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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL  
and ENVIRONMENTAL DEFENSE FUND,

Plaintiffs,

-v-

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Defendant.

18 Civ. 11227 (RWS)

**ANSWER**

Defendant the United States Environmental Protection Agency (“EPA” or “Defendant”), by its attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, hereby answers the complaint under the Freedom of Information Act (“FOIA”) of Plaintiffs Natural Resources Defense Council and Environmental Defense Fund (together, “Plaintiffs”) upon information and belief as follows:

The prefatory paragraph preceding paragraph 1 consists of Plaintiffs’ characterization of their claims in this suit, as well as a characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, to which no response is required. To the extent this paragraph contains factual allegations to which a response is deemed required, EPA denies the allegations in this paragraph, except admits that

Plaintiffs submitted a FOIA request to EPA and avers that EPA's review and processing of records potentially responsive to Plaintiffs' FOIA request are ongoing.

1. Paragraph 1 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents.

2. Paragraph 2 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents.

3. Paragraph 3 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents.

4. EPA admits that Plaintiffs submitted the FOIA request at issue in this action to EPA. Otherwise, paragraph 4 contains Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents.

5. Paragraph 5 contains legal conclusions concerning FOIA, to which no response is required. EPA respectfully refers the Court to the relevant statute for a complete and accurate statement of its contents. To the extent this paragraph contains factual allegations to which a response is deemed required, EPA admits that Plaintiffs submitted the FOIA request at issue in this action to EPA, avers that it sent a letter regarding Plaintiffs' FOIA request dated August 21, 2018, avers that EPA's FOIA management system indicates that in September 2018, EPA sent a message to the Natural Resources Defense Council in which it invoked FOIA's unusual circumstances provision to extend the response date by an additional ten working days, and further avers that EPA's review and processing of records potentially responsive to Plaintiffs' FOIA request are ongoing.

6. Paragraph 6 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents.

7. Paragraph 7 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents. To the extent this paragraph contains factual allegations to which a response is deemed required, EPA avers that EPA's review and processing of records potentially responsive to Plaintiffs' FOIA request are ongoing.

8. Paragraph 8 contains Plaintiffs' characterization of the public interest in the government's implementation of the laws, of FOIA, of this action, and of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, to which no response is required. To the extent this paragraph contains factual allegations to which a response is deemed required, EPA denies the allegations in this paragraph and avers that EPA's review and processing of records potentially responsive to Plaintiffs' FOIA request are ongoing.

9. Denies knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 9.

10. Denies knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 10.

11. Paragraph 11 consists of legal conclusions, to which no response is required. To the extent a response is deemed required, EPA admits that it is a federal agency and that Plaintiffs submitted a FOIA request to EPA.

12. Paragraph 12 consists of legal conclusions regarding jurisdiction, to which no response is required.

13. Paragraph 13 consists of legal conclusions regarding venue, to which no response is required. EPA denies knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 13 concerning Plaintiffs' principal places of business.

14. Paragraph 14 consists of Plaintiffs' characterization of FOIA, to which no response is required. EPA respectfully refers the Court to the relevant statute for a complete and accurate statement of its contents.

15. Paragraph 15 consists of Plaintiffs' characterization of FOIA, to which no response is required. EPA respectfully refers the Court to the relevant statute for a complete and accurate statement of its contents.

16. Paragraph 16 consists of Plaintiffs' characterization of FOIA, to which no response is required. EPA respectfully refers the Court to the relevant statute for a complete and accurate statement of its contents.

17. Paragraph 17 consists of Plaintiffs' characterization of FOIA, to which no response is required. EPA respectfully refers the Court to the relevant statute for a complete and accurate statement of its contents.

18. Paragraph 18 consists of Plaintiffs' characterization of FOIA, to which no response is required. EPA respectfully refers the Court to the relevant statute for a complete and accurate statement of its contents.

19. Paragraph 19 consists of Plaintiffs' characterization of FOIA, to which no response is required. EPA respectfully refers the Court to the relevant statute for a complete and accurate statement of its contents.

