litigation were the consummation of the EPA's decisionmaking process regarding the preservation of certain documents relevant to OLS litigation. These decisions effectively determined that the EPA was not obliged to preserve those documents and that Union Pacific would never be permitted to obtain those documents or receive any further review, within the EPA, of the decision to destroy them.

121. Like any other potential litigant that is on notice that litigation is imminent, the EPA owes a basic obligation to its adversary and to the court not to spoliage relevant evidence. The EPA has violated and continues to violate that obligation. Union Pacific has been aggrieved and has suffered a legal wrong as a result of this action, and will continue to suffer such harm.

122. As a direct and proximate result of the EPA's willful destruction of evidence, Union Pacific will be prejudiced in any administrative or judicial enforcement action by the EPA against Union Pacific concerning the OLS.

123. The EPA's intentional spoliation of evidence is arbitrary, capricious, an abuse of discretion, not in accordance with law and without observance of procedure required by law, in violation of the APA, 5 U.S.C. § 706(2)(A), (D).

124. Union Pacific is entitled to injunctive and declaratory relief to stop the EPA from further spoliation of OLS information and to remedy that which has already occurred.

**Count 5:**  
**Violation of the APA for Failure to Timely Respond to Plaintiff's Administrative Appeal  
(Against the EPA)**

125. Union Pacific repeats and re-alleges paragraphs 1-124 of this Complaint as if fully set forth herein.

126. The EPA's failure to timely respond to Union Pacific's administrative appeal constitutes agency action unlawfully withheld and unreasonably delayed, in violation of the APA, 5 U.S.C. § 706(1).

127. The EPA's failure to timely respond is arbitrary, capricious, an abuse of discretion, not in accordance with law and without observance of procedure required by law, all in violation of the APA, 5 U.S.C. § 706(2)(A).

**VI. PRAYER FOR RELIEF**

WHEREFORE, Union Pacific respectfully requests that the Court:

1. Impose a temporary restraining Order and a preliminary injunction, to immediately:
  - a. Enjoin the EPA and EPA Affiliates from transporting, removing, destroying, deleting, modifying, or in any way tampering with information in their possession or control that is potentially responsive to the FOIA Request;
  - b. Enjoin the EPA and EPA Affiliates from destroying any additional records subject to Union Pacific's FOIA requests;

- c. Enjoin the EPA from destroying any records regarding the history, operation, and scope of its efforts to previously destroy records responsive to Union Pacific's FOIA requests, including but not limited to all information in whatever form from the files either electronic or in hard-copy from all employees of the EPA Region 7 Superfund Division, including the Special Emphasis and Remedial Branch, the Office of Regional Counsel, and all of the EPA's OLS contractors.
- d. Require the EPA and EPA Affiliates to sequester all records potentially responsive to Union Pacific's FOIA Request for production;
- e. Authorize Union Pacific to conduct focused discovery to determine the scope of the record destruction and its impacts;
- f. Require the EPA and EPA Affiliates to immediately suspend the deletion, rotation or modification of any back-up media for any e-mail system or e-mail account relating to the OLS;
- g. Require the EPA and EPA Affiliates to identify and secure any back-up media for any e-mail system or e-mail account relating to the OLS;
- h. Require the EPA and EPA Affiliates to immediately sequester and secure the hard drive or any loose media (thumb drives, portable hard drives, CD roms) of any employee working on any matter relating to the OLS; and
- i. Appoint a Court-supervised, independent certified computer forensic examiner to examine the EPA's OLS records to determine what has been destroyed and whether it can be restored.

In addition, Union Pacific respectfully requests that the Court enter declaratory judgment, finding:

2. The EPA's failure to disclose the records requested by Union Pacific in a timely fashion is a violation of FOIA;

3. Declaring that the EPA's failure to respond to Union Pacific's administrative appeals relating to its 2009 Request is a violation of FOIA;

4. Directing the EPA to conduct an appropriately broad search for the requested records and to promptly provide all responsive, non-privileged records to Union Pacific;

5. Directing the EPA to prepare and file promptly an itemized index for all withheld or redacted records, containing all the information needed to evaluate each claimed exemption; and

6. Declaring that the Administrator's failure to institute an enforcement action regarding the destruction of EPA records is unlawful under the Federal Records Act and directing that such an investigation be initiated;

7. Granting such other and further relief as the Court deems just and proper.

Union Pacific reserves the right to seek further relief in the form of attorneys fees, costs, and sanctions.

## **VII. REQUEST FOR PLACE OF TRIAL**

Plaintiff, Union Pacific respectfully requests that trial and all other Court proceedings be held in Omaha, Nebraska.

DATED this 23<sup>rd</sup> day of June, 2010.

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY,  
Plaintiff,

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