

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 (PKC) (DCF)

### **DECLARATION OF WILLIAM L. WEHRUM**

I, William L. Wehrum, declare pursuant to 28 U.S.C. § 1746 that the following statements are true and correct to the best of my knowledge and belief, and that they are based upon information acquired by me in the course of performing my duties, information contained in the records of the United States Environmental Protection Agency (EPA or agency), and information supplied to me by current and former EPA employees including employees under my direction.

1. I am Assistant Administrator for the EPA Office of Air and Radiation (OAR), which is located at 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460. OAR develops and implements national programs, policies and regulations for controlling air pollution and radiation exposure. Among other responsibilities, OAR is responsible for administering the Clean Air Act (CAA), 42 U.S.C. §§ 7401 to 7671q.

2. I am familiar with the Freedom of Information Act (FOIA) request EPA-HQ-2018-010465 submitted by the Natural Resources Defense Council (NRDC) that is at issue in the above-captioned matter. This declaration will explain the basis for withholding the source code

of a particular EPA model pursuant to FOIA Exemption 5, under the deliberative process privilege. It is submitted in support of EPA's motion for summary judgment and opposition to Plaintiffs' motion for summary judgment

**I. Relevant Background on the Safer Affordable Fuel Efficient (SAFE) Vehicles Proposed Rule**

3. On August 24, 2018, EPA and the National Highway Traffic Safety Administration (NHTSA) jointly proposed the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, which, if finalized, would amend certain existing Corporate Average Fuel Economy (CAFE) and tailpipe carbon dioxide emissions standards for passenger cars and light trucks and establish new standards, all covering model years 2021 through 2026. Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018).

4. As outlined in the SAFE Vehicles proposal, it was determined it was "reasonable and appropriate" to use the U.S. Department of Transportation's (DOT's) CAFE model for EPA's analysis of regulatory alternatives. 83 Fed. Reg. at 43,000-02.

**II. The Optimization Model for Reducing Emissions of Greenhouse Gases from Automobiles (OMEGA Model)**

5. The OMEGA model is a computer model with source code written in C#, Matlab, Visual Basic, Python, and Excel.

6. As outlined in the Declaration of William Charmley, the OMEGA model contains a series of algorithms designed to evaluate the relative cost and effectiveness of available technologies and apply them to a defined vehicle fleet to help facilitate the analysis of the costs and benefits of reducing greenhouse gas emissions.

7. In the past, EPA has publicly released the latest updated version of the source code for the OMEGA model (“core model”), in addition to the other pieces of the model discussed in the Charmley Declaration, only when the agency formally relied upon it in its analysis of a regulatory action such as a proposed or final rule. EPA has publicly released five versions of the OMEGA model since its first iteration, each of which correspond to a particular regulatory action.

8. EPA did not rely on the OMEGA model in the development of the SAFE Vehicles proposed rule. As discussed above, EPA and NHTSA relied instead on DOT’s CAFE model. As such, and consistent with prior practice, EPA did not release an updated version of the OMEGA model at the time the SAFE Vehicles rule was proposed, nor has it done so since then.

9. While it was not relied on in the SAFE Vehicles proposed rule, EPA may use the OMEGA model to inform rulemakings relating to vehicle emissions in the future.

10. EPA first began development of the OMEGA model in 2009. In October of 2009, EPA publicly released for the first time a version of the OMEGA model to support the joint EPA-NHTSA rule entitled “Model Year 2012-2016 Light Duty Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards,” which was proposed on September 28, 2009 and published on May 7, 2010.

11. The OMEGA model has grown and developed since its inception. In addition to the monthly or even weekly updates to the entire OMEGA model by the EPA staff at the Office of Transportation and Air Quality (OTAQ) who work with it closely, upper-level decisionmakers may work with technical staff on a longer timeline to make more substantive analytical changes to the core model, giving it further functionality to allow EPA’s policy decisions to be as well-informed as possible.