20. Paragraph 20 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

21. Paragraph 21 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA

action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

22. Paragraph 22 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

23. Paragraph 23 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

24. Paragraph 24 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

25. Paragraph 25 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

26. Denies, and avers that EPA has revised the OMEGA source code and input data over time.

27. Denies, and avers that EPA has revised the OMEGA source code and input data over time.

28. Paragraph 28 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

29. Paragraph 29 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

30. Denies knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 30.

31. Paragraph 31 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and of materials published on EPA's website, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

32. Paragraph 32 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, to which no response is required. To the extent a response is deemed required, EPA denies the allegations in this paragraph, and avers that it released a full version of the OMEGA model source code in July 2016, and since that time has made other releases of related files through its website.

33. Admits.

34. Admits.

35. Admits.

36. Admits.

37. Admits.

38. Admits.

39. Paragraph 39 consists of Plaintiffs' characterization of materials published on EPA's website, to which no response is required. To the extent a response is deemed required,



EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

40. Admits.

41. Paragraph 41 consists of Plaintiffs' characterization of materials published on EPA's website, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

42. Paragraph 42 consists of Plaintiffs' characterization of materials published on EPA's website, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

43. Admits.

44. Paragraph 44 consists of Plaintiffs' characterization of alleged background information, not allegations of fact pertinent to the resolution of the claims at issue in this FOIA action, and in particular their characterization of a letter from Plaintiffs to an EPA Assistant Administrator dated March 20, 2018, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant letter for a complete and accurate statement of its contents, and admits it did not respond to the letter dated March 20, 2018.

45. Paragraph 45 consists of Plaintiffs' characterization of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a

complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

46. Paragraph 46 consists of Plaintiffs' characterization of materials available on the <http://www.regulations.gov> website, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

47. Paragraph 47 consists of Plaintiffs' characterization of the FOIA request at issue in this suit, to which no response is required. EPA admits that Plaintiffs submitted the FOIA request to EPA, denies knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph regarding Plaintiffs' reasons for submitting the request, and respectfully refers the Court to that request for a complete and accurate statement of its contents.

48. Admits.

49. Paragraph 49 consists of Plaintiffs' characterization of the FOIA request at issue in this suit, to which no response is required. EPA respectfully refers the Court to that request for a complete and accurate statement of its contents and denies any allegation that is inconsistent with the request.

50. Paragraph 50 consists of Plaintiffs' characterization of the FOIA request at issue in this suit, to which no response is required. EPA respectfully refers the Court to that request for a complete and accurate statement of its contents and denies any allegation that is inconsistent with the request.

51. Paragraph 51 consists of Plaintiffs' characterization of EPA's letter dated August 21, 2018, in response to Plaintiffs' FOIA request, to which no response is required. EPA

respectfully refers the Court to the relevant letter for a complete and accurate statement of its contents, and denies any allegation that is inconsistent with the letter.

52. Paragraph 52 consists of Plaintiffs' characterization of EPA's letter dated August 21, 2018, in response to Plaintiffs' FOIA request, to which no response is required. EPA respectfully refers the Court to the relevant letter for a complete and accurate statement of its contents, and denies any allegation that is inconsistent with the letter.

53. Paragraph 53 consists of Plaintiffs' characterization of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

54. Paragraph 54 consists of Plaintiffs' characterization of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

55. Admits.

56. Denies, and avers that EPA's FOIA management system indicates that in September 2018, EPA sent a message to the Natural Resources Defense Council in which it invoked FOIA's unusual circumstances provision to extend the response date by an additional ten working days, and further avers that EPA's review and processing of records potentially responsive to Plaintiffs' FOIA request are ongoing.

57. Paragraph 57 consists of Plaintiffs' characterization of a letter from Plaintiffs and others to an EPA Assistant Administrator dated September 20, 2018, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant letter for a complete and accurate statement of its contents, denies any allegation that is inconsistent with the letter, admits it did not respond to the letter, and avers that EPA's review and processing of records potentially responsive to Plaintiffs' FOIA request are ongoing.

