



United States Attorney
Southern District of New York

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March 5, 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. Environmental Protection Agency*,
No. 18 Civ. 11227 (RWS)

Dear Judge Sweet:

This Office represents Defendant the U.S. Environmental Protection Agency (“EPA”) in the above-referenced action brought by Plaintiffs Natural Resources Defense Council and Environmental Defense Fund (“Plaintiffs”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

I write respectfully to advise the Court that on March 4, 2019, EPA responded to Plaintiffs’ request for priority records, which form the basis for Plaintiffs’ motion for partial summary judgment and to expedite. *See* Dkt. Nos. 12-13. Accordingly, in EPA’s view, Plaintiffs’ motion is moot and should be denied on this basis, in addition to the reasons set out in EPA’s brief in opposition to the motion, Dkt. No. 24.

In its March 4, 2019, response, EPA provided a determination with respect to Plaintiffs’ priority request seeking the “most recent OMEGA model and input data files.” *See* Dkt. No. 13 (Plaintiffs’ Br.) at 11. In the March 4 response, EPA released the latest available input files for the latest full version of the OMEGA model and also released the latest available inputs from Advanced Light-Duty Powertrain and Hybrid Analysis, or ALPHA, including EPA benchmarking data. EPA withheld the latest full version of the OMEGA model itself as exempt under the deliberate process privilege pursuant to FOIA exemption 5, 5 U.S.C. § 552(b)(5).

“The hallmark of a moot case or controversy is that the relief sought can no longer be given or is no longer needed.” *Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983). The principal relief Plaintiffs sought was a court order directing EPA to make a determination on the priority portion of Plaintiffs’ request by March 6, 2019, *see* Dkt. No. 23; accordingly, the motion to expedite and for partial summary judgment is essentially moot. “Once an agency has made its final determination under § 552(a)(6)(A), the *timeliness* of that determination is no longer a live controversy fit for judicial review.” *Muttitt v. Dep’t of State*, 926 F. Supp. 2d 284, 296 (D.D.C. 2013); *accord Adionser v. DOJ*, 811 F. Supp. 2d 284, 294 n.11 (D.D.C. 2011) (once agency “released all non-exempt material” in response to FOIA request, timeliness issue was “moot”).

Finally, to the extent the Court concludes that any portion of Plaintiffs' motion still presents a live controversy, the motion should nonetheless be denied, for the reasons set out in EPA's opposition brief, Dkt. No. 24.

Therefore, for the reasons set out in this letter and in EPA's briefing, EPA respectfully requests that Plaintiffs' motion to expedite and for partial summary judgment be denied as moot due to EPA's March 4 response to Plaintiffs' priority request and, to the extent any live controversy remains, denied on the merits.

I have conferred with counsel for Plaintiffs, who have advised that Plaintiffs do not agree that the motion is moot.

Thank you for your consideration of this matter.

Respectfully submitted,

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