

March 13, 2019

Via ECF

Honorable Robert W. Sweet
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Natural Resources Defense Council et al. v. U.S. EPA*, No. 18-cv-11227-RWS

Dear Judge Sweet:

We write on behalf of Plaintiffs Natural Resources Defense Council and Environmental Defense Fund in response to EPA's March 11 letter to the Court. (Dkt. 32.) EPA proposes staying resolution of the parties' dispute over high-priority records while the agency processes low-priority records on a non-expedited basis. (*Id.* at 2.) Plaintiffs respectfully submit that EPA's approach puts things backward and would primarily serve to delay judicial review of the agency's withholding of high-priority records. Regardless, a sequencing dispute will simply introduce further unwarranted delay of public access to the most urgently-needed records.

For this reason, and others explained below, Plaintiffs hereby voluntarily narrow their claim in this action to encompass only the set of highest priority records: the current full version of EPA's OMEGA model and the files necessary to fully utilize it. Plaintiffs expect to file next week a new motion for summary judgment that encompasses the entire case, accompanied by a request for expedited disposition of the matter and production of EPA records unlawfully withheld.

OMEGA is a computer model that provides data relevant to vehicle emission standards. Because vehicle technology improves over time, EPA periodically updates OMEGA to reflect these changes. (Dkt. 13 at 2-3.) EPA has historically made OMEGA freely available to the public and periodically released updates as a matter of course. (*Id.*; Dkt. 15-3.) But EPA is now withholding the model.

Plaintiffs and others have been seeking release of OMEGA for nearly a year. (Dkt. 15-1.) When informal requests went unanswered (Dkt. 26, ¶ 44), Plaintiffs submitted a formal FOIA request. (Dkt. 1-1.) When that request in turn went unanswered for months (Dkt. 26, ¶ 62), Plaintiffs filed this case. Litigation has finally compelled EPA to respond, but its partial responses to date make clear to

Plaintiffs that the agency will delay full compliance as long as possible. If time were not of the essence, further delay, though unwarranted, might only be inconvenient.

But time is of the essence. EPA is poised to issue a rule that significantly weakens vehicle emission standards through the middle of the next decade. (Dkt 13 at 8; Dkt. 27 at 1.) This is a massive public health rule, and OMEGA and the data it provides are urgently needed to enable public accountability. In prior rulemakings, EPA relied on OMEGA data to set steadily-increasing emission standards. Now, for the first time, EPA is proposing to significantly weaken those standards and has chosen to shield OMEGA from public view. The longer EPA withholds OMEGA, the more the agency vitiates the public opportunity for meaningful accountability.

Plaintiffs' FOIA request seeks all unreleased updates to OMEGA. But the most pressing public need is for the most up-to-date version. After Plaintiffs filed an initial motion to compel its release (Dkt. 12), EPA produced some OMEGA-related files. (*See* Dkt. 31-1.) But the agency is withholding critical components, including the model itself. (*Id.*) Further, other components appear to be missing. Plaintiffs based their request on EPA's official OMEGA website and other public documents, which describe components such as "pre-processors" that EPA has not produced.¹ It is possible EPA classifies those components as part of the "model itself," but however labeled, EPA has not released them. To the extent EPA has reclassified or modified components of OMEGA since the last full public release, Plaintiffs' claim encompasses them as part of the full current version of OMEGA and all files necessary to utilize it. *Cf. Nat'l Day Laborer Org. Network v. Immigration & Customs Enf't Agency*, 811 F. Supp. 2d 713, 747 (S.D.N.Y. 2011) ("Courts have long recognized that the asymmetry of information in the FOIA context places a particular burden on the Government to act in good faith.").

Plaintiffs are entitled to enforce their entire FOIA request. But pursuing it in the face of determined agency resistance will only unnecessarily delay public access to the highest priority records. With the scope of litigation narrowed to these records, and to simplify any remaining disputes, Plaintiffs hereby withdraw their pending Motion to Expedite and Motion for Partial Summary Judgment. (Dkt. 12.)

¹ Dkt. 13 at 2-3, 10; Dkt. 15-3; Dkt. 27 at 9; Dkt. 31 (seeking release of package of files equivalent to those published on EPA's official OMEGA website for prior version of the model); *cf.* EPA, Regulatory Impact Analysis, EPA-420-R-12-016 at 3-5, 3-6 (Aug. 2012), ("OMEGA includes several components, including a number of pre-processors that assist users in preparing a baseline vehicle forecast . . ."), available at <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100EZI1.PDF?Dockey=P100EZI1.PDF>.

The sole basis on which EPA withheld priority records was FOIA's "deliberative process privilege," 5 U.S.C. § 552(b)(5). (See Dkt. 31-1.) Plaintiffs' forthcoming motion will explain why 5 U.S.C. § 552(b)(5), covering certain "inter-agency or intra-agency memorandums or letters," does not apply to OMEGA source code or other components, and will seek expedited disposition and production of those records. Thank you for your consideration of this matter.

Respectfully submitted,

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* Application for admission pending.

** Admitted *pro hac vice*.