

March 7, 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 5 letter to the Court (Dkt. 30). Plaintiffs' motion to expedite and for partial summary judgment is pending. (Dkts. 12, 13, 23, 27.) Plaintiffs sought two forms of relief: (1) a declaration that EPA is violating FOIA by withholding a "determination" on Plaintiffs' August 2018 request for more than half a year; and (2) an equitable order directing EPA to promptly produce a subset of the requested records: specifically, the latest full version of a computer model ("OMEGA") along with associated files necessary for Plaintiffs and the public to utilize the model. (Dkt. 13, Mem. 6, 9-10; Dkt. 27, Reply 4-6.)

In opposing Plaintiffs' motion, EPA urged the Court not to order production because the agency would respond to Plaintiffs by March 4 in a way that would "essentially moot" the motion. (Dkt. 24, Opp. 2, 13.) Late on March 4, EPA released some files necessary to utilize OMEGA along with a letter (attached hereto as Exhibit A) stating that "EPA is withholding the latest full version of the OMEGA model itself" on the basis that the model is exempt pursuant to a "Deliberative Process Privilege." The next day, March 5, EPA filed a letter asking the Court to deny Plaintiffs' motion as moot. (Dkt. 30.)

EPA's eleventh-hour production does not moot the motion. First, EPA is continuing to violate FOIA by failing to provide the required "determination" on the full scope of Plaintiffs' August 2018 request. (Dkt. 13, Mem. 6.) EPA has provided a limited determination on only a subset of the request. EPA has not provided the full determination FOIA requires and remains in violation of the law.

Second, EPA has not "mooted" Plaintiffs' request for a production order. EPA produced some files necessary to utilize OMEGA while withholding at least "the

latest full version of the OMEGA model itself.” (Ex. A.) EPA has previously released multiple usable versions of OMEGA, and Plaintiffs’ request simply seeks an equivalent release of the current version. (Dkt. 13, Mem. 10; Dkt. 15, Ex. C; Dkt. 27, Reply 9). EPA’s last full release of OMEGA, for example, included “the core model, the model documentation, and four ZIP files containing inputs.” (Dkt. 27, Reply 9.) The first of those ZIP files included “OMEGA preprocessors,” (Dkt. 15, Ex. C), but it does not appear that EPA produced the current versions here. Until EPA has produced the full current version of OMEGA as it has done in the past, Plaintiffs’ request is not moot.

OMEGA and the information it provides are urgently needed to enable meaningful public accountability of EPA and its pending action to weaken vehicle emission standards. (Dkt. 13, Mem. 1, 4-5, 10; Dkt. 27, Reply 1-4, 10.) Plaintiffs filed the instant motion to secure prompt public access to EPA’s latest version of OMEGA, and Plaintiffs remain entitled to that relief. EPA’s belated March 4 response, however, clarifies that Plaintiffs will not be able to obtain full and meaningful relief without further Court order, as EPA intends to withhold at least the model source code as exempt. Without the full model and all files necessary to use it, the files EPA produced on March 4 are not useful to the public.

The crucial issue is thus whether EPA is improperly withholding the model under FOIA’s exemption 5, applicable to certain deliberative and pre-decisional “inter-agency or intra-agency memorandums or letters.” 5 U.S.C. § 552(b)(5); *Nat’l Council of La Raza v. DOJ*, 411 F.3d 350, 356 (2d Cir. 2005). Plaintiffs submit that the exemption is patently inapplicable here but recognize that the issue has not been briefed.

In light of the changed circumstances, achieving meaningful relief primarily requires resolving EPA’s lone exemption claim. Plaintiffs therefore respectfully request that the Court hold the instant motion in abeyance pending resolution of that issue. Plaintiffs expect to file a motion for relief on the discrete exemption issue early next week. EPA has not disputed that “good cause” exists for the Court to expedite consideration of this case under the Civil Priorities Act, 28 U.S.C. § 1657(a) (*see* Dkt. 27, Reply 4), and Plaintiffs will respectfully request that the Court expedite its consideration of the forthcoming motion.

Thank you for your consideration of this matter.

Respectfully submitted,

/s/Pete Huffman

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* Application for admission pending.

** Admitted *pro hac vice*.