58. Paragraph 58 consists of Plaintiffs' characterization of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required.<sup>1</sup> To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

59. Paragraph 59 consists of Plaintiffs' characterization of materials published in the Federal Register and/or on rulemaking dockets, to which no response is required. EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents. To the extent a response is deemed required, EPA admits that the comment period for Docket EPA-HQ-OAR-2018-0283 closed on October 26, 2018.

60. Paragraph 60 consists of Plaintiffs' characterization of materials available on the <http://www.FOIAonline.gov> website, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

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<sup>1</sup> Paragraph 58 refers to comments "submitted in October 2016." EPA submits that this paragraph may be intended to refer to comments submitted in October 2018.

61. Paragraph 61 consists of Plaintiffs' characterization of materials available on the <http://www.FOIAonline.gov> website, to which no response is required. To the extent a response is deemed required, EPA respectfully refers the Court to the relevant materials for a complete and accurate statement of their contents, and denies any allegation that is inconsistent with these materials.

62. Admits, and avers that EPA's review and processing of records potentially responsive to Plaintiffs' FOIA request are ongoing.

63. Admits, and avers that EPA's review and processing of records potentially responsive to Plaintiffs' FOIA request are ongoing.

64. Denies, and avers that EPA's FOIA management system indicates that in September 2018, EPA sent a message to the Natural Resources Defense Council in which it invoked FOIA's unusual circumstances provision to extend the response date by an additional ten working days.

65. Admits, and avers that EPA's FOIA management system indicates that in September 2018, EPA sent a message to the Natural Resources Defense Council in which it invoked FOIA's unusual circumstances provision to extend the response date by an additional ten working days.

66. Admits, and avers that EPA's review and processing of records potentially responsive to Plaintiffs' FOIA request are ongoing.

67. Admits, and avers that EPA's review and processing of records potentially responsive to Plaintiffs' FOIA request are ongoing.

68. EPA repeats and incorporates by reference each response contained in paragraphs 1 through 67 as though fully set forth herein.

69. Paragraph 69 consists of legal conclusions and Plaintiffs' characterization of FOIA, to which no response is required and which characterization is denied. EPA respectfully refers the Court to the relevant statute for a complete and accurate statement of its contents.

70. Denies, and avers that EPA's review and processing of records potentially responsive to Plaintiffs' FOIA request are ongoing.

71. The portion of the complaint titled "Request for Relief" following paragraph 70 contains Plaintiffs' prayer for relief, to which no response is required. To the extent a response is deemed required, EPA denies that Plaintiffs are entitled to the relief they seek or to any relief.

### **DEFENSES**

For further defenses, Defendant alleges as follows:

#### **FIRST DEFENSE**

Plaintiffs' complaint should be dismissed in whole or in part for failure to state a claim on which relief may be granted.

#### **SECOND DEFENSE**

Some or all of the requested documents are exempt from disclosure, in whole or in part, under 5 U.S.C. § 552(b).

#### **THIRD DEFENSE**

The Court lacks subject matter jurisdiction over Plaintiffs' requests for relief that exceed the relief authorized under FOIA, 5 U.S.C. § 552.

#### **FOURTH DEFENSE**

Plaintiffs are not entitled to declaratory relief. *See* 5 U.S.C. § 552(a)(4)(B).

#### **FIFTH DEFENSE**

Plaintiffs are not entitled to attorney fees under 5 U.S.C. § 552(a)(4)(E).

**SIXTH DEFENSE**

To the extent that Defendant has exercised due diligence in processing Plaintiffs' FOIA request and exceptional circumstances exist, Defendant should be allowed additional time to process the request. 5 U.S.C. § 552(a)(6)(C).

Defendant may have additional defenses which are not known at this time but which may become known through further proceedings. Accordingly, Defendant reserves the right to assert each and every affirmative or other defense that may be available, including any defenses available pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure.

WHEREFORE Defendant respectfully requests that the Court: (1) dismiss the complaint with prejudice; (2) enter judgment in favor of Defendant; and (3) grant such further relief as the Court deems just and proper.

Dated: February 13, 2019  
New York, New York

Respectfully submitted,

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