12. The regulatory development process and the process of making upgrades to the OMEGA model have traditionally proceeded in parallel. As a regulation develops, EPA's high-level policymakers may realize that they need a different or more substantial type of analysis in a certain area to determine the available policy options that are supported by a robust technical record. In other words, the policy choices made throughout the regulatory development process are inextricably tied to the analytical choices internal to the OMEGA model itself made by those same policymakers.

13. The OMEGA model only becomes final and appropriate for public release, and has only been publicly released in the past, when the regulatory development process has become similarly final. Before that point, and before high-level policymakers have weighed in with their final opinions about the types of analysis that should be done and policy choices that could be made, public release of interim forms of either the OMEGA model or the regulation itself would divulge information only reflecting the initial opinions of staff and, as such, would reveal the agency's deliberations.

14. Releasing an updated interim core model would reveal whether or not substantive analytical changes have been made or explored in the current version of the OMEGA model, which would betray the deliberative give and take of the policy development process.

15. Any factual information contained in the core model is inextricably intertwined with deliberative information to the extent that no meaningful portion could be released. The inclusion or exclusion of analytical tools, including changes to the algorithms themselves, track the analytical and policy framework of draft versions of or discussions about potential accompanying regulations.

16. Even the selection of the factual information contained in the OMEGA model was a part of the deliberative process of creating those draft versions or discussions of accompanying regulations. Disclosure of the mere choice of which analytical tools were employed, or not employed, would betray the agency's pre-decisional deliberations.

17. Before it is released publicly alongside a regulatory action, the OMEGA model is in draft form. The evolving iterations of the analytical tools used in the model currently reflect the opinions of the staff developing the model, which may not represent EPA's ultimate opinions regarding these matters.

18. Take, for example, the policy question of whether to add an economic simulation or consumer choice sub-model as an analytical tool to the OMEGA model, which EPA has considered doing for at least seven years. In the 2012 Model Documentation for version 1.4.1 of the OMEGA model (the version that supported the joint EPA-NHTSA rule entitled "Final Rulemaking to Establish 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards"), EPA stated that it had "begun development of an economic simulation or consumer choice component to OMEGA." In the most recent public release of version 1.4.56 of the OMEGA model, EPA stated that "OMEGA may be expanded in the future" to include such an analytical tool.

19. The mere fact of whether or not policy consideration was given to including such an analytical tool in the current version of the OMEGA model, and the outlines and parameters of any such hypothetical tool, would reveal EPA's pre-decisional thinking about the role of consumer choice in the regulatory development process. Even if release of the current interim version revealed only that the agency did not add such a feature, that disclosure would nonetheless compromise EPA's deliberations on policy determinations.

20. Further, no upper-level policymaker has made a final decision as to whether such a tool should or should not be included in any final version of OMEGA that may actually be used to support a regulatory action, since OMEGA was not relied on for the SAFE Vehicles proposed rule. The interim version of OMEGA that exists today, and the inclusion or exclusion of any such tool in that version, reflects only the preliminary thinking of OTAQ staff.

21. I believe the release of the OMEGA model would be harmful to the agency. First, it would chill free and open discussions of EPA staff regarding their opinions on the appropriate analytical tools to be included in the model. If the staff working on updating the model knew that their interim updates or initial attempts to create new analytical tools would someday be released to the public, they would be less likely to test or experiment with new calibrations or tools that could help create a more effective and robust version of the OMEGA model. This chilling effect would impact EPA's decisionmaking processes and ability to have internal discussions and consultations while designing and updating complex models like OMEGA, and may harm the agency's decisionmaking capabilities in the future regulatory development process.

22. Second, I believe the release of the OMEGA model would cause public confusion. The current version of the OMEGA model does not represent the final form that the model would take if it were tied to a regulatory action, nor does it reflect final decisions about how the model should be calibrated and run, or which analytical tools it should contain. The OMEGA model was not relied on in development of the SAFE rule. Accordingly, releasing it in draft form would confuse the public as to the agency's final policy decisions regarding that rule.

I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: May 3, 2019  
Washington, District of Columbia

A handwritten signature in black ink, appearing to read "W L Wehrum", written in a cursive style.

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William L. Wehrum  
Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency