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)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF EPA'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendant EPA,[1] by its undersigned counsel, respectfully submits this reply memorandum of law in further support of its cross-motion for summary judgment.

ARGUMENT

Plaintiffs' opposition does not undermine EPA's showing that its withholding of the current draft of the core OMEGA model was proper under the deliberative process privilege. The draft model is predecisional because it forms a part of EPA decisionmaking concerning future agency tools to assess greenhouse gas emissions from automobiles and, more broadly, agency policy determinations concerning greenhouse gas regulations. The current interim version of the model is also deliberative, as it is a draft that reflects the views of agency program staff rather than final agency determinations; its release could reveal whether or not the agency made substantive policy-based analytic changes to the model. Such a release would foreseeably cause harm to EPA's deliberative processes. The Court should reject Plaintiffs' formalistic argument that the model is not protected because it is a computer program rather than a "letter" or "memorandum," as well as their claim that EPA could segregate and release the OMEGA "executable package" without releasing its source code. For the reasons set out below, the Court should grant summary judgment to EPA and deny Plaintiffs' cross-motion.

I. VERSION 1.4.59 OF THE CORE OMEGA MODEL IS PROTECTED BY THE DELIBERATIVE PROCESS PRIVILEGE AND WAS PROPERLY WITHHELD

A. EPA's Draft of the Core OMEGA Model Is Predecisional

EPA has shown that version 1.4.59 of the OMEGA core model—EPA's current interim version of the model—precedes and is used to assist EPA decisionmaking regarding EPA's broader regulation of greenhouse gas emissions and potential future final versions of OMEGA. *See* Wehrum Decl. ¶¶ 6, 10-12; Charmley Decl. ¶¶ 11-16. It is therefore predecisional.

[1] Defined terms bear the same meaning assigned to them in EPA's opening brief, Dkt. No. 47.

Plaintiffs incorrectly argue that the privilege is limited to materials used in decisions "facing the agency in the foreseeable future." Dkt. No. 50 ("Pl. Opp.") at 19 (quotation marks omitted). But Plaintiffs' proposed limitation of the privilege to materials leading to specific, final decisions in the near future is not supported by the deliberative process doctrine. Courts have repeatedly concluded that draft material that never becomes finalized (as this version of the core OMEGA model, to date, has not) may nonetheless be protected by the privilege because it constitutes a part of an agency's decisionmaking process, even if it does not lead to a specified final agency decision. For instance, the D.C. Circuit concluded that draft deliberative materials that were never finalized—that is, materials that "died on the vine"—were "still pre-decisional and deliberative," regardless of whether they "actually evolve[d] into final Executive Branch actions." *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014). Similarly, the Second Circuit held that a "draft of a proposed op-ed article" that was "never published" was "a draft and for that reason predecisional." *ACLU v. DOJ*, 844 F.3d 126, 133 (2d Cir. 2016); *see also Nat. Res. Def. Council, Inc. v. Nat'l Marine Fisheries Serv.*, 409 F. Supp. 2d 379, 384 (S.D.N.Y. 2006) (rejecting argument that document was not predecisional because agency did not identify a "final agency report" of which it was a draft).

The "existence of the privilege" does not "turn[] on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975); *accord Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002) ("the fact that the government does not point to a specific decision made by the [agency] in reliance on the [deliberative material] does not alter the fact that [it] was prepared to assist [agency] decisionmaking on a specific issue"); *Color of Change v. DHS*, 325 F. Supp. 3d 447, 454 (S.D.N.Y. 2018) (rejecting analogous argument that agency "fail[ed] to pinpoint a decision

or policy to which the papers contributed”). EPA considered results from the interim OMEGA model in its broader consideration of greenhouse gas regulation as part of an interagency review process, but ultimately did not rely on the draft OMEGA model for its analysis in the rulemaking process. *See* Charmley Decl. ¶¶ 17-21; Wehrum Decl. ¶ 8. The draft version thus contains “reasons which might have supplied, but did not supply, the basis for [agency] policy,” *Sears*, 421 U.S. at 152. Thus, contrary to Plaintiffs’ position, version 1.4.59 of the OMEGA core model is predecisional, regardless of whether the model is ever finalized again for a future release.

B. The Draft Core OMEGA Model Is Deliberative

The draft OMEGA model is deliberative because it is an interim version that reflects EPA’s ongoing process of considering updates to the model. *See* Wehrum Decl. ¶¶ 11-12; Charmley Decl. ¶¶ 13-16.[2] Plaintiffs argue that EPA’s compliance with FOIA’s segregation requirements by releasing the OMEGA inputs and other components of version 1.4.59 somehow precludes the application of the deliberative process privilege to the core model itself. Pl. Opp. at 10. But the fact that EPA has released the input information is not dispositive, because the input files do not necessarily reveal whether updates were made to the core OMEGA model itself. *See* Wehrum Decl. ¶¶ 11-14. By contrast, release of the core model itself “would reveal whether or not substantive analytical changes have been made or explored in the current version of the OMEGA model,” and thus “would betray the deliberative give and take of the policy development process.” *Id.* ¶ 14. The issue here is whether the release of the core model would

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[2] The Court should reject Plaintiffs’ argument that the current version is not a “draft” because, they assert, agency practices differed before 2012. Pl. Opp. at 13-15. Plaintiffs rely on a declaration they supplied, which itself describes agency practices as they reportedly existed before 2012, *see* Dkt. No. 52 (Suppl. Oge Decl.) ¶¶ 2, 8-12. Thus, the facts upon which Plaintiffs rely are simply not in conflict with the agency’s position, as they do not relate to the same time period. *Cf.* Fed. R. Civ. P. 56(c)(4) (declaration supporting summary judgment must be “made on personal knowledge, set out facts that would be admissible in evidence, and show that the . . . declarant is competent to testify on the matters stated”).

show nonfinal changes to how EPA analyzes the data in the input files—not which data were selected for inclusion in the input files, which have been released. *See* Charmley Decl. ¶¶ 10, 12, 17-21.

Plaintiffs also misread several of the cases where courts have ruled on the application of the deliberative process privilege to scientific models or computer programs. In *Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009), the court held that an EPA "draft groundwater flow model" was deliberative, concluding that "evolving iterations of the Model's inputs and calibration reflect the opinions of the staff currently developing the Model, which may not represent EPA's ultimate opinions relating to these matters." *Id.* (quotation marks omitted); *see* Wehrum Decl. ¶¶ 13-14. Furthermore, the court held, "even if the data plugged into the model is itself purely factual, the *selection and calibration* of data is part of the deliberative process to which Exemption 5 applies." *Goodrich*, 593 F. Supp. 2d at 189 (emphasis added). The release of the draft core OMEGA model would reveal analogous deliberative information: EPA's nonfinal determinations concerning the "choice of which analytical tools were employed, or not employed." Wehrum Decl. ¶ 16; *see id.* ¶¶ 13-20.

In *Urban Air Initiative, Inc. v. EPA*, 271 F. Supp. 3d 241 (D.D.C. 2017), the court held that material about an EPA study was deliberative, in part because EPA "had to make critical decisions" to "define[] the scope of the study, estimate[] costs, determine[] test procedures, and select[] the fuel parameters and vehicles." *Id.* at 261 (quotation marks omitted). Plaintiffs miss the point by focusing on the *form* in which this information was packaged, in "emails and other internal agency records." Pl. Opp. at 11. But the principle applies here, too: the release of the draft core OMEGA model would reveal comparable types of nonfinal staff decisions concerning the model, Wehrum Decl. ¶¶ 13-20, even if that information would be revealed through the

model itself rather than being packaged in "prose documents," Pl. Opp. at 11. Finally, Plaintiffs misread *Reilly v. EPA*, 429 F. Supp. 2d 335 (D. Mass. 2006), to stand for the proposition that a model cannot be deliberative. However, *Reilly* held that the model was not deliberative because the identical model used by EPA—the "EPA version"—*was already* "in the public domain" and "available for use by the public." *Id.* at 349, 353. And multiple cases stand for the principle that draft models can be deliberative, including *Goodrich* and *Cleary, Gottlieb, Steen & Hamilton v. HHS*, 844 F. Supp. 770, 782-83 (D.D.C. 1993).[3]

C. Disclosing the Draft Core Model Would Foreseeably Harm EPA's Deliberative Process

EPA established that the release of the interim core model would foreseeably cause harm of the type that exemption 5 is intended to prevent. Dkt. No. 47 ("EPA Br.") at 18-21. And EPA's declaration set out that the disclosure of the interim OMEGA core model "would be harmful to the agency." First, release "would chill free and open discussions of EPA staff regarding their opinions on the appropriate analytical tools to be included in the model" if staff "knew that their interim updates or initial attempts to create new analytical tools would someday be released to the public," thus foreseeably causing "harm [to] the agency's decisionmaking capabilities in the future regulatory development process." Wehrum Decl. ¶ 21. This is the case

[3] Plaintiffs' view of *Cleary* is unconvincing. Plaintiffs assert its holding applies only to records created by a "single, identifiable individual." Pl. Opp. at 13. But the case does not support this view. Indeed, the privilege protects deliberative processes including "review and discussion" with "collaborators" or "research colleagues," as *Cleary* itself recognized. *Cleary*, 844 F. Supp. at 782 (discussing draft manuscript); *see also, e.g.*, *Judicial Watch, Inc. v. DOJ*, 20 F. Supp. 3d 260, 271 (D.D.C. 2014) ("[W]hen the role of the author is as an advice-giver rather than a decision-maker, this militates in favor of the document qualifying as part of the deliberative process."). And Plaintiffs' response regarding *Lahr v. NTSB* is conclusory: they state without evidence that EPA's deliberative process cannot be reconstructed by reviewing the OMEGA model itself. Pl. Opp. at 12. But here EPA has demonstrated that release of the core model will reveal its deliberative process, because the current draft could be compared to prior versions. Wehrum Decl. ¶¶ 14-20; *see Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979).

"[e]ven if the release . . . revealed only that the agency did not add" new analytical tools or features. *Id.* ¶ 19.[4] Second, release would foreseeably "cause public confusion," because the current interim model does not "reflect final [EPA] decisions about how the model should be calibrated and run, or which analytical tools it should contain." *Id.* ¶ 22.

Plaintiffs' response largely consists of the bare argument that EPA's statement is "conclusory." Pl. Opp. at 21. But courts have rejected similar arguments where (as here) the agency "has explained who deliberated . . . , the agency action about which they deliberated . . . , the role the deliberations played in crafting that action . . . , and the harms that would result from disclosure," including "a chill on agency staff's ability to weigh options candidly to make decisions." *Prechtel v. FCC*, 330 F. Supp. 3d 320, 327 (D.D.C. 2018).

D. The Court Should Reject Plaintiffs' "Letter or Memorandum" Argument, Which Is Unsupported by Precedent

Plaintiffs appear to concede that no case law supports their argument that the deliberative process privilege protects only documents described as "memorandums or letters." *See* Pl. Opp. at 3-4. What authority does exist, moreover, rejects their theory. The Fourth Circuit concluded that "although Exemption 5 addresses itself only to 'letters and memorandums,' the privileges Congress sought to preserve would be gutted if FOIA could be used to reach items like draft pleadings, litigation exhibits, and data on government computers." *Hunton & Williams v. DOJ*, 590 F.3d 272, 280 (4th Cir. 2010). The Eleventh Circuit deemed an analogous argument "specious," holding that "[i]n adopting exemption 5, Congress clearly intended to exempt any

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[4] Plaintiffs debate the status of the consumer choice sub-model, *see* Pl. Opp. at 7-8, but in EPA's declaration, this sub-model was posited as an example of the type of analytical tool that EPA has considered for some time, *see* Wehrum Decl. ¶¶ 17-20. Plaintiffs puzzlingly focus on the fact that this sub-model was "encoded in the OMEGA core model, but turned off," Pl. Opp. at 7-8 & n.1—but this is consistent with EPA's declaration, which states that as of 2016 EPA continued to consider expanding future versions of OMEGA to include such a tool. Wehrum Decl. ¶ 18.

document connected with the agency's deliberative process, *not just memoranda and letters*." *Chilivis v. SEC*, 673 F.2d 1205, 1212 n.15 (11th Cir. 1982) (emphasis added). "Thus in applying exemption 5, a court must focus on the contents of a document rather than its form." *Id.*

Additionally, Congress indicated in a legislative report that it intended for exemption 5 to have sufficient breadth to protect agency deliberations, regardless of form. Indeed, Congress's purpose in creating the exemption was to protect "*documents or information*"—not just communications—that an agency "has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation." H.R. Rep. No. 89-1497, at 10 (1966) (emphasis added). Exemption 5 was thus "intended to exempt from disclosure *this and other information and records wherever necessary*" to protect agency deliberations, "without, at the same time, permitting indiscriminate administrative secrecy." *Id.* (emphasis added).

The authority Plaintiffs cite does not support their argument. They erroneously rely on the Supreme Court's statement in *Klamath* that "the first condition of Exemption 5 is no less important than the second," Pl. Opp. at 3 (citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001)), but *Klamath* specifically addressed exemption 5's requirement that the record "must be 'inter-agency or intra-agency,'" *Klamath*, 532 U.S. at 9—not whether the record was a "letter or memorandum."[5] Plaintiffs do not assert that the "source" of the core model is not "a Government agency," *id.* at 8, and thus *Klamath* does not support Plaintiffs' "letter or memorandum" argument.

Moreover, as set out in EPA's opening brief, the privilege is clearly broader than

[5] The Second Circuit has concluded that exemption 5's "inter-agency or intra-agency" language does not preclude even documents prepared *outside* the federal government from deliberative process protection—undermining Plaintiffs' textual argument. *Tigue*, 312 F.3d at 77-78 (despite the text of exemption 5, "nothing turns on the point that reports were prepared by outside consultants rather than agency staff" (quoting *Lead Indus.*, 610 F.2d at 83) (ellipses omitted)).

Plaintiffs' cramped reading. It covers all "*documents* which a private party could not discover in litigation with the agency." *Sears*, 421 U.S. at 148 (emphasis added); *accord Burka v. HHS*, 87 F.3d 508, 516 (D.C. Cir. 1996) ("*information* which is routinely protected in discovery falls within the reach of Exemption 5" (emphasis added)). Plaintiffs' form-over-substance argument cannot be squared with the principle that "Congress enacted Exemption 5 to protect the executive's deliberative processes—not to protect specific materials." *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987).

Plaintiffs' argument also fails to explain the multiple decisions in which courts have concluded that computer models or programs are protected by the deliberative process privilege. *See, e.g.*, *Goodrich*, 593 F. Supp. 2d at 189 ("draft groundwater flow model" protected under exemption 5); *Cleary*, 844 F. Supp. at 782-83 ("computer software programs" protected by deliberative process privilege).[6] Moreover, Plaintiffs are unsuccessful in attempting to explain away holdings of the Second and D.C. Circuits that permitted the withholding of tables, cost estimates, and other factual information. Pl. Opp. at 4 (discussing *Lead Indus.*, 610 F.2d at 85; *Quarles v. Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990)).[7] They present no theory that coherently explains why the same information would properly be protected when "included in a 'report' 'to facilitate understanding,'" *id.* (quoting *Lead Indus.*, 610 F.2d at 85), but not when it is packaged in a different type of document. The Court should reject Plaintiffs' formalistic

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[6] Even the cases that Plaintiffs cite for other purposes undermine their "memorandums or letters" argument. In *Reilly v. EPA*, the court concluded that computer model outputs from a computer model were not protected by exemption 5—but *Reilly* held that those outputs were not *deliberative*, and did not rely on the argument that they were not "memorandums or letters." *See Reilly*, 429 F. Supp. 2d at 351-53; *see also id.* at 353 n.15 (observing that "the case law has taken Exemption 5 well beyond the plain words of the statute").

[7] In *Quarles*, the D.C. Circuit upheld the agency's action to withhold cost estimates under exemption 5, while releasing much of the rest of the "report" itself. *See* 893 F.2d at 391.

argument, which would "gut[]" the "privileges Congress sought to preserve" through exemption 5. *Hunton & Williams*, 590 F.3d at 280; *accord Chilivis*, 673 F.2d at 1212 n.15.

E. EPA's Segregability Analysis Was Proper

Plaintiffs argue that EPA could have segregated and released the compiled "executable package" for the current OMEGA version—the file that can be run by a computer—without releasing its "uncompiled source code." Pl. Opp. at 22. A computer program's "source code" is written in a computer programming language, which is then "compile[d]" into executable "object code," which is, generally speaking, "the binary language comprised of zeros and ones through which the computer directly receives its instructions." *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 698 (2d Cir. 1992).

The distinction between OMEGA's source code and executable package is not as Plaintiffs present it, and releasing the executable package alone would still reveal EPA's deliberative process. First, the release of the OMEGA executable package would reveal whether or not certain analytical tools were added to OMEGA, simply through use of the current interim version, *see* Wehrum Decl. ¶¶ 16-20, thus causing the same harms to the deliberative process. Second, it is true that executable code "generally cannot be understood by humans" because it has been translated into a "language that can be processed only by a computer." Supplemental Declaration of William Charmley ("Suppl. Charmley Decl.") ¶ 1. But "[o]bject code can . . . be decompiled into source code." *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 779 (9th Cir. 2002). This is true here: EPA ran a freely available "'decompiler' program on the executable package for OMEGA version 1.4.59" and was thereby "able to create a functionally identical version of the OMEGA version 1.4.59 source code." Suppl. Charmley Decl. ¶ 2. Thus, because the release of even the executable package alone would disclose predecisional, deliberative material, EPA properly determined it could not segregate and release it.

II. PLAINTIFFS' REQUEST TO EXPEDITE THIS ACTION SHOULD BE DENIED

As shown in EPA's opening brief, Plaintiffs do not qualify for expedited processing under FOIA. *See* EPA Br. at 23-25 (citing 5 U.S.C. § 552(a)(6)(E)). Plaintiffs implicitly concede the point, as they state only that they meet half of the applicable standard, Pl. Opp. at 23-24, while failing to mention that the FOIA standard also requires them to be "primarily engaged in disseminating information," 5 U.S.C. § 552(a)(6)(E)(v)(II), which they are not.[8]

Instead, Plaintiffs suggest that the Court should ignore the FOIA-specific standard for expedition, which they claim to be meaningful only for administrative processing purposes. Pl. Opp. at 23. However, this does not explain Congress's creation of a judicial review provision for denials of expedited processing under FOIA. *See* 5 U.S.C. § 552(a)(6)(E)(iii). Furthermore, while Plaintiffs now assert that they are only seeking to have the *Court* expedite its decision under 28 U.S.C. § 1657(a), Pl. Opp. at 23-24, Plaintiffs took a different position earlier in this same litigation when they first moved to expedite the case under the same provision, seeking to require *the agency* to *process* their request at the pace they thought was appropriate. *See* Dkt. Nos. 12-15 (plaintiffs' first motion to expedite); Dkt. No. 24 (EPA opposition). Plaintiffs ultimately withdrew their first motion to expedite when EPA responded to the priority portion of the request before the Court took any action on the motion. *See* Dkt. Nos. 30-33. Because Plaintiffs have not established that they qualify for FOIA expedited processing, or otherwise shown good cause as required under § 1657(a), their motion to expedite should be denied.

CONCLUSION

EPA's motion for summary judgment should be granted, and Plaintiffs' motion for summary judgment and to expedite should be denied.

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[8] Plaintiffs also did not show "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II); *see* EPA Br. at 24-25.

Dated: May 23, 2019
New York, New York

Respectfully submitted,

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